Table of Contents

Provincial Training Conference for Legal Advocates
October 18, 19, 20, 2016

TABS

5. **Resources and Services**
    - **Update on Aboriginal Law and Resources for Clients (Day 1) (see Tab 1)**
    - **Using MyLaw BC (Day 2)**
    - **PLEI Plenary (Day 3)**

6. **Skills**
    - **Researching Wills and Family Law Resources on CanLII (Day 2)**
    - **Resisting Burnout with Justice Doing (Day 2)**
    - **Online Research on Government Sites: MSDSI and RTB (Day 3)**
    - **Drafting Settlement Agreements in Residential Tenancy and Welfare Matters (Day 3)**
    - **Advanced Ethics: Discussions for Senior Advocates in Poverty and Family Law (Day 3)**

7. **Welfare and Disability Benefits**
    - **Systemic Poverty Law Updates (Day 1)**
    - **Overlapping Benefits: CPP, OAS, PWD, GIS (Day 1)**
    - **Strategies for PWD Applications and Reconsiderations (Day 1)**
    - **Discussion Session for Senior Advocates on Welfare Issues (Day 2)**
    - **Advanced CPP (Day 2)**
    - **Online Research on Government Sites:MSDSI and RTB (Day 3) (see tab 6)**
    - **Welfare on Reserve (Day 3) (see tab 1)**
    - **Advanced Ethics: Discussions for Senior Advocates in Poverty and Family Law (Day 3) (see tab 6)**

8. **Other**
    - **Access to Justice BC (Day 1)**
    - **Strategies for Advocacy in the Internet Age (Day 1)**
    - **Planning Tools: Representation Agreements, Powers of Attorney and other Planning Tools (Day 1)**
    - **Accessibility Issues (Day 2)**
    - **Wills off Reserve (Day 2)**
    - **End of Employment (Day 3)**
    - **Ombudsperson Update (Day 3)**
    - **Sharing Victories (Day 3)**

Aboriginal Issues

- Update on Aboriginal Law and Resources for Clients (Day 1)
- Wills on Reserve (Day 2)
- Welfare on Reserve (Day 3)

Update Aboriginal Law & Resources

Patricia M. Barkaskas, MA, JD
Lecturer & Academic Director, Indigenous Community Legal Clinic, Peter A. Allard School of Law

TRC – Report & Findings

- Residential Schools – A Legacy of Genocide
- Canada's Legal Responsibilities
- Treaty making and education- commitment to on-reserve education breached
- Forced removal of Indigenous children from communities
- National program administered by various church organizations from 1883-1969
- Post-1969 administered by government
- The schools operated in tandem with legislation preventing Indigenous communities to engage in traditional cultural practices, which were deemed illegal
- Canada estimates at least 150 000 children
- Last schools did not close until the late 1990s

Legacy – Ongoing Impacts

- Taking children away from parents = judgment that Aboriginal parents were unfit
- Denigration of Indigenous cultures, laws, and ways of being and knowing
- Assumption that European culture and values, and Christian perspectives are superior
- Coping mechanisms to deal with abuses ie: alcohol and drug abuse
- Perpetuating abuses suffered ie: FASD
- Lack of parenting skills
- Loss of language, culture, and sense of identity
- Isolation and cultural disconnection

Intergenerational Trauma

Intergenerational trauma is the transmission of historical oppression and its negative consequences across generations. There is evidence of the impact of **intergenerational trauma** on the health and well-being and on the health and social disparities facing Aboriginal peoples in Canada and other countries.

TRC – Calls to Action / Law

- Appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations
- Skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism

Call to Action 27

27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Call to Action 28

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Equity for Aboriginal People in the Legal System – Call to Action 50

50. In keeping with the *United Nations Declaration on the Rights of Indigenous Peoples*, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

The Indian Residential Schools History and Dialogue Centre (at the University of British Columbia)

UBC's Dialogue Centre will be affiliated with the National Research Centre established by the Truth and Reconciliation Commission of Canada in Winnipeg, and will be a place for former students, their families and communities, researchers and others to access the records gathered by the Truth and Reconciliation Commission and others. It will support community access, public programming, curriculum development, advanced research, and intensive and regular discussion on issues of common concern.

Indigenous Community Legal Clinic

WHAT WE DO

The Indigenous Community Legal Clinic provides free legal representation for those persons who qualify for legal assistance and have a legal issue that falls under the jurisdiction of the British Columbia provincial courts. Examples of cases dealt with at the Clinic include, but are not limited to:

- criminal matters
- family law matters
- human rights complaints
- civil disputes in small claims court
- wills and estates
- hearings before administrative tribunals dealing with matters such as: employment insurance; welfare; landlord and tenant dispute; and Canada Pension Plan
- Indian Status applications
- Aboriginal legal issues
- limited assistance with some divorce cases

LIMITED DIVORCE ASSISTANCE

In some cases the ICLCmay be able to assist with divorce proceedings in limited and specific circumstances. The ICLC may be able to assist with divorce proceedings if a person is financially eligible and has either successfully applied for an exemption through the Supreme Court from paying the necessary disbursements (that is, fees payable to the Court Registry) or who is able to pay their own disbursements.

The ICLC may be able to offer limited services for those seeking a divorce who have "simple, uncontested" divorces based on grounds of separation or adultery to obtain a divorce.

The ICLC may only assist in cases where all matters relating to custody, access, maintenance and division of property are settled.

The ICLC may also be able to assist with some legal research for those who have Divorce proceedings that deal with matrimonial property on reserve.

IN ORDER TO QUALIFY FOR LEGAL ASSISTANCE

Legal services provided by the Indigenous Community Legal Clinic are provided to those persons who qualify financially for legal assistance, if at the time of application the Clinic has the resources needed to assist the client.

Clients may be asked in confidence to provide the Clinic with information about their income and assets to determine whether the client is eligible.

How the ICLC may assist advocates...

- By referring advocates to other resources, putting them in touch with other organizations or lawyers who may be able to assist pro-bono, and/or providing assistance with research or advocacy
- Limited retainers for legal research on specific areas of laws / legal issues
- Providing guidance on legal research / resources for advocates and clients to conduct their own research

Contact the ICLC

Indigenous Community Legal Clinic, Peter A. Allard School of Law
Suite 101 – 148 Alexander St., Vancouver, BC
Hayley Waring, Legal Assistant
Tel: 604.684.7334
Fax: 604.684.7874
Email: iclc@allard.ubc.ca
http://www.allard.ubc.ca/iclc/indigenous-community-legal-clinic

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Academic Director
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Issues at a Glance:

- Child Protection
- Family
- Criminal ie: Gladue / First Nations Courts
- Human Rights
- Civil Litigation ie: Class Actions
- Aboriginal Rights

Child Protection

- How to incorporate Gladue principles into Child Protection matters?
- How to encourage bands or Nations to engage in the process?
- Kinship Caregiver Agreements / Arrangements
- Resource: Parents Services Society of British Columbia (PSS) – Grandparents Raising Grandchildren Support Line

→For grandparents or family members raising another person's child

- Contact the GRG Support Line:

→ **604-558-4740** (Greater Vancouver) / **1-855-474-9777** (call no charge, outside Greater Vancouver) / by email

→ Monday, Tuesday, Thursday, and Friday from **11 a.m.** to **3 p.m.**

At other times, you can leave a voicemail message or send an email, which will be returned promptly.

http://www.parentsupportbc.ca/grandparents_raising_grandchildren

"Wrapping Our Ways Around Them – Aboriginal Communities and the *CFCSA* Guidebook"

Ardith (Walpetko We'dalks) Walkem is a member of the Nlaka'pamux nation which stretches from the Interior of BC into Washington state. She has a Master of Laws from UBC (with a research focus on Indigenous laws and oral traditions). Ardith has practiced extensively with different Indigenous communities, and in assisting Indigenous communities to assert their Aboriginal Title and Rights and Treaty Rights, with a focus on assisting Indigenous communities to articulate their own laws and legal systems. She has worked as Parents Counsel on CFCSA cases, and as counsel for Indigenous nations in matters involving their child members, and has helped to design systems based on Indigenous laws for children and families. Most recently, she wrote "Wrapping Our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook" (2015, published by the ShchEma-meet.tkt project) and has worked with Indigenous communities to recover and implement their own laws in the area of Indigenous children and families.

L.M. v. British Columbia (Director of Child, Family and Community Services), 2016 BCCA 367

- Appellants were foster parents of an infant child who is in the permanent care of the Director of Child, Family and Community Services.
- Director is the sole personal guardian of the child (re: CCO s. 50(1) of the *Child, Family and Community Service Act*).
- The Director expressed her hope to place the child in the care of a couple in Ontario who have adopted two siblings of the child, with the intention the child will be adopted by the couple. That adoption would be according to the laws of Ontario.
- Appellants wished to adopt the child and petitioned for an Order of Adoption in their favour, and (by a second petition) for relief under the *Charter of Rights and Freedoms*.
- The Appellants appealed the dismissal of those petitions (other petitions in the Supreme Court of British Columbia have not been resolved).
- Held: Appeals dismissed. Parens patriae jurisdiction, advanced as the basis for an adoption order in favour of the appellants, does not permit the court to order adoption of a child outside the statutory scheme. There is no basis for the orders sought in the first petition. The second petition centered on issues that should have been advanced on the first petition and are res judicata.

Family

- In consideration of the best interests of the child (see s. 37 *Family Law Act*) a court may take into account your child's Aboriginal heritage, traditions, and culture.
- If a client lives on reserve and has:
  - guardianship,
  - parental responsibilities,
  - parenting time, or
  - Custody

of their children, the court may uphold your children's rights to continue to live with you even if they're not band members.

- When the court decides about parenting and contact with a child, it can consider your child's Aboriginal ancestry.
- In some cases, a band council resolution may restrict a non-band member parent from going onto the reserve to see their child. If this is the case a client may need to seek an order or agreement for parenting time or contact that sets out where drop-offs and pick-ups can happen off reserve.

http://aboriginal.legalaid.bc.ca/

Aboriginal Mother's Centre Society

- AMCS is a resource for Aboriginal mothers facing homelessness and/or dealing with their child/ren in care of the Ministry.
- As of December 2011, the AMCS offers 16 transformational housing suites, a 25 space licensed daycare, commercial kitchen, large dining room, programming and office space, commercial leasing spaces and a permanent site of the social enterprise called Mama's Wall Street Studio.
- AMCS facility provides shelter, support, and programs for women and children so they may make an elusive dream, of healing and family reconnection, into reality and live in a healthy self-sustaining village that supports women, children, and families. With all this under one roof the Aboriginal Mother Centre Society has the capacity to deliver on-site programming with a traditional Indigenous knowledge centred approach. This approach to spiritual, physical, and emotional health includes counselling, advocacy, education, training, and social support.

http://www.aboriginalmothercentre.ca/home.html

Family Homes on Reserves and Matrimonial Interests or Rights Act

- The *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 [*FHRMIRA*], came into force on December 16, 2013.
- The first part of *FHRMIRA* allowed a transition period of one year in which First Nations could enact their own laws before the provisional federal rules applied.
- After December 16, 2014, if a First Nation has not enacted their own law, then the provisional federal rules will apply until and unless a First Nation enacts their own community-specific matrimonial real property law under sections 7-11.
- However, there are exceptions if a First Nation was on the schedule to the *First Nations Land Management Act* [*FNLMA*] before *FHRMIRA* received Royal Assent on June 19, 2013, or for First Nations with self-government agreements.

- Nations with a land code under the *FNLMA* had a 12-month period to enact the rules and procedures dealing with matrimonial rights or interests in reserve land relating to their land code, while those without a code have a three-year exemption in which to enact a land code and address issues related to matrimonial rights or interests in reserve land under *FNLMA*.
- First Nations with reserve lands and a self-government agreement in effect, who also have jurisdiction over land management, and who have acted on that jurisdiction, are exempt from *FHRMIRA*. These Nations may ask the Minister under section 12 of *FHRMIRA* to make a declaration that the provisional federal rules apply to them – none have done so to-date.

Issues re: *FHRMIRA*

- These exemptions have worked to create the uneven application of *FHRMIRA* from its implementation. There are First Nations without their own laws in effect to whom *FHRMIRA* does not presently apply; members and non-members of these Nations remain without specific rights or protections upon the breakdown of matrimonial or common-law relationships in these communities.

- *FHRMIRA* should have created standards at law for resolving the rights and protections available to married and common-law spouses living on reserves when there is a breakdown of their relationships. However, inequities exist even within *FHRMIRA*; for example, the same rights and protections set out in communities where there are Certificates of Possession or Certificates of Occupation are not available to First Nations members living on custom allotted lands.

- Allowing First Nations to opt-out of *FHRMIRA* by writing their own laws has had the deleterious effect of creating uneven application of matrimonial property laws and emergency protection measures most often needed by women, and their children, across First Nations reserve communities in Canada.

- There are no specific guidelines or minimum standards of protection for women or children which must be considered in laws enacted by First Nations, nor are there consistent definitions under law to be applied, including defining the length of time required for the establishment of common-law relationships (set out in various enacted First Nations laws as between 2-10 years, and in some cases as only between a man and a woman).

- While *FHRMIRA* allows that a court of competent jurisdiction may make rulings about emergency protection orders and as to the occupancy of the family home, some First Nations laws refer decision-making powers to a First Nations tribunal or court, and a few do away with any external court jurisdiction. As a result, *FHRMIRA* does not necessarily address the gendered inequities faced by women living on reserves or create a standard at law for married and common-law spouses living on reserves.

→ List of First Nations with Matrimonial Real Property Laws Under the Act:

- Algonquins of Pikwàkanagàn First Nation, Ontario: April 8, 2014
- Pictou Landing First Nation, Nova Scotia: December 16, 2014
- Millbrook First Nation, Nova Scotia: December 1, 2014
- Bear River First Nation, Nova Scotia: December 16, 2014
- Paqtnkek Mi'Kmaw Nation, Nova Scotia: December 18, 2014
- Whitefish River First Nation, Ontario: March 6, 2015
- Tk'emlúps te Secwèpemc, British Columbia: July 30, 2015
- Sipekne'katik First Nation, Nova Scotia: September 25, 2015
- Mohawks of Akwesasne, Ontario and Quebec: November 26, 2015
- Salt River First Nation #195, Northwest Territories and Alberta: December 6, 2015
- Membertou First Nation, Nova Scotia: April 30, 2016

https://www.aadnc-aandc.gc.ca/eng1408981855429/1408981949311

Centre of Excellence for Matrimonial Real Property
https://www.aadnc-aandc.gc.ca/eng/1350998394711/1350999033025

What can the centre of excellence for Matrimonial real property do for you and your community?

→ The Centre of Excellence can help First Nation individuals, communities and organizations in understanding and applying the new Act. The Centre can:

- Guide First Nations who are opting to develop their own MRP laws by providing templates, examples and answering questions, when applicable.
- Provide information on the protections and rights available to individuals and families living on reserve such as:
  - the right to occupy the family home;
  - safety for children and their caregivers in instances of family violence;
  - rights of survivors on the death of their spouse or common-law partner; and,
  - equitable distribution of MRP assets.
- Assist with implementing the provisional federal rules, which are interim rules that will apply until a First Nation community develops and enacts its own MRP law under the Act.
- Provide research on alternative dispute resolution mechanisms to help facilitate the creation of additional options for parties to resolve MRP issues.

Human Rights

***First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)* 2016 CHRT 2**

- In a landmark ruling released on January 26, 2016, the Canadian Human Rights Tribunal found that the Canadian government is racially discriminating against 163,000 First Nations children and their families by providing flawed and inequitable child welfare services ("FNCFS Program") and failing to implement Jordan's Principle to ensure equitable access to government services available to other children.

- In 2007, the Caring Society and the Assembly of First Nations filed a human rights complaint against the Federal government, alleging that Canada's failure to provide equitable and culturally based child welfare services to First Nations children on-reserve amounts to discrimination on the basis of race and ethnic origin. After several unsuccessful efforts by the Federal government to have the case dismissed on legal technicalities, a hearing on the complaint began on February 25, 2013 at the Canadian Human Rights Tribunal and were completed on October 24, 2014.
- The "I am a Witness" campaign invites organizations and people of all ages to follow and learn about the case in person or online and to decide for themselves if First Nations children are being treated fairly. On this site you will find a comprehensive timeline with the legal submissions by all parties in the case along with relevant reports from credible independent sources like the Auditor General of Canada.

- The Tribunal found that the complaint was substantiated (at para 456).
- The Tribunal ordered INAC "to cease its discriminatory practices and reform the FNCFS Program and 1965 Agreement to reflect the findings in this decision. [INAC] is also ordered to cease applying its narrow definition of Jordan's Principle and to take measures to immediately implement the full meaning and scope of Jordan's Principle" (at para 480).
- The Tribunal further noted that "within three weeks of the date of this decision [January 26, 2016] the Panel will contact the parties to determine a process for having its outstanding questions on remedy answered on an expeditious basis" (at para 484).
- The Tribunal will make further orders on remedy and compensation and will issue a ruling regarding the Caring Society's claim for costs for obstruction of process related to INAC's failure to disclose documents, which the Tribunal deferred (2013 CHRT 16).

Criminal – Gladue

- More than ¼ of the inmate population in prisons in Canada are Aboriginal peoples
- More than 36% of women in prison in Canada are of Aboriginal descent
- First Nations youth living on reserve have a greater chance of going to prison than of graduating from high school

→ s. 718.2(e) Criminal Code of Canada
A court that imposes a sentence shall also take into consideration the following principles:

.....

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The Court instructed judges to look at two sets of factors when sentencing an Aboriginal offender:

> (A) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.

→ Duty of Counsel:

- It is counsel's duty to bring the individualized information before the court (See: *R. v. Florence*, 2015 BCCA, @ para 21 and *Ipeelee* @ para 60)
- Defence and Crown should be prepared to make submissions and, if necessary call relevant evidence (See: *R. v. H.G.R.* BCSC 2015 BCSC, *R. v. Blanchard*, 2011 YKTC 86)
- "The application of Gladue principles is required in every case involving an Aboriginal offender, regardless of the seriousness of the crime" (See: *R. v. Elliot* 2015 BCCA @ p.5 and *Ipeelee* @ para 87)

Gladue Factors

- Are mitigating in nature (See: *R. v. Eustache,* 2014 BCCA 337)
- Not simply a link to Aboriginal heritage or not..
- But a real consideration of "Gladue Factors"
- It is not counsel's or the client's burden to show a "causal link" between the criminal offence and Gladue factors, but it would be helpful to judge to know how the factors or the individual's specific circumstances are linked to the crime

Gladue factors may include:

- family circumstances
- support network
- residential schools
- unemployment
- lack of educational opportunities
- dislocation from Aboriginal communities, loneliness and community fragmentation
- family involvement in criminal environment
- loss of identity, culture and ancestral knowledge
- substance abuse
- poverty
- racism
- abuse
- witness to violence

Gladue Submissions / Reports

COUNSEL HAVE A DUTY TO BRING GLADUE INFORMATION BEFORE THE COURTS & CLIENTS HAVE A RIGHT TO CONSIDERATION OF GLADUE FACTORS / PRINCIPLES

→ IDENTIFY CLIENT AS ABORIGINAL & ADVISE THE CLIENT OF THEIR *RIGHT* TO GLADUE SUBMISSIONS

→ INTERVIEW CLIENT ABOUT BACKGROUND AND/OR APPLY FOR A GLADUE REPORT FOR THE CLIENT

→ PROVIDE THE COURT WITH APPROPRIATE INFORMATION
- Gladue Factors that you know of or that are reported in the Gladue Report
- How they connect to the offender and/or offence
- Explain argument how it reduces "moral culpability"
- Provide caselaw as to appropriate "range' of sentence" (see Courthouse Library RANGEFINDR where you can include specific details ie: client is Aboriginal and there is a Gladue Report)

→ PROVIDE COURT WITH INNOVATIVE ALTERNATIVES RE: SENTENCE WHEN POSSIBLE IE: EMPHASIS ON RESTORATIVE JUSTICE AND HEALING GOALS / CONNECTION BACK TO COMMUNITY

Some Gladue Resources

- "What Gladue Reports Must Contain: A guide to the content, style, formatting, and proofreading of Gladue reports," Legal Services Society Gladue Pilot Project, 2014 (Google search: "What a Gladue Report must contain" will bring up link to PDF)

- University of Manitoba, Gladue Project

→ includes link to "Gladue Handbook: A Resource for Justice System Participants in Manitoba," Debra Parkes, *et. al.* September 2012

http://umanitoba.ca/outreach/chrr/resources/gladue-projec.html

Criminal – First Nations Courts

- Current First Nations Courts: New Westminster (since November 2006); North Vancouver (includes Whistler, Squamish and the North Shore, since February 2012); Kamloops (since March 2013); and, Duncan (since May 2013).
- The Court has been developed in consultation with local First Nations. Courts have Elders who lend wisdom and provide guidance.
- Focus is holistic, recognizing the unique circumstances of First Nations offenders within the framework of existing laws.
- FNC provides support and healing to assist in rehabilitation and to reduce recidivism. It also seeks to acknowledge and repair the harm done to victims and the community.
- Development of new FNCs in communities in BC at the request and with the support of local First Nations.

Civil Litigation – Class Actions

- British Columbia: http://www.callkleinlawyers.com/class-actions/current/aboriginal-sixties-scoop/
- Alberta, Manitoba, Saskatchewan (Merchant Law): https://www.merchantlaw.com/class-actions/current-class-actions/indian-metis-scoop-class-action
- Ontario: https://sixtiesscoopclaim.com/contact-us/
- Newfoundland & Labrador:

→**Representative former students and Canada have now reached a $50 million settlement that provides compensation for former students who attended.**

→Unless they have previously removed themselves from the lawsuit, the Settlement is available for anyone who was alive as of November 23, 2006 and who attended the IGA or Moravian Schools in the following locations between the dates listed:

- i. Cartwright – April 1, 1949 to June 30, 1964
  ii. Northwest River – April 1, 1949 to June 30, 1980
  iii. Nain – April 1, 1949 to June 30, 1973
  iv. Makkovik – April 1, 1949 to June 30, 1960
  v. St. Anthony – April 1, 1949 to June 30, 1979

Status – *Descheneaux*

Descheneaux c. *Canada* (Procureur Général) 2015 QCCS 3555

- On August 3, 2015, the Superior Court of Quebec announced its decision in the *Descheneaux* case. The Court found that several paragraphs and one sub-section relating to Indian registration (status) under section 6 of the *Indian Act* unjustifiably violate equality provisions under the *Canadian Charter of Rights and Freedoms* (*Charter*) because they perpetuate a difference in treatment in eligibility to Indian registration between Indian women as compared to Indian men and their respective descendants.
- The Court struck down these provisions, but suspended the implementation of its decision for a period of 18 months, until February 3, 2017, to allow Parliament to make the necessary legislative amendments.This judgement discusses how the *Indian Act* has historically applied differential treatment on the basis of gender

- From 1927- 1985, Indian Status was extended through the male lineage only. A father with Indian Status could confer status to his non-Indian wife and children. On the contrary, a woman with Indian Status lost her status upon marriage to a non-status spouse, and was unable to pass status to her children. In this way, Indian Status has been been extended through the male line while being retracted through the female line.

- In 1985, amendments to the *Indian Act* replaced this scheme with a gender neutral system: a child with two Indian Status parents is registered as a Status Indian pursuant to section 6(1). A child with one Indian Status parent is registered pursuant to section 6(2), regardless of whether the child's Indian ancestry is matrilineal or patrilineal.

- Although the 1985 amendments neutralize the gender issues going forward, the law continues to uphold the section 6(1) Status of any children who were registered or were entitled to section 6(1) Status under the previous Act.

- This means children who received their section 6(1) Status from their father maintain this beneficial Status, while children who received their status from their mother are only granted section 6(2) Status pursunt to the 1985 ammendments.

- In this way, women continue to face repercussions from past versions of the *Indian Act*. Women granted status under section 6(2) are not able to extend status to the next generation, while their male counterparts with 6(1) status are able to do so.

- This rule has been coined "the second generation cut-off," and puts women at a particular disadvantage. By denying women the ability to pass status on to their children in the same manner as men, the law perpetuates the stereotype that the identity of Indian women and their descendants is somehow less worthy than that of Indian men.
- The plaintiff (Descheneaux) in this case is an Indian man with 6(2) Status. His mother had section 6(1) Indian Status and his father was non-Indian. Descheneaux married a non-Indian and was unable to register his children under section 6 of the *Indian Act*.

- Deschenaux argued that but for the gender discrimination in the *Act*, he would be entitled to 6(1) Status himself and be able to pass 6(2) status to his children. In other words, if Descheneaux's Indian mother had instead been his father, he would have had section 6(1) Status himself, and been able to pass on Status to his children pursuant to section 6(2).
- The Court found that this discrimination in the *Indian Act* is not justifiable. The ability to pass on identity and culture is a right that should not be denied on the basis of gender. The court ruled that section 6(1)(a),(c), (f) and section 6(2) of the *Indian Act* unjustifiably infringe section 15 of the *Charter.*
- Once the new law comes into force, people previously unable to obtain status under the *Indian Act* as a result of the discriminatory provisions may be able to appeal to the Indian Registry for Status with consideration of their matrilineal heritage.

"The Government of Canada's Response: A Sequenced and Two-Staged Approach"

https://www.aadnc-aandc.gc.ca/eng/1467227680166/1467227697623

- Under Stage I, legislation would be introduced to address known residual sex-based discrimination in Indian registration under the *Indian Act*, including the facts in the *Descheneaux* case and decision.
- The proposed amendments would eliminate the inequities found in *Descheneaux* and address other known sex-based discrimination in Indian registration. More specifically, the following have been identified to date, for inclusion as part of the proposed legislative amendments:

- ***Cousins Issue:*** Address the differential treatment of first cousins whose grandmother lost status due to marriage with a non-Indian, when that marriage occurred between September 4, 1951 and April 17, 1985 (see Annex A).
- ***Siblings Issue***: Address the differential treatment of women who were born out of wedlock of Indian fathers between September 4, 1951 and April 17, 1985 (see Annex B).
- ***Issue of Removed Minors:*** Address the differential treatment of minor children who were born of Indian parents, but lost entitlement to Indian status because their mother married a non-Indian after their birth, and between September 4, 1951 and April 17, 1985 (see Annex C).

- As part of Stage II of this initiative and in keeping with the Government's commitment reconciliation with the Indigenous Peoples of Canada through a renewed nation-to-nation relationship based on recognition, rights, respect, cooperation and partnership, a collaborative process with First Nations and other Indigenous groups will be launched in 2017 to examine the broader issues relating to Indian registration and Band membership that cannot be addressed under Stage I, due to time and other constraints.
- The collaborative process would be the iterative next step to, and build on, the wealth of information submitted by First Nations and other Indigenous groups as part of the 2011 *Exploratory Process on Indian Registration, Band Membership and Citizenship*.
- The purpose of Stage II will be to identify areas for future reform.

- Participation in the collaborative process would be inclusive and involve First Nations governments, Treaty and Nation organizations, and regional and national organizations that represent the interests of First Nations, including First Nations women, Métis and non-status Indians.
- The collaborative process would be jointly designed with First Nations and other Indigenous groups. Preliminary discussions with First Nations and other Indigenous groups would be held to determine the nature and scope of work and discussions to take place, the subject matters that would be examined under this process and the types of activities that would be undertaken by participants. Preliminary discussions on the collaborative process would also be informed by the outcomes of priority-setting engagement on the review of laws.

- Without prescribing the subject matters for discussion, based on the findings of the 2011 *Exploratory Process*, it is anticipated that the issues of interest for First Nations and other Indigenous groups will likely include, but not be limited to, the following:
  - Other distinctions in Indian registration.
  - Issues relating to adoption.
  - The 1951 cut-off date for eligibility to registration specific to Bill C-3.
  - The second-generation cut-off.
  - Unstated/unknown paternity.
  - Cross-border issues.
  - Voluntary de-registration.
  - The continued federal role in determining Indian and Band member under the *Indian Act*.
  - First Nations authorities to determine membership under the *Indian Act*.

- Canada would also seek to include for discussion issues surrounding children of same-sex parents and non-cisgender identities as they relate to eligibility for Indian registration and Band membership.
- At the end of Stage II, the Minister will present the results of the collaborative process to Cabinet. Should recommendations be made for further legislative changes, the Minister could embark on subsequent phases of engagement with First Nations and other Indigenous groups on future legislative or other reform pertaining to Indian registration and Band membership.
- The collaborative process under Stage II will be conducted within a one-year time frame and launched some time in 2017-2018, following the passage of legislative amendments to address known residual sex-based discrimination in Indian registration (as per Stage I), and sequenced to follow priority-setting engagement in respect of the review of laws.

Some Resources

- **Truth and Reconciliation Commission – Reports & Findings**

http://nctr.ca/reports.php

- **Indigenous Community Legal Clinic, Peter A. Allard School of Law**

http://www.allard.ubc.ca/iclc/your-legal-problem

- **Wrapping Our Ways Around Them – Aboriginal Communities and the *CFCSA* Guidebook**

www.nntc.cadocs/aboriginalcommunitiesandthecfcsaguidebook.pdf

- **Parents Services Society of British Columbia (PSS) – Grandparents Raising Grandchildren Support Line**

http://www.parentsupportbc.ca/grandparents_raising_grandchildren

- **Indigenous Community Legal Clinic, Peter A. Allard School of Law**

http://www.allard.ubc.ca/iclc/indigenous-community-legal-clinic

- **First Peoples Law – Aboriginal Law Report**

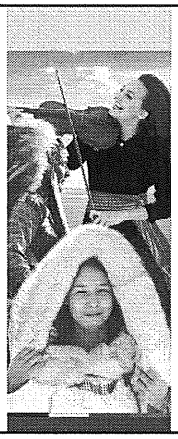
http://www.firstpeopleslaw.com/index/articles/275.php
& http://www.firstpeopleslaw.com/public-education/publications.php

Estates under the *Indian Act*:

An Overview

Estates Unit, BC Region

The Law Foundation Provincial Training Conference - INAC presentation October 19, 2016.



Canada

What we'll cover

The Estates Unit in INAC – BC Region

- Overview of the law of estates under the *Indian Act*
- Sections 48(8) and 50 of the *Indian Act*

Who we are and what we do

The Estates Unit in INAC-BC Region

We act for the Minister of Indian Affairs, carrying out her responsibilities under the *Indian Act*.

1. Approving Wills and confirming the appointment of Executors and Administrators;
2. Settling the estates of people who've passed away, when nobody in the family is able to do so;
3. Managing the finances of people who are unable to manage their own money due to mental incapacity; and
4. Paying out Minors' trust accounts held by INAC.

Who is not covered by the *Indian Act?*

The *Indian Act's* Wills & Estates rules don't apply to everyone

- Section 4(3) states "Sections 114 to 122 and, unless the Minister otherwise orders, sections 42 to 52 do not apply to or in respect of any Indian who does not ordinarily reside on a reserve or on lands belonging to Her Majesty in right of Canada, or a province."
- Sections 42 to 50 are the decedent estates sections.
- Section 51 provides the Minister with the authority to manage the property of mentally incapable adults
- Section 52 deals with minors' trust accounts

Who is covered by the *Indian Act*?

When the Act Applies

The person must be:

1. Status (registered) First Nation person; and
2. Make his/her home on reserve.
   - Includes people who live on-reserve but are away for a period of time to go to school or for seasonal employment;
   - Includes people whose home is on reserve, but who have to leave to go into a care facility off-reserve;
   - Does not include status First Nations people who don't live on-reserve, or people who live on-reserve but don't have First Nations status.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Powers of Minister with respect to property of deceased Indians

- **42.** (1) Subject to this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister and shall be exercised subject to and in accordance with regulations of the Governor in Council.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Section 43: Particular powers of Minister

- appoint, and remove/replace, executors of wills and administrators of estates;
- carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and
- make or give any order, direction or finding that in her opinion it is necessary or desirable to make or give with respect to any matter referred to in section 42.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Section 44: Courts may exercise jurisdiction with consent of Minister

- The Minister can refer an estate to the Court (in BC, the BC Supreme Court) for all purposes (s.44(1)), or can just refer a specific issue to the Court (s 44(2)) but otherwise retain her authority over the estate.
- *Indian Act* still applies, not BC law.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Section 45: Wills

- **45.** (1) Nothing in this Act shall be construed to prevent or prohibit an Indian from devising or bequeathing his property by will.

  (2) The Minister may accept as a will any written instrument signed by an Indian in which he indicates his wishes or intention with respect to the disposition of his property on his death.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Section 45 cont'd: Probate

- (3) No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will or a court has granted probate thereof pursuant to this Act.

What Makes a Will Legal?

The requirements in the *Indian Act* for MAKING a Will

- The person making the Will must:
  1. Be age 16 or older, unless they are married or in the Armed Forces; and
  2. Be able to understand what they are doing when they write the Will ["mental capacity"].

- The Will must:
  1. Be in writing;
  2. Be signed by the will-maker;
  3. Take effect upon death; and
  4. Give something away.

What Makes a Will Legal?

The requirements in the *Indian Act* for PROBATING a Will

- The original "Last" (most recent) Will must be submitted to INAC for probate (called "approval" in the *Indian Act*).
- A photocopy is not acceptable.
- In "approving" a Will, the Minister is checking to confirm that the Will document meets the technical requirements to be a valid Will, i.e., that it is a genuine document (original and signed document) that is in writing, signed by the deceased, disposes of property (such as personal belongings or land), and is intended to take effect upon death.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Section 46: Will Voidance

- (1) The Minister may declare the will of an Indian to be void in whole or in part if she is satisfied that
  - a) the will was executed under **duress** or **undue influence**;
  - b) the testator at the time of execution of the will **lacked testamentary capacity**;

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

- c) the terms would impose hardship on persons for whom the testator had a responsibility to provide;
- d) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;
- e) the terms of the will are so vague, uncertain or capricious ... difficult or impossible to carry out; or
- f) the terms of the will are against the public interest.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Section 47: Appeal to Federal Court

- **47.** A decision of the Minister made in the exercise of the jurisdiction or authority conferred on him by section 42, 43 or 46 may, within two months from the date thereof, be appealed by any person affected thereby to the Federal Court, if the amount in controversy in the appeal exceeds five hundred dollars or if the Minister consents to an appeal.

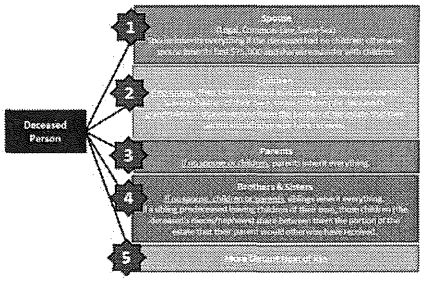
Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

- If a person dies without a valid Will, section 48 sets out the rules for distribution when a person dies without a Will.
- The person looking after the estate must follow these legal rules, which are set out in section 48.

Section 48

Who inherits if there is no valid Will?



Section 48(8)

Where closest heirs are nieces/nephews

DISTRIBUTION OF PROPERTY ON INTESTACY

Distribution among next-of-kin

- 48.(8) ... any interest in land in a reserve shall vest in Her Majesty for the benefit of the band if the nearest of kin of the intestate is more remote than a brother or sister.

Indian Act's estates provisions

Sections 42 to 50: Wills and Estates

Section 49

- A transfer of land from an estate is not effective until Minister approves it.

Section 49 under FNLMA

- A transfer of land from an estate is not effective until the band's designated signing authority has approved and registered the transfer.

The Sale of Reserve Land

Decedent estates

Section 50

- If land is inherited (Will, or no Will) by a person who isn't a member of the same band as the deceased at the time of the deceased's death, the Superintendent of Indian Affairs must sell the non-member's share of the land and give them the sale proceeds instead of the land itself.

Who does section 50 apply to?

Decedent estates

- Section 50 applies only to estates that are under the jurisdiction of the Minister of Indian Affairs. So, if someone is a registered Indian but is ordinarily resident off-reserve in Vancouver, section 50 doesn't apply to their estate.
- The executor or administrator of their estate can't transfer reserve land to a non-member, but how they get there is their business, and the Superintendent isn't involved.

Section 50 (1) and (2)

Decedent estates

Non-resident of reserve

- **50.** (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.

Sale by superintendent

- **50.** (2) Where a right to possession or occupation of land in a reserve **passes by devise or descent** to a person who is not **entitled to reside on a reserve,** that right **shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve** and the **proceeds of the sale shall be paid to the devisee or descendant,** as the case may be. **Unsold lands revert to band.**

Section 50 (3)

Decedent estates

- **50.** (3) Where **no tender is received within six months** or such further period as the Minister may direct **after the date when the right to possession or occupation of land is offered for sale** under subsection (2), **the right shall revert to the band** free from any claim on the part of the devisee or descendant, **subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements** as the Minister may determine.

Section 50 (4)

Decedent estates

Approval required

- **50.** (4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the **possession is approved by the Minister.**

Section 50 workarounds

Absolute Disclaimers, Heirs/Beneficiaries' Agreements

Absolute Disclaimer

Non-member can 'disclaim' (refuse) the gift of land, which will then pass to the next person in line to inherit. Works well if a band member heir or beneficiary is next in line. May be a solution for non-member spouse, if s/he has children with the deceased who will then inherit the land and 'allow' mum/dad to remain in the house. Can also be useful for situation where 6 children are inheriting land and only 1 is a non-member.

Section 50 workarounds

Absolute Disclaimers, Heirs/Beneficiaries' Agreements

Heirs'/Beneficiaries' Agreement

If the estate has other assets as well as the reserve land, the executor or administrator may be able to arrange things so that non-members get the other assets and the reserve land only goes to band members. However, must ensure that everyone is still getting their appropriate share of the estate (e.g. If the land is worth $50,000, can't just give non-member $1,000 in cash and call it a deal).

Section 50 Sales

Sales of Entire, or Fractional, Interests in Land

Can only be conducted by Superintendent, not the executor, administrator, or the Band

Fractional sale: e.g. Selling a 1/20 interest. Unless land is leased (in which case any band member might want it, for the revenue stream).

Sale is conducted by correspondence and is open only to the band-member heirs or beneficiaries and any existing co-owners of the parcel of land. There is no minimum bid.

Usually conducted over a 30-day period.

Section 50 Sales

Sales of Entire, or Fractional, Interests in Land

Full sale: Open to all band members (on or off reserve), advertised in local and regional newspapers, notice of sale posted on reserve. Process derived from Songhees series of court decisions. Usually conducted over a 90-day period, but may be extended if no bidders. There is no minimum bid required.

If no bidders for a sale – whether full or fractional – the interest in land may be returned to the band after 6 months, with no payment for land value to the non-member heir or beneficiary.

Section 50 Sales

Sales of Entire, or Fractional, Interests in Land

If there are no bidders for a sale – whether full or fractional – the interest in land must be returned to the band after 6 months (which may be extended by the Superintendent), with no payment to the non-member heir or beneficiary for the value of the land itself, though the band may be required to pay for the value of improvements (e.g. a house).

We have had a couple of cases in which the land has reverted to the Band.

Contact Information

INAC - BC Region contacts

Estates Unit

604.775.5100

Toll free: 1.888.917.9977

Email: BCestates@aandc-aadnc.gc.ca

Section 50 – Call Lois Paul @604-671-6052

Email: Lois.Paul@aandc-aadnc.gc.ca

Superintendent is Dawna Tong

Email: Dawna.Tong@aandc-aadnc.gc.ca

No Materials

Materials to be provided
at the
Provincial Training Conference

Debt and Consumer Issues

- Show me the Money: Enforcing RTB Monetary Orders in Small Claims Court (Day 1)
- Current Issues in Debt (Day 2)
- Financial First Aid for Advocates (Day 3)

Show me the Money

1. handout;

2. Confirmation of Service of Monetary Order for Enforcement form;

3. Some common procedural questions in Small Claims Court handout;

4. PC Rule 17.1 attachment to procedural questions;

5. updated PC practice direction on fax filing;

6. Schedule A, Small Claims Rules;

7. Resource Sheet for Small Claims Court; and

8. Appendices A to F with Table of Contents

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

(Prepared by: Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, November 16, 2011 and updated October 1, 2016).

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

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

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

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

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

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

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

See Appendix A for a sample demand letter.

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

You **must** have proof of how and when the landlord was served with the RTB Order, as you will need to file that proof of service with the Small Claims Court when you file the Order for enforcement with Small Claims. See Step two, section C below called "How to file a Monetary Order with Small Claims Court for more information on proof of service.

What if a landlord won't voluntarily pay?

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

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

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

Sections 84 and 85 of the *Residential Tenancy Act*, S.B.C. 2002, c 78 [as amended] ("RTA") say:

Director's orders may be filed in Supreme Court

84 *(1) A decision or an order of the director may be filed in the Supreme Court and enforced as a judgment or an order of that court after*

(a) a review of the director's decision or order has been

(i) refused or dismissed, or

(ii) concluded, or

(b) the time period to apply for a review has expired.

(2) Subsection (1) applies whether the decision or order is interim, temporary or final.

Certain director's orders may be filed in Provincial Court

85 *(1) This section applies to a decision or an order of the director if*

*(a) the decision or order is for **financial compensation or the return of personal property**, and*

(b) the amount required to be paid under the decision or order, excluding interest and costs, or the value of the personal property is within the monetary limit for claims under the Small Claims Act.

(2) A decision or an order described in subsection (1) may be filed in the Provincial Court and enforced as a judgment or an order of that court after

(a) a review of the director's decision or order has been

(i) refused or dismissed, or

*(ii) concluded, **or***

(b) the time period to apply for a review has expired.

a) What court? Provincial Court or Supreme Court?

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

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

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

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

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

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

> “In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

> In the calculation of time NOT referred to in subsection (c), the first day must be excluded and the last day included. "*This is the rule that applies when a thing must be done "within" a certain number of days.*

Further,

> "If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.
>
> If the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open."

If neither party files for review of the director's order within 15 days of receiving it, then you can file a copy of the RTB order for enforcement with the courts. Count 15 days, starting the day after you know the landlord received your demand letter and the RTB order. If the 15th day falls on a day that the RTB is not open for business, extend your counting to the next day that the RTB is open for business.

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

> *Question:* Is there a maximum time frame in which you must file an RTB monetary order for enforcement with the courts in BC? For example, if a monetary order was made 5 years ago, can you still file it with Small Claims?
>
> *Answer:* This seems to be a grey area. There does not seem to be a maximum lifespan attached to an RTB monetary order. If a tenant has an old monetary order that they want to enforce, they should proceed with the enforcement steps set out in this workshop. If the Small Claims Court refuses to file it saying it is "too old," the tenant should seek legal advice about their specific situation.

c) How to file an RTB Monetary Order with Small Claims Court

Unless you are dealing with a Registry that allows you to fax file an Arbitrator's Order, you must go in person to the Small Claims Registry to file either the original Monetary Order of a certified copy of the Order.

Before attending the Small Claims Registry to file the RTB Order, you need to:

a) complete a Confirmation of Service of Monetary Order for Enforcement Form. A copy of that form is attached to this handout.

b) attach to the Confirmation of Service form any documents you have to prove how and when the Monetary Order was served on the landlord/other party. If you had the Order personally served on the landlord/other party, the person who served the Order must sign and complete that form to confirm when and how they served the Order.

c) Either arrange to pay the $21 fee to file the RTB's Order with the Small Claims Registry, or complete an Application to the Registrar to waive the filing fee (see handout on "common procedural questions in Small Claims Court" for information on completing an application to waive the filing fee).

   If your agency or your client pays the filing fee, that amount will be added to what the landlord/other party owes your client.

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

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

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

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

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

How do you pick a way to enforce an order?

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

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

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

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

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

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

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

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

Other considerations

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

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

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

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

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

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

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

For example, you can say:

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

My supervising lawyer is Betty Black; she is aware I am seeking the Court's permission to assist with this application today. Mr. Client is trying to enforce an order he obtained against his former landlord at the Residential Tenancy Branch. I represented Mr. Client in the hearing at the Residential Tenancy Branch, and helped him prepare all the documents for today's application. Mr. Client speaks English as a second language and has a grade 6 education. I believe it would assist the Court if I am allowed to speak on Mr. Client's behalf today. Thank you."

2. Interprovincial Issues

You may encounter situations that raise inter-provincial issues.

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

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

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

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

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

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

BC: *Enforcement of Canadian Judgments and Decrees Act*

Saskatchewan: *Enforcement of Canadian Judgments Act.*

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

BRITISH COLUMBIA

Confirmation of Service of Monetary Order for Enforcement in Provincial Court

#RTB – 21

Residential Tenancy Branch File Number

Full name of person seeking payment *(when landlord's name is a business name, enter the full legal business name in the 'last name' box)*

last name | first name | middle name(s)

Address *(current address for service of documents)*

unit | street number and street name | city | province | postal code

Phone Number

area code | number

DISPUTE ADDRESS *(this is the dispute address recorded in the original application for dispute resolution)*

unit | street number and street | city | province | postal code

name

DOCUMENT SERVED ☐ Decision ☐ Monetary Order

Please note: This form may not be used for an Order of Possession. When serving an Order of Possession, you must use the forms required by the Supreme Court of British Columbia. These are available at http://courts.gov.bc.ca/supreme_court/self-represented_litigants/info_packages.aspx.

METHOD OF SERVICE

This was served on the _____ day of _____ in the year 20 _____ on

Full name of person being served, as the name appears on the decision or order

Address *(current address for service of documents)*

unit | street number and street name | city | province | postal code

Phone Number

area code | number

by (check all that apply)

1 ☐ Hand delivering a copy to the person

2 ☐ Leaving a copy with the landlord's agent, if the person is a landlord

3 ☐ Sending a copy by registered mail to the person's residence, the forwarding address provided by the tenant or the address at which the landlord does business as a landlord

4 ☐ Sending a copy by regular mail to the person's residence, the forwarding address provided by the tenant or the address at which the landlord does business as a landlord

5 ☐ Leaving a copy with an adult whom apparently lives with the person

6 ☐ Leaving a copy in the mail box or mail slot at the person's residence or landlord's address

7 ☐ Attaching a copy on the door or other conspicuous place (describe in *Special Details* on page 2)

8 ☐ Faxing a copy to the person's fax number provided for service

9 ☐ The method ordered by the Director of the Residential Tenancy Branch

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.

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

SPECIAL DETAILS *(describing Option 7 on page 1)*

In the box below, please describe the conspicuous place where you attached the material served.

CONFIRMATION

☐ **Registered mail receipt** with clearly legible detailed information and **tracking report** *attached*

☐ Fax transmission report *attached*

☐ Witness statement:

On _____ I watched _____
(Date) (Name of person serving material)

give _____
(Description of what was served)

to _____ by _____
(Name of person being served) (Description of how material was served)

Name: _____ Date: _____
(Name of witness) (Please print)

Signature: _____

☐ Hand delivery receipt:

On _____ I received _____
(Date) (description of what was given to you)

from _____
(Name of person who gave you the materials)

Name: _____ **Signature:** _____
(Name of person receiving the materials)

SIGNATURE

I confirm I served the ☐ Decision ☐ Monetary Order in the way described on Page 1.

☐ I confirm that I checked with the Residential Tenancy Branch and the order has not been suspended.

Signature: _____ **Date:** _____
(Signature of person serving the document(s)) day month year

Full name of person serving the documents, including, if applicable, company name

Address of person serving the document(s) ☐ Same address as person seeking payment (p. 1) **Phone Number**

unit | street number and street name | city | province | postal code | area code | number

Some common procedural questions in Small Claims Court

*Prepared by Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, November 21, 2011 and updated October 1, 2016

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

1. Fax Filing in Small Claims Court

Fax filing in Small Claims is a confusing topic. Different Small Claims Court registries have different rules for what court documents can be filed with that court registry by fax. In each case, you will need to consider what kind of document you are trying to file, and what registry you are working with. **The easiest solution is to call the Registry where you want to file, and ask them if a particular document can be filed by fax, or if it must be filed in person (by mail or in-person attendance).**

Otherwise, each time you want to know if a client can file something by fax, you must look at:

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

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

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

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

Rule 17.1(2) sets out a list of things that cannot be fax filed with a fax filing registry. This includes director's orders under the *Residential Tenancy Act* (although the Rule refers to old section numbers in the *Residential Tenancy Act*; Arbitrator's orders may still not be accepted for filing by fax, even in fax filing registries). Always call ahead to ask before trying to fax file an RTB order with a Registry. Notices of Claim and Replies can be fax filed in such registries. So can other kinds of applications, like applications to a registrar, applications for payment hearings, etc.

When transmitting documents to a Provincial Court registry by fax, you must use a specified fax cover sheet, which is Form 20 under the Small Claims Rules. A sample copy is attached.

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

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

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

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

Registries that are not in the fax filing pilot project seem to be inconsistent in their practice. Again, it is **always** best to phone the registry and confirm whether they will accept a particular document (e.g. an application for a payment hearing, or application to a registrar, an Arbitrator's Order, etc.) for filing by fax, and to confirm the fax number you should use.

2. Can a hearing be held by telephone?

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

Can she attend the hearing by telephone?

Analysis:

Small Claims Rule 16(2), entitled "Applications to the Court," says:

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

So, with permission from the Registrar, a party can attend any Small Claims Court hearing by telephone. However, the party must apply for permission from the Registrar in advance. Note it is not possible to attend a trial in Small Claims Court by telephone, as a trial is not considered to be a "hearing." All parties must attend a trial in person.

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

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

A copy of Form 16 (called Application to the Registrar), is included in the materials as Appendix B. An application to the Registrar for permission to attend a hearing by telephone is a paper application and almost never requires an oral hearing.

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

Schedule A of the Small Claims Rules (attached) sets out the filing fees that must be paid in to the Small Claims Registry. For example, it costs $21 to have a certified copy of an Arbitrator's order under the *Residential Tenancy Act* filed in Small Claims.

Rule 20(1) of the Small Claims Rules says:

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

An application to the Registrar to waive a filing fee is done by paper only and usually does not require an oral hearing. Rule 16(3) of the Small Claims Rules sets out the procedure to follow to apply to waive filing fees. It involves filing an *Application to a Registrar* (which is Small Claims form #16), following the instructions on the form, and filing it at the registry.

A copy of an Application to a Registrar is included in the materials as Appendix B. The Application should include detailed information about the applicant's income and expenses to illustrate that they cannot afford the filing fee. It is a god idea to use a Small Claims Form called a Statement of Finances to do this, although use of that form is not mandatory. A sample Statement of Finances is included in the materials in Appendix B. If possible, the tenant/applicant should attach proof of their income to the application or statement of finances.

4. What costs can someone recover in Small Claims Court?

Rule 20 of the Small Claims Rules deals with what fees and expenses can be recovered in Small Claims Court. Rule 20(2) provides:

Successful party to receive filing and service fees

(2) An unsuccessful party must pay to the successful party the following expenses, unless a judge or registrar orders otherwise:

(a) any fees the party paid for filing any documents;
(b) reasonable amounts the party paid for serving any documents;

> *(c) any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceeding.*

However, that rule seems to apply only to cases started by a Notice of Claim, and not to cases that involved collection action only.

For expenses in collection proceedings, the relevant rules are:

a) Rule 20(7), which allows a creditor who is enforcing an order in Small Claims to ask a judge to add the amount of any filing fees they paid, to the amount the debtor owes them; and

b) Rule 20(6), which provides that if one party drives up expenses unnecessarily (e.g. by repeat adjournments, or unnecessary applications), a judge can order them to pay expenses another party incurs as a result of their conduct.

Unlike the BC Supreme Court, an unsuccessful party cannot be required to pay any of the other party's legal fees in Small Claims Court.

B.C. Reg. 261/93
O.C. 1030/93

Deposited July 30, 1993
effective October 1, 1993

Court Rules Act; Small Claims Act

SMALL CLAIMS RULES

[includes amendments up to B.C. Reg. 371/2008, April 1, 2009]

Rule 17.1 — Procedures in Fax Filing Pilot Project Registries

Definition

(1) In this rule:

"clerk" means a member of the registry staff;

"fax filing pilot project registry" means the Chilliwack, Cranbrook, Dawson Creek, Kamloops, Kelowna, Nelson, Penticton, Prince George, Rossland, Salmon Arm, Smithers, Terrace, Vernon or Williams Lake Small Claims registry.

[en. B.C. Reg. 10/2003, s. 1.]

Application of this rule

(2) Despite rule 17 (17) and subject to this rule, if a registry is a fax filing pilot project registry, a registrar or clerk may accept any document in a filing that has been transmitted to the registry by fax, except the following:

(a) a certificate of service respecting an application for a default order;

(b) a certificate of judgment under section 88 of the *Court Order Enforcement Act*;

(c) an order under section 76 of the *Offence Act*;

(d) a director's order under section 22 (8) of the *Residential Tenancy Act*;

(e) an decision or order of an arbitrator or the director under section 57 (5) of the *Residential Tenancy Act*;

(f) a restitution order under section 741 of the *Criminal Code*.

[en. B.C. Reg. 10/2003, s. 1.]

When a fax filing may be refused

(3) A registrar or clerk may refuse to accept a filing that is transmitted to a fax filing pilot project registry by fax for any one or more of the following reasons:

(a) the filing is not accompanied by a fax cover sheet in Form 20;

(b) the filing relates to more than one claim;

(c) the filing and the fax cover sheet exceed 20 pages in length and the registrar has not given leave;

(d) applicable registry services fees have not been paid;

(e) in the opinion of the registrar or clerk, the filing is illegible and cannot be used by the court;

(f) the filing is incomplete;

(g) the filing should have been transmitted to another fax filing pilot project registry;

(h) the filing does not otherwise conform to practice and procedure under these rules and any applicable enactment.

[en. B.C. Reg. 10/2003, s. 1.]

When a fax filing is filed

(4) A filing that is transmitted to a fax filing pilot project registry by fax and received by the registry fax machine will be filed as soon as is practicable, provided that it has not been refused under subrule (3).

[en. B.C. Reg. 10/2003, s. 1.]

When a fax filing is considered to be filed

(5) A filing that is transmitted to a fax filing pilot project registry by fax is considered to be filed on the date stamped on it by a clerk.

[en. B.C. Reg. 10/2003, s. 1.]

Original of fax filing may be required by judge

(6) A judge may require that the original of a document transmitted to a fax filing pilot project registry by fax in accordance with this rule be produced.

[en. B.C. Reg. 10/2003, s. 1.]

THE PROVINCIAL COURT
OF BRITISH COLUMBIA

Effective date: *23 Feb 2015*
GEN 01

PRACTICE DIRECTION

FAX FILING REGISTRIES - FAMILY AND SMALL CLAIMS

Purpose

To provide fax numbers for the registries where documents will be accepted for fax filing.

Application

This practice direction applies to the court registries listed below.

Directions

1. The following are the designated fax numbers for the registries where documents will be accepted by fax pursuant to *Small Claims Rule* 17.1 and *Provincial Court (Family) Rule* 5.1.

Chilliwack	(604) 795-8397
Cranbrook	(250) 426-1498
Dawson Creek	(250) 784-2218
Kamloops	(250) 828-4345
Kelowna	(250) 979-6768
Nelson	(250) 354-6133
Penticton	(250) 492-1290
Prince George	(250) 614-7923
Rossland	(250) 362-7321
Salmon Arm	(250) 833-7401
Smithers	(250) 847-7344
Terrace	(250) 638-2143

Vernon	(250) 549-5461
Williams Lake	(250) 398-4264

2. *Confirmation of filing*

The registry staff will return to the person submitting the document a confirmation that the document has been filed. It is in the discretion of a registrar or clerk of the court whether the confirmation will be returned by fax or by some other method.

This confirmation will consist of:

- a cover sheet, stating the fees paid and any comments about the filing;
- the first page of the document, showing the date stamp and file number; and
- any other page altered by registry staff.

3. *Hours of registry for fax filing*

Documents received after 4:00 p.m. will be deemed to be received on the following business day.

Duration

This practice direction is in effect from February 01, 2003 and remains in effect until further direction from the Chief Judge.

History of Practice Direction

- Original practice direction dated February 01, 2003.
- Amended practice direction dated February 23, 2015 (changes to wording and formatting only).

I make this practice direction pursuant to my authority under the *Provincial Court Act,* R.S.B.C. 1996, c. 379, the *Small Claims Act*, R.S.B.C. 1996, c. 430, the *Small Claims Rules*, B.C. Reg. 261/93, and Rule 20(13) of the *Provincial Court (Family) Rules*, B.C. Reg. 417/98.

Thomas J. Crabtree
Chief Judge
Provincial Court of British Columbia

B.C. Reg. 261/93
O.C. 1030/93

Deposited July 30, 1993
effective October 1, 1993

Court Rules Act; Small Claims Act

SMALL CLAIMS RULES

[includes amendments up to B.C. Reg. 371/2008, April 1, 2009]

Schedule A

[en. B.C. Reg. 74/98; am. B.C. Regs. 10/2003, s. 2; 172/2003, s. 8; 458/2004; 459/2004; 285/2005; 371/2008.]

Fees

You must pay these amounts for the following services:

	Registry Services	$
1	For filing a notice of claim (a) for claims up to and including $3 000 (b) for claims over $3 000	 100 156
2	For filing a reply, unless the defendant has agreed to pay all of the claim (a) for claims up to and including $3 000 (b) for claims over $3 000	 26 50
3	For filing a counterclaim or a revised reply containing a new counterclaim (a) for counterclaims up to and including $3 000 (b) for counterclaims over $3 000	 100 156
4	For filing a third party notice	25

5	For filing an application for a default order	25
5.1	For returning confirmation of acceptance or refusal of a filing transmitted to a fax filing pilot project registry by fax, by mail or fax	10
5.2	For filing a request for judgment or for dismissal	25
5.3	For filing an application for a mediation compensation order	25
6	For a search of a record, other than (a) an electronic search conducted from outside the registry, or (b) a search of a record of a proceeding by (i) a party to that proceeding, or (ii) the party's solicitor	8
6.1	For returning by mail, fax or electronic mail the results of a search of an existing case, the aggregate of the following: (a) fee for returning the results (b) cost per page faxed or mailed	10 1
6.2	For accessing from outside the registry, including, without limitation, viewing, printing or downloading, any record that is found by or created in response to an electronic search or request, including, without limitation, an index of cases produced in response to a search query	6
7	For copies, per page	1

8	For a certified copy of a record (a) for 10 pages or less (b) for each additional page over 10 pages	 21 6
9	For a certificate of judgment or any other certificate	30
10	For filing a certified copy of an order (a) from another registry of the court, except for a Restitution Order made under the *Criminal Code* (b) of an arbitrator under the *Residential Tenancy Act*	 21 21
11	For taking or swearing an affidavit for use in the court, except for taking or swearing an affidavit in the course of a person's duties as a peace officer or as an agent or officer of British Columbia or an affidavit of non-compliance under Rule 7 (20)	31
12	For filing the records required for the issue of a garnishing order	40
13	Repealed. [B.C. Reg. 10/2003, s. 2 (c).]	
14	For resetting a trial or hearing with less than 30 days' notice before the date of the proceeding as set on the trial list, unless the matter must be reset due to the unavailability of a judge	100
	Sheriff Services	
15	For personal service by the sheriff (a) for receiving, filing, personally serving one person, and returning the document together with a certificate or affidavit of service or attempted service	 100 20

	(b) for each additional person served at the same address (c) for each additional person served not at the same address	30
16	For (a) receiving, filing, serving one person by registered mail and returning the document together with a certificate of service or attempted service (b) each additional person served by registered mail at the same address	 20 10
17	For enforcing orders for seizure and sale (a) for each order (b) for attending, investigating, inventorying, cataloguing, taking possession, preparing for sale, per hour for each sheriff involved (c) as commission on the sum realized, or on the sum settled for, as the case may be, after deducting disbursements properly incurred (d) the amount of the commission payable under paragraph (c) must be reduced by 50% if an auctioneer, broker or other individual sells the goods and chattels for the sheriff and receives a fee or commission for doing so	 70 55 10%
18	In lien and recovery actions, (a) for enforcing a lien other than a repairer's lien, or for recovering goods, if the enforcement or recovery is completely or partly accomplished (b) for attending, investigating, inventorying, cataloguing, taking possession, per hour for each sheriff involved	 75 55
19	In respect of items 17 and 18, for each kilometre travelled	0.50

20	For a search, including a certificate of result	5
21	For taking or swearing an affidavit for use in the court, except for taking or swearing an affidavit in the course of a person's duties as a peace officer or as an agent or officer of British Columbia	30
22	All disbursements properly incurred to carry out items 15 to 21	

In addition to any other fees payable under this Schedule, a further fee of $7.00 must be paid for transmitting a document package to a registry through the electronic filing service of Court Services Online. For the purposes of this provision, a "document package" is any document or, if a group of documents is transmitted at one time in relation to the same court file, that group of documents.

Despite anything in this Schedule, if, after consultation with the Chief Judge, the Crown enters into an agreement with a person under which the person is authorized to access one or both of registry records and specified registry services and is exempted from payment of any or all of the fees provided under Items 6, 6.1, 6.2 and 7 for such access, the person may, on payment of any fee required under the agreement and on compliance with any other terms and conditions imposed by the agreement, access, during the term of the agreement, the registry records and registry services to which the agreement applies without payment of the fees from which the person is exempted under the agreement.

Resources for Provincial (Small Claims) Court

* Prepared by Alison Ward, Barrister and Solicitor, CLAS, November 18, 2011 and updated October 1, 2016

1. The ***Small Claims Rules*** are found at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_00b The Small Claims Rules are the legal rules that set out how applications and various steps must be taken in Small Claims court: how to serve documents, how much notice you must give a defendant of an Application to a Judge, how to apply for a payment hearing, etc.

2. The ***Small Claims Act*** is at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96430_01 The Act does not contain much detail. However, section 3 outlines what jurisdiction the Small Claims court has; sections 5 to 15 outline the procedure for appealing a Small Claims court decision.

3. All of the **court forms that are used in Small Claims Court** can be found at http://www.ag.gov.bc.ca/courts/small_claims/info/forms.htm You will need to read the Small Claims rules, or perhaps a Law Centre guide, to figure out which form you need to use for a specific step in a case.

4. The schedule of **court filing fees payable in Small Claims Court** is located in Schedule A to the Small Claims Rules. Schedule A is at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_05b

   A person who cannot afford to pay court filing fees in Small Claims court can make an application to have filing fees waived, can make an application under Rule 20(1) of the Small Claims rules to be exempted from paying fees. That application is made by filing a application to the Registrar under Rule 16(3) of the Small Claims court

5. The Justice Education Society has a very useful **public legal education website about Small Claims Court** at http://www.smallclaimsbc.ca/ It includes videos that explain how Small Claims Court works, and information about what to expect in the court process. The site has basic information about enforcing court orders at http://www.smallclaimsbc.ca/court-decisions

6. The **Ministry of Attorney General**, Court Services Branch, has a very useful **website about Small Claims Court** at http://www.ag.gov.bc.ca/courts/small_claims/info/guides.htm The site includes links to the Small Claims Rules, Small Claims fees, and Small Claims forms. It also includes 8 guides to the Small Claims court process including, for example, guides to making a claim, replying to a claim, serving documents, etc. The site

also has a "small claims filing assistant," which provides some instructions for completing small claims court forms.

7. The **Law Centre** in Victoria has a set of 21 **extremely useful fact sheets about the Small Claims court process**, including guides to specific applications such as how to apply to set aside a garnishing order, how to apply to cancel a default order, how to apply for a payment hearing or a garnishing order, etc. The fact sheets also include links to the court forms you need to complete for specific applications, and examples of completed court forms.

   The Law Centre fact sheets are at http://www.thelawcentre.ca/self_help/small_claims_factsheets A table of contents listing all the fact sheets on the Law Centre site is **attached.**

8. The UBC Law Students' Legal Advice Program ("**LSLAP") manual** has:

   - A chapter on Creditors' Remedies and Debtors' Assistance (see chapter 10 at http://www.lslap.bc.ca/manual.html). Pages 8 to 15 about unsecured creditors' options are relevant to enforcing monetary orders in Small Claims Court.

   - a chapter on Small Claims Court Procedure (see chapter 20 at http://www.lslap.bc.ca/manual.html) The section on enforcement of orders is quite short, from pages 56 to 59 of that chapter.

9. The **Court Order Enforcement Act**, which contains rules regarding garnishing orders and other applications, is at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01

10. **Consumer Law and Credit/Debt Law** (LSS publication) is at http://www.lss.bc.ca/publications/pub.php?pub=17 This is a free publication of over 200 pages dealing with discrete topics related to debt and consumer law. It has several chapters that may help with enforcing judgments in Small Claims Court. See: Chapter 21, Enforcing judgments against Chattels; Chapter 22, Enforcing judgments against land; Chapter 27, Garnishment and Set-off; Chapter 29, Instalment Payment Orders.

11. **Provincial Court Small Claims Handbook** is a legal manual published by Continuing Legal Education C. It should be available at your Courthouse Library. A copy of the handbook's Chapter 8, "Enforcing the judgment" is included with the course materials.

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

List of Appendices:

A: Sample demand letter to landlord

B: Application to a Registrar and sample statement of finances

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

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

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

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

Appendix A -

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

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

By Registered Mail (or by hand delivery, etc)

November 22, 2011

Dear Ms. Landlord:

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

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

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

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

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

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

Yours truly,

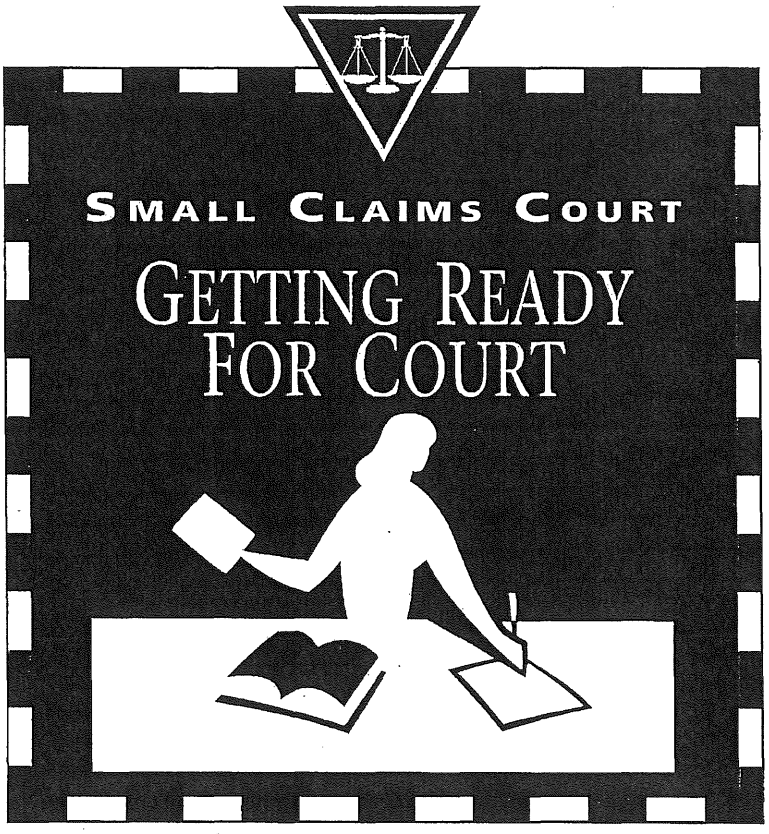
Name of Agency

Ms. X Advocate

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

Appendix B

APPLICATION TO THE REGISTRAR



PROVINCIAL COURT OF BRITISH COLUMBIA

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

(B)

APPLICATION TO THE REGISTRAR

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

REGISTRY FILE NUMBER
REGISTRY LOCATION

APPLICATION TO THE REGISTRAR

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

In the case between:

_____ CLAIMANT(S)

and

_____ DEFENDANT(S)

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

NAME

ADDRESS

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

Check the appropriate box.

The applicant asks for an order

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

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

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

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

I certify these facts are true.

SIGNATURE OF APPLICANT

This will be completed by the court.

The Court orders that

date | by the registrar

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

1-COURT REGISTRY 2-APPLICANT 3-OTHER PARTY

(B)

STATEMENT OF FINANCES

MONTHLY INCOME		MONTHLY EXPENSES	
Net Salary	$_____	Rent	$_____
Commissions	$_____	Mortgage	$_____
Tips and Gratuities	$_____	Property Taxes	$_____
Unemployment Insurance	$_____	Utilities (heat &light)	$_____
Pension	$_____	Phone	$_____
Investments	$_____	Cablevision	$_____
Rentals	$_____	House/Tenant Ins.	$_____
Business Income	$_____	Life Insurance	$_____
Child Tax Benefit	$_____	Food	$_____
Maintenance (if any)	$_____	Restaurant Meals	$_____
Workers' Compensation	$_____	Sundries & Personal Grooming	$_____
Monthly Income of Spouse	$_____	Clothing	$_____
Law Spouse living with me	$_____	Laundry & Dry Cleaning	$_____
Income of Children (if any)	$_____	Motor Vehicle (lease or loan)	$_____
Other	$_____	(license, insurance, fuel & service)	$_____
		Transportation (public)	$_____
		Newspapers & Subscriptions	$_____
		Entertainment	$_____
SUB-TOTAL:	$_____	Alcohol & Tobacco	$_____
		Gifts	$_____
Income Assistance	$_____	Church & Charities	$_____
		Maintenance Payments	$_____
A. INCOME TOTAL	$_____	Child Care & Babysitting	$_____
		School Expenses/Children's	
		Activities, Lessons	$_____
		Other	$_____
		B. EXPENSES TOTAL	$_____

B

MONTHLY DEBTS		VALUE OF ASSETS	
Credit Card(s): (please specify)		Real Estate Equity	
_____	$_____	Market Value	$_____
_____	$_____	Mortgage Balance	$_____
_____	$_____		
Bank or Finance Company: (please specify)		Automobile Equity	
_____	$_____	Make and Year	$_____
_____	$_____	Market Value	$_____
_____	$_____	Loan Balance	$_____
Department Store(s): (please specify)			
_____	$_____	Bank or Other Account	
_____	$_____	(include RRSP's)	$_____
_____	$_____	Stocks & Bonds	$_____
		Life Insurance	$_____
Other:		Money owing to you	$_____
_____	$_____	Name of Debtor	_____
_____	$_____		
_____	$_____	Personal Property	$_____
		Cash	$_____
C. DEBT PAYMENT TOTAL:	$_____	Other	$_____

If you need more space for any item on this Statement,
Attach an extra sheet and sign it.

Date:_____	**A. INCOME TOTAL**	$_____
Signed:_____	**B. EXPENSES TOTAL**	- $_____
Print Name: _____	**SUB-TOTAL**	= $_____
	C. DEBT PAYMENT TOTAL	- $_____
	BALANCE	= $_____

Appendix C

Small Claims Court Factsheets You Can Download:

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

Page Last edited: 2011-04-14 10:49

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Appendix C

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

An Overview of Collection Procedures

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

INTRODUCTION

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

DEFINITIONS

First there are some words that should be defined.

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

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

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

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

COLLECTING DEBTS FROM THE CREDITOR'S POINT OF VIEW

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

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

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

PAYMENT HEARINGS AND PAYMENT SCHEDULES

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

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

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

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

DEFAULT HEARINGS

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

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

SEIZING ASSETS

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

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

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

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

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

GARNISHING WAGES AND OTHER MONEY OWED TO THE DEBTOR

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

REGISTERING A CERTIFICATE OF JUDGMENT AGAINST LAND

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

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

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

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

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

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

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

DRIVER'S LICENCE SUSPENSION

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

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

SOME OPTIONS FOR THE DEBTOR WHO CANNOT AFFORD TO PAY

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

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

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

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

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

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

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

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

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

FOR MORE INFORMATION

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

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

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

Please Click Here to Provide Us With Feedback [17]

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Appendix D

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

Payment Hearings

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

INTRODUCTION

This factsheet is divided into four parts:

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

SOME DEFINITIONS

But first there are some words that should be defined.

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

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

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

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

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PART 1

THE PURPOSE OF PAYMENT HEARINGS

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

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

Rule 12(12) of the Small Claims Court Rules [1]

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

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

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

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

EFFECT OF A PAYMENT SCHEDULE

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

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

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

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PART II

WHEN ARE PAYMENT HEARINGS HELD

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

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

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

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

A Payment Hearing can also be requested by a Debtor.

HOW A CREDITOR CAN REQUEST A PAYMENT HEARING

To apply for a Payment Hearing a Creditor should:

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

OBTAIN A COPY OF THE PAYMENT ORDER

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

PREPARE A SUMMONS TO A PAYMENT HEARING

Then a Summons must be prepared.

Click here to view a sample of a completed Summons form. [2]
Click here to obtain a blank Summons form which you can use. [3]

To complete the Summons you should:

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

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

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

FILE THE SUMMONS

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

SERVE THE SUMMONS

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The Creditor or someone on the Creditor's behalf must serve the Summons. The Summons must be left with the person summoned. The Summons can not be mailed to the Defendant. In extraordinary circumstances, a Judge can allow service of a Summons by way of substitutional service. For general information about substitutional service, see **Factsheet 6** [5].

PREPARE AND FILE AN AFFIDAVIT OF SERVICE

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

Click here to view a sample of a completed Affidavit of Service. [6]
Click here to obtain a copy of a blank Affidavit of Service form you can use. [7]

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

Return

PART III

WHAT HAPPENS AT A PAYMENT HEARING

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

"Your Honour."

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

"Your Worship."

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

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

This factsheet contains sample questions which a Creditor might use at a Payment Hearing. A

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Creditor is not restricted to these questions. But the questions asked must be relevant to the things a Debtor can be asked at a Payment Hearing (see the list above).

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

TYPICAL QUESTIONS FOR A DEBTOR AT A PAYMENT HEARING

1. How do you earn your living?
2. What is the name of your present employer?
3. How frequently are you paid?
4. On what dates of the month are you paid?
5. How long have you worked at your present location?
6. Are you working full time?
7. Are there any other places where you are employed at the present time?
8. Are there any monies owing to you by your employers at the present time?
9. Do you have a share in the ownership of any businesses? How big a share?
10. Does anyone owe you money? Where can they be found?
11. Do you have any other sources of income?
12. What were your earnings last year?
13. Did you receive any gifts of money in the last year?
14. Did you receive any gifts worth more than $_____ since _____?
15. At the time this debt was incurred, who did you work for?
16. How were you paid?
17. Do you have any other debts to be paid?
18. What is the amount of those debts?
19. Since you incurred the debt that was the subject matter of this lawsuit, have you made payments on the other debts?
20. How many payments have you made on the other debts?
21. Do you live with anyone?
22. What is your marital status?
23. Does the person you live with work?
24. How much does that person earn?
25. How many people do you have to support?
26. Are there any other sources of income coming into your family unit?
27. Do you have a bank account?
28. Where is that bank account located?
29. Is it a joint bank account?
30. What other bank accounts do you have?
31. Do you have any children who live with you?
32. Do your children work?
33. How much do your children earn?
34. Do you have any cash elsewhere than in a bank account?
35. Do you have money in any other form such as traveller's cheques?
36. Do you have any expectation of inheriting any money or property?
37. Do you own land? Where is it located?
38. When did you last own land?
39. Who owns the house in which you live?
40. When was it bought? Who provided the money to buy it?
41. Do you own a motor vehicle? (If applicable, when did you last own a motor vehicle?) What kind of motor vehicle is it? What is its licence number?

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42. Does your spouse own a motor vehicle? What kind of a motor vehicle? What is its licence number?
43. Is there any money owing on your or your spouse's motor vehicle? How much? Who is the money owed to?
44. Do you own any stocks or bonds?
45. What is the value of the furniture and other household effects which you own?
46. Do you own a boat? Where is it kept? Is there any money owing on it? To whom?
47. Do you own any jewelry?
48. Do you own any livestock?
49. Did you own any car or house or other property of value prior to a Payment Order being obtained against you? What has happened to those things?
50. Were you paid for those things, and if so, by whom?
51. How do you plan to pay the debt owed in this action?

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PART IV

HOW A DEBTOR CAN REQUEST A PAYMENT HEARING

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

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

PREPARE A NOTICE OF PAYMENT HEARING

Click here to obtain a blank Notice of Payment Hearing form. [7]

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

FILE THE NOTICE OF HEARING

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

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SERVE THE NOTICE OF HEARING

You can serve the Notice of Hearing in three ways:

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

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

PREPARE FOR THE HEARING

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

Listed above are the typical questions which a Creditor might ask at a Payment Hearing. A Debtor should prepare the information needed to answer these and similar questions. In addition, the Debtor should prepare a Statement of Income and Expenses. Click here to obtain a blank form that can be used for that purpose. [9] The form will show the Judge the Debtor's ability to pay the debt owed to the Creditor.

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

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

1. The Debt Collection Act governs debt collection practices of debt collectors in British Columbia.
2. The Director of Debt Collection on September 11, 1989, issued a report which stated that, "It is the opinion of the director that the demand for payment of a debt from a welfare recipient who clearly has welfare as his/her sole income, is contrary to the public interest. Money diverted from the necessities of life to the Creditor reduces the Debtor's standard of living from a level which is already at a minimum and is a use of the welfare money that is not intended or approved by the Minister of Social Services."
3. The Debtor may suggest to the Judge that the policy which applies to debt collectors should also apply to others seeking to enforce a Payment Order against someone on

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welfare. The Debtor who is on welfare should ask the Court to make a very low order or no order for payment.

THE PAYMENT HEARING

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

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

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

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

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

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

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

WHAT HAPPENS IF A DEBTOR FAILS TO ATTEND A PAYMENT HEARING

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

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

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

Appendix E

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

Garnishing Orders

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

WHAT IS IN THIS FACTSHEET

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

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

WHAT IS A GARNISHING ORDER?

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

SOME DEFINITIONS

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

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

A "Defendant" is the person being sued.

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

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

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

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

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

"Attachment Proceedings" is another term used for garnishment.

WHEN CAN A GARNISHING ORDER BE GRANTED

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

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

WHAT MONEY CAN BE GARNISHED

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

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

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

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

GARNISHING ORDERS BEFORE JUDGMENT

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

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

FIND OUT THE CORRECT NAME OF THE GARNISHEE

The first step to obtain a Garnishing Order is to find out the correct legal name of the Garnishee. This is because if you use the wrong name on the Garnishment documents, the Garnishee can refuse to pay to the Court money owed to the Defendant. If the Garnishee is a company, a search at the B.C. Corporate Registry Office would be useful. The way to do this search is described in **Factsheet 2.** [1]

OVERVIEW OF THE NEXT STEPS

To obtain a Garnishing Order you must then:

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

PREPARE AN AFFIDAVIT

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

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

Click here to view a sample of a completed Affidavit in Support of a Garnishing Order Before Judgment. [2]

Click here to obtain a blank Affidavit in Support of a Garnishing Order Before Judgment which you can use. [3]

The Affidavit should be completed by filling in:

1. The court file number which will have been put on the Notice of Claim by the Court Registry staff when the Notice of Claim was filed;

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2. The name of the Registry such as the "Victoria Registry";
3. The name of the Claimant and Defendant as they appear on the Notice of Claim;
4. The name and address and occupation of the person who will swear the Affidavit (usually the Claimant);
5. If the Claimant is swearing the Affidavit tick the box before the words "I am the above-named claimant";
6. In paragraph 2 after the words "This Action is pending and was commenced on the" insert the date the Notice of Claim was filed (e.g., the 3rd day of April 2003).
7. In paragraph 3 after the words "The nature of the course of action is," insert the words *"as set out on the Notice of Claim, a copy of which is attached to this Affidavit and marked Exhibit 'A'"*;
8. In paragraph 4 insert the name of the Defendant after the word " Defendant," then insert the amount owing to the Claimant after the words "the sum of";

   The amount owing should be the amount agreed to in the contract which is the basis of the lawsuit. Unless that contract provides for interest for late payments or other default by the Defendant, interest should *not* be included.

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

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

9. In paragraph 5 list the name, address, and description of the Garnishee.

   For example:
   "Deep Cove Credit Union, 1000 Wharf Street, Mill Bay, B.C., *a Credit Union*";
   or
   "Stan Jones, 2110 High Road, Kamloops, *Real Estate Agent*";
   or
   "The Royal Bank of Canada, 9201 Kings Road, Victoria, B.C., *a Chartered Bank*".

Next make a photocopy of the Notice of Claim.

SWEAR THE AFFIDAVIT

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

The exhibit stamp says:

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

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

It is vital that all words crossed out and any corrected errors on the Affidavit be initialed by the person taking the oath. Remember, a Garnishing Order can be set aside if an Affidavit is not properly completed. The money paid to the Court Registry by a Garnishee might then be returned to the Defendant.

PREPARE A GARNISHING ORDER

Click here to view a sample of a completed Garnishing Order Before Judgment. [4]
Click here to obtain a blank Garnishing Order Before Judgment form. [5]

To complete the form:

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

TAKE THE DOCUMENTS TO THE COURT REGISTRY

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

SERVE THE GARNISHING ORDER

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

Garnishing Orders can be served in the same way as a Notice of Claim, by giving it directly to

the Garnishee or it may be served by mailing a copy to the person to be served by registered mail to the last known post office address of that person.

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

WHAT THE GARNISHEE MUST DO

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

Court Order Enforcement Act [7]

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

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

SETTING ASIDE A GARNISHING ORDER

The Defendant can apply to have the Garnishing Order set aside, in whole or in part. For more information about how a Defendant can do this, see **Factsheet 20** [8], which is called "Setting Aside Garnishing Orders."

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

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

A private employer and a government employer can be garnished.

MONEY EXEMPT FROM GARNISHMENT

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

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

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

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

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

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

OBTAIN A PAYMENT ORDER

The first step is to have a Payment Order completed and filed at the Small Claims Court Registry. If you have obtained a Default Order, you should see **Factsheet 8** [9]called "Default Orders" for instructions as to how to prepare the necessary document. If you obtained an Order from a Judge at trial, you will need to have a Payment Order completed.

For more information see **Factsheet 13** [10]called "Preparing for Trial."

PREPARE AN AFFIDAVIT IN SUPPORT

Click here to view a sample of a completed Affidavit in Support of Garnishing Order After Judgment. [11]

Click here to obtain a blank Affidavit in Support of a Garnishing Order After Judgment form which you can use. [12]

To complete the Affidavit, fill in the following information:

1. The Court file number as it appears on the Notice of Claim;
2. The name of the Registry where the lawsuit took place;
3. The name of the person awarded judgment should be inserted before the words "Judgment Creditor";
4. The name of the person against whom judgment was granted should be inserted before the words "Judgment Debtor";
5. The name, address and occupation of the person who is swearing the Affidavit;
6. If you are going to swear that the contents of the Affidavit are true, tick the box before the

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words "make oath and say that." If you are going to affirm that the contents of the Affidavit are true, tick the box in front of the words "solemnly affirm that";

7. Most likely you will leave the words "I am the person entitled to enforce the Judgment or Order referred to in this affidavit." Put a line through the words "I am the solicitor for the person entitled to enforce the judgment or order hereafter referred to in this affidavit." Also put a line through the words "I am acting for the person entitled to enforce the judgment or order hereafter referred to in this affidavit, and I am aware of the facts hereafter referred to in this affidavit";
8. In paragraph two on the form, fill in the amount of money which the Court found owing to you;
9. Then fill in the amount of money still owing;
10. Then fill in the name of the Debtor;
11. Then insert your name (as Creditor);
12. In paragraph three fill in the name and address and description of the Garnishee. The description might be: employer, credit union, bank, etc.

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

PREPARE A GARNISHING ORDER

Click here to view a sample of a completed Garnishing Order (After Judgment). [13]

Click here to obtain a blank Garnishing Order (After Judgment) form which you can use. [14]

To complete a Garnishing Order fill in the following information:

1. The Court number as it appears on the Notice of Claim;
2. The name of the Registry where the lawsuit took place;
3. Your name before the words "Judgment Creditor";
4. The name of the person you obtained the Judgment against before the words "Judgment Debtor";
5. The name of the Garnishee. If you wish to garnish wages, the Garnishee is going to be the employer of the Judgment Debtor. If the employer is a Limited Company, you must be sure to use the exact legal name of the employer. This will require you to do a search at the B.C. Corporate Registry Office. The way to do this search is described in **Factsheet 2** [15];

   If the Garnishee is the Provincial Government, the name of the Garnishee is "Her Majesty the Queen in the Right of the Province of British Columbia";

6. After the word "before" leave a blank so that this area can be completed by the Registrar;
7. After the words "on reading the Affidavit of" insert your name as the person who swore the Affidavit in Support of the Garnishing Order;
8. After the words "sworn on" insert the date on which the Affidavit was sworn;

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9. Insert the Judgment Debtor's name and address in the box provided on the form;
10. Insert the Garnishee's name and address in the box provided on the form;

    Note: If the Garnishee is Her Majesty The Queen in the Right of the Province of British Columbia, insert the address:

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

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

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

You should now have completed the following forms:

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

FILE THE DOCUMENTS

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

SERVE THE AFFIDAVIT AND GARNISHING ORDER

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

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

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

If the Garnishee is the B.C. Government, the Court Order Enforcement Act [7] says the Garnishing Order should be served on the Deputy Minister of Finance. In fact the Affidavit and

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Garnishing Order may be served on:

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

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

SERVE THE JUDGMENT DEBTOR

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

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

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

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

WHAT THE GARNISHEE MUST DO

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

GARNISHING WAGES OF FEDERAL EMPLOYEES

The garnishment of wages of Federal employees is governed by a Federal statute called the Garnishment, Attachment and Pension Diversion Act. [16]

OVERVIEW OF THE PROCEDURE

1. Obtain a copy of the Consent Order, Default Order or the Order obtained after a Settlement Conference or trial (sometimes called a Payment Order) which states how

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

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

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

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

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

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

Click here to view a copy of a completed Application Under Part 1 of the GAPDA. [17]

Click here to obtain a blank Application Under Part 1 of the GAPDA which you can use. [18]

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

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

To complete the form:

1. Ensure that in Box 1 you insert the Debtor's name as it appears in the Garnishment Order;
2. In answer to Question 5 tick the box that indicates in what capacity the Debtor is

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

SERVE THE APPLICATION, GARNISHING ORDER AND THE ORDER

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

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

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

The Judgment Debtor might try to reduce the amount available by bringing an application to the Court. For information about how this might be done see **Factsheet 20** [8], which is called "Setting Aside Garnishing Orders."

HOW TO GET MONEY PAID OUT OF COURT

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

1. If you obtained a Default Order (because the Defendant did not file a Reply) a special rule applies. You can merely file an Affidavit of Service of the Garnishment Order on the Judgment Debtor and wait until 3 months after the money was paid into Court before requesting it be paid to you. Click here to obtain a blank Affidavit of Service form. [14] It is printed on the back of the Garnishment Order.

   You can then go to the Small Claims Court Registry where the money is and request that it be forwarded to you. Usually the Court will request the Ministry of Finance to forward a cheque to you. It may take up to 4 weeks to get the money.

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2. A faster way to get the money out of Court is to have the Judgment Debtor consent in writing to have the money paid to you.

   Click here to view a sample completed Consent to Payment Out of Court. [19]
   Click here to obtain a blank Consent to Payment Out of Court that you can use. [20]

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

   Click here to view a sample completed Notice of Payment Out. [21]
   Click here to obtain a Notice of Payment Out which you can use. [22]

   The Notice may be served personally on the Judgment Debtor. Section 13 (3) of the Court Order Enforcement Act [23] also permits service of the Notice on the Judgment Debtor by mailing a copy of the Notice registered mail to the last known post office address of that person. If the Judgment Debtor can not be served personally and there is no known address for the Judgment Debtor, you may have to make an application for substitutional service of the Notice. For more information about this procedure see sections 12(2) [24], 13(2) [23] and 9(5) [25] of the Court Order Enforcement Act and **Factsheet 6** [6].

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

   Click here to obtain a blank Affidavit of Service form. [26]

Please Click Here to Provide Us With Feedback [27]

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Provincial Court Small Claims Handbook

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Appendix F

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Enforcing the Judgment

Appendix A

I. INTRODUCTION [§8.1]

A. SCOPE OF THIS CHAPTER [§8.2]

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

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

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

B. PRELIMINARY CONSIDERATIONS [§8.3]

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

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

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

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

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

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

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

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

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

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

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

II. PAYMENT ORDERS [§8.4]

A. GENERAL [§8.5]

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

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

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

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

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

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

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

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

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

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

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

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

(2) after that, file a payment order for

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

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

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

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

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

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

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

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

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

(1) an order for seizure and sale;

(2) a payment hearing;

(3) garnishment;

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

(5) any other means permitted by law.

D. POWERS OF A REGISTRAR [§8.8]

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

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

III. PAYMENT HEARING [§8.9]

A. GENERAL [§8.10]

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

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

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

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

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

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

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

The registry will provide a date for the payment hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) banking records;

(2) financial statements;

(3) tax returns and supporting documents;

(4) payment records;

(5) credit card statements;

(6) utility bills;

(7) RRSP statements;

(8) lists of receivables; and

(9) client lists.

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

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

F. THE HEARING [§8.15]

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

(1) the income and assets of the debtor;

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

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

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

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

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

G. NON-ATTENDANCE [§8.16]

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

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

IV. ORDER FOR SEIZURE AND SALE [§8.17]

A. GENERAL [§8.18]

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

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

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

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

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

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

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

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

Principal residence of debtor

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

(2) This section does not apply to

(a) a corporate debtor, or

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

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

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

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

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

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

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

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

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

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

B. SEARCHES [§8.19]

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

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

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

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

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

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

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

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

A personal property registry search may be requested from:

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

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

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

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

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

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

C. BAILIFF FEES [§8.20]

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

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

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

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

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

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

D. PROCEEDS OF SALE [§8.21]

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

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

E. DURATION OF THE ORDER [§8.22]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. GARNISHMENT AFTER JUDGMENT [§8.25]

A. GENERAL [§8.26]

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

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

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

(2) prepare a draft garnishing order;

(3) obtain the order at the registry; and

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

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

B. WHAT CAN BE GARNISHED [§8.27]

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

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

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

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

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

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

C. THE AFFIDAVIT [§8.28]

1. REQUIREMENTS [§8.29]

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

The affidavit must set out:

(1) the amount awarded under the payment order;

(2) the amount still owing; and

(3) the name and address of the garnishee.

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

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

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

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

2. The Amount Awarded in the Payment Order [§8.30]

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

3. The Amount Still Owing [§8.31]

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

4. The Name and Address of the Garnishee [§8.32]

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

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

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

5. More Than One Garnishee [§8.33]

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

D. THE GARNISHING ORDER [§8.34]

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

Care must be taken to ensure:

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

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

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

E. SERVICE [§8.35]

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

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

(2) by registered mail.

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

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

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

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

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

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

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

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

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

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

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

(1) the affidavit or garnishing order was defective;

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

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

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

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

(1) release the order;

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

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

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

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

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

H. PAYMENT OUT OF COURT [§8.38]

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

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

(1) the amount to be paid out;

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

The consent to payment out form appears at FP 24.

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

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

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

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

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

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

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

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

I. RECOVERING COSTS [§8.39]

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

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

VIII. DEFAULT HEARING [§8.40]

A. GENERAL [§8.41]

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

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

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

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

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

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

(5) changed under Rule 17(3).

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

B. WHO MUST APPEAR [§8.42]

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

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

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

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

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

(1) banking records;

(2) financial statements;

(3) tax returns and supporting documents;

(4) payment records;

(5) credit card statements;

(6) utility bills;

(7) RRSP statements;

(8) lists of receivables; and

(9) client lists.

D. SERVICE [§8.44]

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

E. THE HEARING [§8.45]

At the hearing, the judge may:

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

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

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

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

IX. WARRANTS OF ARREST [§8.46]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

X. WARRANTS OF IMPRISONMENT [§8.47]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

XI. CONTEMPT [§8.50]

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

A judge may then:

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

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

(a) the claimant or applicant;

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

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

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

(a) the defendant or a third party;

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

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

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

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

XII. SEARCHES [§8.51]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Show me the Money

1. handout;

2. Confirmation of Service of Monetary Order for Enforcement form;

3. Some common procedural questions in Small Claims Court handout;

4. PC Rule 17.1 attachment to procedural questions;

5. updated PC practice direction on fax filing;

6. Schedule A, Small Claims Rules;

7. Resource Sheet for Small Claims Court; and

8. Appendices A to F with Table of Contents

Materials to be provided
at the
Provincial Training Conference

Materials to be provided
at the
Provincial Training Conference

Family and child protection

- Family Law Update (Day 1)
- Working with Self-Represented Clients in Family Law Matters (Day 1)
- Key Concepts for Family Law Rules Reform (Day 2)
- Child Protection, Kinship Care and Family Law Matters (Day 2)
- FMEP for Family Law Advocates (Day 2)
- Allegations of Alienation (Day 3)
    - Powerpoint
    - Article
- Family Property and Family Debt (Day 3)
    - Powerpoint
    - Article
- Child Protection Advocacy (Day 3)
- Advanced Ethics: Discussions for Senior Advocates in Poverty and Family Law (Day 3) (see tab 6)

No Materials

Provincial Advocates Conference

Family Law Update

October 18, 2016

Agnes Huang
family law lawyer

Jurisdiction

***Song v. Zhang*, 2016 BCSC 1438** (Chief Justice Hinkson)

Mom sought to have proceedings she commenced in Provincial Court consolidated with the Supreme Court proceedings

Provincial Court – Consent Order made for supervised access

Supreme Court – seeking divorce, division of property, re parenting arrangements and child support

Mom says she would prefer to avoid litigating in both Courts; avoid duplication of effort

Jurisdiction

Mom's application dismissed.

"Section 194 of the *FLA* states that the Supreme Court has jurisdiction to grant a court order *unless* the requested relief has already been granted or refused by the Provincial Court. If the Provincial Court has already granted or refused certain relief then the Supreme Court does not have jurisdiction to grant that relief". [from *Power v. Spadafora,* 2015 BCSC 1399]

Protection Order

***S.F.B. v. D.T.O.D.*, 2015 BCSC 2589** (Mr. Justice Schultes)

Application for a protection order against dad

- Persistent and abuse behaviour towards mom: blocking her movements, pushing her down, slamming doors and throwing things, yelling at her, controlling her daily activities, work opportunities and social relationships
- Acts of violence against child (2yo): shaking child when frustrated, bending child's arm back, pulling child's leg during a fight with mom, aggressively pushing child in stroller

Mom covertly recorded a conversation with dad; confronted him about his behaviour towards the child. Dad admitted to some acts.

Recording and transcript of conversation attached to mom's affidavit.

Protection Order

Judge accepts statements in recordings as admissions by dad so there is convincing evidence of the incidents involving child.

re the recordings:
"While I agree with the authorities cited by [dad's counsel"] that, in general, covert recordings of interactions between parties in family law cases is a very unsavoury practice that should be discouraged, **where a child is involved I cannot turn my back on what may be the most reliable evidence with regards to the child's safety**." (para. 30)

Protection Order

re Protection Order for mom
Mr. Justice Schultes found mom's evidence to be more credible that dad's.

Judge granted a protection order for both the child and the mom. Also ordered that dad's parenting time be supervised.

Expiry of Protection Orders: "Upon the issuance of reasons for judgment in the trial of this matter".

No trial had been set. Judge urged counsel to set at trial date as early as possible.

Protection Order – family member

***J.K. v. G.K.*, 2015 BCPC 117** (Judge Dyer)

J.K. was granted an *ex parte* Protection Order against daughter, G.K., enjoining her from attending at mom's home. Mom 74yo; daughter 53yo. Daughter had previously resided with mom but not when Protection Order granted

Judge: section 183(2) clear that protection orders can only be made when both "victim" and "perpetrator" are family members.

Family member defined in section 1 of *FLA*:
Child must be under the age of 19. Also includes a person "who lives with, and is related to" a person

Protection Order – family member

In the case, G.K. not a "child" and not "living with" J.K.

Judge found that the court has no jurisdiction to grant a protection Order. Terminated the order *nunc pro tunc*, on the day is was made.

"Before I leave this matter, I wish to state how very difficult I have found trying to reasonably construe the definition of "family member" in the context of s. 183 of the FLA requiring both the applicant and respondent to be family members. I have come away from my efforts feeling a sense of great judicial inadequacy that the definition is somehow smarter than I am"

Getting children heard/represented

***L.C.R. v. R.K.*, 2016 BCSC 417** (Mr. Justice G.P. Weatherill)

High conflict case.
Should dad's parenting time continue to be supervised?
Outcome: Judge said no to supervision
Mom filed stay, pending appeal

Both parents say kids are distressed and upset since unsupervised access began

Judge wants to know why children are acting out

No current s. 211 report

Getting children heard/represented

Mr. Justice Weatherill proposes two options:

1) Judge interviews the children in private
   Benefits: children can tell person who will make the decision their views; ensures views are correctly interpreted and not sanitized; views are given in private and in confidence
2) Lawyer appointed for children under section 203 of *FLA*
   a) Requirement that the degree of conflict is so severe it significantly impairs capacity of parties to act in best interest of child is met, but
   b) Is the requirement that the appointment is necessary to protect best interests of the child met?

Judge asks lawyer/father to prepare submissions.

Guardianship

***G.W. v. S.H.*, 2016 BCPC 266** (Judge Keyes)
re s. 39(1)(a) and 39(3)(c)

Mom took position that dad was not a guardian; says they did not live together when baby born, and nor did he have regular care of child

No definition of "living together" but does not specify that parties are in a marriage-like relationship or are roommates
Judge: nature of relationship does not matter; what matters is *whether the parent lives with the child*

If child removed from parents by MCFD, then neither is a guardian (under s. 39(1)(a))

Guardianship

Dad said that at relevant time, he and mom lived in the same home

Judge finds that dad lived with child so is a guardian

Even if not guardian under s. 39(1)(a), Judge found dad regularly cared for child and so is a guardian under s. 39(3)(c)

Dad worked out of town for two weeks in camp; when back I town he took care of child when mom would let him; mom had dad care for child instead of using daycare

Judge found that a fixed schedule is not required to fall within the meaning of "regularly cares for child"

Alienation/Estrangement

***Richards- Rewt v. Richards-Rewt*, 2015 BCSC 1391**
(Mr. Justice Macintosh)

Interim Order that parents share time with child 50/50
11 year old child prefers being with dad

Judge concerned that dad has alienated child from mom, at least to some extent. Before separation, mom and child were close. After separation, dad retained family home and over time child became detached and critical of mom

Judge interviewed child; child had nothing good to say about mom and nothing bad to say about dad

Alienation/Estrangement

Child's views are a factor but... "the interest of the child is not to be confounded with the wish or will of the child"

"Where the conduct of one parent has operated to impair or erode the relationship between the child and the other parent, or has tried to poison the child's mind about the other parent, then **that conduct weighs against that parent when the court is assessing the appropriate parenting arrangements**". *J.D.C. v. K.L.M.F.C.,* 2014 BCSC 2182

Judge found dad to be evasive and often dishonest; speaks to his credibility.

Alienation/Estrangement

Child's views are a factor but... "the interest of the child is not to be confounded with the wish or will of the child"

"Where the conduct of one parent has operated to impair or erode the relationship between the child and the other parent, or has tried to poison the child's mind about the other parent, then **that conduct weighs against that parent when the court is assessing the appropriate parenting arrangements**". *J.D.C. v. K.L.M.F.C.,* 2014 BCSC 2182

Judge found dad to be evasive and often dishonest; speaks to his credibility.

Alienation/Estrangement

In the result, child's stated preference had to be tempered when considering her best interests, given the judge's findings about the dad's integrity and his alienating influence against the mom.

Judge ordered that each parent have two-week alternating with child. (Mom sought 5/7 days for six months)

Judge ordered child and mom to engage in counselling and report back to Judge in six months

Interim distribution

***T.L.L. v. J.J.J.L.*, 2016 BCSC 1353** (Master Bouck)

Wife sought interim distribution of property under s. 89 of *Family Law Act*; half of sale proceeds form house (just under $50,000.00)
Wife says needs money to fund legal fees and anticipated disbursements.

"The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets". *I.F. v. R.J.R.,* 2015 BCSC 793

Interim distribution

Test is whether it would be "harmful to the interests" of the other spouse to allow the interim distribution

Unrefuted evidence that wife cannot pay legal fees and anticipated disbursements without liquidating more assets.
Wife has RRSPs in her name; tax consequence.

Master noted that husband's submissions point to a protracted and costly legal proceeding.

Master ordered release of $20,000, with liberty to wife to apply for a further advance.
Wife would need to bring evidence of cost of disbursements, such as the s. 211 report; no agreement it is necessary.

Claim for damages

***Kirkthanasatit v. Lount*, 2016 BCSC 1017** (Mr. Justice Myers)

Husband's counterclaim: damages for assault, battery and false imprisonment

Husband alleges wife physically assaulted him and unlawfully confined him to inside his apartment. Wife's ex-husband called the police. Police arrested husband and put him in jail for the night

Claim for damages

Judge found husband had exaggerated his claim re the assaults.

But.. Judge found that while wife did not call the police nor did she ask police to arrest husband, she set the train in motion by starting the altercation.

In view of the arrest, Judge awarded husband $3,500.00 for damages, including aggravated damages.

Fines for non-disclosure

***W.F.D. v. S.L.*, 2016 BCPC 194** (Judge Frame)

Application for child suport and section 7 expesens

Orders made for dad to produce his financial documents; extensions granted several times.

Dad did not file Financial Statement until 4:00 pm the day before the hearing, and it was incomplete and inaccurate
Dad had lame excuses at trial for his failure to disclose

Judge Frame: dad's conduct not the most egregious but his indifference not trifling. Dad order to pay $1,000.00 pursuant to section 213(2)(d)(2)

Vexatious litigant

***J.M. v. C.W.*, 2016 BCPC 264** (Judge Challenger)

Mom brought application under s. 221 of the FLA to require the dad to **pay for all or part of her legal expenses** reasonably and necessarily incurred by her as a result of **dad's actions in the conduct of the matter**.

Judge makes an order not meant to punish the dad's bad conduct towards mom during their relationship but rather the dad's conduct that impacted on the proceedings in court.

Vexatious litigant

Father filed application for parenting time every second weekend and two evenings per week. Had seen child only a few times.

At pre-trial conference (Dec 2015), dad said he was seeking equal parenting time and equal parenting responsibilities.

At conclusion of dad's evidence, he indicated to mom's counsel that he would consent to mom having sole guardianship, sole parenting time and sole parenting responsibilities (Feb 2016). **He then refused to sign the order**.

Vexatious litigant

Back to trial in July 2016.
Dad wanted an adjournment to get counsel. Denied.
Mom testified and order which dad said he would consent to was granted.

Judge: throughout litigation, dad behaved in a manner that caused mom to incur unnecessary legal fees. He was non-responsive, his positions changeable, and he was often obstreperous.

Judge: dad never sincerely wanted to be granted equal parenting time with his daughter. Pursued the remedy solely to cause mom anguish

Vexatious litigant

14 court appearances; three contested interim hearings.
Mom successful each time.
Mom also successful at trial.

Mom's legal fees totalled $83,000.00

Judge ordered that dad be responsible for **½ of mom's legal expenses** ($41,500.00)

Enforceable under the provisions of the FMEP and payable forthwith.

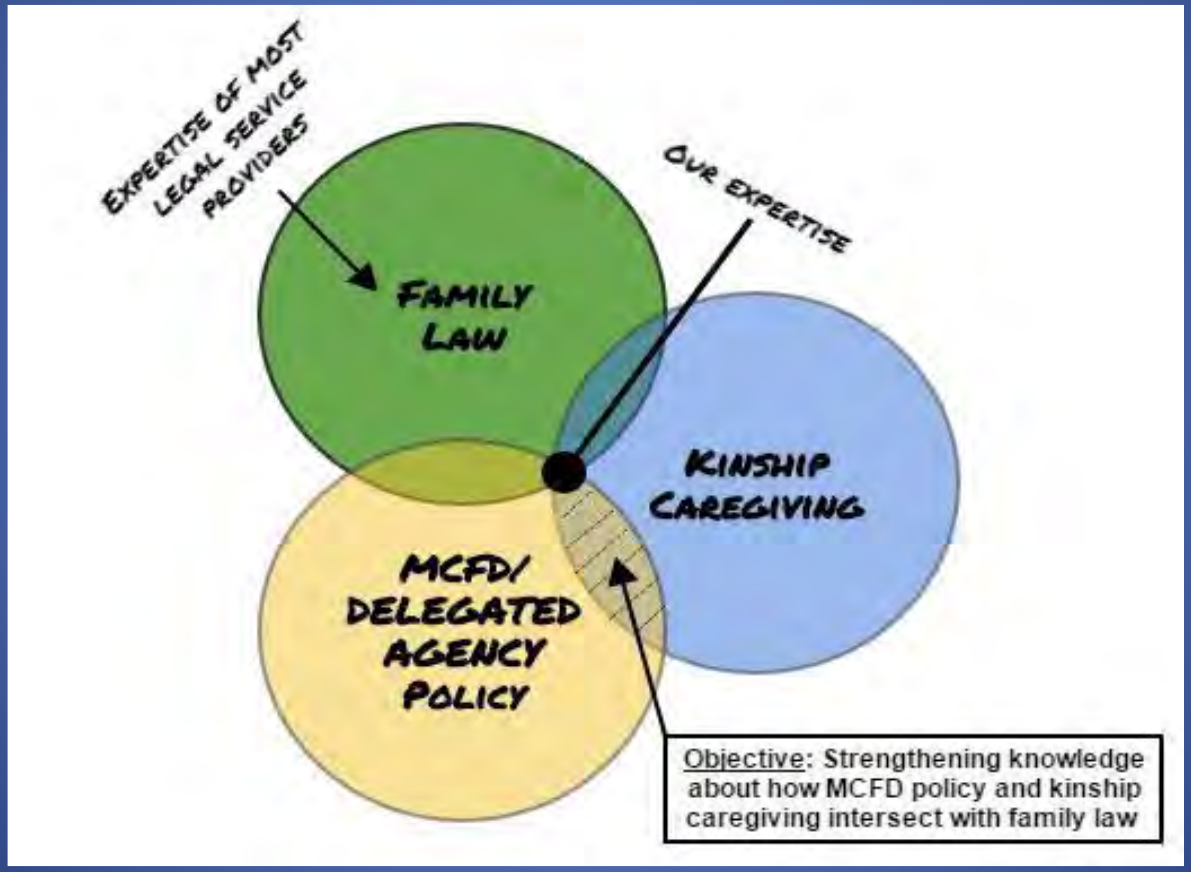
No Materials – discussion session

No Materials

"The child welfare system reflects the disruption of Aboriginal peoples' social, political and legal institutions, and intergenerational harms of a colonial past"

From Wrapping Our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook p. 8-9.

PSS of BC work with Child Protection, Kinship Care, and Family Law



Parent Support Services Society of BC

Our Vision

A world where all children and their families are nurtured, valued, and safe.

Our Mission Statement

To protect the safety and well being of children and promote the health of families by providing support, education, advocacy, research, and resources to those in a parenting role.

Parent Support Services Society *of* BC

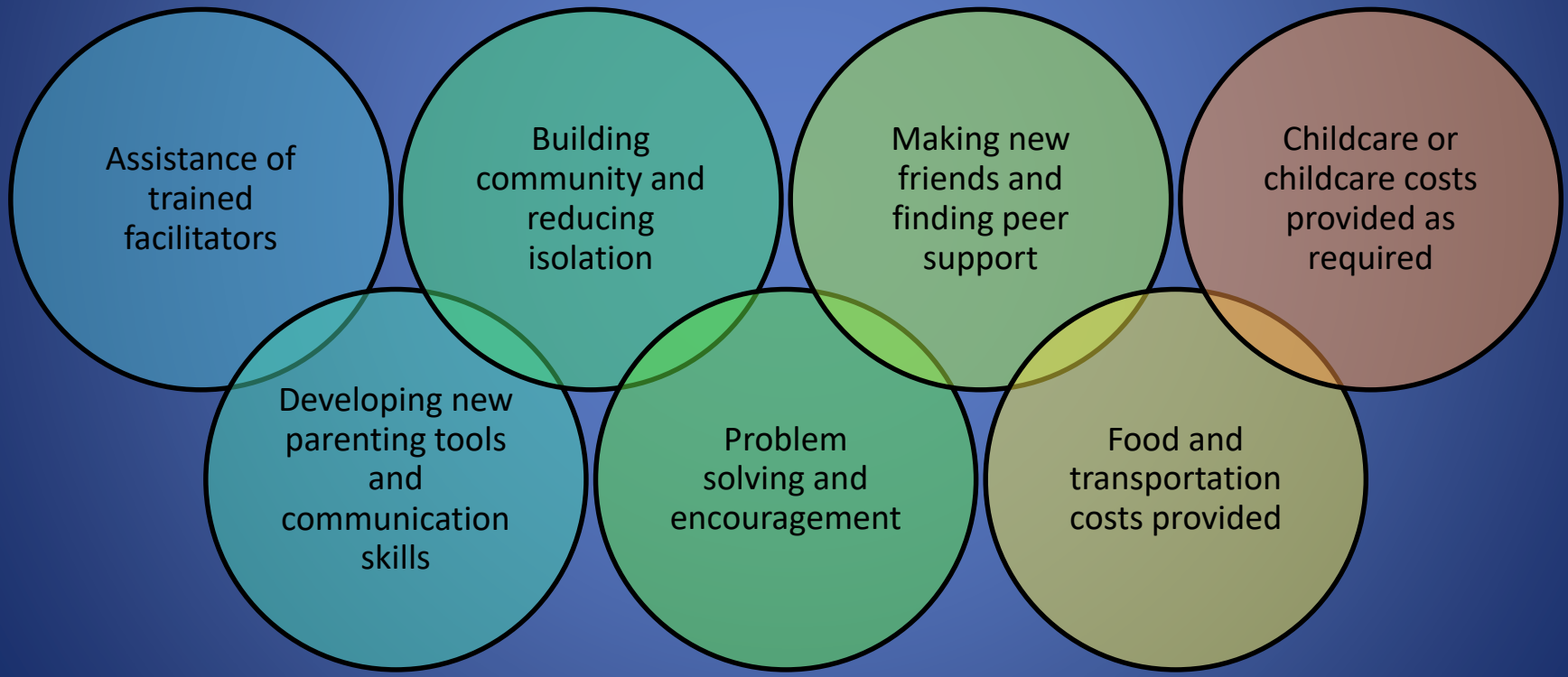
Our mission is supported by…

- Creating safe places for parents and grandparents to meet, share and learn
- Supporting parents and grandparents in dealing with crisis or injustice
- Working with other organizations that serve families
- Carrying out research on emerging parenting issues
- Creating and providing resource materials for parents and grandparents
- Working for legislative and administrative changes

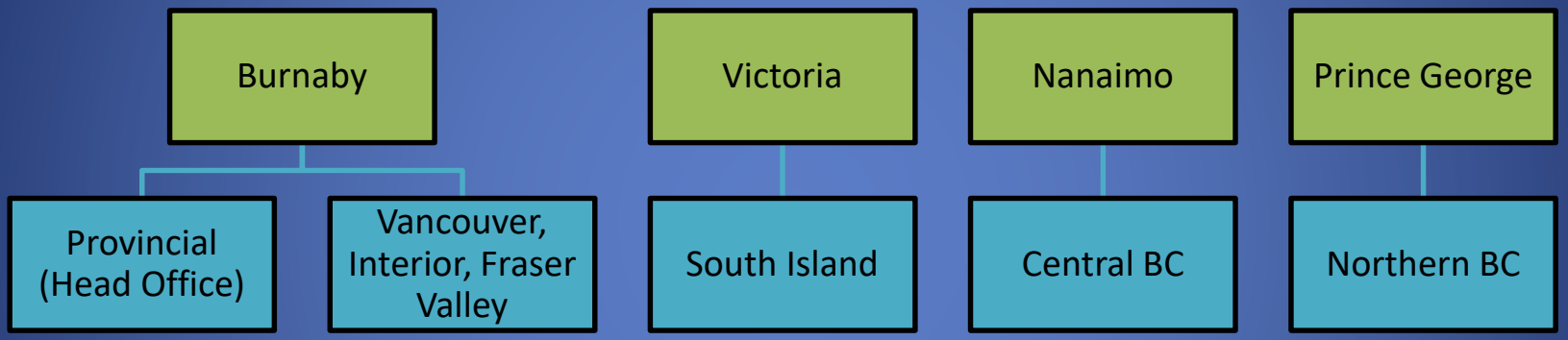
Parent and Grandparent Support Circles

Weekly facilitated groups for any parent, grandparent or caregiver experiencing stress or isolation in their parenting; who would benefit from being a part of a parenting and want to find new and healthy ways to parent their children.

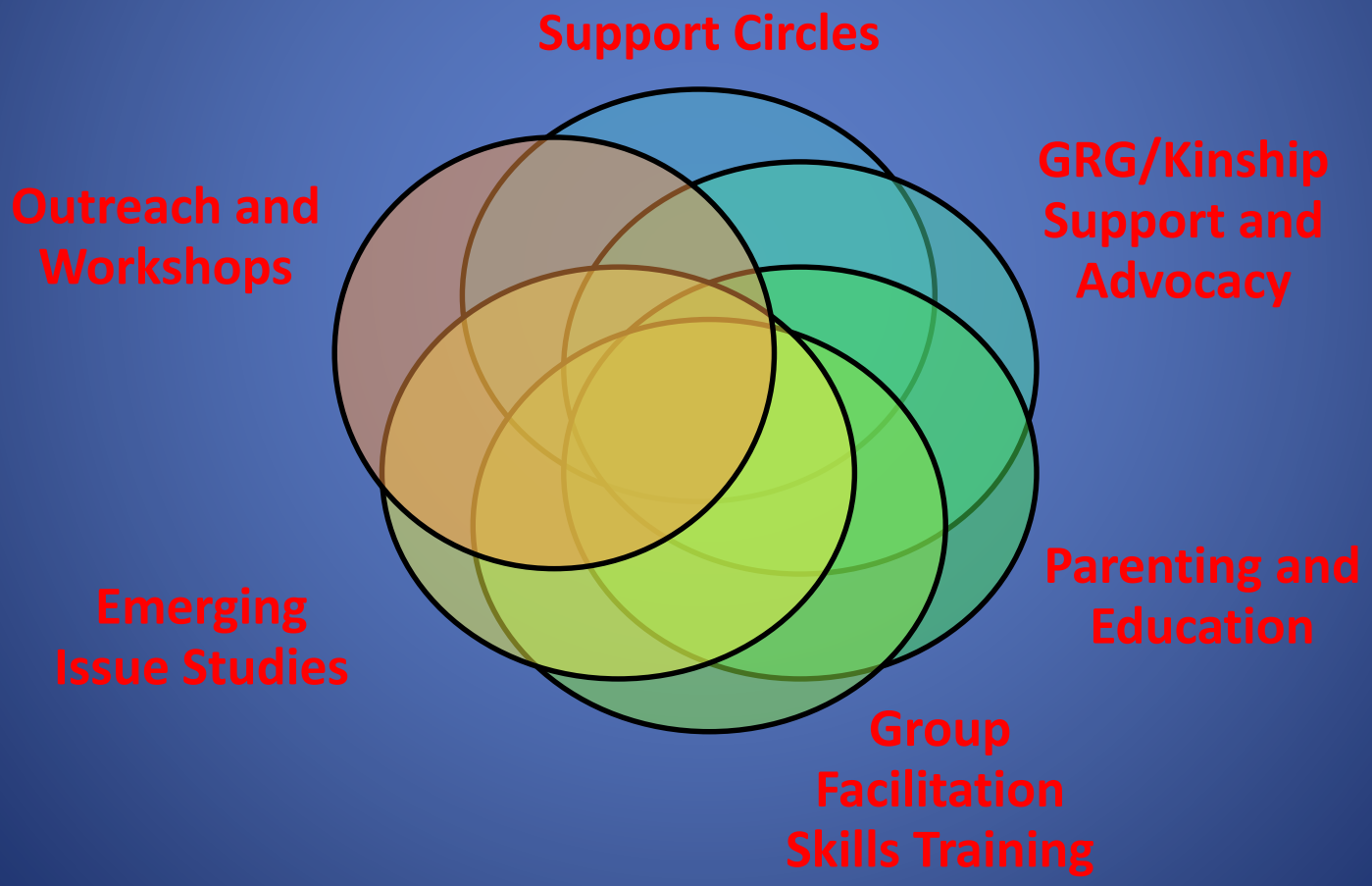
Benefits of Support Circles



Locations


Burnaby
Victoria
Nanaimo
Prince George
Provincial (Head Office)
Vancouver, Interior, Fraser Valley
South Island
Central BC
Northern BC

Programs and Services



Kinship Care or GRG (Grandparent Raising Grandchildren)

Kinship care is provided by individuals who are care for a child in need because of a **family connection**, significant relationship to the child, (e.g. grandparent, aunt, close family friend) or a cultural connection.

This care is provided on a **full time basis** and can be temporary or permanent depending on the situation but requires legal and financial responsibility for the child

It can be a result of MCFD involvement

2011 Census Canada

Grandchildren living with grandparents with no parent present, BC

0-19—6968 children 0-24 year 9,070 children

Total – 11,035 children

The Issue?

- Canada-wide, grandparents are raising more than 75,000 grandchildren, without any parental involvement. In British Columbia, grandparents are raising more than 10,000 grandchildren.
- Growing trend in Western countries
- In the USA, 8-10% of children are being raised by their grandparents.
- About 75% are their grandchildren's legal guardians.
- About 85% report that a crisis situation led to their raising grandchild(ren).
- 52% had grandchild(ren) placed with them by the MCFD
- A significant proportion of the children are suffering from emotional, mental, physical challenges.
- Many of the grandparents are facing significant financial hardships as they raise a second family on fixed incomes and deplete their retirement savings and assets
- More than 50% of the children are being raised by single grandparents
- There is a built in inequity as children in foster homes are compensated at a much higher rates and have access to supports that kinship caregivers do not have.
- MCFD deals primarily with the parents—sometimes the grandparents are left out of the equation and the grandparents are faced with legal worries and costs to get access.
- 1/5 children in BC is living in poverty. The grandchildren of these kinship caregivers are overrepresented in this statistic.

Extra Stressors for the Grandparent(s)

Caregiver-related stressors: Concerns about parenting, finances, and managing multiple responsibilities to grandchildren, the biological parents, and one's own health and well-being

Grandchild(ren)-related stressors: Worries about the child's academic behavioral, and/or disciplinary problems, present and future well-being, relationship with the biological parent, and conflict between the child and other family members

Family-related stressors: Concerns about long-term caregiving, relationships with spouse/other family members, and lack of help from family members


Grandparents
Raising Grandchildren
Support Line
Help for grandparents and other relatives
raising a family member's child
Provincewide
Mon, Tues, Thur, Fri
11:00 am—3:00 pm
604-558-4740
(Lower Mainland) or
1-855-474-9777
(toll-free across BC)
Email
grgline@parentsupportbc.ca
BRITISH COLUMBIA
PSS
Parent Support Services
Society of BC

Child, Family and Community Service Act
Part 4 – Children in Care, Sec 71

Out-of-home living arrangements

71 (1) When deciding where to place a child, the director must consider the child's best interests.

(2) The director must give priority to placing the child with a relative or, if that is not consistent with the child's best interests, placing the child as follows:

(a) in a location where the child can maintain contact with relatives and friends;

(b) in the same family unit as the child's brothers and sisters;

(c) in a location that will allow the child to continue in the same school.

(3) If the child is an aboriginal child, the director must give priority to placing the child as follows:

(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 under paragraph (a);

(c) in accordance with subsection (2), if the child cannot be safely placed under paragraph (a) or (b) of this subsection.

Ministry for Children and Family Development (MCFD)

<u>Two key kinship care supports:</u>

1. Extended Family Program-EFP (sec 8)
2. Permanent Kinship Care (sec 54.01)

Extended Family Program (EFP)

EFP provides services and financial support to help meet the child's needs:

- Circumstance temporarily prevent the parent(s) from caring for their child at home.
- Care provider is a relative or someone with significant relationship or cultural connection to the child.
- Family remains in contact with the social worker – meeting every 6 months and evaluating the plan. Agreements can be extended for up to 2 years.
- Permanency and legal options can be explored as part of long term planning

EFP Supports

- Provincial maintenance payments: $554.27/ages 0-11; $625/ages 12-19
- Basic medical (MSP)
- Extended Medical
- Dental/Optical
- Child Care Subsidy and Surcharge

- Families may be eligible for Federal Canada Child Benefit and Child Disability Benefit

EFP Eligibility Criteria

- Legal status of the child remains with the parent
- Parent requests the service from their local MCFD office
- Reunification is primary objective

Child, Family and Community Service Act Part 2 Family Support Services & Agreements, Sec 8

Agreements with child's kin and others

8 (1) A director may make a written agreement with a person who

(a) has established a relationship with a child or has a cultural or traditional responsibility toward a child, and

(b) is given care of the child by the child's parent.

(2) The agreement may provide for the director to contribute to the child's support while the child is in the person's care.

CFCSA Part 3 – Child Protection
Division 5.1 — Permanent Transfers of Custody
Sec 54.01

Permanent transfer of custody before continuing custody order

54.01 (1) If a child is in the care or custody of a person other than the child's parent under

(a) an agreement made under section 8, or

(b) a temporary custody order made under section 41(1)(b), 42.2(4)(c), 49(7)(b) or subsection (9)(b) of this section,

a director may, before the agreement or order expires, apply to the court to permanently transfer custody of the child to that person…

Permanent Kinship Care

- The transferring of permanent guardianship of a child in kinship care when MCFD/DAA is involved and a parent(s) is unable to resume care of their child.

- When a child is unable to return to parental care at the end of an out of care Extended Family Program (EFP) agreement or an out of care court order.

- Permanent transfer of custody and guardianship is done only with the consents of the proposed guardian, the child (12 years of age or older), the parents (when an out of care EFP agreement is in place).

- Child(ren) must have been living with the proposed guardian for at least 6 consecutive months under an out of care EFP agreement or an out of care court order prior to application to the court (sec 54.01).

Permanent Kinship Care Supports

- Provincial maintenance payments: $803.81/ages 0-11; $909.95/ages 12-19
- Child Care Subsidy and Surcharge
- Not eligible for Federal Canada Child Benefit or Child Disability Benefit

Section 54.01 & 54.1

- Sec 54.01 - before a Continuing Custody Order (CCO)

- Sec 54.1 – after a Continuing Custody Order (CCO)

Social Work Practice

Children in Care Service Standards

CIC Standard 11: Assessments and Planning for a Child in Care

Standard Statement: *Within 6 months of the child coming into care, complete a full assessment and written plan of care with the involvement of the child, family and extended family, the Aboriginal community if the child is Aboriginal, the caregiver, and any significant person involved in the child's care or life (reviewed every 90 days)*

Intent: *is developed in collaboration with the child, family, extended family and cultural family*

Policy: *when appropriate and consistent with the child's best interests, invite and support the participation of significant people in the child's life in developing a plan of care, including: the child's parents, family, extended family*

Administrative Procedures: *Give copies or parts of the plan to: the child; the caregiver; the parent; members of the family who are involved in the child's care, the representative from the Aboriginal organisation involved in the child's care or plan, and any other person who plays a role in the child's care*

Federal Government Supports

Sec 54.01 & 54.1

- The guardian is NOT eligible to apply for federal benefits, such as the Canada Child Benefit or the Child Disability Benefit.

- The guardian *CANNOT* claim the child/youth as a dependent for the purpose of federal programs or benefits e.g. income tax

"The child welfare system reflects the disruption of Aboriginal peoples' social, political and legal institutions, and intergenerational harms of a colonial past"

More Aboriginal children live away from their families and communities today as a result of the child welfare system than lived away from their families in Residential Schools

Over 52% of all children in care in BC as of 2011 were Aboriginal

Aboriginal children are 4.4 times more likely to have a protection concern reported than a non Aboriginal child; 5.8 times more likely to be investigated; 7.7 times more likely to be found in need of protection; 7.1 times more likely to be admitted into care; and, 12.5 times more likely to remain in care.

From Wrapping Our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook p. 8-9.

Case Study – Grandma G

- Grandma G first called the Line in Jan 2013. She informed the advocate that she was a 71-year-old Indigenous grandmother raising her seven year old grandchild.

- She stated that the child's mother has addiction issues and that the child has FASD. She said that the child had been informally (in and out) of her care since birth and that she was receiving no services or benefits.

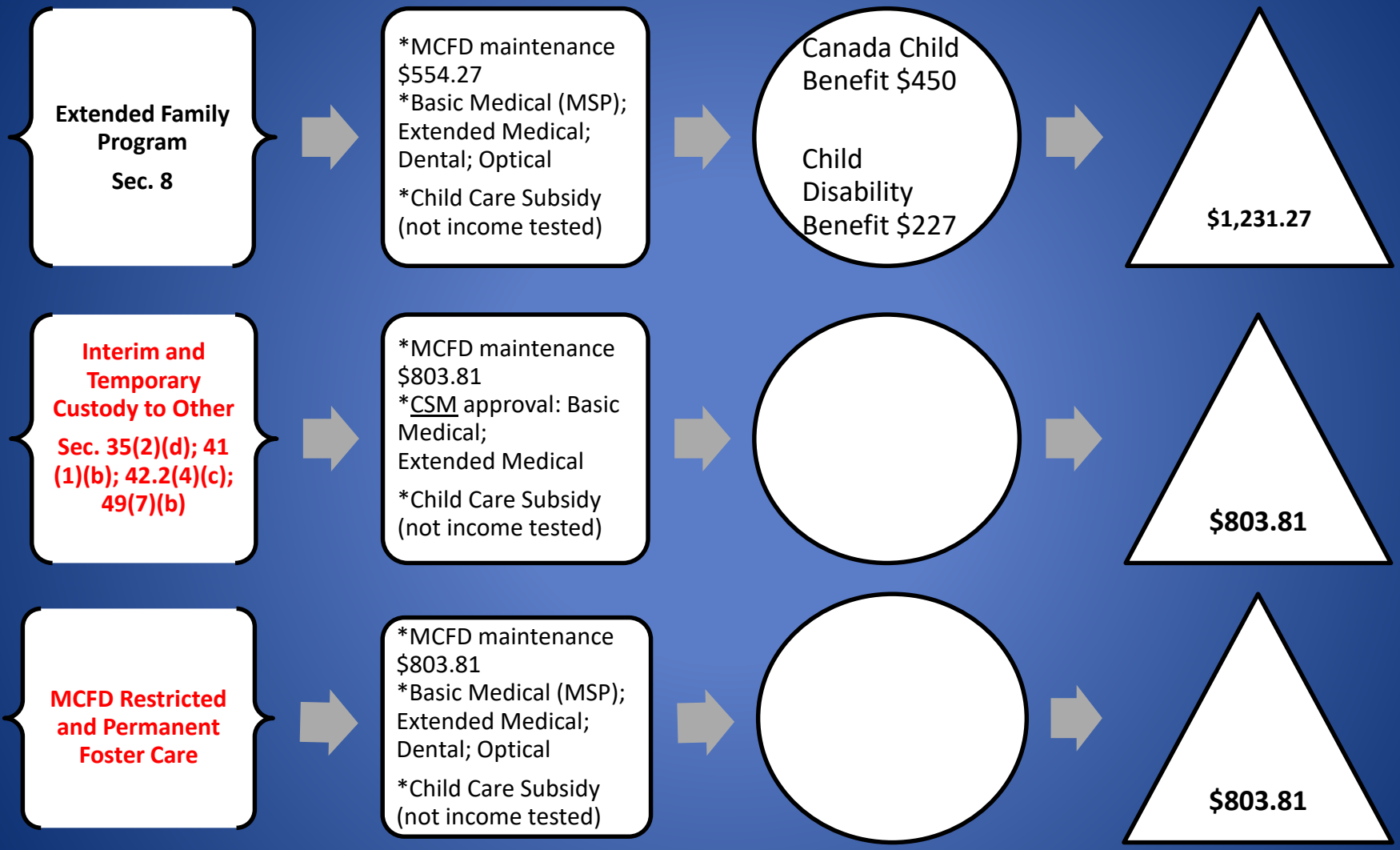
- The advocate informed Grandma G about the MCFD Extended Family Program and the Federal Child Tax benefit.

- In Sept, 2016 Grandma G called again. She said that she is receiving support through the EFP and the Federal Canada Child Benefit but has recently been asked by the social worker to agree to Permanent Kinship Care.

- Specifically, she called the advocate to express her concerns about losing her federal benefits: *"Why would I agree to less support and services now? What should I do?"*

“Why would I agree to less support and services now? What should I do?”

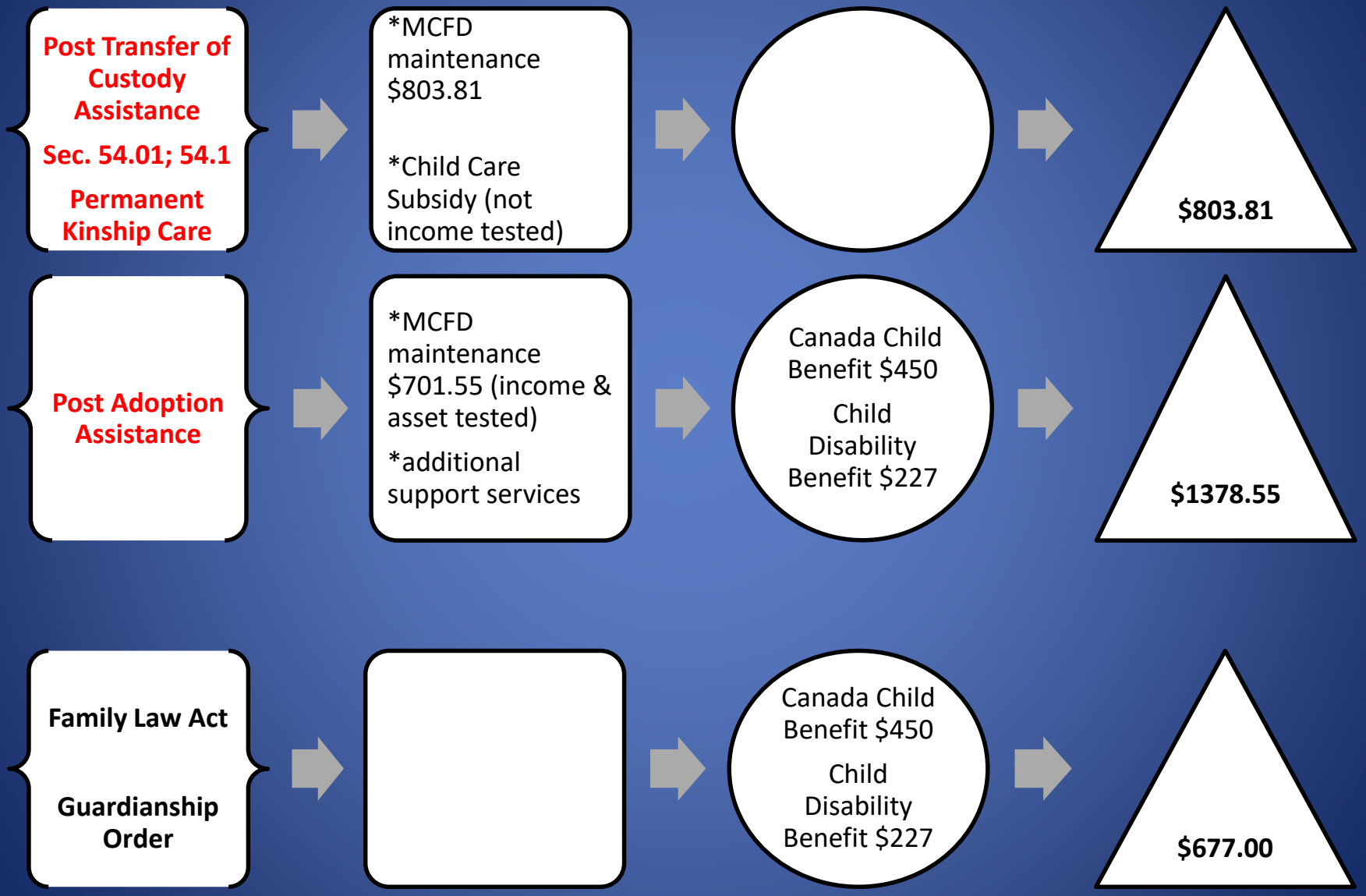
Grandma G: Temporary Care Options



Child in ministry care CSM – MCFD Community Service Manager

Figures are based on Grandma G's story. Diagram created by PSSS and informed by MCFD Payment and Supplemental Benefits Table, Reference for Out-of-Care Options Practitioners May

Grandma G: Permanent Care Options



Kinship Care

Safety, permanency, and well-being are goals for all children and youth. Research is clear that stable, healthy and lasting relationships greatly improve the long term social, emotional and physical health of children and youth. These relationships help to minimize the negative impact on young people when they are unable to return to their parents care.

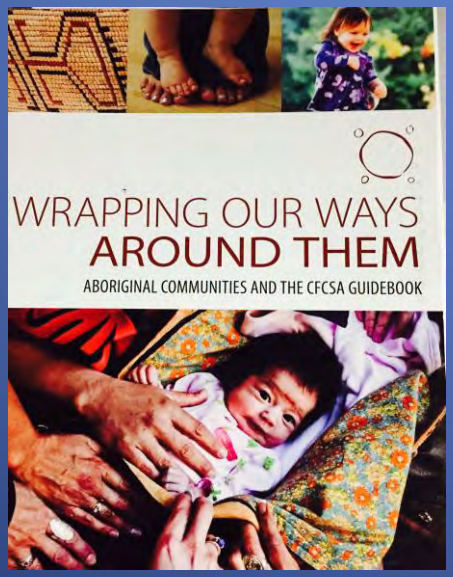
Placements with relatives or adults who have an established relationship with a child or youth serve to maintain family connectedness, stability of relationships, cultural identity and achieve better outcomes when youth enter adulthood.

Belonging 4 Ever: Creating Permanency for Youth in and from Care – Federation of BC Youth in Care Networks – August 2010 and Residential Review Project June 2012

Key Resources

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

- How Aboriginal communities could be involved in child welfare matters as contemplated by the CFCSA and sets out strategies to actively seek and facilitate that involvement.



Metis Commission for Children and Families of BC

- Mission: As the designated community, we foster a Métis specific child welfare system that bridges relationships between communities, services and government to ensure cultural safety for Métis children, youth and families

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CANADIAN
RESEARCH INSTITUTE
FOR LAW AND THE FAMILY

Allegations of Alienation in Family Law Disputes

Provincial Training Conference for Legal Advocates
20 October 2016 • Richmond, British Columbia

John-Paul Boyd
Canadian Research Institute for Law and the Family

Allegations of alienation

- Overview of parental alienation and allegations of alienation in court
- Distinguishing between alienation and estrangement, identifying risk of alienation
- Options for parents and the court when alienation or estrangement are established

2

From Richard Gardner to Joan Kelly and Janet Johnston.

All About Alienation

Wallerstein and Kelly

- In *Surviving the Breakup* (1980), Judith Wallerstein and Joan Kelly wrote about narcissistic parents and vulnerable older children who in an "unholy alliance" together "waged battle" to hurt the other parent
- Conclusions drawn from findings of California Children of Divorce Project

4

Parental Alienation Syndrome

- Richard Gardner described Parental Alienation Syndrome in "Recent Trends in Divorce and Custody Litigation" (1985)
  - Demonstrated by child's unjustified "campaign of denigration" against a parent
  - Results from efforts of parent to brainwash a child, coupled with child's willing participation
- Surprisingly short given its impact

5

Gardner

1. Campaign of denigration by alienating parent and child against rejected parent
2. Weak or absurd explanations for denigration
3. Child displays no ambivalence toward rejected parent
4. Child claims beliefs about rejected parent are his or her own and not those of the alienating parent

6

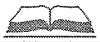
Gardner

5. Child reflexively supports alienating parent in family conflict
6. Child displays no feelings of guilt about treatment of rejected parent
7. Child uses language and descriptions of rejected parent borrowed from alienating parent
8. Child's negative views extend to family of rejected parent

7

Gardner

- Follow-up book, *The Parental Alienation Syndrome*, published in 1992
  - Syndrome is "psychiatric disorder" found in 90% of children he saw involved in custody litigation
  - In 90% of these cases, mothers were alienators
  - Specific psychological factors, one motivational factor, resulted in children's negative feelings and false allegations against parent
  - Significant emphasis on false claims of sexual abuse and Freudian views of sexuality



8

Reception by father's rights groups

- Fathers' rights groups strongly attracted to Gardner's theory
  - Relieved sting of continuing maternal presumption
  - Offered reply to plague of false allegations of physical and sexual abuse believed used to fend off men's claims for custody
  - Allowed assignment of blame for impaired father-child relationship and post-separation reluctance to visit to mothers

9

Reception by father's rights groups

- Provided handy explanation for continued prevalence of maternal custody after demise of tender years doctrine, without reference to
  - History of involvement with children
  - Parenting skills and capacities
  - Children's experiences during relationship
  - Mothers' socioeconomic conditions
- Gardner's recommendation of switching custody to rejected parent welcomed

10

Reception by women's rights groups

- Gardner's theory unreasonably blamed women for the consequences of fathers' behaviour
  - Ignored or minimized effects of family violence
  - Exploited as a defence when physical or sexual abuse suspected
  - Trivialized impact of disengaged / disinterested / absentee parenting style, actual parenting roles adopted during relationship

11

Concerns with the research

- "Recent Trends" based on Gardner's personal opinion and clinical impressions, very little supporting research cited
- *Parental Alienation Syndrome* published by Gardner's own publishing house
  - Also based on Gardner's experience; little by way of supporting research
  - Not peer reviewed, no threshold of peer acceptance or reasonableness required for publication

12

Concerns with the research

- No research findings presented to justify claims about nature and dynamics of syndrome
- No statistics or references to research provided to justify frequency claims
- Claims often explicitly contrary to research available at time of publishing
  - Frequency of false claims of sex abuse
  - Predominance of mother accusers

13

Kelly and Johnston

- Joan Kelly and Janet Johnston provided much needed depth in "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001)
- Children's relationships with parents range on a continuum of positive to alienated
- Children can become estranged from a parent for objectively valid reasons not involving the interference of the other parent

14

Quality of relationship	Child's attitude	Disordered relationship
Positive relationship with both parents	Child prefers contact with both parents	
Affinity toward one parent	Child prefers contact with both parents, but prefers one parent	
Alliance with one parent	Child prefers one parent and expresses some ambivalence toward the other	
Estranged from one parent	Child rejects other parent, and either dislikes or expresses ambivalence	Realistic Estrangement
Alienated from one parent	Child rejects other parent, expresses strong dislike, displays no ambivalence	Pathological Alienation

15

Kelly and Johnston

- Child's estrangement from a parent may be objectively reasonable because of history of:
  - Family violence toward child or favoured parent
  - Emotional abuse toward child or favoured parent
  - Neglect by rejected parent
  - Immature, self-centred behaviour
  - Rigid, authoritarian parenting style
  - Substance abuse impairing parenting capacity

16

Kelly and Johnston

- Child's estrangement is "**a reasoned, adaptive, self-distancing and protective stance that has led to cognitive and affective differentiation of parents**"
- Child typically wishes to severely limit contact with other parent, as alienated children do
- Estrangement often misinterpreted as parental alienation

17

Kelly and Johnston

- Alienated child is "**one who expresses, freely and persistently, unreasonable negative feelings and beliefs … toward a parent that are disproportionate to the child's actual experience with that parent**"
- Approach shifts focus from conduct of alienating parent to observable behaviours of child and the parent-child relationship

18

Kelly and Johnston

- Environmental factors increasing risk of alienation:
  - History of intense marital conflict
  - Humiliating separation
  - Highly conflicted litigation
  - Personality of each parent (especially if personality disorders are present)
  - Age, cognitive capacity and temperament of child
  - Triangulation of child in parents' conflict

Baker and Ben-Ami

- "To Turn a Child" (2011) found that effects of alienation play out over life of child
  - Lower self-esteem as a result of internalizing negative messaging about other parent
  - Reduced self-sufficiency as adults
  - Higher rates of depression
  - Higher rates of insecure attachments
  - Higher rates of drug and alcohol dependence
  - Risk of alienation from own children

Baker

- Baker's "Long-Term Effects of Parental Alienation on Adult Children" (2005) found high rates of:
  - Low self-esteem, self-hatred
  - Depression, substance abuse
  - Difficulty trusting themselves and others
  - Divorce
- *Half of participants reported being alienated from own children at time of study*

But in the end...

- Saini, Johnston, Fidler and Bala "Empirical Studies of Alienation" (2016, in press) reviews all currently available research
  - No consensus for a single definition
  - "Overall lack of empirical quality" in individual studies, significant methodological limitations, much is impressionistic
  - No reliable instruments to establish severity of alienation or distinguish from estrangement

22

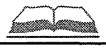
Prevalence of alienation claims and their rate of substantiation.

Alleging Alienation

Bala, Hunt and McCarney

- "Parental Alienation: Canadian Court Cases 1989-2008" (2010) found 175 cases in which court made finding on allegation of alienation:
  - 40 cases between 1989 and 1998, 24 cases concluding alienation had occurred
  - 135 cases between 1999 and 2008, 82 cases concluding had alienation occurred
- Rate of finding of alienation static at 60%

24



Bala, Hunt and McCarney

- Gender of alienating parent:
  - Mother: 68%
  - Father: 31%
  - Both: .9% (one case)
- Custody arrangements of alienating parent:
  - Sole custody: 84%
  - Joint custody: 13%
  - Contact only: 3%

25

Bala, Hunt and McCarney

- Cases where alienation was *not* found:
  - Justified estrangement resulting from abuse or violence: 7%
  - Justified estrangement resulting from poor parenting: 35%
  - Child disengaged but not alienated: 20%
  - Insufficient evidence to establish alienation: 38%
- No expert evidence in 13% of cases, yet alienation found in 41% of those cases

26

Boyd

- Review of British Columbia court cases from mid-2008 to mid-2015 found 115 cases in which court made finding on allegation of alienation material to outcome
  - Trial decisions: 48%
  - Variation of final order: 33%
  - Interim applications: 18%

27

Boyd

- Allegation substantiated in only 21% of cases
- Where allegation not substantiated
  - Not enough evidence: 36%
  - No finding on allegation: 30%
  - Risk of alienation: 5%
  - Estrangement: 5%
  - Alienation and estrangement: 3%

28

Boyd

- Person claimed to be engaging in alienating behaviour (and substantiated allegations)
  - Mothers: 67% (46% of claims substantiated)
  - Mothers and family or friends: 8% (13%)
  - Fathers: 22% (33%)
  - Fathers and family or friends: 4% (8%)

29

Identifying alienation cases and red flags to look for.

Assessing Alienation Allegations

Is it alienation?

- *Some children are reasonably estranged*
  - Intense conflict during relationship, separation
  - Hotly contested, highly conflicted litigation
  - Witnessed or suffered abuse or family violence
  - Parent's issues with substance abuse
  - Unpredictable or disciplinarian parenting style
  - Narcissistic and disengaged parenting style

31

Is it alienation?

- *Not all children who resist contact are alienated or estranged*
  - Age-appropriate separation anxiety
  - Response to parenting style
  - Fear for emotionally parent
  - Response to parent's repartnering and/or new partner, new partner's family
  - Normal preference for a parent

32

Is it alienation?

- *Some parents don't want to admit they are poor parents*
  - Always easier to place responsibility on someone other than self for child's resistance to contact
  - Blaming others feeds into pathology of Cluster B personality disorders
  - Difficult to admit own weaknesses to lawyers, mental health professionals and judges

33

Lee and Olesen

1. Don't oversimplify the problem by only focusing on the allegation of alienation
2. Don't assume allegation is true/false merely because allegation is strategically useful
3. Don't assume rejected parent is wholly blameless
4. Don't assume child has been brainwashed by favoured parent

34

Lee and Olesen / Boyd

5. Remember that adversarial system can potentiate breakdown in relationship
6. Don't assume that presence of alienation excludes possibility of estrangement
7. Don't assume absence of alienation from absence of blitzkrieg, individually de minimus behaviours can accumulate over time

35

Complications of alienation allegations and an alternative.

Attachment Disruption

The problems with alienation

- Child's reluctance to visit usually source of significant narcissistic injury
- Rejected parent unlikely to admit parenting deficits to assessor, to judge or to own lawyer
  - Always easier blame others than self for child's resistance to others
  - Blaming others feeds into general pathology of Cluster B personality disorders
  - Provides counterattack to allegations of abuse

37

The problems with alienation

- Favoured parent can't admit any truth to allegation of alienation
  - Any concession results in severe prejudice to case
  - No defenses except denial, usually with no supporting evidence
  - Counterattack based on inadequacies of other parent most satisfying riposte: incompetent parenting, character defects, addiction, abuse, mental health

38

The problems with alienation

- Narrative of good vs evil highly appealing to counsel used to perpetual ambiguity of family law disputes
  - Loss of child emotionally powerful story
  - Accusations of alienation when accuser was disengaged or absent equally powerful
- Very tempting to ride into battle flush with the fire of righteous indignation
- Short-circuits lawyers' thinking

39

The problems with alienation

- Few lawyers and judges have significant experience in psychology
  - Generalist bench results in absence of experts
  - Family law counsel rarely appointed
- Civil court process highly dependent on experts to provide:
  - Unbiased information on current thinking
  - Clear, empirically sound analysis

41

The result

1. Allegations are highly polarizing
   - Significantly undermines possibility of rational compromise
   - Increases likelihood of trial
2. Allegations exacerbate conflict
   - Wounded feelings, mutual finger-pointing and blaming, all inevitable
   - Poisons chances of positive future coparenting relationship

42

The result

3. Allegations increase:
   - Length of time to trial, length of trial
   - Probability that experts' reports, rebuttal reports, will be required
   - Probability of appeal
   - Cost of trial, overall cost to conclude case
4. Likely highly predictive of court involvement, represented or not, post-trial or -appeal

42

The result

5. Increased conflict, delayed resolution in turn increase:
   - Likelihood that parents' conflict will impact children
   - Likelihood that children will become triangulated in conflict
   - Probability of children experiencing "normal" negative consequence of separation, and severity of those consequences if experienced

43

Attachment disruption

- Whether alienation or estrangement or both, common result is *breakdown in child's attachment to rejected parent*
- Fact of attachment disorder one thing even highly-conflicted parents are likely to agree on
  - Neutral fact sufficient to prompt assessment, therapeutic intervention
  - Doesn't require blaming and other posturing

44

Attachment disruption

- Causality remains an issue…
  - Short- and long-term prognosis, susceptibility to treatment
  - Choice of therapeutic approaches for child, favoured parent, rejected parent
- Causality is *not* relevant to conduct orders required to manage behaviour, compel counselling, ensure compliance with recommendations, address contempt

45

Options for the court when alienation or estrangement are found.

Potential Responses

Responding to alienation

- Rapid intervention
  - Restore contact
  - Prevent further deterioration of relationship
- Case management
  - Early, vigilant involvement of court
  - Quick response to breaches, other problems
- Focus on long-term interests of child
  - Benefit in long run must outweigh short-term pain

47

Initial Interventions

48

Assessment

- Early assessment of parent-child relationship and best interests of child
  - Identify likely cause of child's reluctance to visit
  - Assess each parents' parenting capacity and competency
  - Determine intervention best suited to child and circumstances
- Schedule assessment updates

49

Counselling

- Court may order parent(s) and/or child to attend counselling to address:
  - Behaviour of favoured parent
  - Response of rejected parent to alienated child
  - Child's relationship with rejected parent
- Counselling of child may require support for success; will likely be undermined if child remains with favoured parent

50

Counselling

- Favoured parent may not engage in counselling process in good faith
  - May attend to show compliance with court order and establish that he or she is the "good" parent
  - Cluster B personality disorders are by definition extremely difficult to treat as therapy requires admission/acknowledgement that the individual has imperfections
- Be careful in selecting therapists

51

Detailed parenting plans

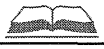
- Encourage rigid, detailed parenting plans with no wiggle room and nothing left to be negotiated
  - Will reduce opportunities for arguing but robs parents of flexibility at same time
  - Loss of flexibility also deprives favoured parent of ability to control or manipulate the schedule
- Not a remedy in itself but will improve likelihood of success of other steps

52

Conduct orders

- Must be made for s. 222 purpose, most likely to "facilitate arrangements pending final determination"
  - Case management by single judge
  - Participation in family dispute resolution
  - Attendance and counselling
  - Restrict communication between parties
  - Order that person "do or not do anything" for s. 222 purpose

53



Protection orders

- Can only be made if person qualities as "at-risk family member" and family violence is likely to occur
  - Restrict communication between family members
  - No-go orders
  - "Any terms or conditions" necessary to protect at-risk family member

54

Subsequent Steps

55

Adjusting parenting arrangements

- Parenting schedules may be adjusted to:
  - Give rejected parent more time with child on an interim or permanent basis
  - Switch child's primary residence to rejected parent for fixed period of time
  - Prohibit favoured parent's contact with child for a fixed period of time
  - Require supervision of favoured parent's contact on interim basis

56

Adjusting parenting arrangements

- May be necessary to support counselling with temporary change of residence
- Supervision may not wholly suppress favoured parent's manipulation of children
  - Non-verbal cues
  - May allow favoured parent to adopt persecuted martyr stance
- Supervision of rejected parent generally not recommended without good cause

57

Enforcing parenting arrangements

- Judicial sanctions must be carefully considered to avoid favoured parent positioning self as martyr or victim, or as powerless to "improve" things for child:
  - Make-up time
  - Payment of legal costs of rejected parent
  - Punitive costs awards
  - Payment of rejected parent's costs thrown away
  - Contempt

Enforcing parenting arrangements

- Finding of contempt requires proof of willful breach of order
  - Quasi-criminal, therefore high threshold
  - Rarely on first, second or even third applications
  - Object not to punish but secure compliance
- Court rarely acts meaningfully when contempt found; contemnor usually allowed to purge contempt by compliance with order

Parenting coordination

- Appoint parenting coordinator to
  - Management implementation of parenting plan, supervise compliance
  - Oversee / coordinate family's participation in counselling
  - Manage contact issues as they arise
- Not suited for interim parenting plans
- Be careful in selecting parenting coordinator

Reunification counselling

- Parens should be skeptical when:
  - Assessor concluding presence of alienation recommends own program as intervention
  - Advertised results seem too good to be true
  - Evaluations not independently conducted
  - Principal not member of regulatory body
  - Principal not respected by peers
  - Absence of screening process

61

Interventions of Last Resort

62

Changing custody

- Reversal of custody is ultimate sanction; step not to be taken lightly:
  - Uproots child from home
  - Places child with hated parent
  - If change occurs too late, repair of child's relationship with rejected parent may be impossible
- Expert evidence will usually be required

63

Changing custody

- Key considerations:
  - May reinforce child's hatred of rejected parent
  - May encourage negative behaviours such as running away, self-harm, substance use
  - Cost of loss of loved parent may exceed benefit of reunification with rejected parent

Must weigh child's emotional distress against long-term benefit and likelihood of success

64

Enforcing parenting arrangements

- Peace officer enforcement is a pragmatic response to enforcement problem but creates serious optics problem for child
  - Often and appropriately viewed as last resort
  - May result in child experiencing significant distress
  - Peace officers may also choose not to enforce order, further empowering and aggrandizing alienating parent

65

Suspending efforts

- It may be in child's best interest that relationship with rejected parent *not* be restored
- In such cases, judicial response may be to terminate rejected parent's right of contact to end child's exposure to parents' conflict

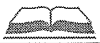
Moral blameworthiness of alienating parent's conduct is ultimately subordinate to child's wellbeing

66

Suspending efforts

1. Child is close to age of majority and will vote with feet
2. Child so deeply enmeshed, alienation so deeply entrenched, therapy unlikely to succeed
3. Trauma of being placed with rejected parent exceeds likely benefit of restored relationship

67



Suspending efforts

4. Damage partly justified estrangement resulting from rejected parent's past actions
5. Parental conflict likely to result from continued litigation not in child's best interests
6. Rejected parent is emotionally or financially exhausted and cannot continue struggle

68

Reconciliation

- Child may reconcile with parent later in life, usually in adulthood as a result of
  - Maturation
  - Emancipation, financial independence
  - Life cycle trigger events
- Rejected parent can encourage by leaving door open, providing means of contact

69

Alienated Children in Family Law Disputes in British Columbia

John-Paul Boyd
Canadian Research Institute for Law and the Family
July 2015

Contents

Alienated Children in Family Law Disputes in British Columbia

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I. Introduction

Family breakdown is complex and multidimensional. As a result, the legal issues triggered by separation cannot be approached as if the totality of the information necessary to address them is contained in the governing legislation, the rules of court and the parties' financial statements. This is especially so in cases where the parenting of children is in dispute.

We have come a long way from the days when fathers, as *patres familias*, were presumptively entitled to custody of their children after separation, and from the subsequent period when the tender years doctrine assigned post-separation custody of younger children to mothers. The loss of these presumptions, as brutally undiscerning as they were, requires families and decision-makers to make best-guesses about the parenting arrangements that are in children's short- and long-term best interests, taking into account a host of intangible factors particular to each family, such as the children's age, adjustment and stage of development, the parenting capacity and mental health of their parents, and the children's present and foreseeable financial and psychosocial needs.

Unfortunately, law schools teach little about parenting disputes beyond the governing legislation and the rules of court, and it is easy for counsel to be seduced into a rash pursuit of ill-considered claims that are not supported by the family's circumstances, seeking improbable results that are unlikely to address the family's needs. Most family law lawyers will not have had to practice for very long before encountering their first allegation of parental alienation. Such claims are always inflammatory; they're also often powerfully dramatic, invoking intense feelings of outrage for the injustices wrought and sympathy for the losses suffered. However, such claims are also often unfounded and, if so, can lead counsel and client down an expensive and highly litigious rabbit hole.

In this paper I will provide an overview of parental alienation from a mental health perspective and discuss the prevalence of such claims, and the rate at which they are proven, in British Columbia, as well as the options available to the court when alienation is established. I will also discuss the difficulty of identifying legitimate cases of alienation and canvass the warning signs which

suggest that the alienation of a child is a risk and preventative action must be taken.

II. Child Alienation and Estrangement

In the late 1970s and early 80s, psychologists interested in family breakdown began to observe that some children developed an alignment with one parent following separation that resulted in the child's rejection of the other parent and became a factor in the parents' litigation. In *Surviving The Breakup: How Children And Parents Cope With Divorce*, first published in 1980, prominent American psychologists Judith Wallerstein and Joan Kelly wrote about certain self-absorbed parents and vulnerable older children who "waged battle" together in an "unholy alliance" to hurt the other parent, drawing on the findings of the California Children of Divorce Project.[1] Five years later, in "Recent Trends in Divorce and Custody Litigation," a remarkably brief article given the fuss it caused, psychologist Richard Gardner used the term "parental alienation syndrome" to describe cases of alignment in which children not only engaged in a "campaign of denigration" against the other parent but were actually prepared to repudiate their relationship with that parent altogether.[2]

A. Gardner's Parental Alienation Syndrome

Gardner described parental alienation syndrome as a psychological disturbance brought about by custody litigation in which "children are obsessed with [the] deprecation and criticism of a parent." He wrote that such extreme alignments were caused by the efforts of one parent, usually the mother, to indoctrinate the children against the other parent, usually the father. Gardner proposed that parental alienation syndrome could be identified by the presence of eight "symptoms":

1. The alienating parent and child are engaged in a campaign of denigration against the rejected parent.

2. The child expresses inconsequential or frivolous explanations for not wishing to see the rejected parent.

3. The child displays a complete lack of ambivalence toward the rejected parent, such that the rejected parent is "all bad" while the alienating parent is "all good."

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[1] J.S. Wallerstein and J.B. Kelly, *Surviving The Breakup: How Children And Parents Cope With Divorce* (New York, NY: Basic Books, 1996)

[2] R.A. Gardner, "Recent Trends in Divorce and Custody Litigation" (1985) 29:2 Academy Forum 3, available online at www.fact.on.ca/Info/pas/gardnr85.htm

4. The child claims that his or her beliefs about the rejected parent are the child's own and not those of the alienating parent.

5. The child reflexively supports the alienating parent in the conflict.

6. The child displays no feelings of guilt about his or her treatment of the rejected parent.

7. The child uses scenarios, language and descriptions of the rejected parent borrowed from the alienating parent.

8. The child's rejection extends to the family of the rejected parent.

Gardner's parental alienation syndrome triggered a flurry of follow-up research and quickly became a flashpoint of controversy. Men's rights groups loved the theory because most of the parents said to engage in alienation were mothers; women's groups loathed the idea as it seemed to downplay the impact of family violence on children's interests and preferences. Psychologists were skeptical because there was so little reliable research on alienation, the theory didn't meet the scientific criteria to be labeled as a diagnosable "syndrome," and the theory seemed overly simplistic and was frequently misapplied in court.[3] The courts weren't fond of the idea as alienation claims were often difficult to establish and the recommended solution, removing the child from the home of the favoured parent, seemed drastic and dangerously at odds with the child's expressed preferences.

In 1997, Deirdre Rand, another psychologist, wrote in "The Spectrum of Parental Alienation Syndrome" that parental alienation syndrome is a risk *whenever* parents go to court about a custody dispute.[4] She said that the risk of alienation increases: when one or both parents make claims that attack the integrity, moral fitness or character of the other parent; when the parent seen as responsible for the breakdown of the relationship becomes involved in a new relationship shortly after separation; and, when a parent leaves the relationship suddenly, with little or no warning.

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[3] Parental alienation syndrome was not included in the *Diagnostic and Statistical Manual of Mental Disorders* III-R, published in 1987, nor in the subsequent IV and IV-TR editions, and is likewise omitted from the current fifth edition (Washington, DC: American Psychiatric Association, 2013). See Robert Emery's comments in "Parental Alienation Syndrome: Proponents Bear the Burden of Proof" (2005) 43:1 Family Court Review 8 and Justice James William's remarks in "Should Judges Close the Gate on PAS and PA?" (2001) 39:3 Family Court Review 267 for interesting discussions of the debate over Gardner's theory within the mental health community.

[4] D.C. Rand, "The Spectrum of Parental Alienation Syndrome (Part II)" (1997) 15:4 American Journal of Forensic Psychology 39, available online at www.fact.on.ca/Info/pas/rand11.htm

Drawing on work by James Garbarino, Edna Guttman and Janis Wilson Seeley in *The Psychologically Battered Child*,[5] Rand described five types of parental behaviour that are hallmarks of parental alienation syndrome:

1. **Rejecting**: The alienating parent rejects the child's need for a relationship with both parents. The child fears abandonment and rejection by the favoured parent if he or she expresses positive feelings about the rejected parent.

2. **Terrorizing**: The alienating parent bullies the child into being terrified of the rejected parent, and punishes the child if he or she expresses positive feelings about the rejected parent.

3. **Ignoring**: The alienating parent withholds love and attention if the child expresses positive feelings about the rejected parent.

4. **Isolating**: The alienating parent prevents the child from participating in normal social activities with the rejected parent and that parent's friends and family.

5. **Corrupting**: The alienating parent encourages the child to lie and be aggressive toward the rejected parent. In very serious cases, the alienating parent recruits the child to assist in tricks and manipulative behaviour intended to harm the rejected parent.

(As a result of certain cases I've dealt with, two further behaviours have also struck me as indications that the alienation of a child is a risk:

6. **Distracting**: The alienating parent sets up activities, goals or interests which conflict with the rejected parent's time with the child, such as enrolling the child in a sports team and placing such a high value on the child's participation that the child is upset to miss a game or practice to spend time with the rejected parent.

7. **Resigning**: The alienating parent stops accepting responsibility for the child's time with the rejected parent, and leaves it up to the child to decide whether to spend time with the rejected parent or not. This puts the child in a loyalty bind by forcing the child to make the choice to see the rejected parent, knowing that the favoured parent doesn't want the child to go at all.)

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[5] J. Garbarino, E. Guttman and J. Wilson Seeley, *The Psychologically Battered Child* (San Francisco, CA: Jossey-Bass, 1986)

B. Kelly and Johnston's Reformulation

In 2001, however, Joan Kelly and psychologist Janet Johnston published a critically important article in *Family Court Review* called "The Alienated Child: A Reformulation of Parental Alienation Syndrome," which adopted a family systems approach to the problem and focused more on the alienated child than the alienating parent.[6] In their view, parent-child relationships at times break down for reasons *not* involving the malicious interference of the favoured parent:

> *Allegations of PAS have become a fashionable legal strategy in numerous divorce cases in which children are resisting contact with a parent, without due regard for possible historic reasons for such resistance within the marital home nor for the children's relationship with both parents.*

Kelly and Johnston argued that parent-child relationships can be described as lying on a continuum ranging between positive and secure on one hand and negative and alienated on the other:

Kelly and Johnston's
Continuum of Parent-Child Relationships

Positive Relationships	**Positive** relationship with both parents	Child prefers contact and has secure relationships with both parents
	Affinity toward a parent	Child prefers contact with both parents but prefers one parent over the other, by normal reasons of temperament, age, gender and so forth
	Alliance with a parent	Child has consistent preference for one parent and is ambivalent, but not rejecting, toward the other parent
	Estranged from a parent	Child rejects one parent and is either ambivalent toward that parent or expresses a dislike of that parent
Negative Relationships	**Alienated** from a parent	Child rejects one parent and expresses a strong dislike for that parent without guilt or ambivalence

Kelly and Johnston recognized that there might be objectively valid reasons for the breakdown of a child's relationship with a parent, reasons that might actually justify the child's rejection of and refusal to visit that parent, for example:

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[6] J.B. Kelly and J.R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39:3 Family Court Review 249, available online at jkseminars.com/pdf/AlienatedChildArt.pdf

a) the child witnessing or experiencing family violence at the hands of the rejected parent;

b) the rejected parent having a rigid or authoritarian approach to discipline;

c) the rejected parent displaying inconsistent and unpredictable expectations and behaviour;

d) the immaturity and self-centredness of the rejected parent;

e) the rejected parent being emotionally unavailable to the child; or,

f) the rejected parent having substance abuse problems impairing his or her parenting capacity.

The presence of factors such as these in a family may cause a child to become reasonably *estranged* from a parent, rather than being *alienated* from the parent as a result of the favoured parent's efforts to poison the parent-child relationship. Kelly and Johnston wrote that children in such circumstances also typically wish to severely limit contact with rejected parent, like alienated children, but their estrangement from that parent is "reasoned, adaptive, self-distancing and protective." An alienated child, by comparison, is "one who expresses, freely and persistently, unreasonable negative feelings and beliefs ... toward a parent that are disproportionate to the child's actual experience with that parent."

The approach taken by Kelly and Johnston has the advantage of shifting the focus of enquiry away from the conduct of the allegedly alienating parent and toward the observable behaviours of the child and the characteristics of the parent-child relationship. Despite the benefits of this analysis, certain groups remain smitten with Gardner's original theory of parental alienation syndrome, as well as grotesque variants such as "divorce-related malicious mother syndrome,"[7] ensuring its continuing prominence in the public imagination.

Unfortunately, it continues to be terribly easy, and rather tempting, to mistake cases of estrangement for cases of alienation. Many parents frankly find it easier to blame the other parent as the cause of the breakdown of their relationship with the children than to find fault with themselves,[8] and the narrative of "all good" versus "all bad" is an alluring change of pace for family law lawyers

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[7] I.D. Turkat, "Divorce Related Malicious Mother Syndrome" (1995) 10:3 Journal of Family Violence 253

[8] Counsel should also be mindful that clients are often inclined to present themselves to their lawyer in the best light possible, perhaps in the belief that the lawyer's favourable opinion will spur him or her toward greater heights of effort, or perhaps because human nature disinclines us toward voluntary confessions of our weaknesses.

accustomed to cases cast in varying shades of gray. It is sometimes difficult to resist the urge to assume the role of white knight.

C. Other Observations from the Research

Other researchers have also explored the phenomena of alienation and estrangement, chief among them being the psychologists Richard Warshak and Douglas Darnall. In his 2001 article "Current Controversies Regarding Parental Alienation Syndrome," Warshak provides a helpful survey of the increasingly sophisticated debate on alienation, including Kelly and Johnston's reformulation of the concept, and proposes three key traits by which alienation could be identified:[9]

a) a persistent rejection or denigration of the rejected parent amounting to a "relentless campaign";

b) the child's rejection is unreasonable and unjustified; and,

c) the child's rejection is at least partly a result of the alienating parent's behaviour.

In his slightly earlier book *Divorce Casualties: Protecting Your Children from Parental Alienation*, Darnall notes that parental alienation may vary in intensity, from mild to severe, and, anticipating the work of Kelly and Johnston, observes that not all parent-child relationship problems are caused by alienating behaviour.[10] Darnall also usefully identifies three types of alienating behaviour:

1. **Naïve alienators**: Alienating parents who are passive about the children's relationship with the other parent but will occasionally do or say something that has an alienating effect.

2. **Active alienators**: Alienating parents who know better than to alienate, but whose intense hurt or anger causes them to occasionally lose control over their behavior or what they say. Such parents may later feel guilty about how they behaved.

3. **Obsessed alienators**: Alienating parents who have a fervent cause to destroy the rejected, or, as Darnall puts it, the "targeted" parent.

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[9] R.A. Warshak, "Current Controversies Regarding Parental Alienation Syndrome" (2001) 19:3 American Journal of Forensic Psychology 29, available online at www.fact.on.ca/Info/pas/warsha01.htm

[10] D. Darnall, *Divorce Casualties: Protecting Your Children from Parental Alienation* (Dallas, TX: Taylor Publishing, 1998)

Needless to say, obsessive alienating behaviour is the most problematic. In "Three Types of Parental Alienators," Darnall says that obsessed alienating parents:[11]

a) are obsessed with destroying the children's relationship with the targeted parent;

b) enmesh the children's beliefs about the targeted parent with their own;

c) sometimes become delusional and irrational, and cannot be convinced they are wrong;

d) often seek support from family members, friends and political groups that share in their beliefs that they are victimized by the targeted parent and by the system;

e) have an unquenchable anger because they believe that the targeted parent has victimized them and whatever they do to protect the children is justified; and,

f) seek to have the court punish the targeted parent with orders that prevent the parent from seeing the children.

Darnall cautions that alienating parents may exhibit the traits of two types of alienating behaviour, usually a combination of naïve and active alienators, and notes that "rarely does the obsessed alienator have enough self-control or insight to blend with the other types."

D. The Consequences of Child Alienation

From the client's point of view, the personal consequences of alienation or estrangements are obvious and immediate: the client has lost a critically important relationship with his or her child and is experiencing the loss, sorrow, anger and grief that accompany the end of any important relationship. Although it can be tempting for counsel to simply stop there – the client, after all, is the person you're working with and the person who's paying your account – it is important to remember that the *child* has lost a relationship as well, a loss that has occurred in the context of intense psychological manipulation and pressure.

Allegations of alienation are generally not made in low- to medium-conflict family law cases; they most often arise in high-conflict disputes, frequently alongside allegations of abuse, addiction and mental disorder. As Kelly and

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[11] D. Darnall, "Three Types of Parental Alienators" (1997), available online at www.parentalalienation.org/articles/types-alienators.html

others have noted, certain negative outcomes are normal for children of separated parents, including mental health problems, such as depression and anxiety, and maladaptive behaviours, such as delinquency and truancy. However, the probability of these outcomes occurring, and the severity of their impact when they do, correlates with the extent of children's exposure to parental conflict. Psychologists Amy Baker and Naomi Ben-Ami, in their 2011 article "To Turn a Child Against a Parent Is to Turn a Child Against Himself," write that:[12]

> *Children's exposure to and involvement in parental conflict has been identified as the single best predictor of outcomes for children after divorce, especially the degree to which children are drawn into parental conflict.*

Fidler and Bala summarize the research on the impact of alienation on children in "Children Resisting Postseparation Contact with a Parent."[13] They write that the qualitative and empirical studies to date "uniformly" indicate that alienated children may exhibit:

a) problems with reasoning and information processing (poor reality testing, illogical cognitive operations, and simplistic and rigid information processing);

b) difficulty in social functioning (inaccurate or distorted interpersonal perceptions, disturbed and compromised interpersonal functioning, aggression and conduct disorders, and disregard for social norms and authority); and,

c) emotional and psychological problems (self-hatred, low or inflated self-esteem, pseudo-maturity, gender identity problems, enmeshment, poor impulse control, emotional dependency, and lack of remorse or guilt).

Baker and Ben-Ami looked at the long-term effects of alienation by examining the effect of common alienation strategies – such as badmouthing the rejected parent, telling the child the rejected parent is unsafe, and limiting contact with the rejected parent – on 118 adults who were children of divorce. They found that:

a) participants' self-esteem inversely correlated with the number and frequency of alienation strategies employed;

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[12] A.J.L. Baker and N. Ben-Ami, "To Turn a Child Against a Parent Is To Turn a Child Against Himself: The Direct and Indirect Effects of Exposure to Parental Alienation Strategies on Self-Esteem and Well-Being" (2011) 52:7 Journal of Divorce & Remarriage 472

[13] B.J. Fidler and N. Bala, "Children Resisting Post-Separation Contact with a Parent: Concepts, Controversies and Conundrums" (2010) 48:1 Family Court Review 10

b) participants who were alienated as children experienced reduced rates of self-sufficiency and educational attainment; and,

c) participants who were alienated as children experienced higher rates of depression and alcohol abuse.

Summarizing their findings, Baker and Ben-Ami write that:

> *The findings reveal just how powerful an influence parental alienation strategies can have on children ... the data support the notion that to turn a child against the other parent is to turn a child against himself or herself. ... When children are told that a parent is not a good person, does not love them and does not care about them, children appear to conclude that the cause lies within themselves.*

These conclusions are supported by Baker's earlier qualitative study of 40 adults who self-identified as having been alienated from a parent as a child.[14] Among this population, Baker found high rates of:

a) low self-esteem, "if not outright self-hatred";

b) depression and serious problems with drugs or alcohol;

c) difficulty trusting themselves, other people or both; and,

d) divorce.

More alarmingly, Baker also found that half of the study participants who were parents reported being alienated from their own children.

The research to date establishes that parental conflict can have critical negative effects on children's mental health and overall wellbeing. These effects are all but assured when separated parents engage in protracted, high conflict and one of the parents is prepared to destroy the child's relationship with the other parent. Although the willful alienation of a child from a parent is – not "arguably is" but *is* – psychological maltreatment rising to the level of emotional abuse,[15] it must be remembered that the impacts of parental conflict and alienation can survive childhood to impact on the child's functioning as an adult. As important as the impact of alienation is for rejected parents, I respectfully suggest that its impact

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[14] A.J.L. Baker, "The Long-Term Effects of Parental Alienation on Adult Children: A Qualitative Research Study" (2005) 33 American Journal of Family Therapy 289

[15] Fidler and Bala support this view, writing that cases of severe alienation "may be identified by child protection agencies as emotional abuse," suggesting that intervention is required, when the child "exhibits serious symptoms such as anxiety, depression, withdrawal, self-destructive or aggressive behaviour or delayed development."

on children is of greater consequence and deserving of immediate action by both bench and bar when suspected.

E. A Note About Language

Although the term "alienation" is value-neutral and merely describes the separation of a person or thing, in the remainder of this paper, I will use the term to refer specifically to situations in which a person has intentionally acted to sever or damage the relationship of a child with a parent. I will use "estrangement" to refer to situations in which a child's relationship with a parent has been severed for reasons other than the interference of another person, usually because of the individual's personality characteristics and past behaviours.

I will refer to the parent whose relationship with the child has been severed as the "rejected parent," regardless of whether the relationship was severed because of alienation or estrangement, and to the other parent as the "favoured parent."

III. Allegations of Alienation in Court Proceedings

The number of family law cases raising allegations of parental alienation has increased steadily since Gardner described his theory of parental alienation syndrome in 1985. Nationally, the rate of substantiation of such allegations held steady at about 60% between 1989 and 2008; however the rate of substantiation in British Columbia between 2009 and 2014 was much lower, at about 11%.

Mothers are, as Gardner suggested, more frequently accused of alienation than fathers across Canada, and in British Columbia in particular. However, it is unclear whether this results from the accuracy of this aspect of Gardner's theory or the fact that it *is* an aspect of Gardner's theory and popular among men's rights groups as a result.

A. Prevalence

Professor Nicholas Bala and students Suzanne Hunt and Carolyn McCarney reviewed Canadian court decisions published between 1989 and 2008 and found 175 cases involving allegations of alienation.[16] The annual number of cases raising such allegations hovered in the low teens between 1999 and 2007 but spiked to 36 in 2008.

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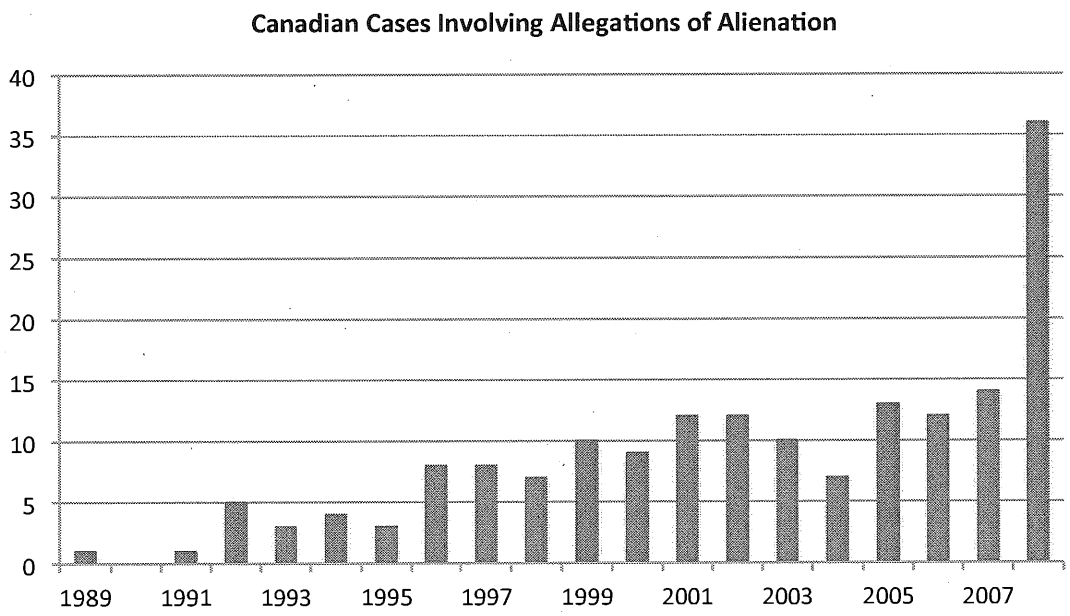
[16] N. Bala, S. Hunt and C. McCarney, "Parental Alienation: Canadian Court Cases 1989-2008" (2010) 48:1 Family Court Review 164



Of the 40 decisions made between 1989 and 1998, the court concluded that alienation had occurred in 24 cases, and of the 135 decisions made between 1999 and 2008, alienation had occurred in 82 cases, yielding a consistent rate of substantiation of about 60%.

Bala, Hunt and McCarney also found that in the majority of the cases where an allegation of alienation was not substantiated (62%), the court determined that the child had instead become *estranged* from the rejected parent:

a) in 7% of the cases in which the allegation was not substantiated, the court found justified estrangement resulting from abuse or violence;

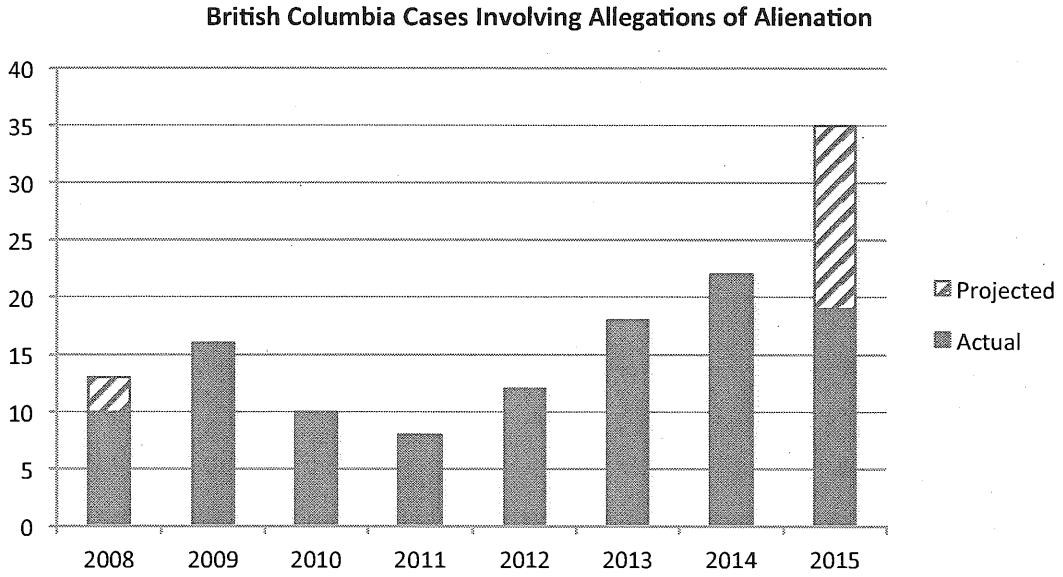
b) in 35% of these cases, the court found justified estrangement resulting from poor parenting; and,

c) in 20% of the cases, the court held that the child was disengaged but not alienated from the rejected parent.

In the remaining 38% of cases, the court found insufficient evidence to establish that alienation had occurred.

In reviewing the British Columbia decisions available on CanLII, I found 115 cases published between mid-2008 and mid-2015 in which claims of alienation

germane to the outcome of the application or trial were made.[17] These cases showed the same generally increasing trend as the national sample.[18]



Given the evidentiary complexity of advancing and defending claims of alienation, such allegations were most often determined at trial at (48%) and post-trial variation applications (33%), and least often addressed at interim applications (18%).[19]

Allegations of alienation were substantiated in only 21% of the cases I looked at, a rate about one-third of that established in the national sample, but which increased significantly between 2012 and 2015:

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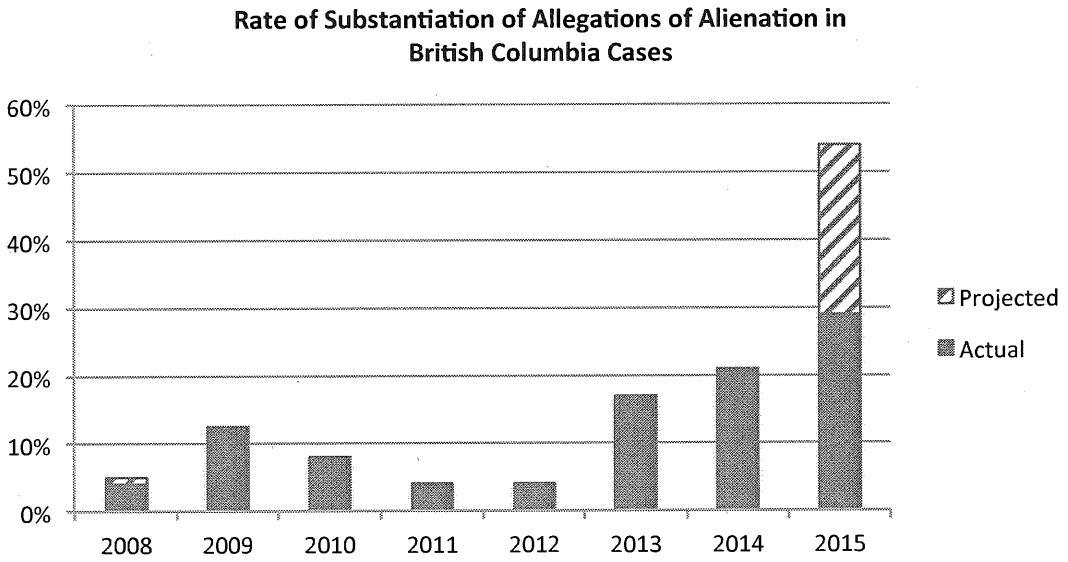
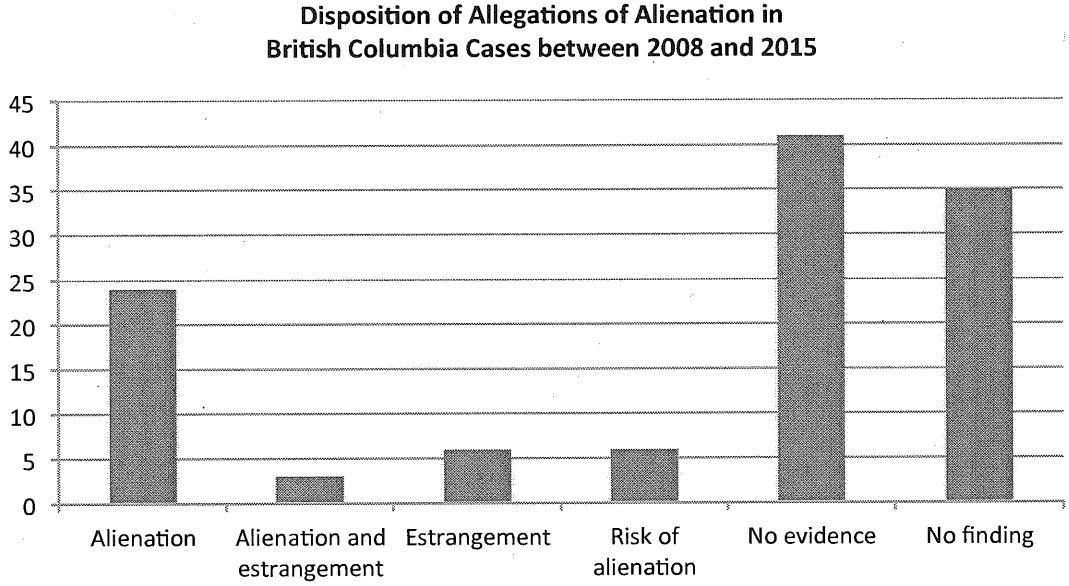
[17] My review excluded appeals, whether to the Court of Appeal or the Supreme Court, child welfare matters, costs applications and cases other than family law cases. My search was limited to the 500 results returned by CanLII for cases with variants of "alienate" in the document text.

[18] "Projected" refers to data I have extrapolated in respect of two partial years. The earliest judgment CanLII returned was published in April 2008; assuming that the rate of 10 claims of alienation in 9 months prevailed between January and March of that year, I estimate that a further 3 claims were made in 2008. My original search was made on 16 June 2015; assuming that the rate of 19 claims in 6.5 months will continue until the end of the year, I project that a further 16 claims will be the subject of decisions made in 2015.

[19] The judgments on interim matters included in my sample addressed applications directly related to the presence of alienation, such as applications for parenting time (9 cases), applications for custody or the primary care of a child (8 cases) and applications for protection orders or orders otherwise restricting contact (3 cases). I have not included judgments on applications for parenting or psychological assessments to determine the presence of alienation.



In the majority of cases where such allegations were not substantiated, the court either did not make a finding on the allegation (30%) or dismissed the allegation for want of supporting evidence (36%).



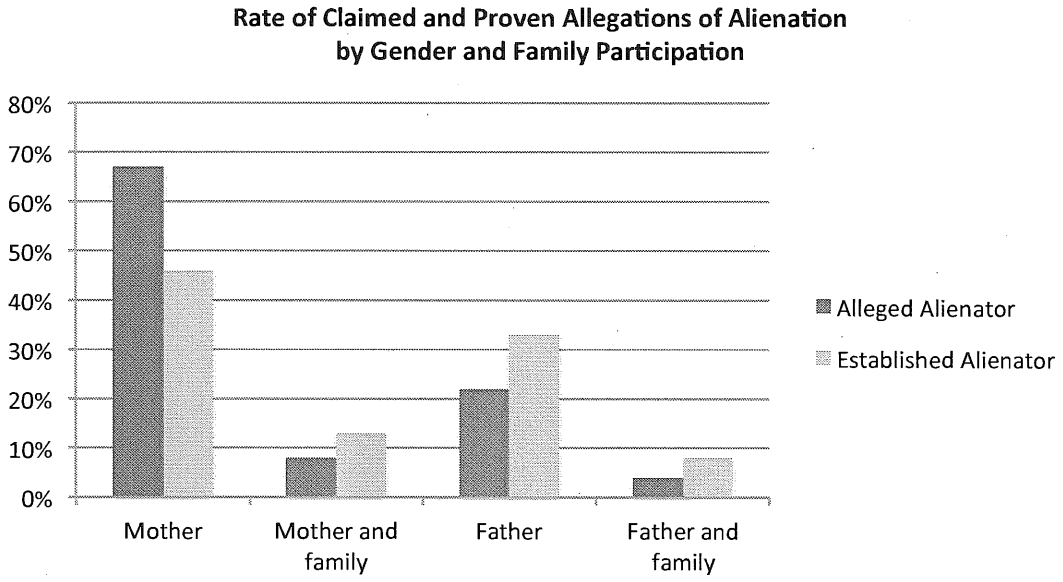
In six cases, the court reached the decision that the child had become estranged from the rejected parent as a result of the parent's actions; in three cases, the court concluded that the child's relationship had broken down because of both the alienating behaviours of the favoured parent and estrangement from the rejected parent. In six cases, the court concluded that although alienation had not been established, there was a risk of alienation that justified the making of prophylactic orders.

B. Alleging and Establishing Alienation

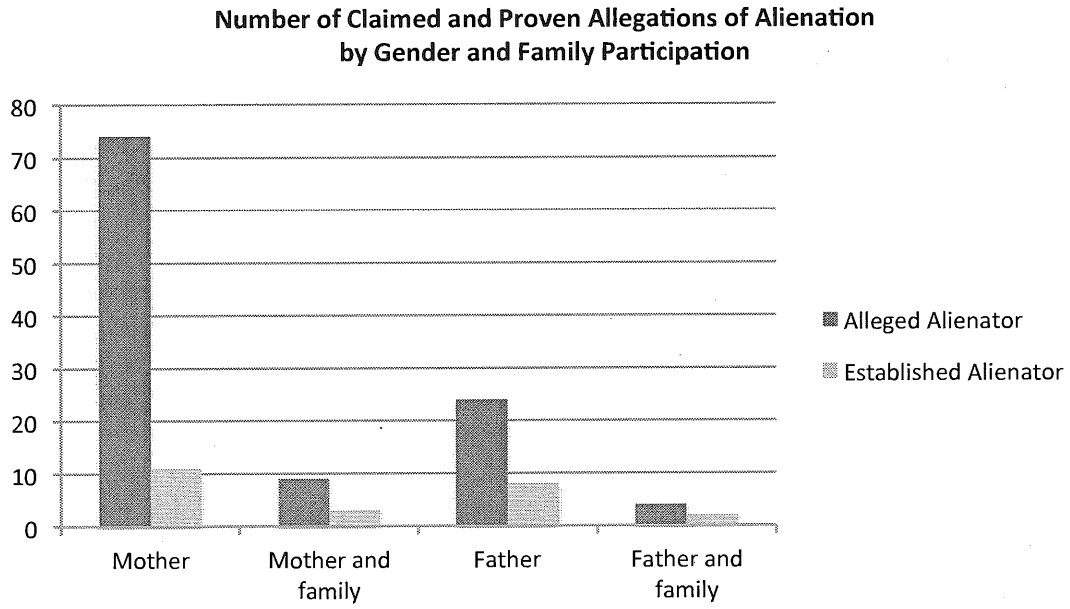
In 68% of the Canadian cases identified by Bala, Hunt and McCarney in which alienation was established, the mother was found to be the favoured parent. The father was the favoured parent in 31% of those cases and in one case, a case in which the parents had split custody, each of the parents was found to be responsible for the alienation of their children.

Similarly, in 67% of the British Columbia cases I studied, the mother was alleged to be alienating the children from the other parent. The father was alleged to be the alienator in 22% of those cases, and the parents made reciprocal accusations of allegation in 4% of the cases. The family or friends of a parent were alleged to be participating in efforts to alienate children in 12% of the cases.

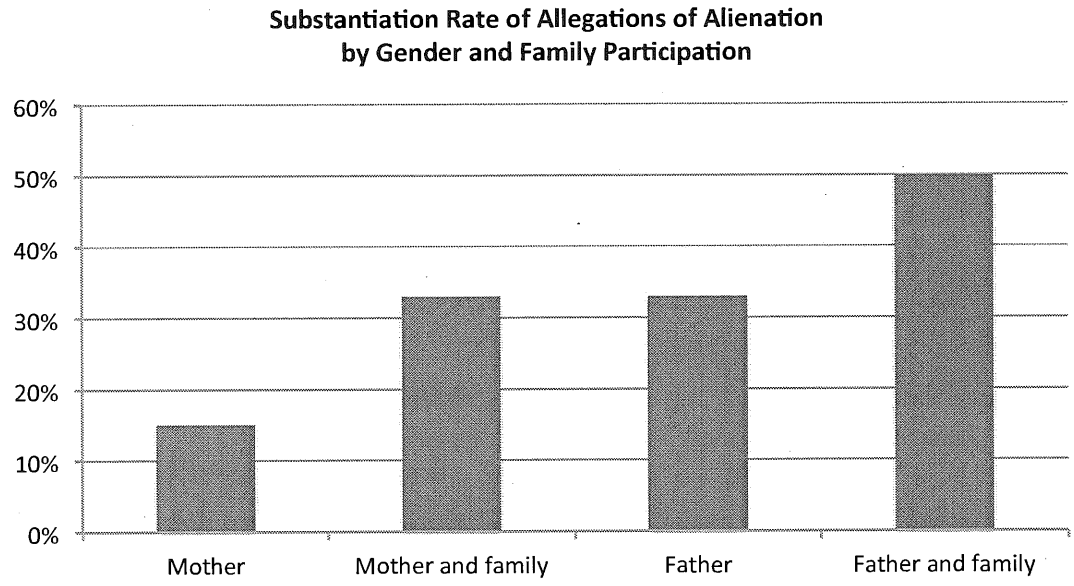
Among the British Columbia cases where allegations of alienation were proven, however, the mother was found to be the favoured parent 46% of time, with the father being found to the favoured parent 33% of the time, suggesting that claims against mothers are less likely to be substantiated than claims against fathers. In 21% of these cases, the child's alienation was found to have resulted from the behaviour of a parent acting in concert with family or friends.



Comparing the number of cases in which allegations of alienation were made against the number of cases in which those allegations were actually proven illustrates the relatively low rates at which all such allegations are substantiated.



The mother was alleged to be the alienating parent in 74 of the cases I reviewed, but was only proven to have been engaged in alienating behaviours in 11 cases, yielding a substantiation rate of less than 15%. In contrast, one-third of the 24 allegations against fathers were proven, and 38% of the claims against parents and family members were proven.

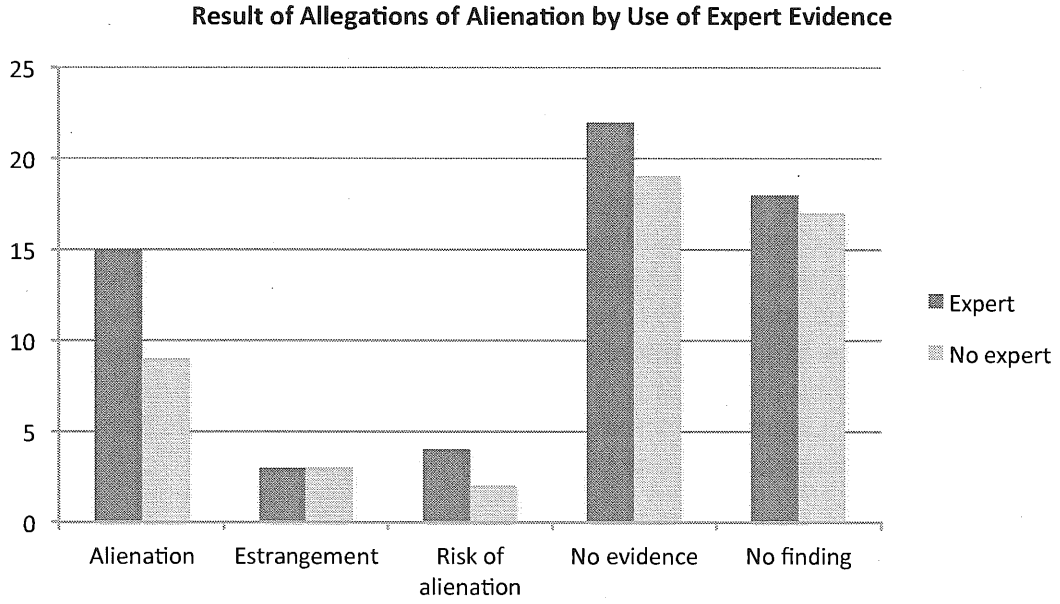


As these figures suggest, it's much easier to allege that a parent is engaging in alienating behaviours than it is to prove that alienation has actually occurred, suggesting that expert evidence might be of some assistance when prosecuting or defending such claims.

C. Expert Evidence

Given the complexity inherent in establishing that a child's relationship with the rejected parent has broken down because of the alienating behaviours of the favoured parent, the opinion of an expert on the issue is necessary or, if not necessary, at least helpful.[20] It is unsurprising, therefore, that Bala, Hunt and McCarney found that expert evidence had been presented in the vast majority of the cases they reviewed. What is less intuitive is their further finding that in the 13% of cases in which no expert evidence was provided, allegations of alienation were nonetheless substantiated in 41% of those cases.

Expert evidence, in a variety of formats including evaluative views of the child reports, parenting assessments and rebuttal reports, was presented in 57% of the British Columbia cases I reviewed. Although the use of expert evidence increased the likelihood that allegations of alienation would be proven (23% of the cases involving expert evidence), no expert evidence was adduced in almost two-fifths of the total number of cases in which such allegations were substantiated (18% of the cases not involving expert evidence).

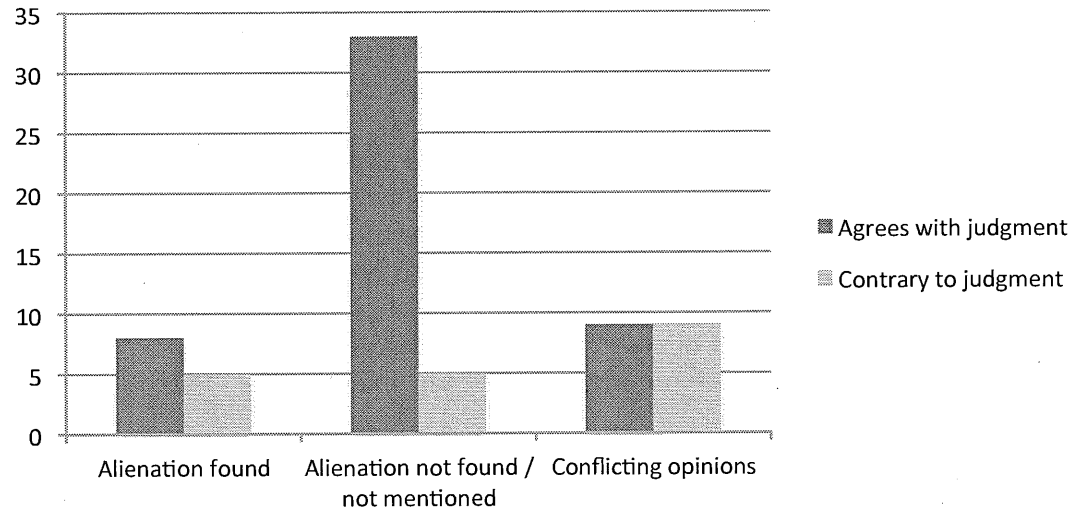


The decisions of the court on allegations of alienation generally track the conclusions of the experts, whether those experts concluded that alienation existed, that it didn't exist or drew no conclusions on the subject at all. Despite the apparent harmony between experts' recommendations and courts' determinations, the court is not bound by expert evidence, and in five of the

[20] The remarks of Judge MacCarthy in *L.D.M. v R.H.M.*, 2014 BCPC 98 are appropriately cautionary: "I cannot conclude on the basis of the evidence that is before me that this is a case of parental alienation or PAS. I have no expert report … that would allow me to reach that conclusion about PAS."

cases I studied, the court concluded that alienation *did not* exist, contrary to the opinion of an expert that it did, and in a further five the court concluded that alienation *did* exist, contrary to the expert's determination that it did not. In nine cases, the conflicting opinions of multiple experts were provided.

Concordance between Expert Opinions and Court Judgments in Cases Involving Allegations of Alienation



D. The Impact of Self-Representation

In 15% of the 115 cases I studied, both parties appeared without counsel (17 cases); in 14% of the cases, the mother appeared without counsel against a represented father (16 cases), and in 29%, the father appeared without counsel against a represented mother (33 cases). In total, 57% of the cases I reviewed involved at least one litigant without counsel.[21] This number is somewhat higher than those reported by Justice Gray, who reviewed records of the British Columbia Supreme Court to conclude that an average of 40% of trials between 2006 and 2012 involved at least one litigant without counsel.[22]

Proportion of British Columbia Supreme Court Trials Involving At Least One Litigant Without Counsel

	Family	Non-Family Civil	Criminal	All
2006	36.3%	17.4%	4.4%	16.9%
2007	37.1%	18.6%	2.5%	16.4%
2008	31.4%	15.7%	3.7%	14.5%
2009	52.3%	12.1%	4.0%	18.1%

[21] Of the cases I reviewed, 101 were decisions of the Supreme Court (88%) and 14 were decisions of the Provincial Court (12%).

[22] Hon. V. Gray, "Filling in the Blanks: Towards a More Inquisitorial Process (with Relevant and Organized Evidence" (Vancouver, BC: 2013)

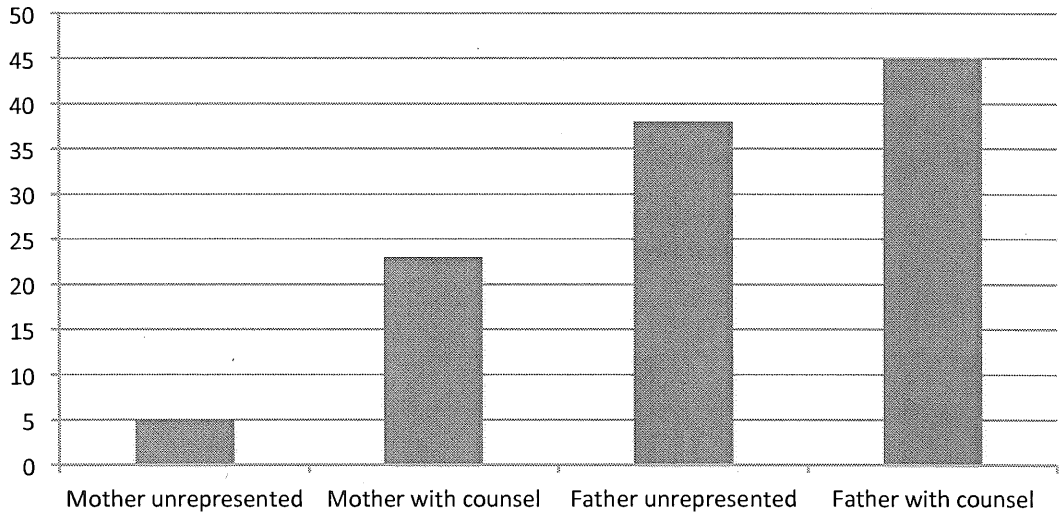
Proportion of British Columbia Supreme Court Trials Involving At Least One Litigant Without Counsel

	Family	Non-Family Civil	Criminal	All
2010	45.9%	17.8%	2.6%	17.7%
2011	40.3%	17.7%	3.4%	16.8%
2012	36.6%	15.4%	3.3%	15.2%

The difference in the rate of self-representation in cases involving claims of alienation may be linked to the inflammatory nature of such claims, their relatively low rate of substantiation, particularly with respect to claims against mothers, and the tendency of litigants without counsel to nurture unreasonably high expectations as to the outcome of their cases.[23]

In the cases I reviewed, allegations of alienation were made by five mothers without legal representation and by 23 mothers with representation. Allegations of alienation were made by 38 fathers without legal representation and by 45 fathers with representation.

Allegations of Alienation by Gender and Representation of Rejected Parent



Although the sample size is low, particularly for mothers without counsel, it appears that for both fathers and mothers, having a lawyer increases the likelihood that allegations of alienation would be advanced.

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[23] For discussions of the expectations of litigants without counsel, see: R. Birnbaum, N. Bala and L.D. Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2012) 91 Canadian Bar Review 67; and, J.-P.E. Boyd and L.D. Bertrand, "Self-represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen's Bench" (Calgary, AB: Canadian Research Institute for Law and the Family, 2014)

Having a lawyer also appears to:

a) decrease the likelihood that mother's allegations of alienation would be substantiated, but increase the likelihood that father's allegations would be proven; and,

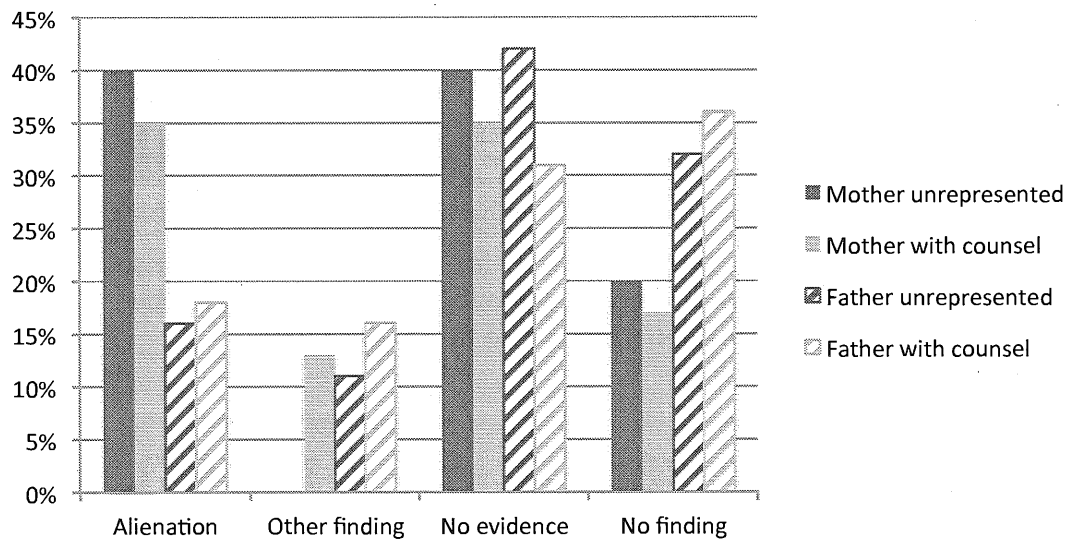
b) increase the likelihood that a finding other than alienation would be made for both fathers and mothers.

Result of Allegations of Alienation by Gender and Representation Status of Rejected Parent

	Unrepresented mother	Represented mother	Unrepresented father	Represented father
Alienation	2	8	6	8
Estrangement			2	3
Alienation and estrangement			1	2
Risk of alienation		3	4	2
No evidence	2	8	16	14
No finding	1	4	12	16

Parents, especially fathers, without counsel were much more likely to have their allegations of alienation dismissed as unsupported by the evidence than represented parents, however having a lawyer curiously increased the likelihood that no finding would be made on fathers' allegations.

Rate of Result of Allegations of Alienation by Gender and Representation of Rejected Parent



IV. Assessing Allegations of Alienation

The decisions reviewed by myself and by Bala, Hunt and McCarney illustrate the challenges involved in proving allegations of alienation. Part of the difficulty with allegations like these lies in differentiating between alienation, estrangement and non-pathological explanations for a child's reluctance to spend time with a parent. "Normal" reasons why a child might resist contact with a parent, for example, include:[24]

a) age-appropriate separation anxiety;

b) a reasonable reaction to the rejected parent's parenting style;

c) fear for an emotionally vulnerable favoured parent;

d) a reasonable response to the rejected parent's new relationship, new partner or new partner's family; and,

e) a normal, age- or gender-appropriate preference for one parent over the other.

Psychologist Barbara Jo Fidler and Nicholas Bala provide a succinct illustration of this dilemma in their excellent 2010 article, "Children Resisting Post-Separation Contact with a Parent":

> *... children can refuse or resist contact with one parent for many reasons. A child while maintaining contact with both parents, may have an affinity toward one parent because of temperament, gender, age, familiarity, greater time spent with that parent, or shared interests. ... This normal and developmentally expected ebb and flow of preferences (affinity) and gender identification occurs in both divorced and nondivorced families, and is not the result of an alienation process. When it occurs in divorcing families, however, affinities and gender identities can be concerning to both parents; the preferred parent incorrectly concludes the other parent has erred in some significant way, and the resisted parent, feeling threatened, may incorrectly conclude that the other parent is trying to alienate the child.*

Further, as Kelly and Johnston point out, even when a child's relationship with a parent has in fact broken down, the child might be justifiably estranged from the rejected parent, rather than alienated, for reasons including:

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[24] J.R. Johnston, "Children of Divorce Who Refuse Visitation," in C. Depner and J.H. Bray, *Non-Residential Parenting: New Vistas in Family Living* (Newbury Park, CA: Sage Publications, 1993)

a) the presence of intense conflict between the parents during their relationship and after their separation;

b) the parents' involvement in hotly contested, highly conflicted litigation;

c) the child witnessing or suffering emotional abuse or family violence;

d) the rejected parent having an unpredictable, rigid or overly authoritarian approach to discipline;

e) the rejected parent displaying inconsistent and unpredictable expectations and behaviour;

f) the rejected parent being emotionally unavailable to the child; and,

g) the rejected parent having substance abuse problems, especially problems that affect his or her parenting.

As a result, it is important to approach clients' complaints of alienation with a modest degree of skepticism. Psychologists Margaret Lee and Nancy Olesen have provided a number of cautions for parenting assessors that seem to me to be equally applicable to counsel.[25]

1. Avoid oversimplifying the problem by focusing only on the allegation of alienation.

2. Do not assume that the allegation of alienation is true – or false! – merely because the allegation is strategically advantageous or popular among certain circles.

3. Do not assume that the rejected parent is wholly blameless in the circumstances that led to the impairment of his or her relationship with the child.

4. Do not assume that the child has been brainwashed by the favoured parent. A parent's alienating behaviours do not always result in an alienated child.

5. Bear in mind that qualities of the adversarial justice system can impact on the parent-child relationship and potentiate the breakdown of that relationship.

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[25] S.M. Lee and N.W. Olesen, "Assessing for Alienation in Child Custody and Access Evaluations" (2001) 39:3 Family Court Review 282

(I would add two more points to this list:

6. Don't assume that the presence of alienation excludes the possibility of estrangement, or vice versa; alienation and estrangement can and do co-occur.

7. Don't assume that all efforts to alienate involve the fully engaged assault described by Gardner and others. Behaviours that have an alienating influence, yet are individually too trivial to bring to court, can accumulate over time and reach the same conclusive result.)

A. Recognizing the Risk of Alienation

Drawing on work by Baker and Darnall,[26] Fidler and Bala provide a helpful list of behaviours that, when exhibited by the favoured parent, suggest alienation may be a risk, including the following, some of which I have paraphrased and expanded upon:

Badmouthing the rejected parent
- portraying the rejected parent as dangerous or mean
- using the rejected parent's first name with the child

Limiting the child's contact with the rejected parent
- arranging activities that conflict with the rejected parent's contact with the child
- frequently calling or messaging during rejected parent's time with the child
- giving the child a choice about initiating or accepting contact with the rejected parent

Declining responsibility for parenting arrangements
- telling the child that the judge has tied his or her hands, and that the child's contact with the rejected parent is beyond his or her control
- giving the child a choice about attending scheduled visits with the rejected parent

Limiting the child's symbolic contact with the rejected parent
- removing photographs of the rejected parent from the child's room
- encouraging the child to call someone else mom or dad
- refusing to mention the rejected parent in the presence of the child

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[26] A.J.L. Baker and D. Darnall, "Behaviours and Strategies Employed in Parental Alienation: A Survey of Parental Experiences" (2006) 45 Journal of Divorce & Remarriage 97

Limiting communication between the child and the rejected parent

- blocking telephone calls, text messages and email from the rejected parent
- intercepting letters and packages sent by the rejected parent
- monitoring or recording communication between the child and the rejected parent

Refusing to communicate with the rejected parent about the child

- not sharing information and notices from the child's school, sport teams and health care providers
- refusing to talk to the rejected parent about the child
- using the child to pass messages to the rejected parent

Emotionally manipulating the child

- withdrawing or threatening to withdraw affection if the child expresses positive feelings toward the rejected parent
- making the child feel guilty about spending time with or favouring the rejected parent
- interrogating the child about his or her time with the rejected parent
- putting the child in loyalty binds
- rewarding the child for expressing criticism or rejection of the rejected parent
- using the child to spy on the rejected parent or activities in the rejected parent's house
- encouraging the child to keep secrets from the rejected parent
- creating conflict between the child and the rejected parent

Interfering with other relationships

- badmouthing the rejected parent to friends, family, health care providers and so forth
- interfering with the rejected parent's professional relations with employers, licensing authorities or regulatory bodies
- needlessly involving police, child protection and taxation authorities with the rejected parent

In the event a risk of alienation is identified, Kelly and others recommend taking immediate action, including taking steps to restore contact between the rejected parent and the child and, if litigation is underway, applying for an order that the file be subject to strict case management, preferably by a single judge, as I will discuss further on in this paper.

B. Identifying Alienation

Kelly and Johnston describe alienated, as opposed to estranged, children as children who "express their rejection of that parent stridently and without apparent guilt or ambivalence, and who strongly resist or completely refuse any contact with that rejected parent." They say that parents rejected as a result of alienation are generally reasonably competent parents who have no history of physically or emotionally abusing their children, and even where there is some truth to their children's complaints, the children's negative views are "significantly distorted and exaggerated reactions." Kelly and Johnston write that such responses are pathological and represent "a severe distortion on the child's part of the previous parent-child relationship":

> *These youngsters go far beyond alliance or estrangement in the intensity, breadth and ferocity of their behaviours toward the parent they are rejecting. They are responding to complex and frightening dynamics within the divorce process itself, to an array of parental behaviours, and also to their own vulnerabilities that make them susceptible to being alienated. The profound alienation of a child from a parent most often occurs in high-conflict custody disputes; it is an infrequent occurrence among the larger population of divorcing children.*

In their recent book *Children Who Resist Postseparation Parental Conflict*, Barbara Jo Fidler, Nicholas Bala and professor Michael Saini adopt the family systems approach proposed by Kelly and Johnston and describe the risk factors and indicators research has shown to be associated with alienation.[27]

Favoured parent

- presence of psychopathology, mental illness, personality disorders
- favoured parent's use of alcohol or drugs
- favoured parent denigration of the rejected parent
- separation experienced as humiliating by the favoured parent
- favoured parent limiting or interfering with contact between the child and the rejected parent and the relatives of the rejected parent
- favoured parent forcing the child to choose between parents
- role reversal between the favoured parent and child
- the presence of an enmeshed relationship between the favoured parent and the child
- favoured parent making unfounded allegations of abuse

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[27] B.J. Fidler, N. Bala and M.A. Saini, *Children Who Resist Postseparation Parental Conflict: A Differential Approach for Legal and Mental Health Professionals*, (New York, NY: Oxford University Press, 2013)

Rejected parent

- presence of psychopathology, mental illness, personality disorders
- rejected parent's use of alcohol or drugs
- counterrejection of the child by the rejected parent
- rejected parent lacking adequate parenting skills and competencies
- rejected parent having a harsh, rigid or authoritarian parenting style
- rejected parent adopting passive response to conflict or withdrawing from parenting because of conflict

Child

- child is emotionally caught between parents engaged in high levels of conflict
- age of the child
- temperament, resilience and personality vulnerabilities of the child
- child demonstrating extreme oppositional behaviours
- presence of anxiety and phobias
- child lacking ambivalence toward the rejected parent
- child using scenarios and phrases borrowed from the favoured parent when discussing the rejected parent
- lack of external support from extended family, friends and counsellors

Factors relating to the parents' relationship

- history of family violence perpetrated by either parent
- parents' engagement in high levels of conflict, involvement in litigation
- parents' involvement with new partners
- duration of the rejected parent's isolation from contact with the child
- distance between the parents' homes
- involvement of polarizing professionals, including overly enmeshed counsel and mental health professionals

Fidler, Bala and Saini note that "no one factor provides sufficient evidence of the presence of alienation," and that "each case should be assessed for the presence of all potential factors … to provide a more complete picture of the complex dynamics of alienation."[28]

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[28] Kelly and Johnston provide a helpful diagram illustrating the key background factors and "intervening variables" that contribute to shaping the child's response to alienation at page 255 of their article.

V. Judicial Responses to Alienation

In *A.A. v S.N.A.*, Justice Preston was required to determine the parenting arrangements best suited to a 10 year old caught up in the conflict between her parents and deeply enmeshed with her mother and her mother's venomous views toward her father:[29]

> *[75] The circumstances of this case present a stark dilemma.*
>
> *[76] I am conscious of the recommendation of [the parenting assessor] which I have given great weight. However, I am constrained by the limitations on the ability of the court to control a day-to-day dynamically-evolving situation such as the apprehension of a child without the mechanisms of the Child, Family and Community Service Act. I am conscious, as well, that the future psychological damage to which [the parenting assessor] refers is, to some extent speculative because of the, as yet unknown, effect of future events. Beyond that observation, I do not mean to imply that I reject her analysis of the potential damage that [the mother] may inflict on [the child].*
>
> *[77] If custody is transferred to [the father], the immediate effect of that change will be extremely traumatic to [the child]. She may or may not adjust in a reasonable length of time. She will have to be forcibly removed from the custody of her mother, either by the authorities arriving at her school and physically apprehending her or by forcibly apprehending her from her mother. Her mother will not cooperate. In my view, [the child] will, with much justification, conclude that she is being forcibly dealt with in a manner that completely ignores her integrity and her wishes. It is unlikely that she will initially accept the reassurance of therapists. ...*
>
> *[80] The relationship that she is being removed from is a relationship that, in the long run, will be detrimental to her. It has already been detrimental to her. However, her relationship with her mother and with her grandmother, who supports [the mother] in her pathological antipathy to [the father], is the most powerful and constant relationship [the child] has ever known.*

I expect that most judges will sympathize with the dilemma faced by Justice Preston and the apparent paucity of options available to the court. Although there are some additional nuances and variants, Warshak outlined the four basic options in a 2010 article in *Family Court Review*:[30]

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[29] *A.A. v S.N.A.*, 2007 BCSC 594

[30] R.A. Warshak, "Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children" (2010) 48:1 Family Court Review 48

1. Award or maintain custody with the favoured parent, with court-ordered psychotherapy and, in some cases, case management.

2. Award or maintain custody with the rejected parent, in some cases with court-ordered or parent-initiated therapy.

3. Place children away from the daily care of either parent.

4. Accept the child's refusal of contact with the rejected parent.

According to Warshak, option one is most likely to be successful "in early stages with less severe problems and when the favored parent and child are likely to cooperate." Option two was Gardner's preferred solution – "the most important element in the treatment of these children is immediate transfer to the home of the so-called hated parent," he wrote – but comes at the steep emotional and psychological cost of placing the children in the home of the hated parent. Warshak described this option, as do the British Columbia case authorities, as the ultimate recourse, to be tried after all others. Option three places the children in the home of a third party, a boarding school or residential facility, but has the drawback of depriving the child of face to face contact with both parents and not guaranteeing isolation from alienating influences. Option four has the appearance of abject failure, but may be the only rational choice when it becomes the least harmful of all other alternatives. However, as Warshak wrote, withdrawal carries with it the consequence that:

> *... rejected parents suffer a searing pain described as worse than the grief associated with the death of a child, because it is an ambiguous loss that does not allow the closure of the normal grieving process.*

Regardless of the approach that is ultimately taken to address a case of alienation, professor Peter Jaffe, psychologist Dan Ashbourne and lawyer Alfred Mamo have identified a helpful set of principles that should assist the court and counsel in balancing the competing priorities alienation invokes:[31]

1. Protect the child and the primary parent from abuse and family violence.

2. Protect the child from ongoing parental conflict and litigation.

3. Protect the stability and security of the child's relationship with the primary parent and respect the right of the primary parent to direct his or her life.

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[31] P.G. Jaffe, D. Ashbourne and A.M. Mamo, "Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention" (2010) 48:1 Family Court Review 136

4. Respect the right of the child to have a meaningful relationship with each parent.

5. Promote the benefits of the child having a positive relationship with a co-parenting team of parents.

In selecting these priorities, Jaffe, Ashbourne and Mamo write that although they do not intend to downplay the harm of alienation, "the court and clinicians have to give a sober second thought to doing more harm than good in their interventions" when alienation is established.[32] However, this is not an admonition to the physician's principle of *primum non nocere*; in alienation cases, the best legal remedy is often the least bad legal remedy.

A. Addressing Alienation

Much has been written about the legal remedies available when allegations of alienation have been proven over the last three decades, the most recent authoritative commentary on which comes from Fidler, Bala and Saini. Although each remedy has its own benefits and drawbacks and is supported to a greater or lesser extent by the research to date, consensus seems to have gathered around three governing principles which I will briefly discuss: the need for rapid intervention when the potential for alienation is identified; the need for attentive case management when court proceedings are underway; and, the need to consider the long-term interests of the child when taking action.

Rapid Intervention. The reason for need for speed in dealing with allegations of alienation is likely obvious: the more time that an alienating parent has to sever the relationship between the child and the rejected parent, the more difficult it will be to repair the damaged relationship. Nicholas Bala, Barbara Jo Fidler, lawyer Dan Goldberg and student Claire Houston write that:[33]

> *The success of legal and mental health interventions depends on establishing, as early as possible, the reasons a child rejects a parent, and responding before parents and children become set in their attitudes and patterns of behaviour. … Bitter, protracted litigation may transform "reasonable" alignment with one parent into outright rejection of the other, and some cases of severe alienation may be effectively impossible to reverse during childhood.*

Darnall echoes this opinion in his article, "Three Types of Parental Alienators":

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[32] The same, I strongly suggest, goes for counsel.

[33] N. Bala, B.J. Fidler, D. Goldberg and C. Houston, "Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts" (2007) 33 Queen's Law Journal 79

> *The best hope for children affected by an obsessed alienator is early identification of the symptoms and prevention. After the alienation is entrenched and the children become "true believers" in the parent's cause, the children may be lost to the other parent for years to come.*

Case Management. Psychologist Matthew Sullivan and Joan Kelly argue that close case management is necessary in cases involving claims of alienation. They recommend that case management commence at the outset of the case and continue, if I understand their point correctly, after the final order has been made.[34] Fidler and Bala support this view, writing that "most experienced legal and mental health professionals emphasize the need for the court's early and vigilant involvement."

In light of the "interpersonal alignments and polarized negative views" that are common in these cases, Sullivan and Kelly see case management as playing a critical role in:

a) preserving relationships between lawyers and clients, clients and counsellors and clients and parenting assessors;

b) ensuring the continuity of parenting time between the child and the rejected parent; and,

c) enforcing orders for parenting time, counselling and assessments.

(I see two other material benefits:

d) controlling the favoured parent's efforts to delay and hinder the movement of the case toward resolution; and,

e) ensuring that applications are heard expeditiously and the case proceeds to trial with a minimum number of delays and interruptions.)

Sullivan and Kelly recommend, and I agree, that these cases should be managed by a single judge:[35]

> *This ensures continuity in decision making about early intervention, assessment, and later interventions, including treatment. As information emerges that*

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[34] M.J. Sullivan and J.B. Kelly, "Legal and Psychological Management of Cases with an Alienated Child" (2001) 39:3 Family Court Review 299

[35] See Donna Martinson's important discussion on the one-judge model in "One Case – One Specialized Judge: Why Courts Have an Obligation to Manage Alienation and Other High-Conflict Cases" (2010) 48:1 Family Court Review 180.

> *clarifies what factors are contributing to the child's alienations, the benefits of having the same judicial officer manage the case are enormous.*

Long-term Interests. Finally, the steps to take when addressing a finding of alienation must always be guided by an assessment of their probable impact on the child, measured by the best interests of the child as required by s. 37(1) of the *Family Law Act*[36] and ss. 16(8) and 17(5) of the *Divorce Act*.[37] The complex dynamics of alienation often require a balancing of short-term pain against long-term gain, resulting in the "stark dilemma" faced by Justice Preston: is harm the child is *certain* to endure in the present, such as being forced to take counselling, enter a reunification program or reside with the rejected parent, outweighed by the *possible* benefits which the course of action may produce in the future?

Whether consensus on this issue has been reached or not, the Court of Appeal, in its opinion on Justice Preston's decision, has decided that the focus of analysis must be on the child's long-term best interests:[38]

> *[27] ... We agree with counsel for the appellant that the trial judge wrongly focused on the likely difficulties of a change in custody – which the only evidence on the subject indicates will be short-term and not "devastating" – and failed to give paramountcy to [the child's] long-term interests. Instead, damage which is long-term and almost certain was preferred over what may be a risk, but a risk that seems necessary if [the child] is to have a chance to develop normally in her adolescent years. ... The obligation of the Court to make the order it determines best represents the child's interests cannot be ousted by the insistence of an intransigent parent who is "blind" to her child's interests.*

Although I am inclined to agree with the Court of Appeal, I do not envy the burden this places on trial judges who must attempt to peer into the dim and distant future and discern the probability of outcomes in deciding how to act. Here's how the Court of Appeal managed the task:

> *[28] While it is obvious that no court should gamble with a child's long-term psychological and emotional well-being, the trial judge's findings show that the status quo is so detrimental to [the child] that a change must be made in this case. Although [the child] has not been permitted to have a normal relationship with her father for two years, the expert opinion suggests she will succeed in adjusting, although the process will be difficult. ... We also note that [the child] is by all accounts a bright girl who has shown a "desire to connect with others" when she is out of her mother's control, and that the chances she will weather this change, if it is properly carried out, seem good.*

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[36] *Family Law Act*, SBC 2011, c. 25

[37] *Divorce Act*, RSC 1985, c. 3 (2nd Supp.)

[38] *A.A. v S.N.A.*, 2007 BCCA 363 (emphasis in original)

One hopes, however, that the degree of certainty trial judges have in future outcomes is somewhat greater than "the chances seem good."

1. Initial Interventions

Early Assessment. Fidler, Bala and Saini recommend the early appointment of a mental health professional to conduct an assessment. Given the difficulty in discriminating between cases in which a child's reluctance to visit a parent stems from the normal factors related to age, gender and other circumstances identified by Janet Johnston in "Children of Divorce Who Refuse Visitation,"[39] a damaged relationship with the rejected parent due to estrangement or a damaged relationship with the rejected parent due to alienation, I can see two key purposes for a speedy assessment:

a) determining the intervention best suited to the child and the circumstances, as the optimal intervention will vary depending on the child's age and temperament and whether the child's resistance to spend time with a parent is non-pathological in nature, caused by estrangement or caused by alienation; and,

b) initiating the preferred intervention as soon as possible, to minimize the damage to the parent-child relationship.

Care must be taken in selecting the mental health professional who will perform the assessment.[40] In my view, the assessor should: be a registered member of the appropriate provincial regulatory body; be recognized by his or her peers as an authority on children who resist contact with a parent after separation; and, comply with commonly accepted empirical standards for forensic psychological investigations.[41]

Counselling. The court may order that one or more of the parents and child attend counselling pursuant to s. 224(1)(b) of the *Family Law Act*. Kelly and Johnston identify a number of characteristics of the favoured parent, the rejected

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[39] *Supra*, fn 23

[40] I raise this caution as a number of the British Columbia judgments I reviewed for this paper included evidence from experts who were prepared to conclude that alienation had occurred without meeting the favoured parent or the children, an approach which struck me as somewhat peculiar; see, for example, *K.M.M. v D.R.M.*, 2014 BCSC 569, *D.S.W. v D.A.W.*, 2014 BCSC 514 and *Crerar v Crerar*, 2013 BCSC 2244.

[41] See P.M. Stahl and R.A. Simon, *Forensic Psychology Consultation in Child Custody Litigation: A Handbook for Work Product Review, Case Preparation and Expert Testimony* (Chicago, IL: American Bar Association, 2013) for an excellent review of the investigatory standards and ethical issues involved in parenting and other assessments in family law matters.

parent and the child that contribute to alienation and can be addressed through counselling.[42]

1. **Favoured parent**: Counselling may be aimed at reducing the frequency with which negative comments about the rejected parent are expressed, building awareness of unconscious and indirect expression of negative sentiments toward the rejected parent, educating about the short- and long-term consequences of alienation on children, and supporting the child's relationship with the rejected parent. Counselling may also be useful in providing a reality check to adjust the parent's distorted beliefs about the rejected parent.

2. **Rejected parent**: Counselling may be necessary to address the rejected parent's reaction to the breakdown of the parent-child relationship, including by withdrawing from or adopting a passive attitude toward the conflict with the favoured parent, counterrejecting the child and withdrawing from the parent-child relationship. Counselling may also: help to address any parenting or personality deficits that may be contributing to the alienation; support the parent through the pain associated with the breakdown of the relationship; and, provide the parent with guidelines for responding to the child's negative comments.

3. **Child**: The first objective of counselling for children will be to repair, or at least shore up, the child's relationship with the rejected parent and ease the child's resistance to visiting that parent. Counselling may also help children to address any traits, such as being anxious, fearful or passive, or having low self-esteem, that increase their vulnerability to the efforts of the favoured parent to damage their relationship with the rejected parent.

Note that counselling for alienated children will require significant support if the intervention is to be successful in the long run. Such support might include setting parameters on the content and frequency of the favoured parent's communication with the child, limiting the child's contact with the favoured parent or removing the child from the home of the favoured parent.

Fidler, Bala and Saini provide a helpful checklist for drafting orders for counselling which I have taken the liberty of adapting:

a) identify the objectives of the therapy;

b) identify the therapist, or provide a process for selecting the therapist;

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[42] For a more expansive discussion of therapeutic approaches aimed at favoured parents, rejected parents and children, see J.R. Johnston, M. Gans Walters and S. Friedlander, "Therapeutic Work with Alienated Children and Their Families" (2001) 39:3 Family Court Review 316.

c) specify the minimum duration for therapy, or the terms on which parents may withdraw and the process for selecting a new therapist;

d) precisely identify any decision-making powers to be exercised by the therapist, for example concerning the favoured parent's communication with the child or the rejected parent's parenting time, and any limits to those powers;

e) identify any educational or therapeutic programs the parents are to attend, such as a high-conflict parenting after separation program;

f) state that the professionals involved may communicate with each other as necessary, and specify that the parents are to execute such authorizations as may be necessary for that purpose;

g) state that the parents are required to cooperate with the therapy process;

h) identify any abridgments to the patient-therapist relationship, including any reporting requirements;

i) specify the consequences of non-compliance; and,

j) specify how the therapist's services will be paid for.

As a general principle, orders for interventions using the services of third parties should be as complete and specific as possible. Lacunae and imprecisions will usually result in delay and costly reappearances for clarification and direction.

Restore Contact. When parenting time between the child and the rejected parent has been interrupted, Sullivan and Kelly recommend that visits be restored as soon as possible, even if such visits must be supervised or facilitated by a third party. They propose that "there should be a presumption that parent-child contact will be continued (or initiated) if alienation is suspected." They write that:

> *When there is no access between the child and rejected parent, the child's resistance to visit often becomes more entrenched. Delays in court hearings and deferred judicial decisions contribute greatly to the problem.*

Eliminate Ambiguity. Parenting plans can often be improved at an early stage to reduce ambiguities and eliminate any areas of discretion that allow the favoured parent to obstruct the rejected parent's parenting time. Sullivan and Kelly write that:

> *Ambiguous orders with insufficient detail provide fertile ground for conflict and acting out, thereby undermining and sabotaging well-intentioned interventions. The alienated child and the aligned parent should not have discretion about whether visits occur.*

The refinement of parenting plans is a strategy commonly used to reduce tensions in high-conflict family law cases, but is especially useful when the alienation of a child is a possibility; as Fidler, Bala and Saini put it, parenting plans must be "detailed, explicit and comprehensive."

Child Protection. If one accepts the proposition that the intentional manipulation of a child in an effort to destroy the child's relationship with a parent constitutes maltreatment rising to the level of emotional abuse, it follows that cases of parental alienation must be reported to child protection authorities by those under an obligation to report, and that those authorities may elect to intervene.[43] Although the involvement of child protection in a family law dispute is rarely welcome, Fidler, Bala and Saini suggest that "when parents have limited resources, a child protection agency may ... provide counselling and support services for the children that would otherwise be unavailable."

2. Subsequent Interventions

Monitor Compliance. Fidler, Bala and Saini state that "non-compliance with court orders and separation agreements is common in high-conflict cases," particularly those involving allegations of alienation:

> *This in part reflects the fact that alienating parents often persuade themselves that non-compliance is promoting the interests or protecting the rights of their children. It also reflects the high incidence of personality disorders, and the corresponding distortion in perception, in this high-conflict population.*

Sullivan and Kelly observe that "the authority of the court ... will be weakened in the eyes of the child and the aligned parent if visits and other mandates of the court are ignored or sabotaged," and suggest that violations of court orders be addressed expeditiously, cautioning against the "variety of tactics" that may be employed to undermine orders.

Failure to enforce court orders for parenting time risks the child perceiving the parent as withdrawing from the parent-child relationship or acquiescing to the

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[43] This actually happened in *Mitchell v Mitchell*, 2015 BCSC 355. In his reasons for judgment, Justice Groves wrote that the Ministry for Child and Family Development had taken "the unusual step of apprehending the children, at least notionally, out of concern about what I would call parental alienation." The Ministry then obtained a supervision order and "worked towards ensuring that the father had contact with his children."

child's reluctance to visit, but also risks emboldening the favoured parent. Fidler, Bala and Saini write that "failure to enforce an order against alienating parents only reinforces their narcissism, false sense of power and disregard for authority."

The need to monitor compliance with orders for parenting time, and respond quickly when breaches occur, underscores the utility of case management and the benefits of having a single judge assigned to the task.

Enforce Orders. Orders for parenting time are commonly enforced by:

a) the admonishment and castigation of the breaching party by the court;

b) the provision of make-up time, now available under s. 61 of the *Family Law Act*;

c) the payment of costs thrown away, such as the cost of airfare, hotel room, movie tickets and so forth incurred in respect of an anticipated but frustrated visit with a child, likewise now available under s. 61;

d) the payment of legal costs; and,

e) the remedies available where a party is found to be in contempt of court.

The less onerous enforcement mechanisms may prove ineffective in alienation cases, especially where the favoured parent is utterly convinced of the intrinsic and immalleable virtue of his or her position. However, caution must be taken when considering genuinely burdensome enforcement processes for fear of inadvertently worsening the situation. Fidler, Bala and Saini write that:

> *... punitive judicial actions may be counterproductive to the extent that the punished alienating parent is then portrayed to the child as a "martyr," which in turn only serves to reinforce the child's negative reaction and alienation.*

Depending on the circumstances and the personality of the favoured parent, it may be better to avoid a punitive approach to the enforcement of orders for parenting time and vary them instead.[44]

Adjust Parenting Arrangements. Parenting plans may be varied on a temporary or permanent basis in an effort to control or ameliorate the effects of the

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[44] Fidler, Bala and Saini note that some researchers are of the view that "while judges should 'encourage' custodial parents to support their children's relationships with non-abusive, noncustodial parents, coercive judicial action to enforce contact between a child and parent is not appropriate."

behaviour of the favoured parent on the child, or to support the child's relationship with the rejected parent. Adjustments that are made on a temporary basis may be in place for a fixed period of time, or be subject to review once a fixed period of time has expired or upon the occurrence of a specified event. Parenting plans are most often varied for curative reasons after settlement or trial, but may also be varied on an interim basis prior to trial.

1. **Reduce contact with favoured parent**: The parenting time of a favoured parent may be reduced, as may the extent of the child's communication with the favoured parent when with the rejected parent. The reduction of the favoured parent's time with the child may be used to support counselling efforts, reduce the child's exposure to alienating behaviours and send a signal to the parent and child that the child's relationship with the rejected parent is important and will be protected by the court.

   Restrictions on the favoured parent's communication with the child may be of critical importance if the favoured parent is attempting to disrupt or undermine the rejected parent's time with the child through frequent phone calls, texts and emails. Requiring all communication to proceed by text or email can be used to monitor the content of communication between the child and the favoured parent and establish a helpful record.

2. **Expand contact with rejected parent**: Increasing the amount of communication and parenting time the rejected parent has with the child can help to restore the parent-child relationship and reduce the child's exposure to the favoured parent's negative views of the rejected parent.

   Equalizing the time the child spends with each parent, which will not always be warranted, sends a strong message to the favoured parent that the rejected parent has equal standing in the child's life, that he or she has lost dominance in the child's life, and may engender a useful fear that his or her parenting time may further diminish without the demonstration of good behaviour. It may also help to undermine claims that the rejected parent is a threat to the child, incompetent or unworthy.

3. **Decision-making**: Making both parents responsible for decision-making in matters concerning the child can be useful where the favoured parent has used his or her authority to: make appointments, enroll the child in activities or plan outings that conflict with the parenting time of the rejected parent; withhold or block information from the child's school and healthcare providers from the rejected parent; or, restrict the rejected parent's attendance at school and other events. In addition to improving the continuity of the child's time with the rejected parent, giving the

rejected parent a role in decision-making can be a tangible demonstration of the rejected parent's involvement in the child's life.

Options for including the rejected parent in decision-making include: making both parents responsible, with neither having the final say in the event of disagreement; making both responsible, and giving the final say to the rejected parent; making both responsible, with the favoured parent having the final say in some matters and the rejected parent the final say in others. It is also possible to switch responsibility for decision-making altogether, such that the favoured parent has no further involvement in decisions concerning the child.

4. **Primary residence with rejected parent**: The child may be placed in the primary care of the rejected parent on a temporary rather than permanent basis. Such orders are usually made to give the child the chance to re-acclimate to life with the rejected parent, reduce the child's demonization of the parent, reduce the child's exposure to the influence of the favoured parent and attempt to rebuild the parent-child relationship.

   Note that a temporary transfer of primary residence to the rejected parent may be necessary to support counselling programs and services.

5. **Suspend contact with favoured parent**: Where the rejected parent has the child's primary residence, it may be necessary to terminate all contact between the favoured parent and the child if the parent cannot be brought to refrain from overtly, covertly, intentionally or unconsciously attempting to impart negative impressions of the rejected parent to the child. The suspension of the favoured parent's time with the child may: improve the success of counselling efforts; give the child's relationship with the rejected parent time to heal by removing the child from the poisoning influence of the favoured parent; and, signal to the child the court's strong belief that the rejected parent is a good, competent parent.

6. **Supervision of parenting time**: Where the rejected parent has the child's primary residence, the parenting time of the favoured parent may be supervised by a neutral third-party. Supervision is primarily useful for the strong message its sends to the favoured parent, however supervision cannot prevent nonverbal alienating behaviours and may backfire if the child perceives the supervision requirement to be an unjust hardship for the favoured parent.

   Fidler, Bala and Saini suggest that supervised parenting time may only be appropriate where there are "reasonable fears" for the child's safety or, if there are no fears, when it is used for short transition periods.

Parenting Coordinator. Parenting coordinators can be appointed to manage the implementation of parenting plans, oversee the family's participation in counselling services or programs and manage contact issues as they arise.[45] In alienation cases, it is particularly important to delineate the scope of the parenting coordinator's authority in the appointing order:

a) identify the parenting coordinator, or the means by which the parenting coordinator will be chosen;

b) specify the duration of the parenting coordinator's appointment, the terms on which parents or the parenting coordinator may withdraw, and the process for selecting a new parenting coordinator;

c) state that the parenting coordination process is transparent and not subject to lawyer-client and patient-therapist confidentiality;

d) identify any counselling processes or therapeutic programs the parents are to attend;

e) state that the parenting coordinator may communicate with the professionals involved, the children's medical and mental health providers, the children's school and other individuals as needed, and specify that the parents are to execute such authorizations as may be necessary for that purpose;

f) state that the parenting coordinator will have the power to make binding determinations on matters related to the implementation of the parenting plan;

g) identify any special decision-making powers the parenting coordinator may exercise, for example concerning the temporary suspension of parenting time or contact, longer term adjustments of parenting time, or the parents' communication with the child and with each other;

h) identify any reporting requirements;

i) specify the consequences of non-compliance; and,

j) specify how the parenting coordinator's services will be paid for.

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[45] Fidler, Bala and Saini also note that where multiple professionals are engaged with a family, parenting coordinators may be especially useful in "ensuring team consistency and continuity to avoid the splitting or pitting of one professional against the other," as the polarization of helping professionals is fairly common in alienation cases.

Orders appointing parenting coordinators are especially likely to cause delays and further court appearances to correct ambiguities and omissions.

As a result of parenting coordinators' power to make determinations that are binding on the parties, parenting coordinators should only be appointed to assist with the implementation of *final* parenting plans, reached through settlement, trial or the variation of a settlement or trial order, to avoid conflict with the court. Ideally, parenting coordinators assume a hybrid role of case manager, mediator, judge and therapist when appointed, relieving the court of the obligation to entertain further disputes arising from the family except in an enforcement capacity.

Care must be given to the selection of parenting coordinator, in particular when choosing between a parenting coordinator with a background in mental health or a lawyer parenting coordinator. Although the psychosocial factors at play in alienation cases are complex and interwoven, suggesting the use of a mental health professional, these cases involve an enormous amount of conflict, some of which will be directed at the parenting coordinator, suggesting the use of a lawyer. In some cases, the choice of mental health professional versus lawyer as parenting coordinator will be obvious. Where the choice is less clear, I see two options.

1. Retain a parenting coordinator, along with an individual from the other profession as consultant to the parenting coordinator, whether a lawyer is being hired as parenting coordinator with a mental health professional as consultant or vice versa. The parenting coordinator remains responsible for the day-to-day management of the family but can call upon the consultant to provide insight, advice and opinions as needed.

2. Separately retain a lawyer as parenting coordinator and a mental health professional as therapeutic lead. The parenting coordinator and therapeutic lead will work in tandem to jointly manage the family, with the expertise of each informing the other, while preserving the different purposes and objectives of their two roles.

Security. The court may require favoured parents to pay a sum of money into court as security for their future good behaviour. The amount of money payable must be an amount that the parent would be loathe to lose, but cannot be so high that the payment impacts the parent's ability to provide for the child.

Costs. Costs are rarely awarded in family law proceedings, despite the rule in *Gold v Gold* that costs should follow the event in family law matters as they do in

civil matters.[46] When costs are awarded, the award is often made to signal the court's disapprobation of the conduct of a party in the litigation, and orders for costs and special costs are somewhat more commonly awarded in alienation cases than they are in other family law disputes. Fidler, Bala and Saini write that

> *Courts will not only award legal fees to alienated parents who have had to take legal action to enforce orders that give them a relationship with their children, but they may also award legal fees to a custodial parent who has been subject to unfounded claims of parental alienation.*

Although the court will generally not award costs where the parent is impecunious or the payment would impact the parent's ability to provide for the child, be wary that interventions which can be characterized as punitive give the favoured parent the opportunity to portray the intervention as another example of the rejected parent's unrelenting depravity.

3. Interventions of Last Resort

Contempt. Favoured parents, especially alienating parents falling within Darnall's "obsessed" category who are likely to continuously breach or frustrate orders for parenting time, often in the belief that they must breach or frustrate the order to protect the child, may be addressed through the court's power to "punish" for contempt. The parent seeking a finding of contempt must show that the other parent has willfully contravened a court order;[47] as contempt hearings are quasi-criminal in nature, the applicant must prove his or her allegations beyond a reasonable doubt.[48]

When a parent is found in contempt, the primary object of sentencing is not to punish the contemnor but to achieve his or her compliance with the orders and directions of the court.[49] Courts generally punish for compliance through orders for fines and committal although other orders, such as for community service, may also be made. However, because of the potentially serious consequences findings of contempt can bring, parents are often given the opportunity to purge their contempt by compliance with the breached order or sentencing is deferred. In the 2008 case of *M.M. v N.M.*, for example, the court found the favoured parent to be in contempt of a number of orders yet treated the finding as a warning, with sentencing to be considered in the event of further breaches:[50]

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[46] *Gold v Gold* (1993), 49 RFL (3d) 56 (BCCA)
[47] *G.S. v L.S.*, 2013 BCSC 1725
[48] *Göyert v Goyert*, 2008 BCCA 196
[49] *Larkin v Glase*, 2009 BCCA 321
[50] *M.P. v N.M.*, 2008 BCSC 1501

> *[28] While I have found the defendant to be in contempt of court in multiple instances, I am adjourning the matter of punishment. I intend to give the defendant one more chance to abide by the orders of this court. If there is any breach of the orders that I make, the plaintiff is at liberty to ask the court that the defendant be found in contempt. If this occurs, and if the defendant is found to be in contempt of any of the orders that I make today, the defendant may be subject to fine, imprisonment, or both. If those circumstances arise, I will address the matter of penalty in regard to the contempt findings that I have made here today.*

Fidler, Bala and Saini raise a further caution against contempt proceedings that goes to the core of the alienating behaviours sentences for contempt are intended to address:

> *... a sanction for contempt may not help to secure compliance with the order, especially in the long term. When alienating parents are sent to jail, they will inevitably tell, or it will be evident to the children, that they are sacrificing their liberty as a result of their efforts to protect what they perceive to be the rights or interests of their children not to see the rejected parent; this "martyr-like" response is unlikely to help the child reestablish a relationship with the rejected parent.*

Despite this drawback, a sentence of imprisonment may nonetheless improve the child's relationship with the rejected parent by severing his or her contact with the favoured parent for a period of time, eliminating the possibility of continued efforts to alienate the child and improving the overall counselling environment.

Peace Officer Enforcement. Peace officer enforcement clauses were commonly used under the *Family Relations Act* as means of enforcing – or threatening to enforce – orders for access.[51] Although peace officers rarely consider themselves bound to actually carry out the instructions of the court,[52] they were theoretically empowered to apprehend and deliver a child to the person entitled to custody.

In cases of alienation, peace officer enforcement clauses should be used with caution, for two reasons. First, while the mere presence of the clause may have a salutary effect on the attitude of the favoured parent and improve the probability that an order for parenting time will be complied with, if the clause is likely to be acted upon consideration must be given to the impression apprehension would leave on the alienated child. Second, in the event the attending officers choose not to enforce the order for parenting arrangements, the favoured parent may be inadvertently empowered and reinforced in the belief that his or her views and beliefs are of primary importance.

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[51] *Family Relations Act*, RSBC 1996, c. 128, s. 36

[52] J.-P. Boyd, "Enforcing Orders for Access: The Views of the Family Law Bar" (2013) 32:2 Canadian Family Law Quarterly 173

Reverse Parenting Arrangements. Transferring the child's residence from the home of the favoured parent to the home of the rejected parent, often with the transfer of sole custody to the rejected parent as well, is the nuclear bomb of alienation remedies. It is a tool of last resort because of the trauma the child will likely suffer from being taken from the home of the loved parent to the home of the hated parent against the child's will. It is also only *one* of the available tools for addressing parental alienation, despite the frequency with which the threat of reversing parenting arrangements is mentioned in the case authorities.

A number of factors must be taken into account before reversing the child's parenting arrangements:

a) the change must be likely to result in the restoration of the child's relationship with the rejected parent (if the child's alienation is too deeply entrenched, the change may not repair the parent-child relationship);

b) the short-term distress of the change must be outweighed by the long-term benefit the change will yield for the child;

c) the rejected parent must have the parenting capacity and emotional health to provide a positive, nurturing environment for the child (arguably, the parenting offered by the rejected parent should be at least as good, if not better, than the parenting offered by the favoured parent); and,

d) the vigour with which the child will resist the change in residence, and the likelihood that the child will engage in adverse behaviours such as running away, self-harm and substance abuse.

The "stark dilemma" described by Justice Preston really boils down to the second of these factors and the fruits of the fourth. As Fidler, Bala and Saini put it,

> *... which risk is greater: separation from an unhealthy or enmeshed relationship or remaining in that relationship? ... is custody reversal likely to cause more harm than good; that is, do the short- or long-term benefits of placing the child with the once loved, now rejected parent outweigh the risks ... of temporarily separating the child from the alienating parent?*

Unfortunately, each family must be considered in light of its own unique circumstances and there is little good research from which generalizable conclusions may be drawn. Fidler and Bala summarize the research thusly, citations omitted:

> *The negative short-term and long-term effects of alienation, including intrusive parenting have been well documented. While there is general recognition that a*

> *reversal of custody may be warranted in severe cases, debate continues with respect to identifying which cases are in fact severe enough.*

Indeed, some writers, including Jaffe, Ashbourne and Mamo, are of the view that the separation of a child from a primary attachment figure, even when the attachment is pathological, places the child at risk of worse consequences than those which result from losing contact with a rejected parent.

Nevertheless, the court will make orders reversing children's parenting arrangements when moved to do so. When this happens, Bala, Fidler, Goldberg and Houston, in their article, "Alienated Children and Parental Separation," recommend that the implementation of the order should be monitored by a court-appointed mental health professional "with on-going judicial supervision":

> *It may be appropriate to suspend or supervise contact between a severely alienating parent and child, for a period of time, if a reversal of custody is to be effective. This is because the alienating parent is very likely to undermine the development of a positive relationship with the other parent.*

4. Taking No Further Action

Do Nothing. Finally, there is the choice of doing nothing, or, as Warshak put it, the choice of accepting the child's refusal of contact with the rejected parent. This may be the only rational alternative remaining if:

a) the child is close to the age of majority and is more likely to vote with his or her feet that remain in the home of the rejected parent;

b) the child is so deeply enmeshed in the perspective of the favoured parent that no intervention is likely to assist;

c) the trauma to the child of any other approach, including being placed in the home of the rejected parent, exceeds the benefits that would be realized from the restoration of the parent-child relationship;

d) the severance of the parent-child relationship is partly due to a justified estrangement resulting from the rejected parent's past behaviour, parenting and personality deficits, or both;

e) the parental conflict likely to result from continuing the litigation is not in the child's best interests; or,

f) the rejected parent is emotionally or financially exhausted and can no longer carry on the struggle against the favoured parent.

The impact on the rejected parent of deciding to do nothing, whether the decision was his or her own or imposed by a judge, is staggering. Still, there are circumstances in which this approach is the most rational course of action, especially if one accepts - as the legislation and case law require - that the interests of the child is the only yardstick that matters.

There are two uncomfortable truths of parental alienation cases. First, the child's feelings toward the rejected parent are the child's feelings, whether those feelings were engendered by the unconscionable malevolent actions of a parent or arose as a result of the child's reasonable response to historic stimuli. Second, the moral blameworthiness of a parent's conduct is: always subordinate to the child's wellbeing; and, irrelevant to the determination of the course of action that is in the child's long-term best interests. Although our native sense of fairness rails against the injustice of allowing the hateful actions of a parent to prevail without retribution, doing nothing may nonetheless be the course of action most closely serving the best interests of the child.

Spontaneous Reconciliation. Making the decision to take no further legal steps should not foreclose all hope. Fidler, Bala and Saini note that "in some cases, children do resume a relationship with a rejected noncustodial parent, though sometimes on in adulthood." Researchers following cases into alienated children's adulthood, including Baker, Darnall and Rand, have noticed various types of what they call "spontaneous reconciliation." Fidler, Bala and Saini say that:

> *Maturation, independence, emancipation, and life cycle trigger events have been identified by these writers and clinicians as precipitants for reconciliation of parent-child relationships, sometimes years after the conclusion of court proceedings.*

However, Fidler, Bala and Saini also observe that the existing data on spontaneous reconciliation later in life are "preliminary and mixed," and far from conclusive.

In order to preserve the possibility for future reconciliation, there are simple steps that parents making the choice to down tools can take to ensure that the children know that their doors remain open and have a means to initiate contact. Whether they receive them, read them or neither, rejected parents should regularly send the children cards on important holidays and the children's birthdays, wishing them well and including their current contact information. Parents should be careful to avoid:

a) overwhelming the children with cards, two or three a year will likely do;

b) using passive-aggressive language and saying anything which might trigger feelings of guilt in the children;

c) discussing the events of the past, particularly those relating to the court proceedings and conflict with the favoured parent;

d) speaking negatively of the children or of the favoured parent;

e) writing at too much length; and,

f) lachrymose expressions of love, loss, regret and grief.

The content of these cards should be brief and to the point, factual, and as unemotional as possible and reasonable.

Rejected parents might also consider setting up a special Facebook account or website that the children can access as they wish, to provide updates on events in their lives and provide the children with another avenue of contact. Parents must assume that the favoured parent will have access to the material and write accordingly. Parents should adopt a similarly careful approach to the content of these materials and avoid using passive-aggressive language, saying anything which might trigger feelings of guilt, discussing the events of the past, speaking negatively of the children or of the favoured parent, and misty-eyed expressions of emotion.

B. Legal Options Available and Exercised in British Columbia

In British Columbia, the legal responses to allegations of alienation are primarily governed by the provincial *Family Law Act*, the federal *Divorce Act*, the rules of court and the Supreme Court's inherent and *parens patriae* jurisdiction. The new *Family Law Act* provides a wide range of tools, much improved over the former *Family Relations Act*, that can be applied to deal with such allegations, most importantly a range of enforcement mechanisms that range from make-up time to fines to imprisonment and can be exercised by the Provincial Court as well as the Supreme Court.

1. Options Available Under the *Family Law Act*

Expert Opinion. Expert evidence on the potential alienation of a child may be obtained through a combination of orders available under the *Family Law Act*, and under the Supreme Court Family Rules as I will discuss shortly.[53]

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[53] Supreme Court Family Rules, BC Reg. 169/2009

1. Under s. 211(1) of the *Family Law Act*, the court may order a person to assess the needs of a child, the views of a child and "the ability and willingness of a party to a family law dispute to satisfy the needs of a child," and, under s.-s. (5), allocate the costs of the assessment among the parties.[54] Questions about the "needs of a child" and the "ability and willingness of a party" certainly encompass concerns about alienation sufficient to direct an inquiry into the issue.

Decision-Making Responsibility. Cases of alienation may be managed by adjusting the distribution of decision-making authority between parents. Under s. 40(1), only guardians have parental responsibilities.

2. Where both parents are guardians, the court may, under s. 40(3), allocate some or all parental responsibilities to both guardians or to one guardian, failing which the guardians are presumed to share all parental responsibilities.[55]

3. Under s. 45(1), the court may make orders about how shared parental responsibilities are exercised, allowing the court to assign final decision-making authority to a guardian in the event of disagreement, as was the case with the Joyce model of joint guardianship commonly used under the *Family Relations Act*.[56] A guardian who disagrees with a decision may apply to court for directions on the matter under s. 49.

4. Note that under s. 218, the court may include in any order "any terms or conditions the court considers appropriate in the circumstances."

Parenting Time. The court may also make orders distributing parenting time between parents, and, in the case of parents who are not guardians, contact. Pursuant to s. 42(2), during parenting time a guardian has "the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child." Persons with contact have no similar rights.

5. The court may allocate parenting time equally or unequally between guardians under s. 45(1), and order that the transfer of the child between guardians or a guardian's parenting time be supervised under s. 45(3).

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[54] Note that persons preparing such assessments are subject to special requirements as to the form and content of their reports and obligations to the court at SCFR 13-1, 13-2 and 13-6.

[55] Pursuant to Parts 3 and 4 of the *Family Law Act*, a child may have more than two parents and more than two guardians.

[56] I have proposed drafts of the Horn and Joyce models of guardianship, adapted for the *Family Law Act* and the *Divorce Act*, in a post to the Courthouse Libraries BC blog, available at www.courthouselibrary.ca/training/stream/jpboyd/the-stream-jp-boyd-guest-blogger/2014/08/01/jp-boyd-adapting-joyce-and-horn-models-for-divorce-act-and-family-relations-act.

6. Likewise, the court may make an order that someone other than a guardian have contact with a child under s. 59(1), in whatever amount of time it sees fits, and may order that the transfer of the child between the guardian and the person or the person's contact be supervised under s. 59(3).

7. Where a parent should not have even day-to-day care and control of the children during parenting time or it becomes necessary to send a strong message to the parent, the court may remove a person as guardian under s. 39(2), if the order is made close to the time of separation, or under s. 51(1)(b) if it is not.

Enforcement. Parenting time or contact provided in an order or agreement may be enforced in a variety of ways.[57]

8. Under ss. 44(3) and 58(3), agreements for parenting time can be filed in court and upon filing are enforceable in the same manner as orders are enforced.[58]

9. Where parenting time or contact provided in an order or agreement has been wrongfully withheld, under s. 61(2) the aggrieved party may apply for:

   a. make-up time;[59]

   b. reimbursement of costs thrown away;

   c. an order that the transfer of the child be supervised;

   d. an order that the withholding guardian post security; or,

   e. an order that the withholding guardian pay up to $5,000 to the applicant or as a fine.

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[57] Note that under s. 195 of the *Family Law Act*, orders of the Supreme Court respecting parenting arrangements or contact may be enforced by the Provincial Court.

[58] The filing of an agreement allows the agreement to be enforced *as if* it were a court order but does not *make* the agreement a court order. See *Cominetti v Cominetti*, (2 July 1993) New Westminster, A910693 (BCSC), *Loos v Loos*, BCSC 1413 and *B.M.D. v C.N.D.*, 2010 BCSC 1785 on the point.

[59] Prudent counsel should heed the caution of Justice Rogers in *K.L.K. v E.J.G.K.*, 2013 BCSC 2030 that "missed parenting time should be assessed on a qualitative rather than a quantitative basis" and "access days should not be totted up or traded back and forth like poker chips."

However, such applications must be made within 12 months of the withholding and may be defended under s. 62(1) on the basis that the withholding was not wrongful.

10. In the event that enforcement under s. 61 bears no fruit, application may be made under s. 231 for:

    a. the imprisonment of the withholding guardian for up to 30 days;[60] and,

    b. the apprehension and delivery of the child to the aggrieved party by a peace officer.

    Note that the court must be satisfied that the party has failed to comply with an order and that no other order will secure the party's compliance before acting under this section.[61]

Protection Orders. Where family violence is an issue, certain protection orders are available which may address some of the issues that arise when alienation is a concern.

11. Under s. 183(3), the court may make an order restraining a party from communicating with another person or attending at places the person frequents, or an order restricting the party's manner and means of communication with a person.

    Note that protection orders may only be enforced under s. 127 of the *Criminal Code*,[62] and not by any means under the *Family Law Act*.

Conduct Orders. A number of conduct orders may also be useful, providing the circumstances of the case satisfy the threshold criteria at s. 222 that the conduct order would facilitate settlement, manage behaviours which might frustrate the resolution of the case, prevent misuse of the court's process or "facilitate arrangements" pending the resolution of the case.

12. Under s. 223(1), the court may strike all or part of a claim or application, seize itself of further applications or prohibit a party from bringing further applications without leave.

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[60] See the decision of Judge Bond in *J.R.B. v J.H.F.*, 2015 BCPC 70 for an outline of the factors the court should consider in determining whether to jail someone pursuant to s. 231.
[61] Among other things, this means that peace officer enforcement orders *cannot* be made on an anticipatory basis; they can only be made after an order has been breached and once the court has been persuaded that no other order will secure the party's compliance.
[62] *Criminal Code*, RSC 1985, c. C-46

13. Under s. 224, the court may order that one or more parties or a child "attend counselling, specified services or programs," and allocate the cost among the parties. Reunification programs, such as the Family Forward program offered by Alyson Jones & Associates in West Vancouver, would certainly seem to qualify as a "specified service or program."[63]

14. Pursuant to s. 225, the court can make orders restricting or imposing conditions on communication between the parties, including orders as to the timing and manner of communication.

15. Under s. 227(1), the court can require a person to give security to "do or not do anything" in relation to one of the factors set out at s. 222.

Prohibitory Orders. Where the conduct of a party, usually the favoured parent, has become pestilential for the reasons set out at s. 221(1), the court may prohibit the party from "making further applications or continuing a proceeding" without leave.

16. Pursuant to s. 221(2), the court may direct that a prohibitory order remain in effect for a fixed length of time or until the restrained party has complied with an order, and may impose terms and conditions on the granting of leave.

17. Under s. 221(2), the court may also make order:

    a. for the reimbursement of costs thrown away; or,

    b. requiring the restrained party to pay up to $5,000 to the aggrieved party or as a fine.

Children's Counsel. Although there is some debate over the wisdom and efficacy of appointing counsel for alienated children,[64] such appointments may nonetheless be made pursuant to s. 203 where the appointment is necessary to protect the child's interests and "the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child."

2. Options Available Under the *Divorce Act*

The *Divorce Act* is bereft of enforcement mechanisms, the federal government having prudently chosen to leave the provinces to their own devices in this regard. However, there is some authority to the effect that where corollary relief

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[63] www.alysonjones.ca/services/family-forward-reunification-therapy/
[64] See Bala, Fidler, Goldberg and Houston.

is sought under both the federal legislation and the provincial, the final order can only be made under the *Divorce Act*,[65] and where alienation has arisen following trial, orders under the *Divorce Act* can only be varied by further orders under the *Divorce Act*.

1. Under s. 16(6), the court may impose such "terms, conditions or restrictions" as it thinks fit on orders for custody and orders for access. See s. 17(3) with respect to variation applications.

2. Although we are thoroughly acclimated to the idea that parties' conduct during their relationship is not relevant in family law proceedings, s. 16(9) allows the court to consider past conduct that "is relevant to the ability of that person to act as a parent of a child." Alienating behaviours would seem to be highly relevant to determinations of parental capacity. See also s. 17(6) with respect to variation applications.

Counsel should bear in mind that the "maximum contact" principle enunciated at ss. 16(10) and 17(9) is not an absolute. The parenting time to be extended to a parent is that which is "consistent with the best interests of the child."

3. Options Available Under the Rules of Court and Elsewhere

Provincial Court. The Provincial Court Family Rules are, with the greatest of respect, of limited utility in addressing situations of alienation independent of the *Family Law Act*.[66] I note, however, that there appears to be no limit to the number of Family Case Conferences which can be set under PCFR 7, and that at these conferences, the court may mediate an issue in dispute, set a date for a further family case conference, give a non-binding opinion, make any order requested in an application or notice of motion, and "make any other order or give any direction that the judge considers appropriate." Family case conferences may provide an excellent vehicle for the sort of hands-on case management recommended by Sullivan and Kelly and Fidler and Bala.

Although the Provincial Court cannot punish for contempt except contempt *in facie*, all of the enforcement powers provided by the *Family Law Act* are available to it, including the power to make orders for imprisonment, the payment of fines and the payment of costs thrown away.

Supreme Court. The Supreme Court Family Rules, on the other hand, contain a number of potentially useful processes and procedures.

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[65] *Yu v Jordan*, 2012 BCCS 367

[66] Provincial Court (Family) Rules, BC Reg. 417/98

1. Judicial case conferences are provided for in SCFR 7-1, and a party may request a judicial case conference at any time in a proceeding, "whether or not one or more judicial case conferences have already been held." Under SCFR 7-1(15), the court may:

   a. mediate an issue in dispute;

   b. set a date for a further judicial case conference;

   c. give a non-binding opinion; and,

   d. make "any procedural order or give any direction" that the court believes will further the objects of the rules, set out in SCFR 1-3.

   The court may also seize itself of all applications in the proceeding.

2. Under SCFR 9-5, the court may make an order that a person submit to a psychiatric examination "if the physical or mental condition of a person is in issue."

3. The court's general injunctive powers are set out at SCFR 12-4. A party may apply for a pre-trial injunction whether or not pled, and for a post-trial injunction to prevent the continuation of a "wrongful act" established in the judgment.

4. The court may appoint its own expert at any stage of the proceeding pursuant to SCFR 13-5, specify the questions the expert is to address and allocate the costs of the expert's services among the parties.

5. The court's powers to punish for contempt are partially codified by SCFR 21-7. In addition to the court's powers to jail or impose a fine and its inherent jurisdiction to impose other remedies as appropriate, the court may require a contemnor to post security for his or her good behaviour.

6. The court may award costs and special costs against a party under SCFR 16-1. Costs may be awarded for all or part of a proceeding, and in respect of anything that "is done or omitted improperly or unnecessarily." The court may order that a party post security for costs under SCFR 22-1(6).

Other Legislation. Under s. 18 of the *Supreme Court Act*, the court may prohibit a person from commencing proceedings without leave of the court, where that person has "habitually, persistently and without reasonable grounds, instituted

vexatious legal proceedings in the Supreme Court or in the Provincial Court,"[67] a remedy similar to that available under s. 211(1) of the *Family Law Act*, albeit one likely more difficult to obtain.[68]

Injunctions are available under s. 39(1) of the *Law and Equity Act* as well as SCFR 12-4, and may be made "in all cases in which it appears to the court to be just or convenient that the order should be made."[69] Injunctions may be granted "unconditionally or on terms and conditions the court thinks just."

Although proceedings under the *Offence Act* are unavailable as a result of s. 232 of the *Family Law Act*,[70] s. 127 of the *Criminal Code* makes the breach of a court order, other than an order for the payment of money, a hybrid offence. In theory breach of any order made under the *Family Law Act* or the *Divorce Act* could be the subject of criminal charges, however I rather think that Crown counsel would decline to use the criminal courts as a vehicle for the enforcement of civil entitlements, particularly when specific remedies are provided for that purpose in the civil courts.[71]

4. Options Exercised in British Columbia

Allegations of alienation were substantiated in 27 of the 115 British Columbia decisions I reviewed, including cases in which the children were found to be both alienated *and* estranged from the rejected parent, and the court found there to be a risk of alienation in a further six cases. The following table lists the orders made in judgments yielding final orders (19 cases) or varying final orders (9 cases) in these circumstances.

Orders Made in British Columbia Cases in which Alienation, Alienation and Estrangement or Risk of Alienation Have Been Established

	Final Orders	Variation of Final Orders
Primary Residence		
Primary residence to favoured parent	5	1
Primary residence to rejected parent	1	4
Guardianship		
Joint guardianship	8	5
Sole guardianship to favoured parent	3	
Sole guardianship to rejected parent	2	

[67] *Supreme Court Act*, RSBC 1996, c. 443
[68] *S. v S.*, (1998) 43 RFL (4th) 373 (BCCA), *The Law Society of B.C. v Dempsey*, 2005 BCSC 1277
[69] *Law and Equity Act*, RSBC 1996, c. 253
[70] *Offence Act*, RSBC 1996, c. 338
[71] I suspect that this line of thinking may explain why s. 188 of the *Family Law Act* provides that protection orders may not be enforced by any means under the act or under the *Offence Act*.

Orders Made in British Columbia Cases in which Alienation, Alienation and Estrangement or Risk of Alienation Have Been Established

	Final Orders	Variation of Final Orders
Parental Responsibilities		
Shared parental responsibilities without final say	1	
Shared parental responsibilities with final say to favoured parent	2	
Shared parental responsibilities with final say to rejected parent	1	
All parental responsibilities to favoured parent		
All parental responsibilities to rejected parent	3	1
Custody		
Joint custody	2	2
Sole custody to favoured parent	6	
Sole custody to rejected parent	6	2
Parenting Time		
Equal parenting time	3	
Parenting time to favoured parent	1	5
Parenting time to rejected parent	3	3
Parenting time to favoured parent at discretion of counsellor		
Parenting time to rejected parent at discretion of counsellor	3	
Supervised time to favoured parent at discretion of counsellor	2	
Supervised time to rejected parent at discretion of counsellor		
Counselling		
Counselling for family	3	
Counselling for favoured parent	2	
Counselling for favoured parent and children	2	
Counselling for rejected parent		
Counselling for rejected parent and children	1	
Reunification		
Participation in reunification counselling	2	
Participation in reunification program		2
Protection Orders		
Against favoured parent restricting communication with children	2	
Against rejected parent restricting communication with children		
Against favoured parent restricting attendance at school or home	2	
Against rejected parent restricting attendance at school or home		
Conduct Orders		
Against both restricting communication with children	5	1
Against favoured parent restricting communication with children	2	
Against rejected parent restricting communication with children	1	
Against both restricting communication with each other	4	2
Against favoured parent restricting communication with rejected parent	1	
Against rejected parent restricting communication with favoured parent		
Against favoured parent restricting consumption of intoxicants	1	
Against rejected parent restricting consumption of intoxicants	1	

Orders Made in British Columbia Cases in which Alienation, Alienation and Estrangement or Risk of Alienation Have Been Established

	Final Orders	Variation of Final Orders
Financial Penalties		
Favoured parent to post security for compliance	1	1
Rejected parent to post security for compliance		
Costs to favoured parent	1	
Costs to rejected parent	2	3
Miscellaneous Orders		
Favoured parent held in contempt of court	2	
Rejected parent held in contempt of court		
Appointment of parenting coordinator	4	2
Peace officer enforcement	2	2
Judge seized of matter	4	3

These cases demonstrate a significant differential in the approach taken to the making of final orders and to their variation where allegations of alienation have been established. It may be that final orders reflect an optimism for the future whereas the orders made upon their variation reflect a cynicism engendered by failure:

a) the variation orders made in the cases I reviewed are far more limited in scope and creativity than the final orders;

b) no variation orders included orders for the counselling of one or more of the parents or the children;

c) families were required to participate in reunification *counselling* in two final orders but required to participate in a reunification *program* in two variation orders; and,

d) rejected parents were more likely to be awarded the primary residence of their children in variation orders than in final orders.

Curiously, explicitly punitive orders, such as orders for costs, security and peace officer enforcement, were infrequently made and were not significantly more commonly made at the hearing of variation applications than at trial, and the only findings of contempt were made at trial.

Also curious is the distribution between orders made and orders not made. The bulk of final and variation orders made in the 28 cases digested in the table above concerned children's primary residence and the allocation of parenting time and responsibility for decision-making (75 orders):

a) orders for counselling were only made eight times, 12 times if orders for attendance at reunification counselling and programs are included;

b) orders restricting parents' communication with the children were made nine times;

c) the court seized itself of the case at hand only seven times;

d) parenting coordinators were appointed six times;

e) costs orders were made six times; and,

f) orders for security for costs were made just twice.

The relative newness of the *Family Law Act*, which didn't come fully into force until 18 March 2013, may explain both the scarcity of some of these interventions and the court's preponderant reliance on more traditional tools. The remedies available under the former *Family Relations Act* were far more limited than the panoply provided by the *Family Law Act*, and important tools such as costs and contempt were unavailable to the Provincial Court. It may be the case that the court will adopt a more inventive approach to alienation cases as bench and bar become increasingly familiar with the *Family Law Act* and the extraordinary range of remedies it offers.

C. Therapeutic Options

Parental alienation is a psychosocial problem that, like all such problems, cannot be "cured" by court order. Barring those cases in which a rejected parent is prepared to walk away or the negative views of an older child are immovably entrenched, something beyond orders about primary residence and parenting time is necessary. The present options appear to be limited to some form of therapeutic intervention, and range from the usual sort of one-on-one counselling most people have experienced to full-blown targeted residential reunification programs.

Therapeutic interventions are most likely to be successful when all family members are involved and when they are supported by a legal framework that requires the involvement of the favoured parent and minimizes the possibility of his or her interference with the process; Sullivan and Kelly write that "therapeutic interventions must be backed by court authority."

1. Counselling

The complexity of alienation cases, the different therapeutic objectives appropriate for favoured parents, rejected parents and children, and the high potential for patient-therapist alignment suggest the need for a team approach. In "Therapeutic Work with Alienated Children and Their Families," Janet Johnston and psychologists Marjorie Gans Walters and Steven Friedlander observe that:[72]

> *Alienated children need a family-focused intervention that includes all parties – the child, siblings, both the aligned and rejected parents, and other family members (e.g. stepparents, grandparents) – determined to be contributing to the dynamics.*

Fidler and Bala warn, in fact, that "individual therapy for the child ... without the inclusion of other family members is likely to deter the effectiveness of the intervention and may further entrench the alienation."

Unlike other interventions, the primary object of interventions based on a family systems perspective is not the reunification of the child with the rejected parent, although reunification may happen, but to:

> *... transform the child's distorted, rigidly held ... views of one parent as "all bad" and the other as "all good" into more realistic and measured ones, rooted in the child's actual experience of both parents. ... the goal is to restore appropriate coparental and parent-child roles within the family.*

This approach recognizes that the damaged parent-child relationship is not a monodimensional problem with a single cause, but a complex problem with multiple contributing environmental and psychological factors that are influenced by the child's distorted perceptions and recollections of each parent. The cause of the damage to the parent-child relationship, in other words, is not wholly reducible to the favoured parent's alienating behaviours.

Further, making restoration of the damaged parent-child relationship the primary object of counselling interventions risks placing the child's best interests in the back seat. Bala, Fidler, Goldberg and Houston argue that "the goal of intervention should be the promotion of a child's wellbeing, and therefore best interests, and not simply to advance the 'rights' of a rejected parent."

Sullivan and Kelly outline a collaborative team approach to counselling in "Legal and Psychological Management of Cases with an Alienated Child," in which the

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[72] *Supra*, fn 42

therapists providing treatment are assisted by professionals in purely supporting roles. Team members may include:

a) a judge involved in a case management function who provides prompt access to decision-making;

b) a parenting coordinator who manages the team and may be responsible for providing prompt conflict resolution;

c) a child therapist who sees the child individually but may provide coparenting counselling with the parents;

d) the parents' therapists; and,

e) the parents' lawyers, who support the counselling process and prevent the case from returning to court.

Johnston, Gans Walters and Friedlander recommend that the roles of all professionals involved in an intervention, their ability to communicate with one another, the existence, and limits, of any decision-making authority and the limits of confidentiality within the process be carefully described in a court order. The order thus provides "an overarching, coordinated, rule-governed process for managing the ongoing family conflict and for implementing the therapeutic intervention."

Nonetheless, judges can and do order that the child alone, or the child and a parent, attend counselling, sometimes for the explicit purpose of restoring the broken parent-child relationship. The functions of counselling in such cases have, for better or for worse, included:

a) for the rejected parent and children, facilitating healthy communication and recommending adjustments to parenting time;[73]

b) for the children, addressing the effect the favoured parent's behaviour had on the child's relationship with the rejected parent;[74]

c) for the favoured parent, assisting him in coming to terms with the end of the relationship;[75]

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[73] *D.G.S. v J.D.S.*, 2014 BCSC 2183
[74] *L.A.I. v K.B.Z.*, 2014 BCSC 652
[75] *I.S. v D.S.*, 2010 BCSC 306

d) for the favoured parent, addressing his anger management issues and difficulty putting the needs of the children before his own;[76] and,

e) for the children, dealing with the effects of their alienation.[77]

2. Reunification Programs

Psychologist Randy Rand began to develop a specialized program aimed at reuniting recovered missing children with their parents in 1991. His program, Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships, which I believe was the first of its kind, was eventually extended to serve alienated children who hadn't been abducted and whose parents were separating. Since that time, but particularly in the last decade, reunification and reintegration programs of various sorts have popped up across Canada and the United States.

In his 2010 article, "Family Bridges: Using Insights from Social Sciences to Reconnect Parents and Alienated Children," Warshak described the goals of Family Bridges as including:

a) facilitating and strengthening children's ability to maintain healthy relationships with both parents;

b) helping children avoid being caught in the middle of their parents' conflict;

c) strengthening children's critical thinking skills;

d) helping children maintain balanced views of each parent;

e) strengthening the family members' ability to communicate with one another and manage conflicts; and,

f) helping family members develop compassionate views of each other's actions.

Warshak, who became involved with the program in 2005 after witnessing its success with "a severely alienated and violent adolescent," says that the program has dealt with more than 130 children in 70 families. At present, the Family Bridges workshop is offered to one family at a time, and is usually held at "vacation resort facilities" around the United States.[78]

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[76] *Bains v Bains*, 2009 BCSC 1666

[77] *Ibid.*

[78] www.warshak.com/services/family-bridges.html

Other well-known American programs include the Overcoming Barriers Family Camp and New Ways for Families. The Overcoming Barriers Family Camp was first piloted in 2008 and today operates as a multi-family five-day overnight camp at different sites in the United States, run by Matthew Sullivan and psychologists Peggie Ward and Robin Deutsch.[79] New Ways for Families, created by lawyer and social worker Bill Eddy, is a multi-modal short-term structured parenting skills method to reduce the impact of conflict on the children in potentially high-conflict divorce and separation cases which includes a component where alienation is a concern.[80] Programs with similar purposes have been established in Canada, including two in British Columbia and one in Alberta.

Unfortunately, little third-party research is available on the outcomes for children and families who have used these programs, although many programs have evaluated their own success. Warshak, for example, says that of the 23 children in 12 families he was involved with, 22 had "restored a positive relationship with the rejected parent," although four of the 22 "regressed after the court renewed their contact with the favoured parent." On the other hand, Sullivan, Ward and Deutsch looked at five families who graduated their camp in 2008 and reported that:[81]

> *Of the five families, one is enjoying a joint access and responsibility co-parenting plan; in a second family, the children are enjoying visiting their father on full alternate weekends … and in a third family, the mother is still estranged from the children and has given up pursing access. A fourth family is now engaged in litigation, and the child is visiting the estranged father with some resistance. The fifth family is having mixed results. The custodial mother is seeing the children in family therapy and weekly for dinner, but the children are reportedly continuing to resist.*

Picking a reunification program is a rather challenging exercise as a result.[82]

Counsel and the court should be concerned about conflicts of interest when a parenting assessor acting under s. 211 of the *Family Law Act* makes a positive finding of alienation and recommends his or her own program as a solution. It is also prudent to be wary of success rates that are too good to be true; in such cases, enquiries must be made to determine how the program defines "success"

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[79] overcomingbarriers.org

[80] www.newways4families.com

[81] M.J. Sullivan, P.A. Ward and R.M. Deutsch, "Overcoming Barriers Family Camp: A Program for High-Conflict Divorced Families where a Child Is Resisting Contact with a Parent" (2010) 48:1 Family Court Review 116

[82] Frankly, the results reported by Sullivan, Ward and Deutsch more closely align with the sort of success rate I expect such programs to have given the difficult nature of alienation cases.

and whether the success rate was determined in-house or by an objective evaluator. Other factors to consider include whether:

a) the program is intended to achieve specific outcomes and is based on a hypothesis that can be empirically tested;

b) the principals of the program are able to produce research supporting their hypothesis and program design;

c) the principals of the program are engaged in its ongoing evaluation;

d) the evaluation of the program includes a long-term follow-up component;

e) the principals of the program are able to report the program's success rate;

f) the principals of the program have significant experience in providing services for families and children;

g) the principals of the program are professionally recognized and respected by their peers;

h) the principles of the program and all therapeutic staff are licensed and insured members of their applicable provincial regulatory body;

i) the program intake process includes screening for family violence, substance abuse and significant mental illness;

j) the program's treatment regime differentiates between alienation and justified estrangement; and,

k) the program includes an aftercare component.

In addition, the presence of one or more of the following warning signs should probably discourage further consideration of a particular program:

a) a principal of the program is not a member of a regulatory body;

b) a principal of the program holds one or more advanced degrees from online or private universities;

c) a principal of the program is not recognized by, respected by or widely known among his or her peers;

d) the reported success rate of the program sounds too good to be true;

e) the program intake lacks a screening process and will accept all comers; and,

f) the principals of the program will not discuss their hypothesis, their methodology or the research supporting their approach.

VI. Conclusion

Alienation cases are enormously challenging for both bench and bar, not least because allegations of alienation tend to be raised in high-conflict disputes, which are astonishingly unpleasant to begin with, but because of the extraordinary and inflammatory claims they provoke. It is easy to lose one's objectivity in the midst of hostilities of this nature and overlook alternative explanations, less accusatory reasons for the child's behaviour and the fact that, the parents' wounded pride aside, it is ultimately the child we must be concerned about. Alienation cases are too often couched in the language of the rights, entitlements and privileges of parents rather than the rights, entitlements and interests of children.

The best interests of children must be the lodestone used to measure our response in alienation cases, whether we are serving as counsel for the favoured parent, as counsel for the rejected parent or as judge. As Bala, Fidler, Goldberg and Houston put it, "the goal of intervention should be the promotion of a child's wellbeing, and therefore best interests, and not simply to advance the 'rights' of a rejected parent." The five simple principles articulated by Jaffe, Ashbourne and Mamo flow nicely from this proposition. Our response to allegations of alienation should strive to:

a) protect the child and the primary parent from abuse and family violence;

b) protect the child from ongoing parental conflict and litigation;

c) protect the stability and security of the child's relationship with the primary parent and respect the right of the primary parent to direct his or her life;

d) respect the right of the child to have a meaningful relationship with each parent; and,

e) promote the benefits of the child having a positive relationship with a co-parenting team of parents.

It is important, I think, to note that none of these guiding principles concern the rights, entitlements and privileges of parents.

I do have tremendous sympathy for parents who have a lost a relationship with a child. However, as I wrote earlier, the moral blameworthiness of a favoured parent's conduct is always subordinate to the child's wellbeing and is irrelevant to determining the course of action that is in the child's best interests.

We must remain alive to the astonishing psychological intricacies and nuances attendant upon alienation cases and struggle against the tendency that such cases have to resolve into an all-or-nothing, black-and-white proposition. Reality is so much more complex, and we do a disservice to our clients' children if we pretend otherwise. Darnall's obsessive alienators certainly do exist, but they are, in a way, monstrous caricatures that obscure the thorny subtleties of the vitiated parent-child relationship.

Where a case involves allegations of alienation, those allegations must be responded to as quickly as possible with the early assessment recommended by Fidler, Bala and Saini. This assessment may well be determinative of the course the case will take by: distinguishing between a child's non-pathological resistance to visiting a parent, situations of realistic estrangement and situations of parental alienation; preventing further maltreatment of the child, if alienation is indeed a factor; steering the family toward the intervention best suited to the circumstances and to the child; and, ensuring that the child has the best possible chance of a healthy childhood, protected from the damaging effects of parental conflict.

Appendix A:
Table of References

Table of primary social science literature, listed by short reference used in main text.

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A.J.L. Baker and D. Darnall, "Behaviours and Strategies Employed in Parental Alienation: A Survey of Parental Experiences" (2006) 45 Journal of Divorce & Remarriage 97

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D. Darnall, *Divorce Casualties: Protecting Your Children from Parental Alienation* (Dallas, TX: Taylor Publishing, 1998)

D. Darnall, "Three Types of Parental Alienators" (1997), found at www.parentalalienation.org/articles/types-alienators.html

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R.A. Gardner, "Recent Trends in Divorce and Custody Litigation" (1985) 29:2 Academy Forum 3

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J.R. Johnston, "Children of Divorce Who Refuse Visitation," in C. Depner and J.H. Bray, *Non-Residential Parenting: New Vistas in Family Living* (Newbury Park, CA: Sage Publications, 1993)

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J.R. Johnston, M. Gans Walters and S. Friedlander, "Therapeutic Work with Alienated Children and Their Families" (2001) 39:3 Family Court Review 316

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M.J. Sullivan and J.B. Kelly, "Legal and Psychological Management of Cases with an Alienated Child" (2001) 39:3 Family Court Review 299

Sullivan, Ward and Deutsch

M.J. Sullivan, P.A. Ward and R.M. Deutsch, "Overcoming Barriers Family Camp: A Program for High-Conflict Divorced Families where a Child Is Resisting Contact with a Parent" (2010) 48:1 Family Court Review 116

Wallerstein and Kelly

J.S. Wallerstein and J.B. Kelly, *Surviving The Breakup: How Children And Parents Cope With Divorce* (New York, NY: Basic Books, 1996)

Warshak

R.A. Warshak, "Current Controversies Regarding Parental Alienation Syndrome" (2001) 19:3 American Journal of Forensic Psychology 29

R.A. Warshak, "Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children" (2010) 48:1 Family Court Review 48

Appendix B:
Summary of British Columbia Case Law Review

Survey of British Columbia judgments retrieved from CanLII on 16 June 2015 through a search for the most recent cases using variants of the term "alienate" in the document text, excluding: appeals, whether to the Court of Appeal or the Supreme Court; child welfare matters; costs applications; and, all cases other than family law cases. Oldest judgment retrieved was dated 28 April 2008.

Year of Decision

Response	Chart	Percentage	Count
2015		16.5%	19
2014		19.1%	22
2013		15.7%	18
2012		10.4%	12
2011		7.0%	8
2010		8.7%	10
2009		13.9%	16
2008		8.7%	10
		Total Responses	**115**

Trial Court

Response	Chart	Percentage	Count
BC Supreme Court		87.8%	101
BC Provincial Court		12.2%	14
		Total Responses	**115**

Nature of Hearing

Response	Chart	Percentage	Count
Interim order		18.3%	21
Final order		47.8%	55
Vary final order		33.0%	38
Enforce final order		0.9%	1
		Total Responses	**115**

Alleged Alienator

Response	Chart	Percentage	Count
Mother		64.3%	74
Father		20.9%	24
Mother and family		7.8%	9
Father and family		3.5%	4
Both mother and father		3.5%	4
		Total Responses	**115**

Rejected Parent

Response	Chart	Percentage	Count
Mother		24.3%	28
Father		73.0%	84
Both mother and father		2.6%	3
		Total Responses	**115**

Expert Evidence Tendered?

Response	Chart	Percentage	Count
Yes		56.5%	65
No		43.5%	50
		Total Responses	**115**

Result of Allegation of Alienation

Response	Chart	Percentage	Count
Estrangement		5.2%	6
Alienation		20.9%	24
Alienation and estrangement		2.6%	3
Risk of alienation		5.2%	6
No evidence		35.7%	41
No finding		30.4%	35
		Total Responses	**115**

Legal Representation of Parties

Response	Chart	Percentage	Count
Both in person		14.8%	17
Both had counsel		41.7%	48
Father had counsel/mother in person		13.9%	16
Mother had counsel/father in person		28.7%	33
Father had counsel/mother no-show		0.9%	1
		Total Responses	**115**

Appendix C:
Summary of Orders Made in British Columbia Cases Where Alienation or Risk of Alienation Is Established

Digest of British Columbia judgments resulting in or varying final orders, excluding appeals, in which allegations of alienation resulted in conclusions that: alienation had occurred; alienation and estrangement had occurred; or, there was a risk of alienation.

2015 *Waugh v Waugh*, 2015 BCSC 688
- primary residence to rejected parent
- parenting time to favoured parent

Mitchell v Mitchell, 2015 BCSC 355
- parents are both guardians
- joint custody
- neither party to have final say on parenting responsibilities
- equal parenting time
- costs to rejected parent

S.M.A. v R.E.W., 2015 BCPC 34
- parents are both guardians
- rejected parent to have all parenting responsibilities
- parenting time to favoured parent

Silverman v Silverman, 2015 BCSC 236
- favoured parent's application to relocate dismissed
- costs to rejected parent

L.D.K. v M.A.K., 2015 BCSC 226
- primary residence to rejected parent
- family to engage in reunification program
- parenting time to favoured parent at discretion of counsellor
- protection order against favoured parent restricting communication with children
- protection order against favoured parent restricting attendance at children's home and school
- peace officer enforcement
- judge seized

2014 *D.G.S. v J.D.S.*, 2014 BCSC 2183
- primary residence to favoured parent
- counselling for rejected parent and children

- parenting time to rejected parent at discretion of counsellor
- conduct order against both restricting communication with children
- judge seized

McDermott v McDermott, 2014 BCSC 1740
- favoured parent to post security for compliance with order for parenting time
- favoured parent to pay rejected parent's costs thrown away of frustrated parenting time

P.K.N. v D.S.N., 2014 BCSC 1156
- primary residence to rejected parent
- rejected parent to have final say on parenting responsibilities
- parenting time to favoured parent
- family to engage in reunification counselling
- counselling for children at discretion of rejected parent

L.A.I. v K.B.Z., 2014 BCSC 652
- parents to share all parental responsibilities
- equal parenting time
- counselling for children at discretion of rejected parent
- conduct order against favoured parent restricting communication with children

J.C.W. v J.K.R.W., 2014 BCSC 488
- primary residence to rejected parent
- sole custody to rejected parent
- family to engage in reunification program
- parenting time to favoured parent at discretion of counsellor
- protection order against favoured parent restricting communication with children
- protection order against favoured parent restricting attendance at children's home and school
- peace officer enforcement
- costs to rejected parent
- judge seized

C.A.J. v N.J., 2014 BCSC 279
- parents are both guardians
- rejected parent to have all parenting responsibilities
- equal parenting time

- conduct order against both restricting communication between each other
- parenting coordinator

2013 *Rashtian v Baraghoush*, 2013 BCSC 2013

- increased parenting time to rejected parent

M.R.P. v S.R.P., 2013 BCSC 1842

- parents are both guardians
- sole custody to rejected parent
- conduct order against both restricting communication with children
- conduct order against both restricting communication between each other

Silverman v Silverman, 2013 BCSC 601

- parents are both guardians
- increased parenting time to rejected parent
- counselling for family
- conduct order against both restricting communication between each other
- parenting coordinator
- costs to rejected parent

D.A.M. v D.M.T., 2013 BCSC 359

- sole guardianship to favoured parent
- sole custody to favoured parent
- parenting time to rejected parent at discretion of counsellor
- conduct order against rejected parent restricting communication with children

2012 *L.G. v R.G.*, 2012 BCSC 1365

- primary residence to favoured parent
- joint guardianship
- favoured parent to have final say on parenting responsibilities
- joint custody
- conduct order against both restricting communication with children
- conduct order against both restricting communication between each other
- favoured parent in contempt
- favoured parent to post security for compliance with order for parenting time

- parenting coordinator

Hockhold v Gerbrandt, 2012 BCSC 1313
- joint guardianship
- sole custody to favoured parent
- parenting coordinator
- favoured parent's application to relocate dismissed

C.L.H. v R.J.J.S., 2012 BCSC 579
- sole guardianship to favoured parent
- sole custody to favoured parent
- counselling for family
- parenting time to rejected parent at discretion of counsellor
- judge seized

2011 *N.B. v L.M.E.*, 2011 BCPC 284
- sole guardianship to rejected parent
- sole custody to rejected parent
- family to engage in reunification counselling
- counselling for favoured parent

2010 *Lower v Stasiuk*, 2010 BCSC 1081
- primary residence to favoured parent
- joint guardianship
- sole custody to favoured parent
- counselling for children
- conduct order against both restricting communication with children
- conduct order against both restricting communication between each other
- parenting coordinator
- judge seized

I.S. v D.S., 2010 BCSC 306
- joint guardianship
- rejected parent to have final say on parenting responsibilities
- sole custody to rejected parent
- counselling for favoured parent
- conduct order against favoured parent restricting use of intoxicants
- conduct order against both restricting communication with children

- conduct order against both restricting communication between each other
- costs to rejected parent
- judge seized

Paleczny v Paleczny, 2010 BCSC 36
- primary residence to favoured parent
- joint guardianship
- favoured parent to have final say on parenting responsibilities
- sole custody to favoured parent
- counselling for family
- parenting time to rejected parent at discretion of counsellor
- conduct order against both restricting communication with children
- favoured parent's application to relocate dismissed

2009 *Bains v Bains*, 2009 BCSC 1666
- joint guardianship
- rejected parent to have certain parenting responsibilities
- rejected parent to have final say on remaining parenting responsibilities
- sole custody to rejected parent
- counselling for children
- counselling for favoured parent
- supervised parenting time to favoured parent at discretion of counsellor
- conduct order against favoured parent restricting communication with children
- conduct order against favoured parent restricting communication with rejected parent

K.R.M. v G.R.K., 2009 BCPC 391
- parenting time to rejected parent
- peace officer enforcement

Novlesky v Novlesky, 2009 BCSC 1328
- primary residence to favoured parent
- sole guardianship to favoured parent
- sole custody to favoured parent
- parenting time to rejected parent
- favoured parent's application to relocate allowed
- costs to favoured parent

McClaughry v McClaughry, 2009 BCSC 501

- primary residence to favoured parent
- joint guardianship
- joint custody
- parenting time to rejected parent
- parenting coordinator

2008 *M.P. v N.M.*, 2008 BCSC 1501

- sole guardianship to rejected parent
- sole custody to rejected parent
- counselling for family
- supervised parenting time to favoured parent at discretion of counsellor
- conduct order against favoured parent restricting attendance at children's school
- conduct order against both restricting attendance at each other's homes
- peace officer enforcement
- favoured parent in contempt

R.R.W.E.S.-V. v S.E.D.V., 2008 BCSC 1136

- primary residence to rejected parent
- joint guardianship
- joint custody
- parenting time to favoured parent
- judge seized

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Family Property and Family Debt

Provincial Training Conference for Legal Advocates
20 October 2016 • Richmond, British Columbia

John-Paul Boyd
Canadian Research Institute for Law and the Family

Dividing property and debt under the Family Law Act.

How Part 5 Works

Part 5

- Division of property, allocation of debt
  - Presumptions of entitlement, triggering event
  - Identifying divisible property, property excluded from division
  - Valuation and valuation date
  - Distribution of property and debt
  - Out-of-province property
  - Agreements dividing property and debt, when court will enforce and when court will set aside

3

Part 6

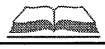
- Applies where party is entitled to benefits under Part 5
- Division of private pensions
- Canada Pension Plan benefits subject to federal legislation

Basic principles

1. Spouse entitled to keep property brought into relationship, plus certain property received during relationship
2. Spouses each entitled to equal share of property acquired after relationship began plus increase in value of property exempt from division
3. Spouses each responsible for equal share of debt existing on date of separation

Basic principles

4. Interests in property and obligations for debt vests on separation, sole triggering event
5. Value is market value at date of trial
6. Property and debt may not be divided unequally unless equal division would be significantly unfair
7. Property excluded from division may not be divided unless significantly unfair not to divide the property



Standing

- "Spouse" may apply for orders under Part 5
- A spouse is:
  - Person married to another person
  - Person cohabiting with another person in a marriage-like relationship for at least two years
  - Former spouse
- Persons with children in shorter cohabiting relationships excluded from Part 5 and Part 6

7

Standing

- Treaty first nations may have standing if:
  - Entitled to make laws on alienation of treaty lands
  - Parcel of treaty lands at issue in proceeding
  - At least one party is member of first nation
- May participate in proceeding
- Court must consider first nation's laws restricting alienation of lands

8

Time limits

- **Married spouses**: two years from date of divorce order, declaration of nullity
- **Unmarried spouses**: two years from date of separation
- Time limit to apply to set aside agreement begins two years from date party discovered "or ought to have discovered" grounds for application

9

Time limits

- Time limit is suspended during "any period" that spouses are engaged in "family dispute resolution" with a "family dispute resolution professional"

10

Scheme of Part 5

- s. 81: *Equal entitlement and responsibility*
  - Spouses presumptively entitled to half family property, responsible for half family debt
  - Triggering event, vesting spouses' interests, is date of separation
- s. 85: *Excluded property*
  - Certain property is excluded from division
  - Burden of proving exclusion lies on party claiming exclusion

11

Scheme of Part 5

- s. 84: *Family property*
  - Subject to exclusions, family property includes:
    - All property owned by at least one spouse on date of separation
    - Beneficial interest in property held by at least one spouse on date of separation
    - Property acquired with family property after separation
    - Growth in value of excluded property
  - Specific categories of property included in family property listed at s-ss. (2), (3)

12

Scheme of Part 5

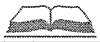
- s. 86: *Family debt*
  - Family debt includes:
    - Debt incurred during relationship
    - Debt incurred after separation to maintain family property
- s. 87: *Value*
  - Value is fair market value
  - Valuation date is presumed to be date of trial

13

Scheme of Part 5

- s. 94: *Orders dividing property or debt*
  - Court may make orders regarding property or debt on application of spouse
- s. 97: *Giving effect to orders*
  - Court may determine any issues respecting ownership, possession or division
  - Court may make declarations respecting ownership, possession, order transfer of title
  - Court may require partition and sale of property, including to pay family debt

14



Scheme of Part 5

- s. 95: *Unequal division of family property, family debt*
  - Court may order unequal division or family property or allocation of family debt if equal division would be significantly unfair
  - Non-exhaustive list of factors to consider at s-s. (2)
  - Impact on earning capacity, objects of spousal support not met at s-s. (3)

15

Scheme of Part 5

- s. 96: *Division of excluded property*
  - Court may order division of excluded property if
    - significantly unfair not to do so
    - extra-provincial property and debt cannot be divided
  - Excluded property may not otherwise be divided

16

Scheme of Part 5

- Division 3: *Interim orders*
  - Court may order advance distribution of family property to pay for litigation, dispute resolution processes, experts reports
  - Court may make orders for use and occupancy of "family residence"
  - Court may make orders respecting protection of property, delivery and safekeeping of property

17

Scheme of Part 5

- s. 94: *Effect of agreements*
  - Court may not make order respecting property or debt addressed in an agreement until the agreement is set aside
- s. 93: *Setting agreements aside*
  - Court may set aside agreement if:
    - Contract voidable, disclosure inadequate, party taken advantage of or failed to understand agreement
    - Agreement is "significantly" unfair

15

Scheme of Part 5

- Division 6: *Extraprovincial property*
  - Test to determine jurisdiction to make orders regarding out-of-province property
  - Test to determine applicable law
  - Exhaustive list of available orders regarding ownership, division, use or preservation of foreign property

Dividing property when the Family Law Act doesn't apply.

The Other Law

When the Act doesn't apply

- Parties don't meet definition of "spouse"
- Claim for interest in property is made outside the time limit
- Property somehow can't be squeezed into definitions of "family property" or "excluded property" (unlikely)

Remedies

- Legislation that applies to strangers that co-own property also applies to people in a relationship, including:
  - *Land Title Act*
  - *Partition of Property Act*
- Where no statutory remedy and not a co-owner, equitable claim of unjust enrichment is available

22

Unjust enrichment

- Claimant must prove:
  - Was the respondent enriched?
  - Was the claimant deprived of something connected to the enrichment?
  - Was there a "juristic reason" for the deprivation and corresponding enrichment?

23

Unjust enrichment

- If proven, court may order payment in amount sufficient to remedy loss
- If amount can't be paid, court may impose a trust on the property subject to the interest, a "constructive trust," to ensure that money will eventually be paid

24

Dividing property and debt, step by step.

The Case Law to Date

Identifying Property and Debt

26

Family property

- Date of separation is date family property is identified (*K.M.J.*)
- Property is family property if it existed on the date of separation and was owned by at least one spouse (*Asselin*)
- Burden lies on party claiming increase in value of excluded property is family property to prove increase in value (*J.S.F.*)

27

Family debt

- Date of separation is date family debt is identified (*K.M.J.*)
- Burden lies on party claiming debt is family debt to establish that debt exists and was incurred during relationship (*Jaszczewska*)

28

Excluded property

- Burden to establish property is excluded lies on spouse claiming exclusion (*Asselin*), must prove property existed prior to relationship and value of property (*J.S.F.*)
- Portion of property acquired with excluded property is excluded property (*Cabezas*)
- Burden lies on person receiving insurance settlement to prove portion attributable to injury or loss (*A.A.P.*)

29

Excluded property

- Burden lies on person receiving insurance settlement to prove settlement does not include lost income (*Jackson*)
- Person claiming exclusion must prove basis for and extent of exclusion on balance of probabilities (*Shih*)
- Court may take into account credibility and reliability of evidence tendered, having regard to precision legislation requires (*Shih*)

30

Valuing Property and Debt

31

Valuation date

- Date of hearing is date family property and family debt is valued; both spouses are presumed to share in positive and negative changes in value between date of separation and date of hearing (*K.M.J.*)
- Order or agreement may require different date of valuation (*Slavenova*)
- Date should not be changed absent proof of significant unfairness (*Blair*)

32

Valuation date

- Date of valuation of family debt may be adjusted to address significant unfairness in division of debt (*K.M.J.*)

33

Excluded property

- Where excluded property depreciates in value, none of the value of the property is family property (*Remmem*)
- Where debt encumbering excluded property increases during relationship, there may be no increase in value to share as family property (*Walsh*)

34

Excluded property

- Value of excluded property applied to improve family property is amount by which value of family property improved (*A.A.P.*)
- Failure to prove value of excluded property may result in no part of the property being excluded from division (*Asselin*)

35

Dividing Property and Debt

36

Family property

- Depreciation in value of excluded property cannot be recovered from family property (*Asselin*)

37

Family debt

- Payment of family debt by one spouse following separation does not relieve other spouse of obligation to share in debt (*K.M.J.*)
- Equal division of liability for debt is not significantly unfair if incurred with knowledge or consent of other spouse (*J.S.F.*)

38

Unequal division of property

- "Significantly unfair" means unfairness that is compelling or meaningful in light of the s. 95(2) factors (*Remmem*), unfairness that is sufficiently weighty to make equal division unjust (*L.G.*)
- To determine significant unfairness, court must first perform notional equal division of family property, taking into account exclusions (*Remmem*)

39

Unequal division of property

- Unequal division of all, some or none of the family property must be considered on a global basis, taking into account the s. 95(2) factors (*Walberger*)

41

Factors *for* unequal division

- Underemployment of payor, needs of child's primary caregiver (*H.C.*)
- Agreement for unequal division (*Slavenova*)
- Contributions to career of spouse (*Jaszczewska*)
- Failure to contribute to family property where disparity is considerable (*Jaszczewska*)
- Failure to contribute to excluded property (*Blair*)

42

Factors *for* unequal division

- Spouse's role in increasing value of property after separation beyond market trends (*Blair*)
- Failure to meet the objects of a spousal support order (*C.M.*)
- Relationship of short duration (*A.M.D.*)
- Tax consequences incurred as a result of division of property (*A.M.D.*)
- Nondisclosure (*Chang*)

42

Factors *against* unequal division

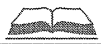
- Pursuit of goal of finding "perfect fairness" (*L.G.*)
- Differing financial contributions during relationship (*Slavenova*)
- Relationship of medium duration (*Blair*)
- Lack of contributions to career of spouse (*Jaszczewska*)

43

Factors *against* unequal division

- Failure to contribute to family property where disparity is considerable (*Jaszczewska*)
- Disproportionate ownership of property at beginning of relationship (*A.M.D.*)

44



Unequal division of debt

- Family debt may divided unequally if not incurred in the normal course of the relationship (*Jaszczewska*)
- Nondisclosure may support the unequal division of debt (*Chang*)
- Debt incurred to improve excluded property, eliminating shareable increase in value, should not be shared by other spouse (*Walsh*)

45

Unequal division of debt

- Significant unfairness may be rectified by adjusting date of valuation or by unequal division of debt (*K.M.J.*)
- Other means of addressing significant unfairness include requiring compensation for payments to debt (*S.L.M.W.*)

46

Gifts, Loans and Inheritances

47

85 (1) The following is excluded from family property:
(b) inheritances to a spouse;
(b.1) gifts to a spouse from a third party; ...
(e) property referred to in any of paragraphs *a* to *d* that is held in trust for the benefit of a spouse; ...
(g) property derived from property or the disposition of property referred to in any of paragraphs *a* to *f*.
(2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

Family Law Act

48

A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title.

Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor.

Rothstein J., *Pecore v Pecore*

49

Characterization

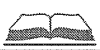
- Characterization of transfer as loan or gift depends on intention of transferor at time of transfer (*Tobias*)
- Characterization as inheritance or gift depends on intention of transferor (*Sardinha*)
- Burden lies on party claiming gift to prove intention to make gift as equity presumes bargains not gifts (*Tobias*)

50

Gifts

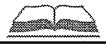
- A gift is made out when property is transferred and accepted without consideration and cannot be revoked by donor (*V.J.F.*)
- Gifts given to both spouses are family property, a gift solely to one spouse may be excluded property (*Cabezas*)
- Gifts intended for the acquisition or maintenance of a family home are family property (*H.C.*)

51



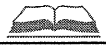
Gifts

- Gifts between spouses are family property (*V.J.F.*)
- Presumption of advancement applies to transfers to parties' children to assume gift intended (*P.G.*)



Inheritances

- Funds received by a spouse as an advance on inheritance are excluded property (*Sardinha*)



Loans

- Presumption of resulting trust characterizes gratuitous transfers as loans; onus lies on other spouse to establish that gift intended (*Tobias*)
- Where loan is made out, loan is shareable family debt (*Tobias*)

Dividing Property and Allocating Debt under British Columbia's *Family Law Act*: The Case Law to Date

Supreme Court of British Columbia Education Seminar
Kelowna, British Columbia

John-Paul Boyd
Canadian Research Institute for Law and the Family
May 2016

Table of Contents

Dividing Property and Allocating Debt under British Columbia's *Family Law Act*: The Case Law to Date

John-Paul Boyd
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I. Introduction

The division of property and allocation of debt between the parties to a domestic relationship in British Columbia is primarily accomplished through the provisions of Part 6 (pensions) and Part 5 (property other than pensions) of the new *Family Law Act*,[1] the common law of trusts and a miscellany of related legislation, such as the provincial *Partition of Property Act*[2] and *Pension Benefits Standards Act*[3] or the federal *Family Homes on Reserves Act*[4] and *Canada Pension Plan*,[5] that also come into play from time to time.

The *Family Law Act* takes an entirely different approach to property and debt than the former *Family Relations Act*.[6] Although the Supreme Court retains exclusive jurisdiction to hear and determine these disputes,[7] unmarried spouses have rights and entitlements equivalent to those enjoyed by married spouses,[8] divisible "family assets" are now known as "family property," rules are provided for the allocation of responsibility for "family debt"[9] and the sole triggering event is the date of separation,[10] not the making of a declaration of irreconcilability, the execution of a separation agreement or the pronouncement of a divorce order.[11] Most

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[1] *Family Law Act*, SBC 2011, c. 25

[2] *Partition of Property Act*, RSBC 1996, c. 347

[3] *Pension Benefits Standards Act*, SBC 2012, c. 30

[4] *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c. 20

[5] *Canada Pension Plan*, RSC 1985, c. C-8

[6] *Family Relations Act*, RSBC 1996, c. 128

[7] *Family Law Act*, ss. 192(1) and 193(2)(b)

[8] *Ibid.*, ss. 3(1) and 81

[9] *Ibid.*, ss. 81, 86 and 87(b)

[10] *Ibid.*, s. 81(b)

[11] *Family Relations Act*, s. 56(2)

importantly, the new act adopts a partnership of acquests regime, in which spouses share in the property acquired after the commencement of their relationship, over the deferred community of property regime provided for in the *Family Relations Act*.

According to the white paper released by the Ministry of the Attorney General in 2010, the chief concerns about the property scheme under the *Family Relations Act* involved the high degree of discretion available to the court and the consequent uncertainty as to outcome in any given case:[12]

> *British Columbia's current law relies heavily on judicial discretion to sort out property division disputes. The existing statute provides a general framework for dividing property but relatively few detailed rules. As well, in British Columbia, judges have significant discretion with regard to dividing property unequally at the distribution stage. While experienced family lawyers are familiar with the developments from the case law, the governing law is relatively inaccessible to spouses without lawyers. The broad discretion in the existing Act makes it harder to predict outcomes. This uncertainty, in turn, can fuel and prolong disputes.*

Accordingly, the Ministry's Civil Policy and Legislation Office proposed that any new legislation "move to an excluded property model that involves less judicial discretion, particularly at the initial stage of identifying which assets are subject to division."[13] The white paper further commented that:[14]

> *The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subject to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. Where one spouse enters the relationship with more assets than the other, providing that spouses share the increase in the value of the excluded property promotes a fair outcome. ...*
>
> *Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement.*

The Ministry's 2012 resource, "The Family Law Act Explained," published after the passage of the act on 23 November 2011, continued these themes, characterizing the scheme of Part 5 as

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[12] *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (Victoria, BC: Ministry of Attorney General, 2010) at pp. 79 and 80, available online at http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/family-law-white-paper.pdf.

[13] *Ibid.*, p. 80

[14] *Ibid.*, p. 81

"an excluded property model that involves less judicial discretion" and stating, rather optimistically, that:[15]

> *These changes make the law simpler, clearer, easier to apply and easier to understand for the people who are subject to it. British Columbia historically had a higher than average level of property division disputes in court; the broad flexibility and discretion in this area created uncertainty and promoted litigation. As well, the excluded property division model is a better fit with people's expectations about what is fair: they share the property and debt that they accrue together during their relationship.*

Despite government's wish to simplify the law and make it easier to understand, and thereby increase both certainty of outcome and the number of family law disputes resolved other than by trial,[16] a number of controversies quickly emerged from the new legislation that have had a contrary effect:

a) the provisions on the characterization of trusts as shareable family property at s. 84(3) failed to anticipate the problems posed by contingent entitlements and multiple beneficiaries;[17]

b) the exclusion of gifts from family property at s. 85(1)(b) included gifts between spouses, raising the possibility of double recovery;[18]

c) the definition of family debt at s. 86(a) includes debts incurred during the spousal relationship but paid out prior to separation;

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[15] "The Family Law Act Explained," available online at http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained. See also British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, Vol. 27 No. 9 (14 November 2011) at 8709.

[16] In the discussion of s. 84 on family property in "The Family Law Act Explained," for example, the Ministry offers its opinion that:

> *This section provides a clear and closed list of what is family property. This will promote settlement by making it easier to predict outcomes.*

See http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part5.pdf. This view was previously stated by the Attorney General thusly:

> *Judicial discretion around dividing family property will be reduced so that the law will be more certain and separated spouses will be better able to predict court outcomes.*

See British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, Vol. 28 No. 2 (17 November 2011) at 8845.

[17] These issues were partly addressed through the amendments introduced by s. 12 of the *Justice Statutes Amendment Act, 2014*, SBC 2014, c. 9.

[18] This issue was rectified by s. 13 of the *Justice Statutes Amendment Act, 2014* which amended the *Family Law Act* to specify that excluded gifts are gifts from third parties.

d) the provisions for applications regarding extraprovincial property at Part 5, Division 6 are inscrutably complex;[19]

e) the potential non-expiry of property interests vesting upon separation pursuant to s. 81(b), despite the limitation expressed at s. 198(2);[20] and, most significantly,

f) the terms of s. 104(2), which carry forward the effect of s. 69(2) of the *Family Relations Act* and regrettably provide that the rights available to spouses under Part 5 "are in addition to and not in substitution for rights under equity or any other law."

I suspect that most of these issues will be sorted out as the case law on Part 5 accumulates, however, s. 104(2), as this paper will describe, requires amendment, if not excision, if government's intentions of simplifying the act and promoting settlement are to be realized.

In this paper, I will provide a digest of the overall scheme of Part 5, and address matters such as jurisdiction and time limits along with the mechanics of the division of property and debt. I will then review the key findings in the emerging case law, and conclude with a discussion of the Court of Appeal's recent decision in *V.J.F. v S.K.W.*[21] An appendix listing the *Family Law Act* cases discussed, with hyperlinks to those decisions on CanLII, is provided.

II. Scheme of Part 5

The differences in the approach to the division of property taken by the *Family Relations Act* and the *Family Law Act* are profound; no assumptions should be made that the terms of the new act bear any relation to those of the old without consulting the text of the legislation. In this section I will discuss the threshold prerequisites of all claims under Part 5 – standing, time limits and jurisdiction – before reviewing the act's conceptual foundations, its definitions of family property, excluded property and family debt and the various interim and final orders it provides.

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[19] The division was broadly amended by ss. 14 to 17 of the *Justice Statutes Amendment Act, 2014*, although I don't think that the amendments did much to clarify matters.

[20] See Boyd, J.-P., "Easter Eggs and Bad Eggs: Surprises in the Drafting and Subsequent Interpretation of the *Family Law Act*" (Calgary, AB: Canadian Research Institute for Law and the Family, 2015) at pp. 5 to 8, available online at http://www.crilf.ca/Documents/Easter Eggs - May 2015.pdf.

[21] *V.J.F. v S.K.W.*, 2016 BCCA 186

A. Standing

The rights and remedies available under Part 5 of the *Family Law Act* are available only to persons qualifying as spouses,[22] and the burden of establishing standing as a spouse lies on the party claiming that status.[23] Under s. 3, *spouse* for the purposes of Parts 5 and 6 includes:

a) a person who is married to another person (s. 3(1)(a));

b) a person who has lived with another person in a marriage-like relationship for a continuous period of at least two years (s. 3(1)(b)(i)); and,

c) a former spouse (s. 3(2)).[24]

Treaty first nations, presently defined in the *Interpretation Act* as the Tsawwassen and Maa-Nulth First Nations,[25] may also have standing under s. 210(1) if: the first nation is entitled to make laws regarding the alienation of treaty lands; a parcel of its treaty lands is at issue in the proceeding; and, at least one party is a member of the first nation. In such cases, the first nation is entitled to participate in the proceeding and the court must additionally consider "any evidence or representations respecting the applicable treaty first nation's laws restricting alienation of its treaty lands."[26]

B. Time Limits

Applications for orders to divide property or allocate debts must be brought within a two-year period which, for *married* spouses, commences on the date of:

a) the divorce order (s. 198(2)(a)(i)); or,

b) the marriage being declared a nullity (s. 198(2)(a)(ii)).

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[22] Under s. 81(a), only spouses are presumptively entitled to family property and responsible for family debt. Only spouses may: apply for interim relief in relation to property under Part 5, Division 3, pursuant to s. 88; apply to set aside an agreement on property or debt under s. 93(3); apply for a final order in relation to property or debt under Division 4, pursuant to s. 94(1); take steps to enforce or protect property interests under Division 5, pursuant to ss. 99(1), 100(1) and 103(2); and, apply for an order respecting property located outside province under Division 6, pursuant to s. 109(2).

[23] *Khorramtash v Boroojeni*, 2015 BCSC 2275 at para. 27

[24] This is a slightly narrower definition of spouse than that which applies in the remainder of the act. Under that broader definition, "spouse" includes a person who has lived with another person in a marriage-like relationship for less than two years and has had a child with that person; see s. 3(1)(b)(ii)).

[25] *Interpretation Act*, RSBC 1996, c. 238, s. 29.1(1). This section should be periodically reviewed for amendments in the event further treaties are made.

[26] *Family Law Act*, s. 210(2)

The limitation period for *unmarried* spouses begins to run somewhat earlier, on the date of separation, pursuant to s. 198(2)(9)(b).[27]

Note that provisions regarding the effect of attempts to reconcile on spouses' status as separated, approximating those of s. 8(3)(b) of the *Divorce Act*[28] on the subject, are made at s. 83 of the *Family Law Act*.

Note also that, pursuant to s. 198(5), the running of the basic time limit for married and unmarried spouses under s-s. (2) is suspended during "any period" that the spouses are "engaged in family dispute resolution with a family dispute resolution professional." *Family dispute resolution* is defined in s. 1 as including mediation, arbitration, collaborative settlement processes and parenting coordination. *Family dispute resolution professional* is defined as

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[27] The date of separation has a significance under the *Family Law Act* that it lacked under the former *Family Relations Act*. Under the new act, separation not only starts the running of the limitation period for unmarried spouses, it is, pursuant to s. 81(b), the triggering event which vests an undivided one-half interest in all family property in each spouse as tenants in common. Perhaps as a result, the indicia of separation are partially described at s. 3(4):

> (4) For the purposes of this Act,
>
> (a) spouses may be separated despite continuing to live in the same residence, and
>
> (b) the court may consider, as evidence of separation,
>
> (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
>
> (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

Case law accumulating under the *Divorce Act* suggests that other measures of separation include:

a) a physical separation, although continued cohabitation by virtue of economic necessity does not mean that the parties are not separated, see *Oswell v Oswell* (1990), 74 OR (2d) 15 (OHC), *Dupere v Dupere* (1974) 19 RFL 270 (NBSC) and *Cooper v Cooper* (1972), 10 RFL 184 (OHCJ);

b) a repudiation of the relationship resulting in its breakdown, see *Dupere*, *Oswell* and *Mayberry v Mayberry* (1971), 3 RFL 395 (OHCJ), the absence of joint social activities, see *Cooper*, *Oswell* and *Campbell v Campbell*, 2011 BCSC 1491, and the taking of meals separately, see *Cooper* and *Mayberry*;

c) the cessation of domestic services for reciprocal benefit, see *Cooper* and *McKenna v McKenna* (1974), 19 RFL 357 (NSSC);

d) the absence of a sexual relationship, although the absence of sexual relations is not conclusive on its own, see *Dupere*, *Cooper*, *Campbell*, *Oswell* and *Mayberry*; and,

e) the commencement of divorce proceedings, see *Taylor v Taylor* (1999), 5 RFL (5th) 162 (ONSC) and *Czepa v Czepa* (1988), 16 RFL (3d) 91 (OHC).

However, as all relationships are unique unto themselves, there is no "checklist of characteristics that will invariably be found in all marriages," as Frankel J.A. observed in *Austin v Goerz*, 2007 BCCA 586 at para. 58; see also the comments of Whitten J. to a similar effect in *Taylor* at para. 13.

[28] *Divorce Act*, RSC 1985, c. 3 (2nd Supp.)

including lawyers, family law mediators qualifying under the regulations,[29] family law arbitrators qualifying under the regulations[30] and parenting coordinators.[31]

Under s. 198(3), the limitation period to apply to set aside an agreement on property under s. 93 commences on the date the applicant discovered, "or reasonably ought to have discovered," the grounds for the application.

C. Jurisdiction

The *Family Law Act* prescribes no particular conditions that must be met to establish jurisdiction in personam or in rem, other than in cases where an order about the division of property may be made in more than one jurisdiction. In such cases, the court must make a finding under s. 106(2) before making any other orders under Part 5; s. 106 provides that:

> (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
>
> (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
>
> (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
>
> (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
>
> (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.
>
> (3) For the purposes of subsection (2)(d), a real and substantial connection is presumed to exist if one or more of the following apply:
>
> (a) property that is the subject of the proceeding is located in British Columbia;
>
> (b) the most recent common habitual residence of the spouses was in British Columbia;

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[29] Family Law Act Regulation, BC Reg. 347/2012, s. 4

[30] Family Law Act Regulation, s. 5

[31] No decisions considering s. 198(5) had been published at the time of writing. Issues to be addressed include: determining the point at which a process of family dispute resolution ends when the process is abandoned without express termination; the status of the time limit when the parties are working with a person who is not a qualified family dispute resolution professional, either by consent or by mutual mistake; the effect of delay occasioned by the family dispute resolution professional; and, the scope and nature of the "other processes" included in the definition of family dispute resolution. Case law will also be needed to address the effect of the lapses that are common in family law matters, in which lengthy periods of time pass with no steps taken by either party, usually as a result of the adequacy of the status quo rather than an effort to hinder or delay resolution or an intention to repudiate an out-of-court dispute resolution process.

(c) a notice of family claim with respect to the spouses has been issued under the *Divorce Act* (Canada) in British Columbia.

However, even if one or more of the s. 106(2) conditions are met, the court may decline jurisdiction under s-s. (4) if it is "more appropriate" for jurisdiction to be exercised by another court, having regard to the factors set out in s-s. (5). Those factors include: avoiding a multiplicity of proceedings; the convenience of the parties and witnesses; the law that is to be applied in determining the division of property; the extent to which an order made in one jurisdiction would be enforceable in the other; and, of course, "any other circumstances the court considers relevant."[32]

Where no other jurisdiction may make an order dividing the parties' property, jurisdiction in personam is exclusively established under Part 2 of the *Court Jurisdiction and Proceedings Transfer Act*,[33] which provides that "territorial competence" is established where:

a) the party is ordinarily resident in British Columbia (s. 3(d));[34]

b) the party has attorned to the jurisdiction (s. 3(b));

c) the parties have a contract specifying jurisdiction (s. 3(c));

d) there is a real and substantial connection between the province and the facts on which the proceeding against the party is based (s. 3(e));[35]

e) there is no court outside the province in which the claimant could commence the proceeding (s. 6(a)); or,

f) it would be unreasonable to require that proceedings be commenced in another jurisdiction (s. 6(b)).

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[32] Donegan J. provides a succinct description of s. 106, and the analysis required by the rest of Part 5, Division 6, in *Cockerham v Hanc*, 2014 BCSC 2432 beginning at para. 31.

[33] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28

[34] A useful discussion of "ordinary residence" in the context of a claim involving extraprovincial property is provided by Smith J. in *Parker v Mitchell*, 2016 BCSC 723 beginning at para. 13.

[35] Note that s. 10 of the *Court Jurisdiction and Proceedings Transfer Act* sets out a number of circumstances in which a real and substantial connection is presumed to exist, including where proceedings: are brought in relation to immovable and movable property located within British Columbia; are brought to enforce or set aside a contract relating to property located within the province; concern restitutionary obligations arising in the province; concern torts committed in the province; are brought against a trustee resident in the province or in relation to trust property located within the province; or, seek injunctions concerning the behaviour of a party in the province or in relation to property located within the province.

The court's jurisdiction in rem over property located in the province is a function of its territorial jurisdiction and, with respect to immovable property, the fact that no other court is able to make an enforceable order concerning such property.[36] The court may, however, make certain orders with respect to the ownership and division of extraprovincial property under s. 109, if it decides to assume jurisdiction pursuant to s. 106.

D. Conceptual Structure

The three presumptions on which Part 5 is founded are:

a) that spouses are entitled to an equal share of all property qualifying as "family property" (s. 81(a));

b) that spouses are equally responsible for debt qualifying as "family debt" (s. 81(a)); and,

c) that spouses are entitled to separately retain that of their property which qualifies as "excluded property" and is exempt from division (s. 96).

Accordingly, once jurisdiction is established, the first step in a proceeding under Part 5 is to identify which of the spouses' property is family property and which of their debt is family debt.

Certain interim orders may be made, at any time prior to the making of an agreement or final order regarding the property in dispute, concerning advance distributions of family property, use of the residence qualifying as the "family residence" and the protection of "any property at issue" in the dispute.

Final orders may be made dividing family property and excluded property and allocating family debt. Family property may not be divided unequally unless an equal division would be "significantly unfair." Excluded property may not be divided at all, except in two circumstances: if family property and family debt located outside British Columbia cannot be divided; or, if it would be "significantly unfair" not to divide the excluded property. Final orders concerning property and debt that is the subject of a qualifying agreement between the spouses may not be made until the agreement is set aside.

A wide variety of orders and declarations are available under s. 97 to give effect to the determination and division of family property and excluded property and allocation of family debt. Further orders are available under s. 109 with respect to extraprovincial property and debt if the court has accepted jurisdiction over that property and debt.

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[36] See *Tezcan v Tezcan* (1987), 11 RFL (3d) 113 (BCCA).

1. Categorization of Property and Debt

The *Family Law Act* deals with the division of property in terms of "excluded property," the property that is exempt from division and presumptively remains the property of its respective owners, and "family property," the property that is shared between spouses. *Excluded property* is exhaustively defined in s. 85 as:

a) property acquired before the spouses' relationship began (s. 85(1)(a));[37]

b) inheritances (s. 85(1)(b));

c) gifts from third parties (s. 85(1)(b.1));

d) settlements and awards of damages resulting from injury or loss, unless the settlement or award is given to both spouses or is made in respect of lost income (s. 85(1)(c));

e) proceeds of insurance policies, other than policies respecting property, except any portion payable to both spouses or in respect of lost income (s. 85(1)(d))

f) interests in discretionary trusts contributed to and settled by third parties (s. 85(1)(f)); and,

g) property derived from the disposition of excluded property (s. 85(1)(g)).

As one would expect, the burden of showing that property is excluded property lies on the party asserting the claim, pursuant to s. 85(2).

Family property is non-exhaustively defined in s. 84 as including:

a) all property interests held by one or both spouses on the date of separation, less any excluded property (s. 84(1)(a));

b) property interests acquired after separation from family property (s. 84(1)(b) and (2)(f));

c) interests in corporations, partnerships, businesses and ventures (s. 84(2)(a) and (b));

d) accounts receivable, including tax refunds (s. 84(2)(c));

e) bank accounts, annuities, pension plans, RRSPs and income plans (s. 84(2)(d) and (e));

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[37] Under s. 3(3) of the *Family Law Act*, the date a spousal relationship begins is the earlier of:

a) the date on which the parties begin to live together in a marriage-like relationship; or,

b) the date of their marriage.

f) any increase in value of excluded property occurring since the later of the commencement of the spouses' relationship or the acquisition of the excluded property (s. 84(2)(g));[38] and,

g) property contributed to a trust controlled by the spouse or in which the spouse's interest is nondiscretionary (s. 84(3)).

The debt that may be allocated among spouses is "family debt." *Family debt* is exhaustively defined in s. 86 as:

a) all financial obligations incurred by a spouse between the date when the spouses' relationship commences and the date of separation (s. 86(a)); and,

b) all financial obligations incurred by a spouse to maintain family property after the date of separation (s. 86(b)).

Note that, pursuant to ss. 82 and 97(3), the provisions of Part 5 and any orders made under the part, do not affect the rights and interests of creditors with respect to family debt and are effective only as between the parties.

2. Entitlement to Property and Responsibility for Debt

The basic principles of Part 5 with respect to spouses' presumptive interests in property and obligations for debt are set out in s. 81:

> Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6,
>
> (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
>
> (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

A spouse's entitlement to family property rests on the fact that the property is owned by one or both spouses on the date of separation, or is derived from property owned at the date of separation, pursuant to s. 81(1); it is no longer necessary to prove that the property was ordinarily used for a family purpose.[39]

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[38] Note that under s. 84(2)(g) it is only the *increase* in value of excluded property which is shared, not any *decrease* in value. As the Attorney General has described the section, a "relationship is not an indemnity against bad spending choices or poor investments of one's excluded property;" see British Columbia, Legislative Assembly, *Official Report of the Debates of the Legislative Assembly*, Vol. 28 No. 8 (23 November 2011) at 9033.

[39] See *Family Relations Act*, s. 58(2).

3. Interim Orders

Pursuant to s. 88 of the *Family Law Act*, a spouse may apply for an interim order under Part 5, Division 3, "at any time before a final agreement or final order is made." The available interim orders include:

a) orders for the distribution of family property to pay for family dispute resolution, all or part of the action or obtaining information or evidence for the purpose of family dispute resolution or an application (s. 89);

b) orders for the exclusive occupancy of the family home, including orders for the exclusive possession or use of personal property at the home (s. 90(2));[40] and,

c) restraining orders prohibiting the disposition of property at issue under Parts 5 and 6, and orders for the possession, safekeeping and preservation of property (s. 91(1) and (2)).[41]

With respect to orders regarding the family home, note that: pursuant to s. 90(3), orders for exclusive occupancy or use do not authorize the applicant to "materially alter the substance of the family residence or personal property;" and, protection orders to a similar effect as orders for exclusive occupancy may be made, by both the Provincial Court and the Supreme Court, under s. 183(3).

Note also that the court may make conduct orders under s. 226 requiring a party to make payments respecting "rent, mortgage, specified utilities, taxes, insurance and other expenses" related to a residence, and to refrain from terminating "specified utilities" for a residence.

4. Final Orders

The court's general authority to make final orders dividing property and allocating debt is set out at s. 94(1), which provides that "the Supreme Court may make an order under this Division on application by a spouse." This authority is limited by s-s. (2):

> (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in section 93(1), unless all or part of the agreement is set aside under that section.

The act contains no express provision to the effect that the court may make orders for the *equal* division of family property and family debt; this authority must be inferred from s. 81.

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[40] The provisions of s. 90 are substantially similar to those of s. 124 of the *Family Relations Act*, such that case law accumulating under the latter act may be applied to the interpretation of the former.

[41] The provisions of s. 91 are substantially similar to those of s. 67 of the *Family Relations Act*, such that case law accumulating under the latter act may be applied to the interpretation of the former.

Under s. 95(1), however, the court may make orders for the *unequal* division of property and debt if the equal division of family property or debt, or the division of a pension as required by Part 6, would be "significantly unfair."[42] A non-exhaustive list of factors the court may consider in determining whether a division of property and debt would be significantly unfair, some of which are carried forward from the *Family Relations Act*,[43] is provided at s-ss. (2) and (3):

> (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
>
> (a) the duration of the relationship between the spouses;
>
> (b) the terms of any agreement between the spouses, other than an agreement described in section 93(1);
>
> (c) a spouse's contribution to the career or career potential of the other spouse;
>
> (d) whether family debt was incurred in the normal course of the relationship between the spouses;
>
> (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

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[42] At the time of writing, the only other British Columbia legislation using the phrase "significantly unfair" is the *Strata Property Act*, SBC 1998, c. 43, which employs the term at s. 164 in respect of the actions of a strata council against an owner or tenant and the exercise of voting rights at a general meeting by a person holding more than 50% of the votes. The nature of the relationships and balance of power between the parties to an action under the *Family Law Act* and the parties to an action under the *Strata Property Act* strike me as sufficiently dissimilar that interpretation of the phrase "significantly unfair" by reference to case law accumulating under the *Strata Property Act* should perhaps be approached with caution.

Although the precise meaning of the phrase is somewhat ambiguous, government's intention to reduce judicial discretion with respect to the reapportionment of property and debt is not. In its discussion of s. 95 in "The Family Law Act Explained," the Ministry states that the language of the section is intended to create a "higher threshold and make the test for unequal division stricter." The Ministry further writes that:

> *Judges still have some flexibility to take into account a spouse's unique circumstances and divide property unequally, but may only do so based on a more limited basis than under the Family Relations Act.*

[43] The test for the reapportionment of property under the *Family Relations Act* was unfairness simpliciter, determined in light of the factors set out at s. 65(1):

> (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage,
>
> (b) the duration of the period during which the spouses have lived separate and apart,
>
> (c) the date when property was acquired or disposed of,
>
> (d) the extent to which property was acquired by one spouse through inheritance or gift,
>
> (e) the needs of each spouse to become or remain economically independent and self sufficient, or
>
> (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
>
> the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

(3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 have not been met.

Pursuant to s. 96, the court may not make orders dividing excluded property between spouses unless:

a) extraprovincial family property and family debt "cannot practically be divided," presumably through s. 109 or the court's jurisdiction in personam; or,

b) it would be "significantly unfair" not to divide the excluded property in light of the length of the spouses' relationship and non-owning spouse's direct contribution to the excluded property.

Pursuant to s. 94(2), the court may not make orders concerning property and family debt that is the subject of an agreement between spouses until the agreement is set aside following an application under s. 93.[44] Agreements may be set aside for one of three reasons: if there was a significant defect in the bargaining process of the sort seen in *Miglin*[45] and *Rick v Brandsema*;[46] if the agreement is "significantly unfair" in the circumstances of the relationship; or, if the court

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[44] The agreements covered by s. 94(2) must, under s. 93(1), be in writing and have the spouses' signatures witnessed by at least one other person. The court may, however, waive the requirement that the spouses' signatures be witnessed under s. 93(6).

Note that ss. 93 and 94 are only applicable to agreements between persons qualifying as "spouses" within the definition at s. 3(2); where the parties are not spouses, the usual law of contracts will apply.

[45] *Miglin v Miglin*, 2003 SCC 24

[46] *Rick v Brandsema*, 2009 SCC 10

would not make an order that is "substantially different" than the agreed division of property and debt:[47]

> (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement ... only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
>
> (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
>
> (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
>
> (c) a spouse did not understand the nature or consequences of the agreement;
>
> (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
>
> (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
>
> (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
>
> (a) the length of time that has passed since the agreement was made;
>
> (b) the intention of the spouses, in making the agreement, to achieve certainty;
>
> (c) the degree to which the spouses relied on the terms of the agreement.

A panoply of orders for determining property interests and giving effect to the division of property, pensions and debt, similar to those provided at s. 66 of the *Family Relations Act*, is provided at s. 97 of the new act. The orders and declarations available should suffice to address most issues arising from the division of property and debt in British Columbia, and include, in addition to the sort of orders one would reasonably expect, the following:

a) orders granting a life estate, or title for a fixed number of years, in a property to a spouse (s. 97(2)(b));

b) orders for the payment of compensation where a spouse has disposed of or converted property (s. 97(2)(c));

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[47] Harvey J. succinctly described the operation of s. 93 in *Asselin v Roy*, 2013 BCSC 1681 as follows:

> *[125] Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.*

c) orders that all or some of the property to which one or both spouses are entitled be held in trust or vested in a child (s. 97(2)(e));

d) declarations that a spouse is responsible for the payment of a particular family debt (s. 97(2)(h)); and,

e) orders for the sale of property to pay a particular family debt (s. 97(2)(i)).

Further orders are available under s. 109 when the court has accepted jurisdiction over property located outside the province and makes an order "respecting the ownership and division of the extraprovincial property:"

> (2) For the purposes of dividing extraprovincial property, the Supreme Court, on application by a spouse, may make an order to do one or more of the following:
>
> (a) instead of dividing the extraprovincial property,
>
> (i) require property or family debt within British Columbia to be substituted for rights in the extraprovincial property, or
>
> (ii) require a spouse who has legal title to the extraprovincial property to pay compensation to the other spouse;
>
> (b) if the court is satisfied that it would be enforceable against a spouse in the jurisdiction in which the extraprovincial property is located,
>
> (i) preserve the extraprovincial property,
>
> (ii) provide for the possession of the extraprovincial property,
>
> (iii) require a spouse who has legal title to the extraprovincial property to transfer all or part of the spouse's interest in the extraprovincial property to the other spouse, or
>
> (iv) provide for any other matter in connection with the extraprovincial property;
>
> (c) if the court is satisfied that it would be enforceable in the jurisdiction in which the extraprovincial property is located, provide for non-monetary relief.

E. Application of Other Law

Law other than the *Family Law Act* may be considered in a property dispute in British Columbia in four circumstances:

a) when extraprovincial property is involved and the "proper law of the relationship," as determined under ss. 107 and 108, is the law of another jurisdiction;

b) when a party relies on legislation other than the *Family Law* Act, such as the *Partition of Property Act* or the *Business Corporations Act*;[48]

c) when a party invokes one of the common law presumptions to promote or a defend a claim to an interest in property, for example the presumptions of advancement, gift and loan; and,

d) when a spouse invokes the principles of equity, usually unjust enrichment and constructive trust, and to the extent that it remains applicable in family law disputes, resulting trust.[49]

The applicability of other domestic legislation,[50] the common law and the law of equity results from s. 104(2), which provides that "the rights under this Part are in addition to and not in substitution for rights under equity or any other law," contrary to government's apparent intention of creating in Part 5 a complete code for the division of property between spouses.[51]

III. Case Law Developing in the Supreme Court

In this section, I will canvass the highlights and areas of controversy in the jurisprudence developing under Part 5 of the *Family Law Act* in summary form. I will generally not review the facts of the cases discussed in much detail unless relevant to the legal principal or issue at hand; I have also omitted the citations for referenced cases, legislation and secondary materials. Links to the full text of the cases discussed are provided in the Appendix.

A. *Asselin v Roy*

The first judgment to be released on a Part 5 claim was the very early decision of Harvey J. in *Asselin*,[52] a case involving unmarried spouses separating after a 24-year relationship. Justice

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[48] *Business Corporations Act*, SBC 2002, c. 57

[49] See *Kerr v Baranow*, 2011 SCC 10 at para. 15.

[50] The application of other British Columbia legislation in the context of claims under Parts 5 and 6 of the *Family Law Act* will, however, be governed by the rule of statutory interpretation that a statute of specific application is to be preferred and applied over a statute of general application. See: *Ass. of Area #23 v Lafarge*, 2001 BCSC 596 at paras. 27 and 29; *Condominium Plan No. 762 1828 v Marusyn*, 2010 ABQB 523 at para. 19; and, *Madore-Ogilvie v Kulwartian* (2006), 34 RFL (6th) 138 (ONSCDC) at para. 24.

[51] Regardless of the authorization granted by s. 104(2), trust claims can be brought, and may be the only effective means by which a person may pursue an interest in property owned by another, when the claimant:

a) does not qualify as a "spouse" under s. 3(1); or,

b) is out of time under s. 198(2).

[52] *Supra*, fn 47

Harvey was doubly cursed, unfortunately, as he not only drew the first property case under the new act, with a trial that began the very day the *Family Law Act* came fully into force, but was required to reach a decision based on inadequate evidence that lacked critical details about important issues such as value. As Justice Harvey observed:

> *[104] Future litigants referencing this decision would be well advised to avoid some of the problems encountered by the parties in this litigation by preparing a Scott Schedule detailing the assets and liabilities of each party as of the date of separation.*
>
> *[105] One of the apparent objectives of the Act is to create more certainty for litigants in the division of their assets. The broad judicial discretion formerly available under the [Family Relations Act] has been replaced with a more formulaic approach to both the identification and division of family property.*
>
> *[106] To implement the objectives, more mathematical certainty from a clear evidentiary record is required. Where inheritances are said to come into play, estate documents should be produced. Where exclusion of property is sought, on whatever basis, documents showing the value of property as at the time cohabitation commenced and at the date of separation will be critical in the assessment which the court is to perform. Where one party suggests, as is the case here, that excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded.*

Among other issues, *Asselin* involved property brought into the relationship; property bought during the relationship with inheritances, property bought during the relationship with the proceeds of property brought into the relationship, property bought during the relationship using money acquired during the relationship as well as property brought into the relationship, credit card debt and an impugned marriage agreement executed in 1990, giving Harvey J. the opportunity to address the key principles of Part 5.

1. Setting Agreements Aside

Effect of unwitnessed agreements. The act does not require that the spouses' signatures on an agreement be witnessed as a condition of its validity; even oral agreements, if proven, are valid. Although s. 93 requires that the spouses' signatures be witnessed for the section to apply, that requirement can be waived.

> *[132] The fact the Agreement is unwitnessed is of no consequence to its validity. Section 92 does not require that the Agreement be in writing or witnessed. Presumably, oral agreements respecting the division of property are enforceable if properly proven on the evidence. The fact the Agreement was unwitnessed doesn't preclude the court's intervention; s. 93 (6).*

Test to set aside agreements. Agreements can be set aside for three reasons under s. 93: the formation of the agreement lacked procedural fairness; a fairly negotiated agreement has

become significantly unfair; or, the court would not make an order substantially different than the terms agreed to.

> *[125] Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.*
>
> *[126] Even if the court determines the agreement was unfairly reached, there is still discretion to decline to set aside or vary the agreement if the result would not be substantially different from that which is contained in the agreement. s. 93(4)*
>
> *[127] If an agreement was fairly reached, having regard the enumerated factors in s. 93 (3), the court must go on to consider whether the agreement is significantly unfair having regard to the enumerated criteria in s. 93(5).*
>
> *[128] Judicial discretion has been modified, particularly as it relates to the assessment and enforceability of agreements. Under the previous legislation, a finding of unfairness based on one of [the] enumerated factors in s. 65(1) was sufficient to allow the court to, in effect, rewrite the parties' Agreement to achieve the fairness found lacking in the original version.*

Procedural fairness. The test to determine procedural fairness in agreements between spouses is different than the test applicable to commercial agreements and requires, among other things, legal information and financial disclosure sufficient for the parties to fully consider their positions in entering into the agreement.

> *[137] Procedural fairness in family related matters is paramount. Different considerations apply in the negotiations of contracts between spouses, on the one hand, and commercial transactions, on the other. As was said in Rick v Brandsema ... :*
>
> > *[46] This contractual autonomy, however, depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so.*
>
> *[139] Ms. Asselin ... had been residing with Mr. Roy for a period in excess of two years and, as such, had at least the potential for a spousal support claim under existing legislation.*
>
> *[140] Similarly, two of Ms. Asselin's children and been residing with her and Mr. Roy for a period in excess of one year... entitling her to a potential claim for child support for Mr. Roy in the event of separation.*
>
> *[141] Each of these 'rights' was waived under the Agreement without her situation having been explained to her by someone safeguarding her interests ... absent Independent Legal*

Advice, she likely would not be able to substantially understand the specific import of the Agreement.

[142] As to the submission that Ms. Asselin, by virtue of her education, understood the nature and consequences of the Agreement, I refer to the following passage in Gurney v Gurney ... where Pitfield, J. stated:

> *[29] In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the Agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the Agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the Agreement in all the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the Agreement as opposed to pursuing some other course.*

[143] Nothing in the language in s. 93 (3) (c) ameliorates that statement of law.

2. Dividing Property and Debt

Identifying family property: Property is divisible family property if it existed on the date of the spouses' separation and was owned by at least one spouse.

[160] ... Unlike the former legislation governing property division, there is no requirement under the Act to establish entitlement to an asset before its characterization as 'family property'. There is no requirement of ordinary usage or contribution to the asset; rather the court merely has to determine that such property existed on the date of separation and at least one spouse owned it or had a beneficial interest in it.

Identifying excluded property: The burden of establishing that property is excluded from division lies on the party asserting the exclusion.

[195] Section 85(2) casts the onus of proof upon the spouse seeking to exclude property.

A failure to prove the amount of excluded property contributed to the purchase of property may result in no part of the purchased property being excluded property.

[209] In respect of the acreage on [Property A], acquired according to the respondent with partial proceeds from the inheritance from his mother, no documents have been provided which allow me to determine the extent of the respondent's down payment and positively identify the source of those funds as coming from the inheritance he received from his mother in 1998.

[210] While sympathetic to the respondent's plight, the absence of any evidence as to the amount of the down payment or any basis upon which to make an informed estimate of the amount precludes any finding that any portion of the [Property A] acreage is excluded property. The Act makes clear that it is the respondent who bears the onus of proof to demonstrate that property ought to be excluded.

[211] Here, he's failed to do so. I cannot specify, on the balance of probabilities, either the amount paid for the down payment in respect of the [Property A] acreage or the source of funds.

[212] In the result, I decline to find any portion of the [Property A] acreage is excluded property.

Dividing property and debt. The excluded character of property can be traced into property bought with excluded property; the amount of the exclusion from the new property is the equity in the original property at the later of the purchase of the original property or the commencement of the spousal relationship. Any increases in the value of the exclusion are shared family property.

[196] The equity in [Property B] as at [the date cohabitation commenced], is excluded property pursuant to s. 85(1)(a). ...

[197] [Property B] sold for $175,000 in 1991. I accept as fact that substantially the whole of the net sale proceeds were applied to the acquisition of [Property C]. I do so based on a purchase price of $289,000 together with closing costs including property purchase tax and legal fees.

[198] This invokes s. 85(1)(g), causing whatever portion of the $175,000 which 'existed' as at [the date cohabitation commenced] to remain for the benefit of Mr. Roy in these proceedings as property excluded from division under Part V of the Act. ...

[200] ... The excluded portion of [Property C] based on the tracing of the excluded portion of [Property B] into the acquisition of [Property C] is $150,000. That sum, together with what follows, is excluded from the division of [Property C] in favor of Mr. Roy.

Where the value of a property purchased with excluded property has dropped below the amount of debt encumbering the property, there will be neither excluded property nor family property to distribute and both parties may be liable for the shortfall.

[206] Both parties agree there is little, if any equity, in [Property D]. The assessed value is $233,100; a realtor has opined the value may be as high as $258, 520. The mortgage and line of credit which encumbers this property has an outstanding balance of $250,523.

[207] If sold, there will likely be nothing left to distribute, leaving both parties liable for any shortfall.

> *[208] In the result, I conclude there is nothing left of the 'excluded portion' of the property to maintain for the benefit of the respondent. More likely, there will be a shortfall between the selling price and the amount required to discharge the encumbrances leaving each party with the liability in respect of [Property D].*

Where excluded property is applied to improve family property, the enhanced value of the family property is excluded property.

> *[223] The claimant testified that she spent over $120,000 of her inheritance on improvements to the [Property C] home. Were those improvements demonstrated to have enhanced the value of the property, the enhanced value would be excluded property.*

B. *Cabezas v Maxim*

The next decision under Part 5 was that of Hinkson C.J. in *Cabezas v Maxim*.[53] The parties to this case were unmarried spouses who had been involved in a relationship lasting some six years and owned a variety of assets bought before and during their cohabiting relationship.

Among the assets acquired during the relationship were the family home, a mobile home and lot. The home was jointly registered and was purchased with funds provided by the respondent and his company, of which the claimant agreed to repay half, and the proceeds of a mortgage. The mortgage was subsequently retired by a number of payments made by the respondent's parents, raising the question of whether the payments were made as a loan, as a gift or as an advance on the respondent's inheritance, and the applicability of the presumption of advancement to the division of property under Part 5.

Identifying family property. Gifts given to both spouses are family property. Gifts by a spouse's parent to the spouse are subject to the presumption of advancement, which will normally result in the gift being characterized as excluded property. However, gifts given to purchase or maintain the parties' home are presumed to be gifts given to both parties and as such are family property.

> *[39] I find that the family property in this case consists of the [bank account] and the [property]. Both fall within the definition of family property found in s. 84 of the Act. ...*
>
> *[67] I have already concluded that the [property] was a family asset. ... I am not persuaded that the funds used to pay off the mortgage were provided to the respondent either as a loan or as an advancement on his inheritance. Such a conclusion would be at odds with how the respondent's parents treated all of their children. While I accept that the respondent's mother has subsequently and sensibly chosen to treat the gifts to both of her sons and their partners as advancements against what the sons will inherit from her estate, I find that such an*

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[53] *Cabezas v Maxim*, 2014 BCSC 767

> *intention was formed well after the gifts were given. I therefore find that the funds in question were given as a gift intended to benefit both the respondent and the claimant.*
>
> *[68] Had Mrs. Maxim's intentions been unclear, I would nonetheless have found that ... the funds used to pay off the mortgage on the [property] were provided by the respondent's parents as a gift to avoid the foreclosure of the property, resulting in a presumption of advancement to the claimant. This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the [car] received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.*

C. *Remmem v Remmem*

The decision of Butler J. in *Remmem v Remmem*[54] was given three months after *Cabezas* and concerned married spouses leaving a 22-year relationship, a commercial fishing boat brought into and depreciating during the relationship, property brought into the relationship and used to buy property in the parties' joint names, and property acquired during the relationship without the use of property brought into the relationship.

Like Harvey J. in *Asselin*, Butler J. concluded that the owner of excluded property depreciating during the relationship must bear the depreciation without compensation from other property. However, the primary significance of this case lies in the court's analysis of application of the presumption of advancement to the division of property under the *Family Law Act*; contrary to the conclusion reached in *Cabezas*, Butler J. concluded that Part 5 of the act operates as a complete code excluding the application of other legal principles.

1. Application of Case Law from Other Jurisdictions

Application of other case law. Decisions made under foreign legislation may be instructive, however the court must be mindful of any differences between the foreign legislation and the domestic.

> *[31] Mr. Remmem relies on the approach to this issue taken by Saskatchewan courts and both parties referred to decisions from Alberta and Saskatchewan. While the decisions are instructive, the legislation in those provinces differs from the FLA in important respects. ...*

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[54] *Remmem v Remmem*, 2014 BCSC 1552

[40] ... The language in the FLA requires a different approach from that taken in either Alberta or Saskatchewan. ...

Differences in Alberta's *Matrimonial Property Act*.[55] Alberta's legislation excludes the value of property at the time of marriage from division, not the property itself. It also gives the court a broad discretion to distribute divisible property in an equitable manner.

[33] There are two significant differences between these provisions and the FLA: the Alberta exemption applies to the "market value" of the exempt property at the time of the marriage. The property itself is not excluded from division. Second, the court is given a broad discretion under s. 7(3) to distribute in a just and equitable way, the difference between the exempted value and the market value of the property at trial. On a preliminary reading, s. 7(3) appears to allow the court to distribute between the parties the depreciation that has occurred in relation to exempted property. However, Alberta courts have decided that generally the only exemption available to the party who brought property into the relationship is the depreciated market value of that property at the date of trial.

[34] In Lovich v Lovich ... the court summarized the approach taken by the Alberta courts to depreciating property that is consumed over time:

> *Where depreciable exempt property is consumed during the marriage, the following principles should apply:*
>
> *(a) the initial exempt value is the fair market value of the depreciable property on the date of the marriage, or the date of the gift.*
>
> *(b) the exemption can be carried forward if the property is traded in, or if the property is sold and replaced. The exempt value can be traced forward into new property so long as there is a reasonable nexus between the exempt property and the replacement property. No precise and exact tracing is required, and de minimus breaks in the chain of exempt property can be tolerated.*
>
> *(c) the amount of the exemption is lost as the property is consumed up or depreciated. If, by the time of trial, the property has been totally consumed and depreciated, there is no remaining exempt value.*
>
> *(d) if the property is partly consumed and depreciated, and then traded for other property, the value at the date of the trade-in is carried forward into the new property. If that new property is then consumed or depreciated, the exempt portion is deemed to be consumed pro rata with the non-exempt portion.*

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[55] *Matrimonial Property Act*, RSA 2000, c. M-8

Differences in Saskatchewan's *Family Property Act*.[56] The Saskatchewan legislation excludes the value of property at the time of marriage from division, not the property itself. It also gives the court a broad discretion to distribute excluded property and distributed divisible property in an equitable manner.

> *[38] There are important differences between the Saskatchewan legislation and the FLA. The Saskatchewan exemption, like the Alberta exemption, applies to the value of the property and not the property itself. Second, and more significantly, the Saskatchewan legislation gives the court discretion at two separate stages of the property division exercise. Section 23(4) gives the court a specific discretion to consider the fairness of the exemption and to make any other order where it is fair and equitable to do so. Section 21(2) provides a broad discretion to make an order for other than equal distribution of family property. The FLA provides for a similar broad discretion by way of s. 95, but does not include a specific discretion to consider the fairness of an order exempting or excluding property. ...*
>
> *[41] ... The Saskatchewan decisions are driven by the language in the Family Property Act, not simply by the type of property ... the Family Property Act requires the court to exempt the value of property brought into the relationship so long as the property is not the matrimonial home or household goods. It is only "when considering whether it would be unfair or inequitable to allow the exemption in whole or in part, is the court to have regard for such matters as the depreciating nature of the property." The effect of this legislative scheme is that the default position for such property is that its value as of the date of commencement of the relationship is excluded from division subject to the considerations in s. 23(4).*

2. Application of Other Legal Principles

The presumption of advancement. The act does not address the presumption of advancement, however applying the presumption would have a number of adverse effects, including undermining the simplicity of the act's scheme for the division of property and creating separate standards for married spouses and unmarried spouses. Accordingly, the presumption of advancement does not apply to the division of property under the act.

> *[50] The FLA contains no provisions dealing with the presumption of advancement between spouses which would suggest that the presumption still applies. However, as noted by Mr. [Scott] Booth, the presumption would raise a number of problems when applied under the scheme of the FLA including:*
>
> > *a) The presumption only applies to married spouses and so gratuitous transfers between married and unmarried spouses would be treated differently.*
> >
> > *b) The presumption is at odds with and would thus limit the utility of the tracing provisions. Property ... placed in joint names is clearly derived from excluded property and so it is easy to trace the full amount of the exclusion. Unlike the presumption of*

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[56] *Family Property Act*, SS 1997, c. F-6.3

advancement, tracing does not depend on the parties' intentions. The application of the presumption of advancement and an examination of whether property was gifted is at odds with the simple concept of tracing.

c) When applied, the presumption of advancement would significantly reduce the value of the exclusion to the donor spouse.

d) Further, if half of the excluded property is a gift to the donee spouse, shouldn't he or she be able to claim that his or her half of the property is excluded?

[51] These issues would have two significant consequences. First, the apparent simplicity and certainty of the property division scheme would be lost. Exclusion would depend not only on whether property was owned prior to the commencement of the relationship or brought in by way of inheritance in the course of the relationship, but on other circumstances. The new scheme is easier to apply if subsequent transactions only have to be examined to see if property is derived from the excluded property. If the court also has to look at subsequent transactions to determine if property was gifted, it would have to consider the parties' intentions in transactions which may have taken place many years before trial. This would be a difficult exercise which would require considerably more court time. Further, the amount of the exclusion would be different for married and unmarried spouses, a result that does not appear to have been intended by the legislation. The amount of the exclusion might also be different for married spouses in similar situations, depending on the conclusions arrived at as to application of the presumption of advancement.

[52] When I consider these difficulties, I conclude that the tracing provisions in the FLA, at least when applied to the circumstances in this case, are to be applied without considering or applying the presumption of advancement between married spouses. ...

3. Dividing Property and Debt

The effect of triggering events on excluded property. The ownership of excluded property is unaltered by the occurrence of the triggering event.

[40] ... Section 85 excludes from the definition of family property, any property acquired by a spouse before a relationship began. Accordingly, any such property is not family property and the other spouse has no right to an undivided half interest in that property as a tenant in common. ...

Depreciated excluded property. Excluded property is exempt from division, not the value of the excluded property. Where excluded property depreciates in value, none of the excluded property is divisible family property, and the depreciated value cannot be recovered from family property.

[42] In British Columbia, the legislation provides that the property acquired by a spouse before the relationship began is excluded, not the value of the property. As a result, when property

depreciates, no part of the depreciated property is subject to division. The court has no discretion during the first stage of its analysis (i.e. when determining the property is subject to division) to include the original value of depreciated property in the division exercise. In the present case, this means the [fishing boat] is not and never was family property, and the $100,000 value of the vessel [on the date cohabitation commenced] cannot be brought into the equation to apply against other family property.

Unequal division of family property. To order an unequal division of family property, the court must first identify the family property and then undertake a notional equal division of that property. The court's discretion to order an unequal division is different under the *Family Law Act* than it was under the *Family Relations Act*. The court must find an equal division would be significantly unfair. The unfairness must be compelling or meaningful having regard to the factors set out in s. 95(2).

[43] It is only at the very end of the [process of identifying the family property] that equitable considerations come into play pursuant to s. 95. After determining the full extent of the family property, the court must go through the notional exercise of dividing that property equally. The court must consider if equal division would be "significantly unfair". If it would, then it is possible to order an unequal division.

[44] The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act ... courts had a discretion to divide family property in unequal shares if the court found that the division of property ... would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact – something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2). ...

[47] In order to determine if it would be significantly unfair to divide the family property equally, the court must notionally divide the family property, taking into account the exclusions, in accordance with the provisions of the FLA. ...

D. *H.C. v H.P.C.*

The case of *H.C. v H.P.C.*,[57] a decision of Burke J., involved a claim for the unequal division of family property, the family home, on the grounds that: the claimant's income paid for the home; the claimant's parents had contributed a substantial sum toward the purchase price; and, the claimant "needs the value of the property" to raise the parties' child, who she would be primarily responsible for parenting.

Although Burke J. followed *Cabezas* in applying the common law presumption that funds advanced by a party's parent for the purchase of the family home is a gift to both parties and therefore family property, she reached outside the considerations listed in s. 95(2) to allow an unequal division of that property to reflect the parties' parenting roles and the respondent's limited contributions to the support of the child.

Unequal division of family property. Disproportionate child care responsibilities coupled with the underemployment of the payor may lead to an equal division of family property being significantly unfair.

> *[64] As noted in L.G. v. R.G. ... the provision is different from the Family Relations Act in terms of the standards the judge must apply before exercising discretion to order the unequal division of family property. Brown J. then went on to note at para. 71:*
>
> > *[71] In my view, the term 'significantly unfair' in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division. ...*
>
> *[66] The [property] is a family asset as per s. 84 of the FLA. The child, however, will be living full time with the claimant. The claimant will therefore bear the full burden of childcare. The respondent is not working and indeed appears to be having difficulty in this regard. I am also satisfied that during the marriage, the claimant was significantly responsible for the care and upbringing of the child ... since moving to Canada, the claimant clearly has primary responsibly for the care and upbringing of the child.*
>
> *[67] ... I have a concern with the significant underemployment of the respondent and his inability to provide for the child. The child will now be definitively residing full-time with the claimant. This is a factor which could lead to significant unfairness if the property is divided equally. There is real doubt as to whether the respondent will be able to meaningfully contribute to the support of his daughter. The division of assets in this case should take that factor into account. The needs of the claimant as the primary caregiver for the child in the*

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[57] *H.C. v H.P.C.*, 2014 BCSC 1775

circumstances must be taken into account. This ultimately favours an unequal division of family property.

Identifying family property. The presumption of advancement may apply to claims for the division of property under Part 5. The presumption that funds advanced for the purchase of a family home by a party's parent is a gift to both parties may also apply.

> *[68] ... The claimant has also argued the gift from her parents should be taken into account in providing for an unequal division. A question arises therefore as to whether the division of the family property should take into account an exclusion of $95,000 – the gift to the claimant which was used as part of the purchase price of the home.*
>
> *[69] Section 85(1)(b) excludes gifts or inheritance to a spouse from family property. As set out by Hinkson C.J. in Cabezas v Maxim, ... if the funds were a gift solely to the claimant, any property derived from those may be excluded property under the FLA. ...*
>
> *[70] Ultimately, Hinkson C.J. in that case concluded at para. 68:*
>
> > *[68] ... This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the [car] received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.*
>
> *[71] Even if I were to conclude in this case that the claimant's parents gifted the disputed amount to the claimant, the case law reflects a presumption of gift to both a child and his or her spouse to facilitate the purchase of a family home when a parent chooses to provide funds to the child for the purchase of a family residence.*

E. *Williams v Killey*

The case of *Williams v Killey*[58] involved an unmarried relationship of less than four years' duration, during which time certain assets owned by the respondent, primarily his home and his RRSP savings, significantly increased in value, the home by about $107,200 and the RRSPs by about $96,700. Apart from a preliminary question as to whether the nature of the parties' relationship qualified them as spouses, the case primarily concerned the nature and extent of the claimant's property entitlement.

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[58] *Williams v Killey*, 2014 BCSC 1846

This decision is one which should perhaps be approached with a degree of caution as a result of the analysis undertaken,[59] and I include it in this paper for that reason, bearing in mind the very real possibility that I may have misunderstood the court's analysis.

Pursuant to ss. 81(b) and 84(2)(g)(i), the claimant in *Williams* was presumptively entitled to one-half of the increase in value of the respondent's home and RRSPs, both of which qualified as excluded property as property acquired before the parties' relationship began, pursuant to s. 85(1)(a). The respondent, however, argued that the "growth in value of his assets" should be divided entirely in his favour or that the claimant should receive, at most, 10% of growth in value of the home. Given the presumption of equal entitlement, the burden of showing that an equal division of the family property would be "significantly unfair" under s. 95(1), the sole ground for an unequal division of family property, lay on the respondent.

In this decision, however, the duration of the relationship was approached as an independent ground for an unequal division of property, without a prerequisite finding of significant unfairness, and the claimant's entitlement to a share of the family property appears to have rested on her contributions to that property rather than on the presumption of equal entitlement provided in s. 81:

> *[67] Section 95 is the re-apportion section of the FLA. Here under s. (a), the duration of the common law relationship between the parties is to be considered, which was approximately three and one-half years. Under s. (i), the only other factor applicable would appear to be one that results in significant unfairness.*
> *[68] The respondent's cases I consider to be a lot more helpful than the claimant's cases and they put the contribution of a spouse in a short term relationship as being valued at 10-15% of property.*[60]
>
> *[69] The claimant here did contribute significantly to the household expenses and to the preservation and maintenance of the townhome. I consider it would be significantly unfair to her for her efforts to be denied any part of the increase in the townhome which was due only to market forces while she resided there.*
>
> *[70] I award the claimant 15% of the $107,173 increase in net value of the townhome during their relationship time. The amount awarded for the increase is $16,075.95.*

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[59] However, see *Stanbridge v Stanbridge*, 2015 BCSC 1468 in which the analysis in *Williams* was applied.

[60] Given that no decisions arguing for an unequal division under the *Family Law Act* on the basis of brevity of relationship had been published as at the date of trial, I infer that the cases provided by counsel had been determined under the *Family Relations Act*. Apart from the difference between the "unfairness" required by s. 65 of the old legislation and the "significant unfairness" required by s. 95 of the new, the property being divided under the *Family Relations Act* was the *whole* of the property, not just the increase in the property's value since the beginning of the parties' relationship. See the comments of Sharma J. in *A.M.D. v K.R.J.*, 2015 BCSC 1539 at paras. 59 and 60 on the application of reapportionment case law under the *Family Relations Act* to unequal division claims under the *Family Law Act*.

[71] RRSPs are family property by virtue of s. 84(2)(e). The respondent's RRSPs were acquired prior to the relationship so s. 85(1) is also applicable to the RRSPs as excluded property.

[72] However, again, s. 84(2)(g) takes into account any increase in excluded property during the relationship for the purpose of division and brings into play as well s. 95 for re-apportion purposes.

[73] While the respondent's RRSPs increased in value by $96,661 during the relationship, during that same period of time the evidence is that he contributed over $85,000 to his RRSPs.

[74] In these circumstances, I apportion the RRSPs 100% to the respondent.

With respect, I suggest that when addressing claims under Part 5:

a) the starting point is the presumption of equal entitlement to family property, regardless of the brevity of the relationship or the spouses' relative contributions to that property during their relationship;

b) spouses' entitlement to family property exists, pursuant to s. 81(a), "regardless of their respective use or contribution" to that property;

c) the onus of demonstrating significant unfairness lies on the spouse resisting an equal division of family property; and,

d) the duration of the spouses' relationship is one of the enumerated factors that the court may take into account in determining whether an equal division of family property would be significantly unfair but is not a ground for the unequal division of family property independent of a conclusion of significant unfairness.

F. *K.M.J. v J.H.D.N.*

The decision of Betton J. in *K.M.J. v J.H.D.N.*,[61] the sixth substantive trial judgement on Part 5, includes an important discussion on: spouses' responsibility for family debt; changes in the amount of debt owing following separation; and, the date on which the family debt should be valued. This judgment is especially valuable, not only for the court's analysis of s. 86, but for the principles Betton J. draws from that analysis.

At separation, the parties were in arrears of personal taxes in the approximate amount of $43,700, owed sales tax payments of about $6,400, owed about $18,000 for a line of credit, and owed about $9,600 on a credit card held by the respondent and about $15,600 on a credit card held by the claimant; the amounts owing fluctuated significantly thereafter. At the date of trial, the personal tax debt had decreased to about $22,300 as a result of the CRA's vigorous

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[61] *K.M.J. v J.H.D.N.*, 2014 BCSC 1895

enforcement, and the sales taxes owing had increased to about $14,800. The balance owing on the claimant's credit card had decreased insignificantly. However, the respondent's credit card and line of credit had been paid off but new debt had accumulated, with $18,000 owing on the line of credit and $16,000 owing on the credit card. The claimant thus took the position that a significant portion of the debt owing at the date of trial was not family debt; the respondent, on the other hand, argued that the debts were all but unchanged since separation and that the fluctuations were irrelevant to the court's analysis.

1. Statutory Interpretation

Interpretation of the *Family Law Act*. The act is to be constructed in a holistic manner, with the text of the act being read in light of the overall scheme of the act and the intentions of government.

> *[137] The well-established approach to statutory interpretation is summarized in Bell ExpressVu Limited Partnership v Rex ... as follows:*
>
> > *[26] In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):*
> >
> > > *Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*
> >
> > *Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings ...*

2. Dividing Debt

Identifying family debts. Under the *Family Law Act*, the date of separation is the date on which family property and family debt are identified and the date on which they are valued is the date of trial. Changes in the value of property after separation resulting from market trends are shared by both spouses. The same principle should apply to changes in the value of debt, however, decreases in value rarely result from market trends. If the valuation of debt at trial results in significant unfairness to a party, s. 95 is available to address the issue and s. 87 allows the court to select a different valuation date.

> *[140] The legislation sets the separation date as the date when property and debts are to be identified and, in the absence of an agreement, the date of hearing for valuation. Some of the challenges with interpretation seem to arise from the drafters' decision to deal with property and debts together.*
>
> *[141] A simple review of s. 85 demonstrates that family property can take many forms. In that context, the importance of identifying valuation dates is obvious and the idea of fluctuating*

values is easily understood. The value of a piece of real property, for example, might change dramatically between separation and hearing dates. It is entirely logical that, as a starting point, both spouses share in the positive or negative change brought on by market trends.

[142] The definition of debt in s. 86, on the other hand, is simple: "all financial obligations incurred by a spouse". What makes it family debt is the time at which the debt was incurred or, in cases of it arising after separation, its purpose. Family debts are then, by definition, less variable in kind. ...

[143] The parties should generally still share in both the increases or decreases in value that may occur between separation and hearing (or agreement). However, in the case of debt, decrease in value, which is analogous to a positive change in the value of property, is almost never the result of passive market trends. ...

[145] ... The language of the Family Law Act is clear and unambiguous. It provides clarity and increased certainty to the process of identification and valuation. ...

[147] It is also important to observe that s. 95 is available to rectify such prejudice. However, it is apparent, first, that the legislation was intended to remove elements of judicial discretion in the first instance, but provide for the ability to avoid "significant unfairness". Second, the language of s. 95 appears to focus on remedying the problem the claimant is complaining about: when one party significantly increases a debt ... between separation and hearing beyond that caused by market trends. ...

[153] The language of s. 86 is clear, as is the scheme of the legislation. There is no inconsistency between them. ...

[154] Section 87 also provides for a mechanism to use a different valuation date if necessary and where s. 95 is not applicable.

General principles governing the division of family debt. Where a spouse retires family debt between the dates of separation and trial in good faith, the other spouse is not relieved of his or her obligation to share the debt. To ensure that spouses' equal responsibility for family debt is realized, the valuation date of the family debt may be changed under s. 87 and family property may be unequally divided under s. 95.

[155] The process outlined here will hopefully assist in ensuring that the process of valuing property and debts is clear and consistent and ultimately fair.[62] *If family property is disposed of after separation but before the hearing date, not in good faith (s. 95(2)(g) specifies good faith as a relevant consideration), that cannot deprive the other spouse of the value of their interest in the property. If it were disposed of in good faith, presumably s. 87 would be used to select the disposition date as the valuation date. Similarly, the good faith retirement of all or*

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[62] This process was subsequently applied by Fenlon J., as she then was, in *Bilawchuk v Bilawchuk*, 2014 BCSC 2067, beginning at para. 59.

some of a family debt post-separation but before hearing cannot relieve the other spouse of their obligation to share in that family debt. The Act specifies that we start with the value at hearing date, but provides tools in ss. 87 and 95 to adapt to the peculiar circumstances that might arise to achieve the intent of the legislation.

[156] Some examples may be useful. I will use a line of credit as the family debt throughout, for consistency. In these examples, I will assume that the starting debt meets the definition of family debt at the date of separation.

- *If the principle debt remained static post-separation but interest accumulated, then the value should be the new balance including accumulated interest at the date of hearing.*

- *If the amount of the debt was identical at hearing date and separation date but one party had used the line of credit during the period, such that the amount of debt had been much higher and/or much lower between those dates, the value would still be the balance at hearing plus some interest adjustment. The interest would have to be adjusted using s. 95, taking into account the balance at separation and whether the use post-separation resulted in greater interest accumulation than would have otherwise occurred, and whether those charges or other charges have increased the debt "beyond market trends".*

- *If the debt was paid off entirely by one spouse post-separation but pre-hearing leaving nothing to divide at the hearing date, s. 87 allowing the court to set a different valuation date should be used or, perhaps, s. 95 would be used to correct what may be a significant unfairness through division of other property or debts. I would use s. 87. Interest accumulated to the date the debt was retired would need to be considered. The same process would be applied if the debt had been paid down but not retired entirely.*

- *If the debt had been run up well above the separation date level, so that the value was significantly different at hearing, this significant unfairness could again be addressed through the application of ss. 87 or 95. The peculiar circumstances of each case may drive the selection of which section to use and the date to be selected.*

[157] These examples involve variations in the debt related to payments or interest; true monetary influences. The respondent's consumer proposal here reminds us that separate from market trends and such true monetary influences, there can be changes to debts for another reason – compromise. Whether through a statutory process such as the Bankruptcy and Insolvency Act or otherwise, creditors and debtors often negotiate reduced payment in exchange for either or both of prompt and certain payment.

[158] The timing of any negotiated compromise and its terms will have to be considered to assess its effect of the value of family debt. Obviously, if the compromise arrangement is concluded by the hearing date that is not a contingent arrangement, the value will be the compromise value. If it is contingent, the nature of the contingencies will have to be

considered. Full disclosure will be needed to avoid potential abuses and ensure there are true contingencies and what the consequences are.

G. *Wells v Campbell*

The parties in *Wells v Campbell*,[63] a decision of Masuhara J., entered into a 22-year relationship later in life and left it with no significant assets other than the family home, brought into the relationship by the claimant and subsequently transferred into joint tenancy, and income derived wholly from public retirement benefits. The primary issue concerned the effect of the gratuitous transfer of title to the family home on the determination of excluded property and family property under ss. 84 and 85.

Property interests and the value of property. Family property is defined as real and personal property and the increase in value of excluded property. Excluded property is defined as real and personal property and beneficial interests in property. With the sole exception of the increase in value of excluded property, the subject matter of Part 5 is property not value.

[25] In s. 83(4) of the Act, "property" is defined as including "a beneficial interest in property unless a contrary intention appears."

[26] In s. 84(1), "family property" is defined as "all real property and personal property." It also includes the amount by which the value of excluded property has increased since the later of the date the relationship began or the excluded property was acquired.

[27] In s. 85, "excluded property" is stated to be property, inheritances, gifts to a spouse from a third party, an award of damages, money paid or payable under an insurance policy, property held in trust for the benefit of a spouse, a spouse's beneficial interest in property held in a discretionary trust that is settled by a person other than the spouse.

[28] I note that the term "excluded property" ... describes itself as property and that "property" is described as real or personal property and includes a beneficial interest. It is questionable then as to whether a "value" in property falls within the definition of excluded property. Next, in respect to family and excluded property, the items described as such are things (e.g. gifts, inheritances, money) or recognized interests and not a value as argued by Mr. Wells. The only exception appears to be where there has been an appreciation in value of excluded property after the start of a relationship. In such a situation the appreciation is considered family property. Other than appreciation, it is apparent that property is viewed distinct from value. Interestingly, depreciation in value is not considered family property.

[29] As a result, it would seem that value appears to be different from property and does not constitute excluded property.

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[63] *Wells v Campbell*, 2015 BCSC 3

Effect of triggering event on property held in joint tenancy. The occurrence of the triggering event severs joint tenancies and vests in each spouse an equal interest in the property as tenants in common.

> *[30] ... As is well known, a joint tenant in a property holds an undivided equal share in all of that property. With a severance of the joint tenancy, which is the case here, each party retains a divided equal interest in the property as tenants in common.*

Effect of gifts. The act does not alter the law on inter vivos gifts; a perfected gift cannot be revoked by the donor. Excluded property gifted to a spouse becomes family property.

> *[32] I find that Mr. Wells at the time he transferred the [property] into joint tenancy he did so as a gift to Ms. Campbell. At that time, the relationship was intact and there was no evidence to suggest that it was failing. The transfer of an interest in the [property] was a perfected inter vivos gift and the gift cannot be revoked ... Ms. Campbell as a result obtained legal and equitable interest in the property. I do not read the Act as altering the law of inter vivos gifts. Accordingly, I cannot see how Ms. Campbell can be denied the entirety of her interest in the property, subject to the division of family property under s. 95(1). ...*
>
> *[41] Also, I note that the definition of excluded property includes gifts to a spouse from third party but does not include gifts between spouses.*
>
> *[42] Further, intention has not been eliminated from the considerations, given that the definition of "property" in the Act includes a beneficial interest "unless a contrary intention appears."*
>
> *[43] It seems that the excluded property relates to property which was held by a spouse prior to the relationship and in which an interest in title was not transferred to the other during the relationship.*

Effect of the presumption of advancement. Although applying the presumption of advancement to claims under Part 5 may result in the problems identified by Butler J. in *Remmem*, those problems do not lead to the conclusion that the act precludes the application of the presumption; the act does not explicitly extinguish the presumption.

> *[36] In Remmem, excluded property and a joint tenancy are discussed and in that case the joint tenancy was held not to have reduced the value of the excluded property. It held that the property division provisions of the Act were "intended to be a complete code so that there is no need to examine the intentions of the parties at the time of the transfer of excluded property to joint tenancy. To come to the opposite conclusion would bring uncertainty and a level of inequality into a property division structure that was intended to treat married and unmarried spouses equally and to provide for a greater level of certainty".*
>
> *[37] Certain problems if intention were relevant to the issue when applied under the scheme of the Act were identified. ... The actual finding however appears to have been limited to the*

facts as the court concluded "that the tracing provisions in the FLA, at least when applied to the circumstances in this case, are to be applied without considering or applying the presumption of advancement between married spouses."

[38] While I do not disagree certain problems can be presented; I am not persuaded that they lead to the conclusion that the Act displaces or extinguishes the presumption of advancement, or the effect of an inter vivos gift resulting in a joint tenancy. There is no explicit extinguishment in the Act, as has been done in other jurisdictions. See for example: Waters' Law of Trust in Canada, 4th ed., at p. 414. In those other jurisdictions, the application of the presumption of resulting trust is required in questions of ownership of property between spouses. The legislation in those jurisdictions state where a property is held by the spouses as joint tenants, that fact is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants.

[39] In jurisdictions where the presumption is said to remain such as in this province, the authors of Waters' state the presumption has arguably been reduced to no significance because of the comprehensiveness of the discretionary powers in the family property legislation to divide between married persons' property owned by either or both of them. Significance is obviously not the same as extinguishment; and it is notable that the Act has narrowed the court's discretion from its predecessor, the Family Relations Act.

H. *Slavenova v Ranguelov*

The decision of Savage J. in *Slavenova v Ranguelov*[64] concerned an 8-year marriage – a second marriage for both parties – and a claim for the unequal division of property delightfully leavened by allegations that the parties' marriage was a fraud. The main issues included valuing the family property and excluded property and a claim for an unequal division of the family property.

1. Valuing Property and Debt

Date of valuation of excluded property. In the absence of conclusive evidence establishing the date the parties' relationship began, and thus the date on which excluded property is valued, the court may use the date of marriage.

[41] Although the respondent agrees that the property is excluded property he disagrees with the claimant's valuation of the property. The respondent submits that ... the beginning of the parties' relationship is the appropriate date to value the excluded property. I do not accept the respondent's submission on this point.

[42] ... Although the parties commenced living together on the respondent's arrival in Canada in December 2003, I am unable to say, on the evidence before me, that a marriage-like relationship commenced at that time, merely because the parties were living together and

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[64] *Slavenova v Ranguelov*, 2015 BCSC 79

had intimate relations. In the circumstances I would use the date of marriage to ascertain the value of the excluded property.

Date of valuation of family property and family debt. Family property and family debt will be valued as at the date of the hearing dividing the property and debt, absent an order or agreement to the contrary.

[34] Section 87 of the FLA provides that, unless an agreement or order provides otherwise, the value of family property or family debt must be determined as of the date of an agreement dividing family property and debt or as of the date of hearing before the court respecting the division of family property or debt. ...

[54] I have already determined that the parties do not have an existing agreement with respect to family property and debt. Similarly, I find that there is no agreement providing for an alternate valuation date than that contemplated by s. 87, which in the circumstances is the date of the hearing before the court. However, I find that in the circumstances it is appropriate for me to order under s. 87 that the parties' real property should be valued at the date of separation, rather than at the date of trial.

2. Dividing Property and Debt

The unequal division of family property. The court should depart from the presumptive equal division of family property with caution. "Significant unfairness" must be established before family property can be divided equally. Significant unfairness is not proven merely by the parties' differing contributions during their relationship; unequal contributions are expected. However, the court may order the unequal division of property where the parties have made an agreement that a property will be unequally divided.

[35] Section 95 of the FLA provides that the court may order an unequal division of family property or family debt or both if an equal division would be significantly unfair for the various reasons specified in s. 95(2) including "any other factor...that may lead to significant unfairness".

[36] The threshold of "significant unfairness" represents a change from the old Family Relations Act ... to the new FLA that has been held to signify a caution against departing from the default of equal division proscribed by the Act in an attempt to find "perfect fairness" ...

[60] The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.

[61] With one exception, there is nothing in the circumstance of this relationship that results in significant unfairness, so as to compel an unequal division of family assets or debt under s. 95, after taking into account the agreed excluded property, the alternate valuation date, and the agreed premarital debt compensation payment.

[62] [Property A was] acquired late in the relationship. The respondent executed a disclaimer deed dated June 6, 2011 with respect to [Property A] (the "Disclaimer Deed"). The Disclaimer Deed provides that "...[t]he property is the sole and separate property of the Spouse..." and the respondent "...has no past or present right, title, interest, claim or lien of any kind or nature whatsoever in, to or against the Property". The claimant purchased those properties with funds entirely borrowed from others. In the circumstances, I would exclude the value of these properties from division pursuant to s. 95(2)(b). Likewise, the respondent is not responsible for any of the debt associated with these properties.

Foreign property. The court may make certain orders concerning the ownership of foreign property, enumerated in s. 109, where a party is habitually residence in the province at the time proceedings under Part 5 are commenced. However, before making those orders, the court must be satisfied that its orders will be enforceable in the foreign jurisdiction, and evidence must be provided to that effect. In lieu of making orders concerning the ownership of foreign property, the court may make an order requiring a party to compensate the other party for his or her interest in the foreign property.

[77] Both parties sought orders affecting foreign properties. Orders respecting foreign property are addressed in ss. 105-109 of the FLA. Because the claimant is habitually resident in B.C. and was at the time these proceedings were started, s. 106 gives the Court the authority to make orders respecting property division that could be made in more than one jurisdiction (in this case being B.C., Texas and Arizona). However, s. 109 restricts the orders that may be made with respect to property located outside B.C.

[78] The respondent and the claimant both seek full title to [Property B]. The claimant also seeks a declaration that the respondent has no interest in [Property A]. Before making any such orders I must be satisfied that the orders would be enforceable in the jurisdictions in which the foreign properties are located: FLA ss. 109(2)(b)-(c). I do not have before me any evidence with respect to the enforceability of such orders in either Arizona or Texas. In the circumstances I find that I am unable to grant the orders sought.

[79] Nevertheless, under s. 109(2)(a) the Court may make an order requiring a spouse who has legal title to the foreign property to pay compensation to the other spouse instead of ordering the division of the foreign property. Therefore, should the equal division of the balance of the family property and debt determined as of the date of separation require the division of [Property B] and [Property A], this may be effected by way of a compensation payment.

I. *Walburger v Lindsay*

The next significant decision under Part 5 was that of Fitzpatrick J. in *Walburger v Lindsay*.[65] Although *Walburger* is helpful for its discussion of valuation in the face of conflicting appraisals and the test to determine whether something is a fixture as opposed to a chattel, I will review only the parts of the decision concerning debts between spouses and the unequal division of family property.

1. Agreements for the Division of Property and Debt

Effect of oral agreements. Spouses may make agreements to divide family property and family debt under s. 92; such agreements may be made orally or in writing. The court may set aside agreements to divide family property and family debt under s. 93, but only where those agreements are in writing. Oral agreements are not subject to the court's oversight under s. 93 but remain subject to the law of contracts.

> *[78] The final debt issue arises from Mr. Lindsay's advance of $12,798 to Ms. Walburger in December 2010 which was used by Ms. Walburger, in part, to repay her line of credit. Ms. Walburger agreed that she would repay Mr. Lindsay this amount with interest. ...*
>
> *[80] Pursuant to the FLA, s. 92, spouses may make agreements respecting the division of property and debt, including the division of family debt, and may do so unequally or to exclude as family debt items of debt that would otherwise be included: see ss. 92(a) and (c), respectively.*
>
> *[81] Ms. Walburger submits that this agreement to repay the debt should not be upheld or enforced. She cites s. 93 of the FLA in support, although that section only applies if there is a "written agreement", which by s. 1 of the FLA means an "agreement that is in writing and signed by all the parties". ...*
>
> *[82] It is well-taken here that the agreement between Mr. Lindsay and Ms. Walburger to repay this debt was oral, not written. As such, s. 93 does not apply, although I acknowledge that such circumstances may well result in the unusual situation where an oral agreement under s. 92 may well be enforceable, if proven, without the court's oversight under the provisions of s. 93. It would, however, remain open to a spouse to assert that any oral agreement is unenforceable under common-law principles. ...*
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> *[84] I do not consider that there is any basis upon which Ms. Walburger can contend that the agreement is unenforceable under common-law principles. She argues that she did not have independent legal advice, but that is not an absolute requirement, and it is very apparent that she understood what Mr. Lindsay required in return for advancing the funds. She is a woman*

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[65] *Walburger v Lindsay*, 2015 BCSC 341

of average intelligence and there is no suggestion that she did not know what she agreed to.
...

Effect of agreements not made in anticipation of separation. Agreements between spouses made during their relationship may not qualify as agreements to divide family property and family debt under s. 92 if they are not made in contemplation of separation or do not address the effect of separation.

[83] In terms of s. 92, it is not entirely clear from the provisions of this fairly straightforward loan agreement that the parties intended that this was an "agreement respecting the division of... debt" in the sense of the parties turning their minds to the result upon a separation. In fact, I consider that the parties did not specifically intend that result, and only sought to delineate their responsibilities within their relationship which was ongoing at the time. However, I see nothing in this agreement to indicate that it would cease to apply upon separation, and the formality of this agreement between the couple would suggest that their intention was that it would survive any separation.

2. Debts Between Spouses

Accounts receivable are family property. Debts between spouses outstanding at the date of separation may be construed as family property, being "property owing to a spouse" under s. 84(2)(c), or as family debt, being a "financial obligation incurred by a spouse" under s. 86(a).

[85] [In the event the loan agreement survives separation,] the loan owing to Mr. Lindsay can be said to be "family property" shareable by the parties pursuant to the FLA, ss. 84(1)(a) and 84(2)(c). Conversely, the amount owing by Ms. Walburger to Mr. Lindsay can be said to be a "family debt" likewise shareable by the parties pursuant to the FLA, ss. 81 and 86. Viewed in this light, there is a circular analysis in determining where the final responsibility for this loan should lie.

[86] In my view, the fairest result in respect of this loan is to require each party be responsible for half of the balance outstanding. The same result arises from an application of the reapportionment provisions under s. 95 which results in each party being equally entitled to/responsible for this asset/debt. Accordingly, Mr. Lindsay is entitled to a credit from Ms. Walburger of $6,257.

3. Dividing Property

Significant unfairness. The court should not depart from an equal division of family property unless the consequences of an equal division would be weighty, or the unfairness would be compelling or meaningful.

[100] In one of the first decisions of this Court to consider the meaning of "significant unfairness", Mr. Justice N. Brown stated in L.G. v R.G. ... :

> *[71] In my view, the term 'significantly unfair' in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.*

[101] To similar effect, Mr. Justice Butler discussed the meaning of this new term in Remmem v Remmem ... :

> *[44] The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act ... courts had a discretion to divide family property in unequal shares if the court found that the division of property (pursuant to agreement or the provisions of the FRA) would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact – something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).*

Unequal division of family property. The court should consider claims for the unequal division of family property in a holistic, global manner, after undertaking a notional equal division of family property and family debt.

> *[113] ... I wish to make clear that my conclusions on the reapportionment issues discussed above have been considered by me on both an individual and on a global basis. In Remmem at para. 47, the court notes, I think correctly, that the court may only consider reapportionment after dividing up the family property and family debt.*

> *[11] Just as the parties did not compartmentalize their lives together and their relationship, the court, in my view, must take a global approach to reapportioning all, some, or none of the family assets in terms of whether "significant unfairness" results, while taking into the account the factors in s. 95(2).*

J. *V.J.F. v S.K.W.*

The court returned to the question of applicability of common law principles to claims under Part 5 in *V.J.F. v S.K.W.*,[66] a case decided by Walker J. in which the claimant, toward the tail end

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[66] *V.J.F. v S.K.W.*, 2015 BCSC 593

of the parties' marriage, applied a sizeable sum received as a gift to building a new family home registered in the sole name of the respondent and to paying off the mortgage on the old family home, also registered in the sole name of the respondent. After reviewing the judgments in *Remmem* and *Wells*, Walker J. ultimately followed the reasoning of Masuhara J. in *Wells*, relying additionally on the provisions of s. 104(2) of the *Family Law Act*. *V.J.F.* is also notable as the first case to consider the division of excluded property.

1. Gifts and the Presumption of Advancement

The effect of the presumption of advancement. The presumption of advancement deems property transferred by one spouse to the other to be a gift. This presumption provides certainty where there is weak or unpersuasive evidence as to the donor's intention. The *Family Law Act* precludes neither the making of gifts between spouses nor the application of the presumption of advancement. In fact, s. 104(2) of the act operates to preserve spouses' entitlements under the principles of equity and the common law.

> *[57] ... In [Remmem], Mr. Justice Butler found the FLA to be a complete code where no regard should be paid to the intention of the parties, even where they agree to transfer excluded property into their joint names. In finding that cases decided under other legislative regimes are of diminished utility, he said at para. 48:*
>
> > *[48] This issue considers whether the transfer of excluded property into joint property reduces the value of the exclusion for the spouse that brought the property into the relationship. I have concluded that the purchase of property in joint names using the proceeds of excluded property does not reduce the value of the exclusion. The property provisions of the FLA are intended to be a complete code so that there is no need to examine the intention of the parties at the time of a transfer of excluded property to joint tenancy. To come to the opposite conclusion would bring uncertainty and a level of inequality into a property division structure that was intended to treat married and unmarried spouses equally and to provide for a greater level of certainty.*
>
> *[58] Butler J. concluded at para. 50 that, "The FLA contains no provisions dealing with the presumption of advancement between spouses which would suggest that the presumption still applies."*
>
> *[59] The law has historically found for the presumption of advancement to apply from husband to wife and from parents to children in cases of dependency. ...*
>
> *[60] The common law presumes that a spouse who purchases property and puts it in the other spouse's name or voluntarily transfers property to the other spouse will be found to have made a gift. The presumption of advancement has been defended on the basis that it provides certainty, particularly where evidence concerning the transferor's intent is unavailable or unpersuasive. The presumption is rebuttable ...*

[62] In [Wells], Mr. Justice Masuhara observed that although the presumption of advancement has been reduced in its significance in the new legislative regime, it has not been extinguished. He determined that the FLA did not exclude the possibility of inter vivos gifts being made from one spouse to the other during their marriage ...

[63] Indeed, in s. 104(2), the FLA provides that common law and equitable rights are retained. That section provides:

> *Rights under this Part*
>
> *104 (2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.*

[64] In looking through the reasons for judgment, I cannot find where s. 104(2) was raised before Justice Butler in Remmem.

[65] Masuhara J. ultimately concluded that excluded property is property held by a spouse prior to the relationship over which an interest in title was not transferred to the other spouse during the relationship:

> *[43] It seems that the excluded property relates to property which was held by a spouse prior to the relationship and in which an interest in title was not transferred to the other during the relationship.*

[66] In making those remarks, Masuhara J. was dealing with the effect of transferring title to what was otherwise excluded property during the relationship and did not consider whether an inheritance or gift received by one spouse during the relationship could be subsequently gifted to the other.

[67] ... In view of [s. 104(2)] I am of the opinion that it cannot be said that the FLA does not contain any provision that permits for the presumption of advancement.

Identifying gifts. A gift is made out when property is transferred and accepted without consideration and cannot be revoked by the donor.

[75] The FLA does not define "gift". It found it instructive to consider definitions in other cases where the statute is silent, such as Neville v National Foundation for Christian Leadership ... In that case, the Court of Appeal also considered definitions from other cases involving different subject matters. It considered a gift to be the act of unqualified giving accompanied by delivery and acceptance by the recipient where the gift cannot be revoked by the donor. I find that is what occurred in the present case. ... The interest he has in that property is what is afforded to him by statute only.

Effect of gifts. The *Family Law Act* does not prohibit gifts between between spouses. When excluded property is gifted to a spouse, it loses its characterization as excluded property under s. 85 and becomes shareable family property.

> *[69] I conclude that the FLA does not prohibit inter vivos gifts between spouses. In this case, when excluded property owned by one spouse was comingled with funds derived from family property to purchase an asset that is placed solely in the name of the other spouse in order to immunize it from potential creditors, the exclusion is lost because the disposing spouse gifted it to the other. It is not open for Mr. F., as the transferor, to say that Ms. F., the transferee, holds the property in trust for him because it is inconsistent with the purpose of the transfer ... In other circumstances, involving different purposes, the result may be different. The rebuttable aspect of the presumption of advancement allows for individual circumstances to be considered.*
>
> *[71] I agree with Ms. W. that the character of the $2 million payment changed almost immediately after Mr. F. received it. Mr. F. made a gift of the bulk of the funds to his wife to purchase the Vancouver property and to cover some of the preconstruction cost. He used the remainder to pay for debt on family property. ...*
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> *[77] Accordingly, the funds currently held in trust are family property and are to be paid out to the parties on an equal basis. There is no basis to rebut the presumption of equal division.*

2. Dividing Excluded Property

Division of excluded property. Case law interpreting "significantly unfair" with respect to the unequal division of family property under s. 95 assists in the interpretation of "significantly unfair" with respect to the division of excluded property under s. 96, even though the factors set out in s. 96(b) differ from those set out in s. 95(2).

> *[80] In L.G. v R.G., ... Mr. Justice Brown described the phrase "significantly unfair" as found in s. 95(1) of the FLA as "essentially ... a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'". It is, he said, "Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart [sic] from the default equal provision."*
>
> *[81] A determination of significant unfairness turns on the individual facts of each case. In the absence of a definition of the term in the FLA, I found it useful to draw on cases defining the phrase in other contexts where no specific definition is found in the applicable statute. In 459831 B.C. Ltd. v Strata Plan BCS 1589, ... in dealing with the Strata Property Act, ... the Court of Appeal said at para. 15 that the "characterization of an action as significantly unfair is not a matter of discretion but is an inquiry requiring consideration of the facts before the court and what legally constitutes unfair action." The Court referred to the definitions given to the phrase in other strata property and unrelated oppression cases ... – "unfairly prejudicial", "burdensome, harsh, wrongful," and "lacking in probity and fair dealing" – and, as I read the*

reasons for judgment, concluded that significantly unfair must be something more than "mere prejudice and trifling unfairness".

[82] The Court adopted a two-part test that included an objective assessment of the reasonable expectations of the petitioner. That test was not advanced by the parties in this case. In my opinion, the factors set out in s. 96(b)(i) and (ii) of the FLA point to considerations that are different than reasonable expectations.

[83] The FLA has not set the bar so high that finding significant unfairness is next to impossible. ...

K. *A.A.P. v G.T.F.*

The decision of Ehrcke J. in *A.A.P. v G.T.F.*,[67] addressed a variety of issues arising from the dissolution of the parties' 11-year unmarried relationship, including the division of family property and the claimant's assertion that part of an insurance settlement could be traced into the proceeds of the sale of the current family home – about $55,100 that had been applied to the mortgage on the former family home and $88,000 that had been spent renovating that property – and should be excluded from division.

The claimant's position raised two issues, determining the value of excluded property applied to improving family property and determining the portions of an insurance settlement attributable to compensation for injury or loss rather than lost income.

Identifying excluded property applied to family property. The amount by which family property increases in value as a result of the application of excluded property to improve the property is excluded from division, not the amount of the excluded property. The party claiming the exclusion bears the onus of proving the increase in value attributable to the use of the excluded property, failing which no exclusion should be ordered.

[67] ... With respect to the money spent on renovations, there is no evidence that this increased the sale value of the 69th Avenue residence. It might have done so, but there is no evidence that it did, and s. 85(2) of the Act is very clear that a spouse claiming that property is excluded bears the onus of demonstrating this to be the case.

Identifying excluded property in insurance settlements. The portion of insurance settlements allocated to injury or loss, but not the portion allocated to lost income, is excluded property under s. 85(1)(c). The party claiming the exclusion bears the onus of proving the portion of a settlement attributed to injury or loss, failing which no exclusion should be ordered.

[68] ... The claimant has not demonstrated what portion, if any, of the settlement money she received from ICBC is excluded property. Although s. 85(1)(c) provides that excluded property

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[67] *A.A.P. v G.T.F.*, 2015 BCSC 662

includes a settlement or award of damages as compensation for injury or loss, it also provides that such a settlement is not excluded property if it represents compensation for lost income. On the evidence before me, it would appear highly probable that a very significant portion of the settlement from ICBC resulted from the fact that the claimant was let go from her job at City Xpress and did not work again outside the home up to the date of the settlement.

[69] It is not for the respondent to prove what portion of the settlement was in relation to lost income. The claimant is the spouse who is claiming that the settlement money is excluded property. Pursuant to s. 85(1)(c) of the Act, she bears the onus of proving that the portion of the settlement she says is excluded, was not paid as compensation for lost income. She has adduced no evidence on that point, and therefore, I must conclude that she has not proven that any portion of the equity in the current Family Home is excluded property.

L. *Jaszczewska v. Kostanski*

In the case of *Jaszczewska v Kostanski*,[68] Baker J. considered the division of family debt in the context of a 10-year unmarried relationship and significant controversy over the dates when the parties' relationship began and ended. This decision provides a helpful discussion of the identification and division of debt and the unequal division of family property.

1. Dividing Debt

Identifying family debt. A party claiming that a debt is family debt bears the burden of proving that the debt exists and that it was incurred during the parties' relationship.

[117] Mr. K had credit card debt in January 2013 of about $33,000. He also owed Canada Revenue Agency $33,677. He is also claiming to be indebted to his brother in the amount of $23,000. ...

[119] Mr. K's testimony about non-arm's length transactions with his brother was also unconvincing. He testified, for example, that he owed his brother money but also testified that his brother owed him money. I am not persuaded, on the balance of probabilities, that Mr. K is indebted to his brother; and in any event, a set-off would be warranted. Mr. K shall be solely responsible for the payment of any debt owed to his brother.

Unequal division of family debt. Family debt may be divided unequally where the indebted spouse fails to prove that the debt was incurred during the normal course of the parties' relationship pursuant to s. 92(2)(d).[69]

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[68] *Jaszczewska v Kostanski*, 2015 BCSC 727

[69] With respect, my reading of the interplay between the presumption of equal obligation for family debt at s. 81(a) and the provisions for the unequal division of family debt in s. 95 suggests that the onus does not lie on the party claiming that a debt is a family debt, but on the party resisting a requirement to contribute to the payment

[118] Mr. K's testimony about the tax debt – said to be related to Goods and Services Tax - was confusing and less than convincing. I am not persuaded that this is a family debt. If am wrong, then I would reapportion the debt pursuant to s.95(2)(d) of the FLA as Mr. K has failed to prove that it was a debt incurred in the normal course of the relationship between the parties. If this debt exists, Mr. K shall be solely responsible to pay the debt.

2. Dividing Property

Length of relationship. Relationships of medium duration militate neither in favour or against a finding of significant unfairness under s. 95(2)(a).[70]

[143] I note that s. 95(2)(a) refers to the duration of the relationship as a factor to be considered. Mr. K and Ms. J lived together as spouses for 10 years and nine months. I would consider this to be a relationship of middle duration – neither a very short nor a very long relationship, and therefore a neutral factor.

Contribution to career or career potential. Contributions by a spouse to advance the career of the other may militate in favour of a finding of significant unfairness under under s. 95(2)(c); the absence of such contributions is not a factor relevant to determining the fairness of an equal division of family property.

[154] I agree with Counsel for Mr. K that Ms. J cannot be said to have done much to advance Mr. K's career during the relationship. Section 95(2)(c) identifies a spouse's contribution to the other's spouse's career or career potential as a factor to be considered. ...
[156] While contributions by one spouse to advance the career of another might support reapportionment, I am not persuaded the Legislature intended that the absence of a contribution by one spouse to the advancement of the other spouse's career should weigh heavily against equal division of family property.

Disproportionate contributions made to the the family property. A spouse's failure to contribute to the acquisition, maintenance and improvement of the family property may militate in favour of finding of significant unfairness under the catchall provision of s. 95(2)(i) when the disparity in contributions is considerable.

[162] In enacting the Family Law Act and adopting a new regime for allocating family property, the Legislature, in my view, intended that the exceptions to equal division would not become the norm. In almost any spousal relationship the nature of the contributions made may be unequal in some sense, but in providing for the equal division of family property (after taking into account excluded property or a contribution to value derived from excluded

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of that debt. Proof that a debt existed at the date of separation under s. 81(b) should suffice to prima facie qualify the debt as a family debt.

[70] In *Hoppen v Kravariotis*, 2015 BCSC 779 at para. 139, Hyslop J. observed that case law on the impact of the length of marriage developed under the *Family Relations Act* were "of no consequence" in the proceeding.

property), the Legislature intended the general rule to prevail unless very persuasive reasons can be shown for a different result.

[163] Had the Legislature intended unequal contribution to be a significant factor justifying unequal division of family property under s. 95, surely the Legislature would have specifically said so. Section 65(1) of the Family Relations Act ... specifically invited the court to consider circumstances relating to acquisition, preservation, maintenance or improvement of family assets in relation to an application for unequal division of family property. These factors are not included in the enumerated factors in section 95 of the FLA. ...

[171] In this case, there is considerable disparity between the respective direct contributions made by Mr. K and Ms. J to the accumulation of family property...

[172] Ms. J made only minor direct and indirect contributions to the acquisition, maintenance and enhancement of the family property. ... Ms. J was occupied with caring for [the child] in the early stages of the relationship ... but as time went on and [the child] became a teenager and then a young adult, Ms. J's responsibilities in relation to [the child's] care became less onerous in any event. Even then, Ms. J did not make any serious attempt to find more work; or to embark on a more remunerative career.

[174] Having considered all of the factors, I conclude that Mr. K has met the onus to show that equal division would be "significantly unfair" ...

Disproportionate ownership of property at beginning of relationship. The *Family Law Act* exempts property brought into the relationship from division between spouses. Accordingly, whether one spouse has brought more property into a relationship than the other is not a basis for the unequal division of family property under the catchall provision of s. 95(2)(i).

[144] I begin with the submission made by Counsel for Mr. K that equal division would be significantly unfair because Mr. K brought assets into the relationship while Ms. J did not. In my view, this factor can be given little or no weight in the circumstances of this case. ... The FLA established a new regime for identifying and valuing family assets. It contains provisions excluding from family property the assets each party brings into the relationship if those assets still exist when the relationship ends; or the value of the pre-relationship property can be traced into other family property. ... Given the new regime for excluded property, I do not think the Legislature intended that mere disparity in wealth at commencement of the relationship would generally justify unequal division of family property at the end of the relationship.

M. *Blair v Johnson*

The primary issue in *Blair v Johnson*,[71] a decision of Fleming J., concerned the valuation and division of shares in a holding company which had skyrocketed in value between the date of

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[71] *Blair v Johnson*, 2015 BCSC 761

separation in 2012 and the date of trial in 2014, increasing from about $630,000 to about $5,075,000. The parties agreed that the shares themselves were excluded property, being derived from two companies owned by the claimant prior to the commencement of the parties' 9-year relationship.

This decision is especially helpful for the test proposed by Fleming J. to determine when a valuation date other than the date of trial, which s. 87(b)(ii) normally requires, should be used.

1. Valuation Date

Principles guiding varying the date of valuation. The *Family Law Act* provides no factors to guide the court's discretion in ordering that family property and family debt be valued other than at the date of trial pursuant to s. 87. The principle of statutory interpretation requiring legislation to be interpreted in its entire context allows consideration of government's intention. Government intended that s. 87 would codify the case law on valuation dates developed under the *Family Relations Act*. Accordingly, that case law may be applied to claims that a different valuation date be used.

> *[60] The wording of s. 87 does not contain any criteria with which to guide the court's discretion to depart from the hearing date as the date of valuation. It appears to have attracted little judicial attention thus far in relation to family property. ...*
>
> *[63] The well-established modern approach to statutory interpretation requires the words of an Act to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature ... The discussion found in Hansard ... offers limited assistance in understanding the legislator's purpose in enacting s. 87. The Minister described s. 87 as a "big step forward" because the Family Relations Act ... did not provide any guidance on setting a valuation date and there had been considerable criticism of the broad judicial discretion to determine the date ... In the Family Law Act Transition Guide, the Ministry of Justice provides the same explanation for s. 87 and the following commentary:*
>
> > *... It codifies how and when the value of family property and family debt is determined. Except in relation to benefits under a pension plan, the presumptive valuation date is the date of trial or the date of agreement, unless otherwise provided for in an agreement or order. The Family Relations Act did not provide any guidance on valuation date. However, s. 87 is consistent with the principles that have emerged in case law about valuation date of family assets (see, for example, Blackett v Blackett ...*
>
> *[64] In other words, it seems the legislator intended for s. 87 to codify the common law developed under the FRA which provided the valuation date was, presumptively, the trial date. ...*

Case law developed under the *Family Relations Act*.[72] In general, the date of valuation should be the date of trial, unless there is reason to choose a different date, as spouses should share in the increase and decrease in value of property occurring after the triggering event.

> *[64] ... In Blackett v Blackett, ... the Court of Appeal overturned the trial judge's decision that the husband should pay compensation to the wife using the date of separation to value shares in a company found to be a family asset. Madam Justice Southin ordered the trial date to be the date of valuation, stating at 103 - 104:*
>
> > *When an asset is determined to be a family asset, the Court must ask itself whether s. 51 should be invoked. For that purpose, it is often necessary to have some idea of the value of an asset as at the triggering event for whether or not there is to be a variation of the right given by s. 43 must be determined by the facts existing when that right came into existence. It is then, and then only, that the right can be unfair.*
> >
> > *But when the Court considers what to do by way of a compensation order under s. 52, it is the value at date of trial which is significant for it is at that point that one spouse is having taken away a vested interest and the other spouse is paying for that vested interest.*
> >
> > *The reason is simple. Section 43 gives the wife an undivided one-half interest in the shares - not an undivided one-half interest in the value of the shares at the date of the triggering event or at any other date. ...*
>
> *[65] Not long after, in Gilpin v Gilpin, ... the Court of Appeal observed numerous authorities made it clear "having regard to the issue of fairness that unless there be reason to the contrary the valuation date for family assets including the matrimonial home should be chosen as of the date of trial".*
>
> *[66] In N.M.M. v N.S.M., ... Mr. Justice Joyce summarized the relevant principles as follows:*
>
> > *[76] From my review of the forgoing authorities I distill the following principles:*
> >
> > > *1. Because it was the triggering event that gave each spouse a prima facie equal interest as tenants in common in each family asset, the circumstances at that date should be considered to determine whether an equal division would be unfair.*
> > >
> > > *2. Generally the spouses share any increase or decrease in value of a family asset that occurred after the triggering event because their interests in the asset vested.*

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[72] A thorough discussion of the law on the valuation dates accumulating under the *Family Relations Act* can be found at §4.69 in pre-2013 updates of the third edition of the *Family Law Sourcebook for British Columbia* published by the Continuing Legal Education Society of British Columbia. The leading cases were: *N.M.M. v N.S.M.*, 2004 BCSC 346, *Blackett v Blackett* (1989), 22 RFL (3d) 337 (BCCA); *Gilpin v Gilpin* (1990), 29 RFL (3d) 250 (BCCA); and, *Stark v Stark* (1990), 26 RFL (3d) 425 (BCCA).

3. Valuation at the date of trial was generally appropriate when considering the mechanism under s. 66 to achieve the division of family assets, for example, by dividing the assets in specie by vesting the assets in the names of the parties or by vesting an asset in the name of one party in exchange for an order compensating the other for the divested interest.

4. Generally the appropriate date for valuing family assets was the trial date, however there was a discretion to fix another date, not earlier than the triggering event, if it was necessary to achieve fairness.

5. Discretion may have existed to reapportion assets or to vest title in one spouse while awarding the other compensation taking into account events following the triggering event where for example, the conduct of one party caused the asset to increase or decrease in value and it would have been unfair and unjust to ignore those events.

6. Where it was established that one spouse disposed of a family asset or caused it to decrease in value significantly, the court could order compensation for that loss. The compensation was based on the loss in value, which necessarily involved determining the value of the asset prior to the loss.

[67] In Berg v Berg, ... the Court of Appeal affirmed the trial date was the appropriate valuation date in cases where the court took away the interest of one spouse in a family asset and ordered the other spouse to pay compensation for it. In N.A.J. v P.L.J., ... Mr. Justice Harvey expressed the view that while the court retained the discretion to determine the valuation date so as to achieve "substantial fairness", Blackett remained the "default position", particularly where reapportionment was being sought by one of the parties.

Test to vary the date of valuation. A party seeking a valuation date other than the date of trial must establish that it would be significantly unfair to use that default date before the court chooses another date for the valuation of family property and family debt.

[69] Section 95 of the FLA requires significant unfairness on specified grounds before the court may order an unequal division of family property. To the extent that s. 95 and s. 87 may provide alternate routes to address the substantial unfairness that would arise from awarding parties equal shares in family property valued at trial, it seems to me the significant unfairness threshold should also be met before the court departs from the date of trial as the valuation date pursuant to s. 87. To conclude otherwise would allow for an earlier valuation date resulting in a radical departure from an equal division as of the date of trial in circumstances where the significant unfairness threshold under s. 95 is not met. I say this leaving aside circumstances where it is necessary to set an earlier date because family property has been sold etc. or debt eliminated prior to the hearing. It is important to bear in mind the basic principle of equal entitlement (and responsibility) found in s. 81 that is integral to the division of family property regime in the FLA.

2. Dividing Property

Unequal division of family property. To determine whether an equal division of family property would be unfair, the court must first undertake a notional equal division of that property. This requires that the property be valued at both the date of separation and the chosen valuation date.

> *[74] In Remmem, the court found that in order to determine if it would be significantly unfair to divide family property equally, the family property must first be notionally divided, taking into account the exclusions, in accordance with the FLA (para. 47). ...*
>
> *[75] In order to consider whether a significant unfairness would arise from an equal division due to a significant increase in the value of the shares ... I must also determine the value of the shares at the time of separation. ...*

Length of relationship. Relationships of medium duration militate neither in favour or against a finding of significant unfairness under s. 95(2)(a).

> *[73] I regard the length of the parties' relationship as a neutral factor here. ...*

Contribution to career or career potential. A spouse's failure to contribute to excluded property owned by the other may be a factor militating in favour of a finding that it would be significantly unfair to equally divide the increase in value of that property under s. 95(2)(c).[73]

> *[78] Mr. Blair also seeks an unequal division in the increase in the value of the shares based on Ms. Johnson's lack of contribution to his businesses throughout their relationship, relying on s. 95(2)(c). Ms. Johnson submits guaranteeing the secured line of credit for Integral in early 2012 was a significant contribution. She also points to small loans she made to Mr. Blair's company, all of which she said were repaid with interest, except the last one provided to [Company A]. ...*
>
> *[80] The other important evidence relating to the question of Ms. Johnson's contribution was that the parties were not involved either directly or indirectly with one another's professional lives. There is no dispute they operated their respective businesses separately. Until later in the relationship, neither supported the other. They shared living expenses equally. ...*
>
> *[82] While I agree Ms. Johnson's role in arranging for a secure line of credit for [Company A] was a form of contribution, I am not persuaded in the context of the relationship as a whole that it was a significant one. Ms. Johnson testified that she had no real plans for her retirement although she did want to write a cookbook. After she stopped working for the most part, Ms. Johnson's lack of involvement in Mr. Blair's businesses continued, reflecting, in my view, the extent to which the parties intended to keep their business lives separate. ...*

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[73] However, see the finding of Baker J. to the contrary in *Jaszczewska* at para. 156.

Increase or decrease in value beyond market trends. A spouse's role in increasing the value of excluded property beyond market trends after separation may be a factor militating in favour of a finding that it would be significantly unfair to equally divide the increase in value of that property under s. 95(2)(f). This provision does not require a spouse to have contributed to the increase in value in a new way; increases attributable to the spouse's customary management of the property may qualify.

> *[76] There is no dispute that the dramatic increase in the value of Alberta Co.'s shares between the 2012 and 2014 valuation dates was driven by increased revenues for [Company B]. [There was no] dispute about the evidence provided by Mr. Blair regarding the importance of his role in generating work for [Company B] through his key client contacts, relationships and his First Nations status. ...*
>
> *[77] ... Based on the evidence, I find that in addition to market forces, which will always be at play for resource based businesses, Mr. Blair's role in the operations of [Company B] – his expertise, key client contacts and relationships within the industry – contributed significantly to the dramatic increase in the value of [holding company's] shares between the 2012 and 2014 dates ... While Mr. Blair's role in the company was just as critical in 2012, I do not regard s. 95(2)(f) as requiring a spouse to cause an increase in the value of family property by a new means after separation.*

N. *C.M. v M.S.*

The decision of Grist J. in *C.M. v M.S.*[74] involved, among other matters, a financially dependent spouse struggling to find employment at the end of a 10-year relationship and a payor unable to make payments of spousal support sufficient to address the objectives for spousal support set out in s. 161 of the *Family Law Act*. This case provides helpful but brief commentary on s. 95(3) and on the possibility that s. 95 provides the court with a broader latitude to divide property unequally than was available under s. 65 of the *Family Relations Act*.

Discretion to divide family property unequally. The catchall provision of s. 95(2)(i), allowing the court to consider "any other factor ... that may lead to significant unfairness" in determining whether to divide family property unequally, is broader in scope than the catchall provision of s. 65(1)(f) of the *Family Relations Act*. The new act provides the court with a broader discretion to divide family property unequally than was previously available, and address causes of significant fairness other than those enumerated in s. 95(2)(a) to (h).

> *[34] One of the changes effected by the change from s. 65 of the FRA to s. 95 of the FLA lies in a more restricted discretion to redistribute family assets in order to meet a need to enhance one party's capacity to be independent and self-sufficient. Section 95(3) stipulates that this objective is to be first considered in determining entitlement to spousal support with reapportionment being a secondary form of relief.*

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[74] *C.M. v M.S.*, 2015 BCSC 1031

[35] But the second observation I would make is that s. 95 gives a broader discretion to redistribute assets based on a more open-ended direction in s. 95(2)(i) allowing redistribution based on "any other factor ... that may lead to significant unfairness." This contrasts with s. 65 of the FRA which allowed for redistribution for unfairness, but confined to unfairness generated by one of the enumerated factors in s. 65(1)(a) to (f). This discretion is tempered by the requirement that the unfairness address needs to be classified as "significant". ...

[36] ... In light of the more open discretion expressed in s. 95(2)(i), I am of the view that this section can be used directly to deal with ... sources of significant unfairness separate from the consideration of the need for independence and self-sufficiency, a matter which the FLA directs the court to consider by way of spousal support before having any effect on distribution of property.

Failure to meet the objects of spousal support. Where a spouse is entitled to spousal support and the objectives of an order for spousal support cannot be met, family property may be divided unequally to address the unmet need under s. 95(3).

[33] Section161 stipulates the objectives of a spousal support order:

> *161. In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:*
>
> *(a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;*
>
> *(b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;*
>
> *(c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;*
>
> *(d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time. ...*

[38] ... Ms. C.M. is in need of assistance in order to provide for her independence and self-sufficiency until she is able to improve her employment skills and find work. However, the priority given to child maintenance ahead of spousal maintenance limits the ability to make an order under the Spousal Support Advisory Guidelines that would make any substantial contribution to promoting her economic self-sufficiency. Accordingly, the objective of s.161 in this regard cannot be met and s. 95 again becomes available.

O. *P.G. v D.G.*

The issue of the application of common law principles to claims under Part 5 arose yet again in *P.D. v D.G.*,[75] in the context of a 14-year marriage and a property brought into the relationship that was first used as collateral for the joint purchase of a second family home and then sold and used to pay off the mortgage on the first family home, also held jointly.

Despite a subsequent decision of the Court of Appeal, the reasoning of Fenlon J. in this case is important for its persuasive and elegant reconciliation of the conflicting decisions in *Remmem*, *Wells* and *V.J.F.* and the exception provided for gifts to children. It is also, not that it matters, the approach I prefer, for reasons including the Ministry's stated objects of making the act "simpler, clearer, easier to apply, and easier to understand for the people who are subjected to it,"[76] and the latter point in particular as it relates to access to justice for litigants without counsel.

The effect of the presumption of advancement. First, under s. 85(1)(g), property derived from the disposition of excluded property, including gifts, is excluded property. The tracing of property's status as excluded is not limited to property owned only by the spouse who owned the original property. Applying the presumption of advancement to limit the application of s. 85(1)(g) in this manner would treat all excluded property commingled with family property as family property, despite the express intention of the legislation to exclude such property from division. Second, the approach in *Remmem* is more consistent with the objects of the *Family Law Act*. Third the scheme governing the property rights of spouses changes upon their separation, from the general law of property, including the common law presumptions, which applied while their relationship was intact, to the regime set out in the *Family Law Act*. Under the *Family Law Act* regime, gifts between spouses made during their relationship are irrelevant; ss. 84 and 85 impose a new characterization on the spouses' property. Fourth, applying the presumption of advancement would defeat the tracing provision in s. 85(1)(g) and may result in an unfairness not included among the factors for determining the significant unfairness of an equal division of family property set out in s. 95(2).[77]

> *[67] Having considered [Remmem, Wells and V.J.F.] I conclude that I should follow the approach taken in Remmem for a number of reasons. First, Wells and V.J.F. focused on the continued existence of the presumption of advancement – neither case addressed s. 85(1)(g), the tracing provision which expressly provides for the exclusion of property derived from excluded property or the disposition of excluded property.*

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[75] *P.G. v D.G.*, 2015 BCSC 1454

[76] *Supra*, fn 14

[77] This analysis was considered and adopted by: Pearlman J. in *Andermatt v Tahmasebpour*, 2015 BCSC 1743 at paras. 36 to 51; Warren J. in *Shih v Shih*, 2015 BCSC 2108 at paras. 57 to 59; Young J. in *J.B. v S.C.*, 2015 BCSC 2136 at paras. 71 to 89; Steeves J. in *Lawrence v* Mulder, 2015 BCSC 2223; and, Skolrood J. in *Kuhberg v Hall*, 2015 BCSC 2230 at paras. 98 to 109

[68] In Wells, it appears the effect of s. 85(1)(g) was not raised. The subsection is not listed in the summary of the relevant provisions of the FLA at para. 17, and is not referred to at all in the analysis. In V.J.F., s. 85(1)(g) is referred to in the summary of the claimant's position at para. 39, but it is not referred to in the discussion of excluded property at paras. 53-55 of the analysis. As set out in Re Hansard Spruce Mills, ... given that a relevant statutory provision was not addressed, I am not bound to follow these decisions.

[69] In considering the effect of s. 85(g), I am mindful that the provisions of a statute are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the legislature ...

[70] Section 85(1)(g) of the FLA is broadly worded. The section excludes property "derived from property or the disposition of property" acquired by a spouse before the relationship between the parties began. ...

[75] Section 85(1)(g) does not restrict tracing to an asset held solely by the spouse who owned the original excluded asset. Recognizing the presumption of advancement when applying Part 5 of the FLA would generally "extinguish" the right of a spouse who has brought property into the relationship to retain it on separation whenever the pre-owned property is mingled with property held by the other spouse. The implications of this are far-reaching. Arguably an inheritance deposited into a joint bank account, a gift from a parent to one spouse used to pay down the mortgage on a home held as joint tenants, or an award of damages for pain and suffering used by a spouse as a down payment on a house placed in both names or placed in the other spouse's RRSP would be subject to the presumption of advancement. It would follow that the spouse who was the original owner of these assets, which are expressly defined as excluded property under s. 85(1) of the FLA, would not be able to claim them as excluded property at the end of the relationship, unless he or she could marshal evidence to rebut the presumption of advancement at the time the transfer occurred.

[76] The second reason I prefer the approach in Remmem is that it is consistent with the objects of the FLA. In the British Columbia Ministry of Attorney General's White Paper on Family Relations Act Reform: Proposals for a new Family Law Act, ... the reason for introducing an excluded property regime was described as follows:

> *The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subjected to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. ...*
>
> *Changing to an excluded property scheme removes the broad judicial discretion from the asset identification stage and leaves some discretion at the distribution stage. This change is designed to make it easier to identify property subject to division and, therefore, reduce the potential for disagreement. ...*

[78] Third, the reasoning in Wells and V.J.F. focusses on the legal effect of a transfer of property during the marriage without reference to the overall scheme of the FLA on marriage breakdown. In my view, general property law, including the presumption of advancement, applies during the parties' marriage. While the relationship continues, a transfer of real property from the husband's sole name into joint tenancy gives the wife an undivided interest in that property. If the husband dies, the entire property vests in the wife and does not fall into the husband's estate. If the house is put into the wife's sole name, it is hers absolutely during the marriage and the husband's creditors, absent a fraudulent conveyance, cannot pursue it because the husband has no interest in that property.

[79] On marriage breakdown, however, a new property rights regime descends as between the spouses, just as it did under the former FRA. The rights of third parties vis-à-vis the property held by the spouses remain unaffected (s. 82), but between the spouses, all changes. Whether property is held solely in the wife's name, solely in the husband's name, or jointly, it is all subject to the scheme of division created by Part 5 of the FLA (s. 84(1)). Some of that property is to be excluded under s. 85(1) and all the rest is presumptively to be divided equally regardless of whose name it is in at the date of separation.

[80] Under this scheme it does not matter that one spouse during the marriage is presumed to have gifted property, whether excluded or otherwise, to his or her spouse. There is a whole new regime once the marriage ends. In my view, this interpretation finds support in s. 85(1)(b.1), which was amended to clarify that only gifts from a third party, as opposed to a spouse, are excluded property. ...

[83] As a result of this amendment and the property regime under the FLA as a whole, whether a house or a piece of jewellery is given by one spouse to another during the marriage, it all falls back into the communal pot when the marriage ends. Some of the property will then be excluded if a spouse can meet the requirements of s. 85, and the remainder may, in certain cases, be divided unequally under s. 95. Section 96 of the FLA provides that even excluded property may, in certain cases, be divided if justice so requires.

[84] Logically, if the presumption of advancement continues to govern on marriage breakdown, then a gift from one spouse to another would not fall back into the communal pot. If "a gift is an irrevocable gift" for the purpose of determining what can be claimed as excluded property, why would a gift not be an irrevocable gift for the purpose of determining what is family property to be divided at the end of a marriage? The amendment reflected in s. 85(1)(b.1) demonstrates the legislature did not intend that approach to be taken. ...

[87] It is unlikely that when the legislature drafted the new excluded property regime under the FLA it was unaware of the practical reality that many spouses will combine assets during their marriage.

[88] Finally, I note that failing to give effect to the tracing provision in s. 85(1)(g) when excluded property is placed in the name of the other spouse in whole or in part may result in an unfairness. Section 95 of the FLA replaces s. 65(1) of the FRA and provides for an unequal division of family property in circumstances of "significant unfairness". However, whereas

> *s. 65(1) of the FRA specifically invited the Court to consider circumstances relating to acquisition and preservation of family assets, those factors are not included in the enumerated factors to be considered in s. 95 of the FLA ...*

Effect of gifts. Gifts from spouses to their children are not captured by the property regime set out in Part 5, and the presumption of advancement will accordingly apply if not rebutted.

> *[90] The parties do not agree on whether two musical instruments are family property: a violin used by [Child A] worth $6,000 and a cello used by [Child B] worth $3,000.*
>
> *[91] Mr. G. submits these are family property while Ms. G. asserts that the instruments were gifts to the children, belong to them, and should not be divided between the parties.*
>
> *[92] I find that the instruments were purchased by the parents and given to their daughters. The presumption of advancement applies when a parent transfers property to a minor child ... The presumption that the musical instruments were gifts to [Child A] and [Child B] has not been rebutted by Mr. G. The violin and cello therefore do not constitute family property.*

P. *A.M.D. v K.R.J.*

The decision in *A.M.D. v K.R.J.*[78] concerned the parties to a relationship of slightly more than four years' duration and the respondent's claim for the unequal division of family property he brought into the relationship. The judgment of Sharma J. in *A.M.D.* is, like those in *Jaszczewska* and *Blair*, useful for its exploration of factors claimed to support a finding that an equal division of family property would be significantly unfair.

1. Application of Case Law on Reapportionment

Case law developed under the *Family Relations Act*. Case law on reapportionment claims brought under s. 65 of the *Family Relations Act* are of limited assistance in interpreting s. 95 of the *Family Law Act* as the bar to justify an unequal division is higher in the new legislation and as the only way to exclude property brought into the relationship under the old legislation was through a reapportionment claim.

> *[59] The respondent relies on case law under the Family Relations Act ... in which property was reapportioned to the husband because of the short duration of the marriage and the fact that he brought the major portion of the family assets into the marriage ...*
>
> *[60] These cases are distinguishable. First, I note that the threshold for reapportionment was lower under the FRA ("unfair") than under the FLA ("significantly unfair"). The legislature has raised the bar to justify an unequal distribution; it is necessary to find that the unfairness is*

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[78] *Supra*, fn 60

"compelling" or "meaningful" having regard to the s. 95(2) factors ... Cases under the former "unfair" threshold are of limited assistance ...

[61] Second, the property regime under the FRA did not exclude property acquired by a spouse before the relationship between the spouses began as the FLA now explicitly does in s. 85. The only remedy for excluding such property was through reapportionment under s. 65 of the FRA. In the new framework, such property is already excluded, except for its increase in value during the relationship until the time of trial. ...

2. Dividing Property

Length of relationship. Relationships of short duration are a factor in favour of a finding of significant unfairness under s. 95(2)(a).

[69] I agree that the parties' relationship of four years and three months was of short duration, which supports an unequal division. I find this to be a strong factor in the respondent's favour. ...

[72] Having considered all of the relevant factors in s. 95(2), I do find it would be significantly unfair to the respondent to equally divide the family property ... The strongest factor in favour of reapportionment is the length of the marriage. ...

Tax consequences. Tax liabilities incurred as a result of a transfer of property are a factor in favour of a finding of significant unfairness under s. 95(2)(h).

[73] In addition, I understand that there may be tax consequences to the division of the respondent's shares. I find that ... the tax consequences should be taken into account ...

Disproportionate contributions made to the the family property. Unequal contributions to family property may be a factor in favour of a finding of significant unfairness under the catchall provision of s. 95(2)(i), however s. 81(a) clearly states that the parties' entitlement to family property is independent of their use of or contribution to that property.

[64] I note that the factors for consideration under reapportionment have changed in the new legislation. In particular, s. 65(1) of the FRA specifically invited the court to consider circumstances relating to the acquisition, preservation, maintenance or improvement of family assets. These factors are not included in s. 95 of the FLA. It could be argued that the parties' relative contributions should be considered under s. 95(1)(i) as "any other factor ... that may lead to significant unfairness", but in my view, the court cannot ignore the clear language in s. 81 which states that "spouses are both entitled to family property and responsible for family debt, regardless of their use or contribution."

[65] Justice Baker reviewed recent FLA case law on this issue in Jaszczewska at paras. 165 to 170, noting that in some cases the court did consider unequal contribution, among other

factors, to warrant unequal division or as insufficient reason to establish "significant unfairness". ...

[66] Respectfully, I agree with Justice Fleming in Nearing v Sauer ... :

> *[141] Section 95(2) does not appear to allow for the wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities that occurred pursuant to s. 65(1)(f). Instead the court may consider a spouse's contribution to the career or career potential of the other spouse under s. 95(2)(c) or a spouse's detrimental impact on to the value of family property or potential family property under s. 95(2)(g) which appears focused on the spouse's direct actions vis-à-vis the value of family property. I interpret the words "spouse's contribution" in s. 95(2)(c) as including the full spectrum of all levels of contribution from one spouse negatively impacting on the other spouse's career to greatly enhancing the career or career potential of the other spouse. ...*

[68] In the circumstances of this case, I do not take into account the parties' financial contribution to the family property during the relationship as s. 81 is clear that each spouse has a right to an undivided half interest in all family property regardless of their respective use or contribution. Moreover, the evidence was uncontroverted that the claimant had the responsibility for maintaining the home by doing chores, etc. during the relationship, and, therefore, contributed positively to the building up of the asset.

Disproportionate ownership of property at beginning of relationship. The *Family Law Act* exempts property brought into the relationship from division between spouses. Whether one spouse has brought more property into a relationship than the other is not a basis for the unequal division of family property under the catchall provision of s. 95(2)(i).

[61] ... In the new framework, such property is already excluded, except for its increase in value during the relationship until the time of trial. ...

[62] In any event, I find that the respondent did not bring substantial assets into this relationship. In [Jasinski v Jasinski], for example, the husband brought assets to the marriage valued at $350,000 (para. 50). In [Li v Long], it was millions (para. 147). In contrast, the respondent bought the home with a $5,000 down payment and had contributed about another $1,000 to the principal of the mortgage by the time the parties began cohabitating.

Q. *Chang v Xia*

The decision of Fleming J. in *Chang v Xia*[79] involved the unrepresented parties to a 6-year marriage, evidence challenging the respondent's credibility and the adequacy of his disclosure,

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[79] *Chang v Xia*, 2015 BCSC 1994

and concerned, among other issues, the respondent's claims for an unequal division of the family property and an equal division of the family debt.

This case is one of the few property cases under the *Family Law Act* to discuss the consequences of nondisclosure and the impact of that venerable line of cases on the subject beginning with *Cunha v Cunha*,[80] on proceedings under the new legislation.[81]

Effect of nondisclosure. Nondisclosure may be addressed through the imputation of property to the offending party or the unequal distribution of family property or family debt under s. 95(2)(f) and (i), including through a finding that it would be significantly unfair to require the other party to share in a family debt.

> *[47] Where a spouse fails to disclose financial assets and dissipates family assets after separation, the court may impute assets to the spouse and/or reapportion family assets or debt pursuant to s. 95(2) of the FLA if the court finds it would be significantly unfair to order an equal division, or the common law.*
>
> *[48] In Cunha v Cunha, ... the court referred to the non-disclosure of assets in family cases as the cancer of matrimonial property litigation. The court determined it was not sufficient to respond to such conduct with an award of costs or by dealing only with the known assets. Instead, the court divided the parties' family assets on the basis that the husband's undisclosed assets had an imputed equal value to the disclosed assets. The court then vested all the known assets in the name of the wife.*
>
> *[49] In Laxton v Coglon, ... the court clarified that where the non-disclosing party has not satisfied the court that full disclosure has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the disclosed assets. ... The court in Laxton also observed that the principle in Cunha applies only where there is a strong evidentiary basis for the proposition that one of the parties to the litigation has hidden assets. ...*
>
> *[51] In this case, it is clear the respondent failed to disclose his pension assets and the existence of any remaining RRSP assets and that he dissipated his RRSP assets ...*
>
> *[52] Given the absence of evidence as to the nature and value of his pension and the value of any remaining RRSP asset, however, I do not regard it as appropriate to impute assets to the respondent. Instead, I find pursuant to s. 95(2)(f), it would be significantly unfair to divide his student loan debt equally, and reapportion that debt entirely to the respondent. In other words, the claimant will not be required to make any contribution to this family debt.*

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[80] *Cunha v Cunha* (1994), 99 BCLR (2d) 93 (BCSC)

[81] See *Assselin* at para. 106 and *Cizmic v Cizmic*, 2015 BCSC 1430 at paras 105 to 110.

R. *Shih v Shih*

The issue of the evidence necessary to prove a claim to excluded property, first discussed in *Asselin*, was raised again in *Shih v Shih*,[82] a case heard by Warren J. involving the parties to an unmarried 8-year relationship and a variety of property and debt. After reviewing the relevant case law, the court concluded that a party raising a claim to excluded property must establish the basis for and amount of the exclusion on the balance of probabilities. Where the excluded property has been sold and used to acquire new property, the party must provide sufficient evidence to trace the excluded character of the old property into the new property.

Identifying excluded property. Although a party claiming an entitlement to excluded property is generally required to provide documentary evidence establishing the exclusion and its amount, proof on the balance of probabilities may suffice when such evidence is not available. The claimant must prove, to the satisfaction of the court, both the basis for and extent of the exclusion with precision. The court may consider the credibility of the claimant and the reliability of his or her evidence in light of the whole of the evidence tendered.

> *[61] Ms. Shih says Asselin establishes that documentary evidence is required to prove a claim to excluded property. Mr. Shih submits that conclusive documentary evidence is not essential and that even if a party does not have documentary evidence to establish a direct link from an excluded asset into an existing asset, an exclusion will be established provided there is a sufficient evidentiary basis for the court to conclude, on a balance of probabilities, that there is such a link. He emphasizes that in Asselin, Mr. Justice Harvey found that the husband had established some excluded property on the basis of an informed estimate notwithstanding the absence of specific documentary proof of its value.*
>
> *[62] As noted in Asselin and subsequent cases that have considered this issue such as Cizmic v Cizmic ... and V.J.F., the FLA reflects a more formulaic and less discretionary approach to both the identification and division of family property than existed under the former Family Relations Act. As stated by Mr. Justice Harvey in Asselin at para. 106 "more mathematical certainty from a clear evidentiary record is required." Thus, generally speaking, a party asserting a claim to excluded property is expected to produce documents showing the value of the property at the critical times and, where relevant to the claim, documents showing the movement of the property as it changes character from one asset into another.*
>
> *[63] Notwithstanding that general expectation, I do not read Asselin as holding that documentary evidence is invariably required. In Asselin, the respondent established a claim to certain excluded property on the basis that it was derived from property he owned before the relationship began, notwithstanding the absence of documentary evidence establishing the value of the property at that time. ... This is because Mr. Justice Harvey was satisfied that the evidence tendered was sufficient to permit him to make informed findings ...*

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[82] *Supra*, fn 77

[64] The principle that emerges from the case law is that a broad brush or rough estimate approach to identifying excluded property is not appropriate and that a party claiming excluded property must establish, on a balance of probabilities, the basis for and extent of the exclusion with precision. Where it is asserted that excluded property has changed character, each link in the chain required to trace the property into a currently owned asset must also be established. Depending on the nature of the claim in question, this may mean, in practical terms, that it is impossible for a party to meet the onus without documentary evidence. For example, where the claim in question is a bank account that one party says pre-existed the relationship the court may conclude that a party's viva voce testimony of the balance in the account at a particular point in time several years earlier is unreliable, and therefore insufficient to meet the onus, if not corroborated by a bank statement. On the other hand, where the claim in question is founded upon an unusually memorable event, such as inheritance, the court may conclude that a party's viva voce testimony as to the value of the inheritance is reliable without corroborating documents. In other words, in determining whether the onus has been met, the court will assess the credibility and reliability of the whole of the evidence tendered in the context of the specific case, but having regard for the precision mandated by the more formulaic approach of the FLA.

S. *Jackson v Jackson*

The problem of identifying the excluded portion of an ambiguous insurance settlement arose again in *Jackson v Jackson*,[83] a decision of Burnyeat J.

Identifying excluded property in insurance settlements. The portion of insurance settlements allocated to injury or loss is excluded property under s. 85(1)(c); the portion attributable to lost income is, in a departure from the law established under the *Family Relations Act*, shareable family property. The party claiming the exclusion bears the onus of proving the portion of a settlement attributed to injury or loss, however a failure to establish the portion attributed to injury or loss may not result in the entire settlement being found to be family property.

[10] The first question which arises is whether, because some of the Settlement may relate to "lost income", all or part of the Settlement should not be found to be "family property". Clearly, it was the intention of the Legislature to exclude from family property that portion of a "settlement or an award for damages" which could not be attributed to "lost income". Section 85(1)(c) of the Act was a departure from the law established under the Family Relations Act ... that compensation for past wage losses was not a family asset.

[11] I am satisfied that, if a spouse cannot show what portion of "compensation or injury or loss" relates to "lost income", the entire portion "settlement" or "damages" should not be excluded from what will be considered as "family property". In this regard, A.A.P. v G.T.F. ... dealt with a settlement in relation to a motor vehicle accident where a lump sum payment had been received. The conclusion reached was that the claimant had not demonstrated that

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[83] *Jackson v Jackson*, 2015 BCSC 2114

a portion of the settlement money received was excluded property. ...

[12] Even if I was not bound by the decision reached in A.A.P., I would have reached the conclusion that the Claimant has not demonstrated that $100,000 of the Settlement should be considered as excluded property. First, the onus is on the Claimant to show the Settlement does not include "lost income". He is not able to do so. The information in that regard is not available. Second, without being able to show what portion of the Settlement would relate to "lost income", the Claimant cannot demonstrate what portion of the Settlement is excluded property because it relates to an award for damages as compensation for injury or loss. While I am satisfied that it is likely that a substantial portion of the Settlement did not compensate the Claimant for lost past or future income, the portion relating to this "injury or loss" is unknown. Because it is unknown, no part of the Settlement can be excluded from family property. It may be the case that the "price" to be paid by the Claimant for obtaining the advantage of not requiring the breakdown of the Settlement into all of its component parts including lost and future income at the time the Settlement was reached is that the Claimant is not now in a position to claim that part of the Settlement is excluded property.

T. *J.B. v S.C.*

The application of the presumption of advancement to claims under Part 5 returned for consideration in *J.B. v S.C.*,[84] a case involving the parties to an 8-year unmarried relationship during which property brought into the relationship by one spouse was sold and used to buy an interest in a property registered in the other spouse's name. Although Young J. applies the reasoning of Fenlon J. in *P.G.* on the issue, she makes an important point about the differential treatment of married and unmarried spouses, first raised under the *Family Law Act* in *Remmem*, and concludes that, should the presumption continue to apply, it ought to apply equally to all spouses.

Application of presumption of advancement. The scheme for property division under the *Family Law Act* treats unmarried and married spouses equally. There is accordingly no principled basis upon which the application of the presumption of advancement should be limited to spouses in married relationships.

[87] In my view, if the presumption of advancement is going to continue to apply to spouses in British Columbia, it should apply equally to common law spouses. The Family Law Act recognizes that married and unmarried spouses have similar responsibilities and obligations to one another, and I see no principled basis for restricting the application of the presumption of advancement to married spouses only. This accords with the view that Mr. Justice Affleck expressed at para. 14 of McNamara v. Rolston, ... where he said:

> *[14] The respondent refers to substantial changes in society to the way that marriage and property rights are understood. She argues that although the two were viewed as*

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[84] *Supra*, fn 77

> *attached in the past, this is no longer the case. In my opinion, the doctrine of presumption of advancement remains a part of the law of this province but insofar as it applies to marriage, it is no longer confined to those who are formally married to each other. It may be applied in appropriate circumstances to what are frequently called "common law relationships" or to "marriage-like relationships", the latter being a basis for the definition of "spouse" found in the Family Law Act ...*
>
> *[89] The inconsistency between the presumption of advancement and the property division scheme under the Family Law Act is apparent both in that it extinguishes rights under the tracing provisions of s. 85(1)(g), and that it creates the possibility that married and unmarried spouses will be treated differently, as the law is currently unsettled as to whether the presumption of advancement applies to common law spouses.*

U. *J.S.F. v W.W.F.*

The judgment of Weatherill J. in *J.S.F. v W.W.F.*[85] concerned the division of property and other issues arising between the parties to a rather fraught 11-year marriage and is of note for the court's comments on proving the increase in value of excluded property and on the characterization of debt and accounts receivable incurred as a result of investments made in the normal course of a relationship.

With respect to excluded property, the legislation and the case law to date, including *Asselin* and *A.A.P.*, are clear that the onus lies on the spouse claiming the exemption to prove both the exemption and its value. Wetherill J. helpfully notes the corollary obligation lying on the *other* spouse to establish the increase in value claimed to be family property.

With respect to the outcome of investments made during a relationship, Weatherill J. observed that where a spouse has consented to the investments being made, the spouse is not entitled to "retroactively withdraw her consent" to the investments. The consequences of consent include: not being entitled to compensation for one-half of funds loaned but one-half of any actual repayments, if and when received; and, being liable for one-half of funds borrowed for the purposes of the investments.

1. Valuing Property

Proving the increase in value of excluded property. The spouse claiming that property brought into the relationship is excluded property has the burden of establishing that the property existed prior to the parties' relationship and its value. The spouse claiming that an increase in value of excluded property is shareable family property has the burden of establishing the increase in value of that property.

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[85] *J.S.F. v W.W.F.*, 2015 BCSC 2375

[160] The respondent has satisfied his onus of demonstrating that [the car] was acquired by him prior to the beginning of his relationship with the claimant. While there is evidence that the value of [the car] increased after 1994, there is no evidence that its value increased during the parties' relationship, other than the respondent's evidence that he spent approximately $10,000 during the marriage restoring and maintaining the vehicle. In particular, there is no evidence as to the vehicle's value at the time the parties' relationship began.

[161] In my view, to the extent that the claimant seeks to have any increase in the value of [the car] during the relationship included in family property, it is the claimant, not the respondent, who has the onus of establishing what the increase was. If she is dissatisfied with the respondent's evidence that the increase was approximately $10,000, she had the obligation to lead evidence to the contrary. This she did not do.

2. Characterization of Investments

Contingent recovery of accounts receivable. Where credit has been extended by a spouse with the knowledge of the other spouse, the other spouse is not entitled to recover one-half of the amount advanced but one-half of the amount actually recovered.

[170] The parties agree that the respondent's shares in [Company A] are family property. However, the claimant submits that she should be entitled to a repayment from the respondent of 50% of the $125,000 which is collectively on the books of [Company A] as owed to the parties by way of a loan.

[171] I disagree. The claimant was well aware of the respondent's involvement in [company] and, although she may not have been aware of the details of the investment, I find that she had authorized the respondent to make that investment on her behalf.

[172] I am ordering that 50% of the respondent's shares in [Company A] be transferred by him to the claimant. Any future recovery by [Company A] from its joint venture partner is family property to be shared equally by the parties.

Unequal division of debt. The equal allocation of liability for debt incurred by a spouse for the purpose of making investments is not significantly unfair if the investments were made in the normal course of the parties' relationship and with the consent or knowledge of the other spouse

[177] The claimant takes the position that the respondent did not act in good faith and breached her trust in using the parties' joint line of credit for the investments he made in [Company A] and [Company B]. Both investments lost money. The claimant says that it would be significantly unfair for her to be burdened by the respondent's poor investment decisions and seeks an order pursuant to s. 95 of the FLA that the joint line of credit debt be divided unequally.

> *[178] The phrase "significantly unfair" has been interpreted to mean "consequences significantly weighty to render an equal division unjust or unreasonable" ... and "compelling or meaningful" ...*
>
> *[179] As mentioned above, during the parties' marriage, the claimant gave the respondent virtual carte blanche authorization to make investments on the family's behalf. I find that he did so for proper purposes in the normal course of the parties' relationship in a bona fide attempt to better the family's financial position. ...*
>
> *[181] In my view, it would not be significantly unfair to order that the parties' joint line of credit debt be equally divided ....*

V. *Walsh v Chambers*

In *Walsh v Chambers*,[86] Rogers J. addressed the consequences and sharing of debt incurred during a relationship to improve excluded property brought into the relationship, the family home, resulting in a net decrease in the value of the property over the course of an 11-year unmarried relationship.

1. Valuing Property

Proving the increase in value of excluded property. Where the debt encumbering excluded property increases during the spouses' relationship, there is no increase in value of that property to be divided between the parties as family property.

> *[53] During the parties' relationship, the mortgage debt on the house increased by more than the increase of its assessed value. I find that the equity in the house did not increase during the relationship and that there is, therefore, no family property to divide between the parties.*
> ...

2. Dividing Debt

Unequal division of family debt incurred to improve excluded property. A spouse bringing property into a relationship encumbered by debt is solely responsible for that debt. Where additional debt is incurred during the parties' relationship to improve that property such that there is no increase in value to be divided as family property, it would be significantly unfair for the other spouse to be equally responsible for that additional debt.

> *[53] ... The claimant is solely responsible for payment of the mortgage. Nothing that the respondent did or did not do caused the claimant to incur the original mortgage debt. For that reason I do not consider the original mortgage debt to be a family debt. That debt is not divisible between the parties.*

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[86] *Walsh v Chambers*, 2016 BCSC 67

> *[54] The increase of the mortgage debt in 2007 was attributable to renovations carried out during the relationship. The claimant will enjoy the benefit of those renovations going forward; I cannot see how it would be fair to require the respondent to contribute to the cost of the renovations beyond the share of payments he made prior to the parties' separation. For that reason I will not accede to the claimant's demand that the respondent directly pay or indemnify the claimant for one-half of the outstanding balances of the renovation expense.*

Equal division of family debt incurred to improve excluded property. A spouse may, however, be jointly liable for other debt incurred with respect to excluded property owned by the other spouse, especially if the debt includes an amount incurred for the spouse's individual benefit.

> *[55] On the other hand, the parties are jointly liable for the consolidation loan. Further, the consolidation loan arises out of a joint decision to bring a number of family debts under a single loan. Those debts included $10,000 borrowed for the renovations and another $12,000 for other family obligations. Among those additional family obligations were, for example, legal fees for family litigation that were charged to the respondent. Doing relatively rough justice here, I find that one-half of the at trial balance of the consolidation loan is a family debt and that that half is divisible equally between the parties. The balance of that loan at trial was $8,521. The respondent is liable for one-half of one-half of that debt, or $2,130.*

W. *Tobias v Tobias*

Pearlman J. addressed the presumption of resulting trust in *Tobias v Tobias*,[87] a case involving the parties to a 24-year married relationship during which funds were received by a spouse from the spouse's parents to renovate the family home. The court preferred the reasoning of the Court of Appeal in *Beaverstock v Beaverstock*[88] over that applied in *Cabezas* and *H.C.* in concluding that the funds were provided as a loan.

The presumptions of advancement and resulting trust. Whether a transfer of property to a spouse from the spouse's parent was a loan or gift depends on the parent's intention at the time of the transfer. Where a transfer is gratuitous, the presumption of resulting trust applies to characterize the transfer as a loan; the onus lies on the other spouse to rebut the presumption and establish that the transfer was intended as a gift. If the property was transferred as a loan, the debt is a family debt for which both spouses are liable.

> *[37] In Beaverstock v Beaverstock, ... the appellant mother claimed that she had loaned $50,000 to her son to refinance his purchase of the property. The respondent, the son's widow, executrix, and sole beneficiary, said she had no knowledge of a loan and that prior to the separation, her husband told her that his mother had given him $50,000 as an advance on his inheritance. There was also conflicting evidence about whether the respondent had acknowledged the advance was a loan and had admitted an obligation to repay it.*

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[87] *Tobias v Tobias*, 2016 BCSC 125

[88] *Beaverstock v Beaverstock*, 2011 BCCA 413

[38] The Court addressed the correct approach to the resolution of the dispute at para. 9:

> *[9] The correct approach to the resolution of this dispute is not in dispute. It is set out in Pecore v Pecore ... Whether the transfer was a loan or a gift depends on the actual intention of the appellant when she made the advance, which is a question of fact. As the advance was gratuitous, the onus was on the respondent to demonstrate that the appellant intended a gift, since equity presumes bargains, not gifts (para. 24). This equitable principle gives rise to a presumption the son received the money on a resulting trust, which is a rebuttable presumption of law. The trial judge was therefore required to presume the advance was not a gift and to determine whether the respondent had satisfied the burden of rebutting the presumption of resulting trust on a balance of probabilities (para. 44). ...*

[47] The respondent relies upon a line of authorities that holds that where a parent advances funds to a child for the purchase or maintenance of the family home, there is a rebuttable presumption that the funds are a gift to both the child and his or her spouse ...

[51] In cases dealing with issues of excluded property under s. 85 of the FLA, judges of this Court have followed and applied Cabezas in J.B. v S.C. ... , H.C. v H.P.C. ... , and Madruga v Madruga ....

[52] It does not appear that Beaverstock was brought to the attention of the court in Cabezas or the other authorities cited by the respondent.

[53] On the case law cited on this application, I conclude that the governing authority is the judgment of the Court of Appeal in Beaverstock. I must determine whether the actual intention of the claimant's parents was to make a gift or a loan. Because the advance was gratuitous, the respondent bears the onus of demonstrating that the transferors intended a gift, "since equity presumes bargains, not gifts". In determining the transferors' intention, the court must take into account the Locke factors, along with all of the other evidence. ...

[64] After weighing all of these factors and considering the evidence as a whole, I find that Mr. and Mrs. Haebler, when they advanced the $70,000, intended to loan those funds rather than gift them to the parties.

X. *S.L.M.W. v M.R.G.W.*

The case of *S.L.M.W. v M.R.G.W.*,[89] concerned domestic and foreign property, the valuation of family property and excluded property, including certain trust property, and the division of family debt in the context of a 10-year married relationship. The decision of Steeves J. is helpful for:

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[89] *S.L.M.W. v M.R.G.W.*, 2016 BCSC 272

a) the court's analysis of the trust property as family property or excluded property, the only judicial consideration of s. 84(3) to date;

b) its discussion of the means available to rectify significant unfairness in the division of debt, in light of the decision of Betton J. on the matter in *K.M.J.*; and,

c) the methodology it articulates for determining the value of family property derived from the increase in value of excluded property.

The trust property in question consisted of a New Zealand property, purchased by borrowing against a property owned by the respondent in British Columbia; the respondent was a co-trustee and a discretionary beneficiary of the trust. The respondent argued that the trust property was excluded property. Unsurprisingly, the claimant took the position that the trust was a sham intended to deprive her of an interest in the trust property. Steeves J. was ultimately unable to resolve the issue on the evidence and arguments provided, and directed the parties to make further submissions.

1. Characterization of Property

Trust property as family property or excluded property. The list of various types of property that are defined as family property at s. 84(2) is non-exhaustive; the specific trust property defined as family property at s-s. (3) adds to that list, and extends the general definition of family property at s-s. (1) by providing that the specific trust property is family property whether or not the spouse owns or has a beneficial interest in that property. Characterizing trust property as family property or excluded property required reference to both s. 84 and the list of various types of property that are excluded from family property at s. 85. A trust property which is neither the trust property identified as family property at s. 84(3) nor the excluded trust property identified at s. 85(1)(f) may still fall under the general, inclusive definition of family property at s. 84(1).

> *[94] I note that s. 84 is directed to what is family property and s. 84(3) is one example of property that is family property under the statute. Section 84(2) describes other examples. ... The evidence is that the three subsections of s. 84(3) do not apply to the respondent in this case. On this basis I am urged by the respondent to find that the [trust] is not family property.*
>
> *[95] In my view, that is a misreading of s. 84 as a whole and s. 84(3) specifically. Section 84 describes what is included as family property. It cannot, in my view, be interpreted to mean that property is excluded because it does not meet, for example, the description in s. 84(3). In fact, as set out in ss. 84(2) and (3), family property "includes" the enumerated categories and the plain meaning is that there could be other types of family property that is not described in ss. 84(2) or (3) but is captured by s. 84(1).*

[96] ... Subsection (3) extends the reach of s. 84 by deeming trust property to be family property if any of (3)(a) through (c) apply, whether or not the spouse owns, or has a beneficial interest in, the trust property.

[97] It is s. 85 which expressly describes what property is excluded from family property and it is conceded by the respondent that s. 85(1)(f) does not apply to exclude the [trust]. As above, that subsection states that a "beneficial interest held in a discretionary trust", to which the spouse did not contribute and that is settled by a person other than the spouse, is excluded from being family property. ... However, the respondent's beneficial interest in the [trust] predates the relationship, and therefore its pre-relationship value is excluded under s. 85(1)(a).

[98] Returning to s. 84, as a matter of evidence, I agree with the respondent that the [trust] does not come under s. 84(3). However, that is not the end of the matter and I am required to consider all of s. 84 (as well as s. 85) to determine whether the [trust] has some family interest.

[99] In particular I note that s. 84(1)(a)(ii) states that "a beneficial interest of at least one spouse in property", on the date of separation, is family property. I also note that, under the terms of the trust (s. 1.2), the respondent is one of four "Discretionary Beneficiaries." I conclude that the respondent has a beneficial interest in the [trust]. Since he acquired that interest before the relationship began, only the increase in value of his beneficial interest is family property: s. 84(2)(g).

[100] Some discussion of that interest is necessary. Broadly speaking there is the issue of valuing a beneficial interest in a trust generally and there is an issue as to whether any of the trust property is derived from family property.

[101] More specifically, s. 84(1)(a)(ii) of the FLA states that it is the "beneficial interest" of the respondent which is family property. That is, the underlying trust property itself may not be family property. If it is, it is not clear how and in what form the interest of a discretionary beneficiary of the [trust] can be transposed to a family interest in that trust under the FLA. In this regard I note s. 84(2.1) states that, for the purposes of subsection (2)(g), "any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property."

2. Dividing Property

Calculating the value of family property deriving from excluded property. The value of the excluded portion of property brought into a spousal relationship is the value of the property on the date the relationship began, less the amount of any debts encumbering the property on that date. The value of the property at the date of trial is the fair market value of that property less the amount of any debts encumbering the property on that date. The value of the property

which is shareable family property is the value of the property at the date of trial less the value of the property at the date the relationship began.[90]

> *[69] The calculation for the value of [Property A] when the marriage-like relationship commenced on December 1, 2001 is:*
>
> > *(a) **Value of property as of December 1, 2001:** ... I assess the value of [Property A] as of December 1, 2001 to be $825,000.*
> >
> > *(b) **Line of credit owing**: ... I assess the line of credit balance as of December 1, 2001 at $293,698.*
> >
> > *(c) **Judgment registered against property**: A charge was registered against the property on August 23, 1996, in the amount of $15,096. ...*
> >
> > *(d) **Value at commencement of marriage-like relationship (a – b – c)**: $516,206.*
>
> *[70] I calculate the value of [Property A] at the date of trial, November 2015, as follows:*[91]
>
> > *(e) **Value of property as of November**: $1,000,000 (appraisal as at November 4, 2015).*
> >
> > *(f) **Mortgage owing**: As of August 28, 2015 the balance owing on a mortgage was $113,311. I have taken that amount and three monthly payments of $832 for September, October and November 2015 for a figure of $110,815.*
> >
> > *(g) **Line of credit debt**: ... I assess $60,000 as the balance of the line of credit as of the date of trial in November 2015.*
> >
> > *(h) **Value at date of trial (e – f – g)**: $829,185.*
>
> *[71] Therefore, the value of [property] for the purposes of s. 84(2)(g), from the date the marriage-like relationship began ... to the date of trial ... is $312,979 (**h** minus **d**, or $829,185 minus $531,302). The claimant is entitled to one-half of that amount: $156,490.*

3. Dividing Debt

Unequally dividing debt where a spouse did not contribute following separation. As Betton J. observed in *K.M.J.*, significant unfairness in the division of a debt paid by a spouse after separation may be rectified by adjusting the date of the valuation of the debt under s. 87 or by allocating the debt unequally between the spouses under s. 95. These are not the only two

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[90] The same approach will apply to excluded property acquired during a spousal relationship. Substitute "on the date the property was acquired" for "on the date the relationship began."

[91] I have corrected certain numbering errors in the CanLII text of the decision in this paragraph.

options available; significant unfairness in the division of a debt may be remedied in other ways. One option is to require the other spouse to compensate the spouse for one-half of the payments made.

> *[59] The respondent submits that the June 2013 date of separation should be used for the calculation of family debt with respect to [Property A] and [Property B]. This is because he has paid the mortgage payments for both parties and the claimant has not made any contribution to the mortgages after separation in June 2013. That is a fact. In Ranguelov the date of separation was used for the valuation of family property because it had increased in value after separation and one party had managed the property and paid down the debt after separation ...*
>
> *[60] The respondent also relies on an example given in K.M.J. ... where it was suggested that s. 87 or s. 95 could be used where significant unfairness results from one party paying off family debt post-separation but pre-hearing. Justice Betton in K.M.J. would use s. 87 and interest accumulated to the date the debt was retired would have to be considered.*
>
> *[61] In the subject case the respondent relies on the following statement given as part of this example in K.M.J: "[t]he same process would be applied if the debt had been paid down but not retired entirely." According to the respondent, he has paid down some of the debt and this statement supports the use of the date of separation as the date of determining the value of family debt in this case to reflect that fact.*
>
> *[62] I do not agree that K.M.J. goes as far as saying this approach is necessarily required by the operation of s. 87. As well, I have not been given any calculation comparing the amount of debt paid down by the respondent and the amount of debt at the date of separation versus the amount at date of trial. In my view, some calculation is necessary to avoid the arbitrary application of s. 87 (or s. 95).*
>
> *[63] Nonetheless I accept that some adjustment is required to remedy the significant unfairness that would result from the fact that the respondent has paid the debts associated with the two properties while the claimant did not contribute. In my view, the remedy here is a straightforward one: the claimant is required to pay one-half of the debt payments made by the respondent for the material times.*

Y. *Sardinha v Sardinha*

The decision of Betton J. in *Sardinha v Sardinha*,[92] a case involving the division of property between the parties to a 12-year marriage, was the first to consider the judgment of the Court of Appeal in *Cabezas v Maxim*,[93] itself the first substantive appellate decision on Part 5 of the *Family Law Act*. As in that case, the parties in *Sardinha* had benefitted from the payment of the

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[92] *Sardinha v Sardinha*, 2016 BCSC 348

[93] *Cabezas v Maxim*, 2016 BCCA 82

mortgage encumbering the family home by the claimant's parents and, as in that case, the resulting questions were: whether the funds applied to the mortgage were an advance on the claimant's inheritance or a gift; and, if a gift, whether the gift was to both parties or to the claimant alone.

Identifying family property. Where a spouse receives funds from a parent that are provided as an advance on the spouse's inheritance, the funds are the spouse's excluded property. Where funds are received as a gift and applied to property owned by both spouses, however, the gift is presumed to be a gift to both spouses and the funds are the spouses' family property. Characterization of funds received from a parent as inheritance or gift requires proof of the donor's intentions in transferring the funds.

> *[38] There are numerous decisions that have dealt with situations where the parents of children in relationships have participated in paying for homes or repairs of homes. Often a significant point of contention in those decisions is whether or not the funds provided by the parents in those circumstances were a gift or a loan. Here, there is no suggestion that the funds from the claimant's parents were a loan. The question that arises here is whether or not the funds were an advancement on the claimant's inheritance or a gift. Further if they were a gift, was it a gift to both of the parties or only the claimant. ...*
>
> *[40] Where gifts of money to one party are made for reasons other than the purchase or maintenance of a home, s. 85(1)(b) provides that they would be excluded property. Until the Court of Appeal decision in Cabezas, there was some uncertainty as to whether the presumption of advancement operated in respect of gifts that went toward the purchase or maintenance of a family residence. ...*
>
> *[41] The trial decision in Cabezas v Maxim ... does make reference to the impact on the analysis if funds are found to be in the nature of an advancement on a party's inheritance. This was not the subject of comment by the Court of Appeal. Chief Justice Hinkson said this:*
>
> > *[67] I have already concluded that the [property] was a family asset. Considering the factors outlined in Locke, I am not persuaded that the funds used to pay off the mortgage were provided to the respondent either as a loan or as an advancement on his inheritance. Such a conclusion would be at odds with how the respondent's parents treated all of their children. While I accept that the respondent's mother has subsequently and sensibly chosen to treat the gifts to both of her sons and their partners as advancements against what the sons will inherit from her estate, I find that such an intention was formed well after the gifts were given. I therefore find that the funds in question were given as a gift intended to benefit both the respondent and the claimant.*
>
> *[42] A further example of a case dealing with funds that might be characterized as an inheritance is L.A.F. v E.H.D. ... There, Madam Justice Baker said the following:*

> *[114] Mr. D submitted that the court should conclude that the funds given to Ms. F in 2010 were intended to be a gift to both of the parties. He relies on the decision in Cabezas v Maxim ... In that case the respondent's parents had advanced money to pay off the mortgage on a home jointly owned by the parties. Based on the evidence before him, Chief Justice Hinkson concluded that the funds were given as a gift intended to benefit both the respondent and the claimant. In the alternative – and in my view this conclusion is obiter dicta – he stated that the presumption of advancement would have applied, absent evidence to rebut the presumption.*
>
> *[115] In my view, the facts in that case are quite different from the facts in this case. Here the funds advanced to Ms. F in 2010 were clearly intended to be in the nature of an inheritance. The funds were advanced to her alone. She chose to use some of the funds to pay construction costs and to make a lump sum payment on the mortgage. The evidence does not establish that Mrs. F Sr. intended Mr. D to receive any of the funds or to have any control over the use that Ms. F made of the funds. The funds advanced were not directed in any specific way. Cabezas does not assist the respondent.*
>
> *[43] There are features of the case before me that distinguish it from both Cabezas and L.A.F. Unlike Cabezas, there is evidence here to suggest the monies were in the nature of an inheritance. Unlike L.A.F., the money here was applied directly to the mortgage, an instrument that the claimant's parents were debtors under, and was, obviously, specifically for the home of which both parties were registered owners. ...*
>
> *[47] In the circumstances, I conclude that the funds were provided as an advancement on the claimant's inheritance. ...*

Z. *M.J. v M.W.*

Grist J. addressed the intersection of third party rights, allegations of unjust enrichment and claims under Part 5 in *M.J. v M.W.*[94] In this case, the family home was purchased with use of funds provided by the respondent's parents from the refinancing of their own home, and was registered in the names of the respondent and her mother as joint tenants. The respondent sought an order that her mother have a one-half interest in the property, such that only the remaining half interest would be subject to division with the claimant; the claimant argued that the mother would be unjustly enriched by receiving a half interest in the property.

The court ultimately concluded that, despite the ownership indicated on the title to the family home, the parties intended the claimant to have an interest in the home. As a result, the respondent's mother would be unjustly enriched if the claimant's interest in the property was limited to one-half of the respondent's half interest in the property as a result of the combined effect of the *Land Title Act* and the *Family Law Act*.

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[94] *M.J. v M.W.*, 2016 BCSC 856

Rebutting the presumption of indefeasible title. Under the *Land Title Act*, the parties named on the title of real property have an indefeasible estate in that property. This presumption can be displaced by equitable principles including the presumption of advancement and the enforcement of an agreement between the parties for a different ownership arrangement.

> *[30] Section 23(2) of the Land Title Act ... provides that an indefeasible title is conclusive evidence that the person named on title is indefeasibly entitled to an estate in fee simple to the specified land. In this case, the 'persons' on title are Ms. A.W. and Ms. M.W., as joint tenants.*
>
> *[31] This is a statutory presumption which may be displaced by equitable principles. Two principles often listed are: (1) the presumption of advancement; and (2) the enforcement of an agreement between the parties in order to prevent an unjust enrichment should the face of a title be upheld.*
>
> *[32] The second of these exceptions can sustain an action for an equitable remedy where it is shown that the parties' intentions were that a person on title was never intended to hold a beneficial interest (or perhaps the particular percentage interest indicated on title) ... Reliance on this equitable consideration has resulted in the reordering of beneficial interests from those to be presumed from the title where a person came on title to assist with financing the property, but was not to have been beneficially entitled to the listed interest ...*
>
> *[33] At the same time, there is value to such a person's contribution and the position on title may be justified, or at least the presumption in favour of the person holding the listed interest may be sustained, in any individual case. The issue, when the interest is challenged, is whether the evidence is capable of rebutting the presumption in favour of the registered interest ...*
>
> *[40] ... The second equitable exception to the presumption resulting from the form of the legal title has application here: the enforcement of an agreement between the parties in order to prevent an unjust enrichment should the face of a title be upheld. ... It was, as Mr. M.J. indicated in his evidence, to be the younger couple's home and the parents' contribution was to assist in its acquisition for this purpose. The repayment of the parents' contribution supports the view that the parents' interest was to be a diminishing one.*
>
> *[41] As between the mother and daughter, the joint tenancy was not to determine their eventual beneficial interests. Ms. A.W. was clearly intending to ultimately benefit her daughter; and, at the same time, to do little to benefit Mr. M.J. Further, I accept Mr. M.J.'s evidence that he was originally to be on title but, as it turned out, it was deemed convenient by the mother and daughter to retain the title in their joint names.*
>
> *[42] The presumption of a continuing equal beneficial ownership is rebutted by this evidence. The joint expectation at the time the house was purchased was that the parent's interest would be a diminishing one; and in my view, this was in consideration of the changing equities associated with the younger couple's contributions.*

Determining unjust enrichment. Unjust enrichment is established upon proof of a party's enrichment, a corresponding deprivation to the party alleging the enrichment and the absence of juristic reason justifying the enrichment.

> *[34] In addition to the authorities recognizing the equities that might displace the statutory presumption equating the beneficial interest to the listing on the title, perhaps beginning with Pettkus v Becker ... and Peter v Beblow ... ,listed owners can be held to be constructive trustees for a claimant as a remedy granted to prevent an unjust enrichment. These are cases where the claiming party has made substantial contributions to the acquisition, preservation, maintenance or improvement of the property ...*
>
> *[43] At this point, the consideration of an equitable remedy merges with Mr. M.J.'s claim for a remedy by way of an unjust enrichment.*
>
> *[44] The elements of an unjust enrichment are well-known. There must be: an enrichment, in this case because of the state of title in favour of the mother and daughter; a corresponding deprivation to Mr. M.J.; and no juristic reason to account for the enrichment ...*
>
> *[45] Enrichment and corresponding deprivation are found in the fact that Mr. M.J., along with Ms. M.W., used their joint resources over a number of years to significantly pay down the sources of mortgage financing that allowed for the purchase of the home. They also put significant effort into improving and maintaining the property. Mr. M.J. did much of this work himself and paid a number of the expenses directly ...*
>
> *[48] None of the established categories [of juristic reasons] are engaged here, nor do the expectations of the parties or public policy considerations form a basis upon which to deny recovery. As mentioned, I am satisfied that there was no agreement in place to treat the property as a short term investment, with the profits from its sale to be divided equally. Accordingly, the claim for unjust enrichment has been established.*

Remedy where unjust enrichment is established. Where an allegation of unjust enrichment is proven, the court may order a monetary award be paid by the enriched party or, if the monetary award be inadequate, the court may impose a constructive trust over the enriched party's interest in the property in favour of the deprived party.

> *[49] The next issue to consider is the appropriate remedy. As stated in Kerr ... , "A successful claim for unjust enrichment may attract either a 'personal restitutionary award' or a 'restitutionary proprietary award'." A personal restitutionary award is a monetary remedy, whereas a restitutionary proprietary award results in a constructive trust. The first remedy to be considered is a monetary award, which may be calculated on either a value received approach determined by the cost of the benefits on the open market, or a value survived approach determined by the value created in an asset by the claimant's contributions ... It is only where a monetary award is deemed inadequate and there is a "sufficiently substantial and direct" contribution to the acquisition, preservation, maintenance or improvement of the property in which the trust is claimed that a constructive trust may be considered ...*

[51] In this case, I view an equitable distribution to be established and each parties' contributions to the acquisition, maintenance and enhancement of the property to be properly recognized if each party, Ms. A.W., Ms. M.W., and Mr. M.J., is found to be entitled to a one-third interest in the equity in the [property], after repayment of the first mortgage and the remaining balance of the second mortgage on the parents' home.

IV. Case Law Developing in the Court of Appeal

In this section, I will review the two substantive appellate decisions on claims under Part 5 of the *Family Law Act* published to date, *Cabezas v Maxim*,[95] released on 23 February 2016, and *V.J.F. v S.K.W.*,[96] released on 28 April 2016.

A. *Cabezas v Maxim*

The primary issue on appeal in *Cabezas* concerned the payments made by the respondent's parents to the mortgage on the family home and whether those payments should be considered "a gift to both spouses, or a loan or inheritance." The payments were characterized by Hinkson C.J. at trial as a gift intended to benefit both parties,[97] making the gift divisible family property, relying on the presumption of advancement to reach the same result in the alternative. The trial court held thusly on the matter:

[67] ... I am not persuaded that the funds used to pay off the mortgage were provided to the respondent either as a loan or as an advancement on his inheritance. Such a conclusion would be at odds with how the respondent's parents treated all of their children. While I accept that the respondent's mother has subsequently and sensibly chosen to treat the gifts to both of her sons and their partners as advancements against what the sons will inherit from her estate, I find that such an intention was formed well after the gifts were given. I therefore find that the funds in question were given as a gift intended to benefit both the respondent and the claimant.

[68] Had Mrs. Maxim's intentions been unclear, I would nonetheless have found that, in keeping with the statement of Harvey J. in Wiens, the funds used to pay off the mortgage on the [property] were provided by the respondent's parents as a gift to avoid the foreclosure of the property, resulting in a presumption of advancement to the claimant. This presumption of advancement is limited in scope, and does not apply to all gifts or inheritances received by a spouse from his or her parents. Generally, such gifts are excluded property under s. 85(1)(b) of the Act, as was the [car] received by the respondent from his father in this case. However, where a parent chooses to provide funds to a child for the purchase or maintenance of the

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[95] *Supra*, fn 93

[96] *Supra*, fn 21

[97] *Supra*, fn 53

> *family residence (to use the language of the Act), those funds are presumed to be a gift to both the child and his or her spouse. Absent evidence rebutting that presumption, the funds and any proceeds derived from them are family property under s. 84 of the Act. None of the evidence presented is capable, in my view, of rebutting that presumption.*

Should the payments be characterized as a loan, however, the payments would be a family debt for which the claimant would be one-half liable; should they be characterized as an inheritance, the payments would be the sole property of the respondent and excluded from division with the claimant.

1. Characterization of Property

The Court of Appeal concurred with the conclusion of the trial judge that the payments were a gift:

> *[34] ... The trial judge found that the mortgage payments were intended as a gift at the time they were made. It is not suggested that he made a palpable and overriding error in making that finding. There was evidence, including evidence of similar gifts made to Mr. Maxim's siblings, to support this conclusion. Additionally, the judge was not persuaded that the subsequent decision to treat the gifts as advancements on the Maxim children's future inheritance nullified evidence that, when made, they were intended to be gifts to both parties. There is no basis to disturb these findings of fact.*

The court further held that the terms of ss. 84 and 85 do not preclude the application of common law principles to characterize property as family property or excluded property. As a basic principle of statutory interpretation, "statutory law and common law are necessarily intertwined:"

> *[39] I agree, as was said in Remmem, that s. 85 codifies the types of assets that are excluded from family property. However, in interpreting the FLA (and s. 85 in particular) one cannot completely ignore fundamental common law principles regarding the characterization of the assets themselves. The court may turn to common law when determining if a particular asset falls into the categories set out in s. 85. This is not controversial.*
>
> *[40] Remmem is also distinguishable insofar as there was no dispute that the jointly purchased property was acquired from what clearly fell into a category of excluded property; that is, property acquired before the parties commenced living in a marriage-like relationship. The dispute was whether the value of the property should be excluded notwithstanding that half of that amount was effectively gifted to the other spouse through the purchase of joint property. In this case, the dispute concerns whether the property in question can be fairly categorized as excluded property at all.*

Agreeing with the characterization of the payments as a gift, the court also upheld the decision of Hinkson C.J. to divide the proceeds of sale of the family home equally.

2. Application of the Presumption of Advancement

The court did not, however, agree with the trial judge's conclusions with respect to the presumption of advancement as an alternative ground upon which the equal division of the payments from the respondent's parents could be ordered. Relying on the decision of the Supreme Court of Canada in *Pecore v Pecore*,[98] and its subsequent interpretation in *Zhu v Li*,[99] the court held that the presumption was inapplicable, "at least on these facts:"

> *[43] While not necessary for the purposes of resolving this ground of appeal, one additional point should be addressed for the purposes of clarity. I observe that at least on these facts, the trial judge erred in relying on the presumption of advancement as an alternative basis for finding that the mortgage payments made by Mr. Maxim's parents were gifts.*
>
> *[44] As noted, the trial judge relied on Wiens as authority for the application of the presumption of advancement. However, the Supreme Court of Canada's decision in Pecore, which implicitly overrules Weins, was not put before him. In Pecore, Rothstein J. for the Court held that the presumption of advancement no longer applies between parents and adult independent children. He explained the rationale for this conclusion as follows, focusing primarily on present social conditions relating to elderly parents and adult children:*
>
> > *[36] ... First, given that a principal justification for the presumption of advancement is parental obligation to support their dependent children, it seems to me that the presumption should not apply in respect of independent adult children. As Heeney J. noted in McLear, ... parental support obligations under provincial and federal statutes normally end when the child is no longer considered by law to be a minor: see e.g. Family Law Act, s. 31. Indeed, not only do child support obligations end when a child is no longer dependent, but often the reverse is true: an obligation may be imposed on independent adult children to support their parents in accordance with need and ability to pay: see e.g. Family Law Act, s. 32. Second, I agree with Heeney J. that it is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have that child assist them in managing their financial affairs. There should therefore be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs.*
>
> *[45] In Zhu v. Li, ... Neilson J.A. further explained the rationale for abandoning such a legal presumption in both the matrimonial and familial context. At para. 51, she said:*
>
> > *[51] First, there is considerable support for the view that the presumption of advancement has lost its force in the contemporary matrimonial context. The editors of Waters' Law of Trusts describe its origins in the 18th century, rooted in the assumption*

---

[98] *Pecore v Pecore*, 2007 SCC 17

[99] *Zhu v Li*, 2009 BCCA 128

> *that when a husband or father transfers an asset to his wife or child, his intention is to make a gift due to the donee's financial dependence on him and the reasonable expectation that the donee would share in his estate. They observe that this premise has lost its persuasiveness in contemporary society, to the point that the presumption of advancement has been eliminated by express legislation in the majority of Canadian provinces and territories. While it has not been abolished in British Columbia, they say that legislation dealing with the division of matrimonial property has "reduced the presumption to no significance" ...*
>
> *[46] It follows from Pecore and Zhu that the presumption of advancement is not applicable to the facts of this case, and I will not consider it further.*

The extent to which the presumption of advancement between parent and child has been rendered nugatory in family law disputes is unclear. Although the comments of Rothstein J. in *Pecore* seem to provide a repudiation of the presumption, at least in respect of independent adult children,[100] the Court of Appeal may have confined its opinion to the specific facts of the case before it and Betton J., writing in *Sardinha*, appears to limit the effect of the decision to gifts from a parent intended to be applied to the "purchase or maintenance" of a family home:

> *[40] Where gifts of money to one party are made for reasons other than the purchase or maintenance of a home, s. 85(1)(b) provides that they would be excluded property. Until the Court of Appeal decision in Cabezas, there was some uncertainty as to whether the presumption of advancement operated in respect of gifts that went toward the purchase or maintenance of a family residence. If it did, the funds would be presumed to be a gift to both parties in the absence of evidence rebutting the presumption. ...*

B. *V.J.F. v S.K.W.*

The conflict between the line of cases headed by *Remmem* and *Wells* was squarely before the Court of Appeal in *V.J.F.*:

---

[100] Rothstein J. wrote as follows in *Pecore*:

> *[23] ...I think the long-standing common law presumptions continue to have a role to play in disputes over gratuitous transfers. The presumptions provide a guide for courts in resolving disputes over transfers where evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive. ...*
>
> *[36] ... the presumption should not apply in respect of independent adult children ...*
>
> *[40] ... I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regard to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.*

> *[3] One line of cases, of which Remmem v Remmem ... and P.G. v D.G. ... are the most prominent, suggests that the Act is a "complete code" and that on marriage breakdown, a "new property rights regime descends as between the spouses". On this view, a gift made by one spouse to the other that can be traced back to excluded property retains its status as excluded property within the meaning of s. 85 – even though at common law, it would be regarded as the donee's property on separation. The other line of cases, typified by Wells v Campbell, ... holds that common law and equitable concepts of property continue to apply under the FLA. On this view, a gift made by one spouse to the other becomes and remains the donee's "property" on separation and falls within the definition of "family property" in s. 84, even if the gift was previously excluded property of the donor spouse.*
>
> *[4] A related question arising in the appeal is whether the presumption of advancement between spouses is effectively eliminated by the "complete code" of the Act, or whether it remains unaffected, as s. 104 might suggest.*

For the purpose of this paper, the primary issue on appeal was the availability of the presumption of advancement in claims under Part 5. The conclusions of the trial judge that the funds received by the claimant were "a gift by way of inheritance" and were excluded property "at the time of the distribution" were not challenged on appeal, nor was his finding that the funds were applied to building a new family home and paying off the mortgage on the old family home.

After reviewing the reasoning of Fenlon J. in *P.G.* in some detail, commensurate with the number of trial court judgments adopting her analysis, the court ultimately concluded that the principles of equity and the common law continue to apply to disputes under Part 5:

a) the common law is necessarily available to interpret and give context to statute law (para. 73)

b) the *Family Law Act* does not contain a "clear statement" doing away with the presumption of advancement, and had government intended to abolish the presumption it could have done so; (para. 77) and,

c) the rights provided in Part 5 are, pursuant to s. 104(2), "in addition to and not in substitution for rights under equity or any other law." (para. 71).

The nub of the court's opinion was expressed thusly:

> *[74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses. ...*

[75] ... Nor do I agree that the FLA effectively 'prohibits' gifts between spouses, as Mr. F. suggested. Gifts between spouses can continue as they have through the ages. It would take much clearer wording to render them suddenly revocable or null or illegal. ...

[76] Contrary to the suggestion made in P.G., moreover, the $2 million gift received by Ms. W. does "fall back into the communal pot" on separation and is divisible as family property in the normal way. The spouses are presumptively entitled to equal shares as tenants in common. The fact s. 95 does not list the same set of factors previously listed in s. 65 of the FRA is, with respect, a choice made by the Legislature. ... The FLA is not to be interpreted by means of a comparison of the fairness of its provisions with those of the FRA.

[77] In the absence of a clear statement abolishing the presumption of advancement, I also conclude that it continues to apply under the FLA (although I would not necessarily refer to it as a "right" within the meaning of s. 104). Had the Legislature intended to abolish the presumption, it would have been an easy thing to so state, as other provinces have done. It would also be an easy matter to provide, or perhaps clarify, that the presumption applies to common law as well as formal marriages and even that it should apply to gifts from a wife to her husband, not just the reverse. ...

[78 I acknowledge that judges may in some cases have to determine whether transfers of excluded property that may have taken place years before, were gifts or not. This seems likely to occur most often in cases where inherited property is transferred by the heir to his or her spouse or into joint names. (Of course, the presumption of advancement was invented as a way of resolving such questions where the evidence is unclear or equivocal.) That said, there are means by which the inheriting or recipient spouse can protect against 'losing' the exclusion. Subject to other relevant provisions of the FLA, for example, the transferor can require the transferee to acknowledge that no gift of the excluded property (or its value) is intended.

Accordingly, the gift received by the claimant was in turn gifted to the respondent when it was applied to benefit properties registered in her name alone. Although the original gift qualified as excluded property under s. 85 when received, the exclusion was lost when the claimant "voluntarily and unreservedly" transferred the funds to the respondent.

V. Conclusion

The case law on the interpretation of Part 5 of the *Family Law Act* has begun to gel, particularly with the pronouncements of the Court of Appeal resolving the question of the applicability of the presumption of advancement – and presumably the other principles of equity and the common law – on claims under Part 5 in *Cabezas* and *V.J.F.*

Reviewing the case law accumulating to date, it appears that government's intentions for the *Family Law Act* have only been partially realized. There is, happily, a near consensus in the case law that the "broad judicial discretion" available for the division of family assets under the

Family Relations Act has been fettered to some degree and that the threshold of "significant unfairness" that must be met to divide property and allocate debt unequally, or to divide excluded property, is indeed a tangibly higher threshold than mere unfairness. However, the goal of a scheme for the division of property and debt that is "simpler, clearer, easier to apply, and easier to understand for the people who are subject to it" remains frustratingly out of reach.

A summary of the principles emerging from the case law might include the following.

1. The occurrence of the triggering event: severs joint tenancies (*Wells*); and, does not affect the ownership of excluded property (*Remmem*).

2. The burden lies on the party claiming an exclusion to prove the value of the excluded property on the later of the date that spouses' relationship began or the property was acquired and, where excluded property has changed character, to provide the documents necessary to trace the exclusion (*Asselin*, *A.A.P.*, *Shih*, *Jackson*, *J.S.F.*).

3. A failure to prove the value of excluded property brought into the relationship, or applied to the purchase of property, may result in no part of the property being excluded from division (*Asselin*).

4. Where the value of excluded property has depreciated or fallen below that of the debt encumbering the property, no portion of the property will be family property and family property may not be used to provide restitution for the diminution in value of the excluded property (*Asselin*, *Remmem*, *Walsh*).

5. Where excluded property is contributed to improve family property, the excluded portion of the family property is the amount by which the value of the family property improved, not the value of the excluded property (*Asselin*, *A.A.P.*).

6. The presumptive date for the identification of family property and family debt is the date of separation (*K.M.J.*, *Slavenova*).

7. There is no requirement of use or contribution before entitlement to family property is established. All that is necessary is to prove that the property existed on the date of separation (*Asselin*).

8. The presumptive date for the valuation of family property and family debt is the date of trial, absent an order or agreement for another date, as spouses should share in the increases and decreases in value following separation (*K.M.J.*, *Blair*).

9. A party seeking to use a date other than the date of trial for the valuation of family property and family debt must demonstrate that it would be significantly unfair to use the trial date (*Blair*).

10. The date of valuation of family debt may be adjusted to address significant unfairness in the division of debt (*K.M.J.*, *Tobias*).

11. Gifts to both spouses are family property (*Cabezas* trial), gifts between spouses are family property (*V.J.F.* trial).

12. Gifts to a spouse to buy or maintain a family home are family property (*H.C.*, *Sardinha*).

13. Gifts are made out when property is transferred and accepted without consideration and cannot be revoked by the donor (*V.J.F.* trial).

14. Claims for the unequal division of family property require the court to first identify the family property and then perform a notional equal division of that property, taking all exclusions into account, before determining whether an equal division would be significantly unfair (*Remmem*, *Walburger*, *Blair*).

15. "Significant unfairness" means unfairness that is weighty, compelling or meaningful (*Remmem*, *Walburger*).

16. Factors that may lead to a finding of significant unfairness in the division of family property include: disproportionate responsibility for childcare (*H.C.*); agreements for an unequal division of family property (*Slavenova*); contributions to the career of a spouse (*Jaszczewska*); considerably disproportionate contributions to the family property (*Jaszczewska*, *A.M.D.*); failure to contribute to excluded property owned by the other spouse (*Blair*); a spouse's role in increasing the value family of family property beyond market trends (*Blair*); failure to achieve the objects of spousal support when a spouse is entitled to support (*C.M.*); relationships of short duration (*A.M.D.*); tax liabilities incurred as a result of the transfer of property (*A.M.D.*); and, nondisclosure (*Chang*).

17. Factors that may *not* lead to a finding of significant unfairness in the division of family property include: differing contributions to the family property (*Slavenova*); relationships of medium duration (*Jaszczewska* , *Blair*); the absence of contributions to the career of a spouse (*Jaszczewska*); and, the disproportionate ownership of property brought into a relationship (*Jaszczewska*, *A.M.D.*).

18. The burden lies on the party claiming that debt is family debt to prove that the debt exists and that it was incurred during the spouses' relationship (*Jaszczewska*).

19. The payment of family debt by one spouse following separation does not relieve the other spouse of liability for those debts (*K.M.J.*).

20. Factors that may lead to a finding of significant unfairness in the division of family debt include: nondisclosure (*Chang*); increases in debt to improve excluded property (*Walsh*); and, noncontribution to a family debt following separation (*Tobias*).

21. Factors that may *not* lead to a finding of significant unfairness in the division of family debt include: debts incurred in the normal course of the relationship with the consent or knowledge of a spouse (*J.S.F.*).

22. Spouses may make valid agreements dividing property that are oral or are written and signed without their signatures being witnessed (*Asselin*, *Walburger*).

23. Only written agreements dividing property are subject to judicial oversight under s. 93 (*Walburger*).

Appendix: Statutes and Cases Referenced

This appendix is included for the convenience of the reader and provides a list of the statutes relevant to the division of property under Part 5 of the *Family Law Act* and the case law developed under Part 5 referenced in this paper, with hyperlinks to these materials on CanLII.

Clicking on a link in the electronic version of this paper will launch your default web browser and open the document in CanLII, and may result in a box popping up warning of a security risk. Clicking ALLOW and the "Remember my action for this site" box will permanently enable the link.

A. Principle Statutes

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28

Divorce Act, RSC 1985, c. 3 (2nd Supp.)

Family Homes on Reserves and Matrimonial Interests or Rights Act, SC 2013, c. 20
***Family Law Act*, SBC 2011, c. 25**
Division of Pensions Regulation, BC Reg. 348/2012
Family Law Act Regulation, BC Reg. 347/2012
Family Relations Act, RSBC 1996, c. 128

Interpretation Act, RSBC 1996, c. 238

Land Title Act, RSBC 1996, c. 250

Partition of Property Act, RSBC 1996, c. 347

B. Family Law Act Case Law Referenced

A.A.P. v G.T.F., 2015 BCSC 662
A.M.D. v K.R.J., 2015 BCSC 1539

Andermatt v Tahmasebpour , 2015 BCSC 1743
Asselin v Roy, 2013 BCSC 1681

Bilawchuk v Bilawchuk, 2014 BCSC 2067
Blair v Johnson, 2015 BCSC 761

Cabezas v Maxim, 2014 BCSC 767
***Cabezas v Maxim*, 2016 BCCA 82**
Cizmic v Cizmic, 2015 BCSC 1430
C.M. v M.S., 2015 BCSC 1031
Cockerham v Hanc, 2014 BCSC 2432

H.C. v H.P.C., 2014 BCSC 1775
Hoppen v Kravariotis, 2015 BCSC 779

Jackson v Jackson, 2015 BCSC 2114
Jaszczewska v Kostanski, 2015 BCSC 727
J.B. v S.C., 2015 BCSC 2136
J.S.F. v W.W.F., 2015 BCSC 2375

Khorramtash v Boroojeni, 2015 BCSC 2275
K.M.J. v J.H.D.N., 2014 BCSC 1895
Kuhberg v Hall, 2015 BCSC 2230

Lawrence v Mulder, 2015 BCSC 2223

M.J. v M.W., 2016 BCSC 856

Parker v Mitchell, 2016 BCSC 723
P.G. v D.G., 2015 BCSC 1454

Remmem v Remmem, 2014 BCSC 1552
Sardinha v Sardinha, 2016 BCSC 348
Shih v Shih, 2015 BCSC 2108
Slavenova v Ranguelov, 2015 BCSC 79
S.L.M.W. v M.R.G.W., 2016 BCSC 272
Stanbridge v Stanbridge, 2015 BCSC 1468

Tobias v Tobias, 2016 BCSC 125

V.J.F. v S.K.W., 2015 BCSC 593
***V.J.F. v S.K.W.*, 2016 BCCA 186**

Walburger v Lindsay, 2015 BCSC 341

Walsh v Chambers, 2016 BCSC 67
Wells v Campbell, 2015 BCSC 3
Williams v Killey, 2014 BCSC 1846

No Materials – discussion session

Housing

- Housing Issues Outside of the RTA (Day 1)
- Show me the Money: Enforcing RTB Monetary Orders in Small Claims Court (Day 1) (see tab 2)
- Residential Tenancy Update (Day 2)
- Building Wide Complaints in Housing Matters (Day 2)
    - Powerpoint
    - Joint retainer
    - Forms
- Online Research on Government Sites: MSDSI and RTB (Day 3) (see tab 6)
- Drafting Settlement Agreements in Residential Tenancy and Welfare Matters (Day 3) (see tab 6)

Non-Residential Tenancy Act Housing Issues

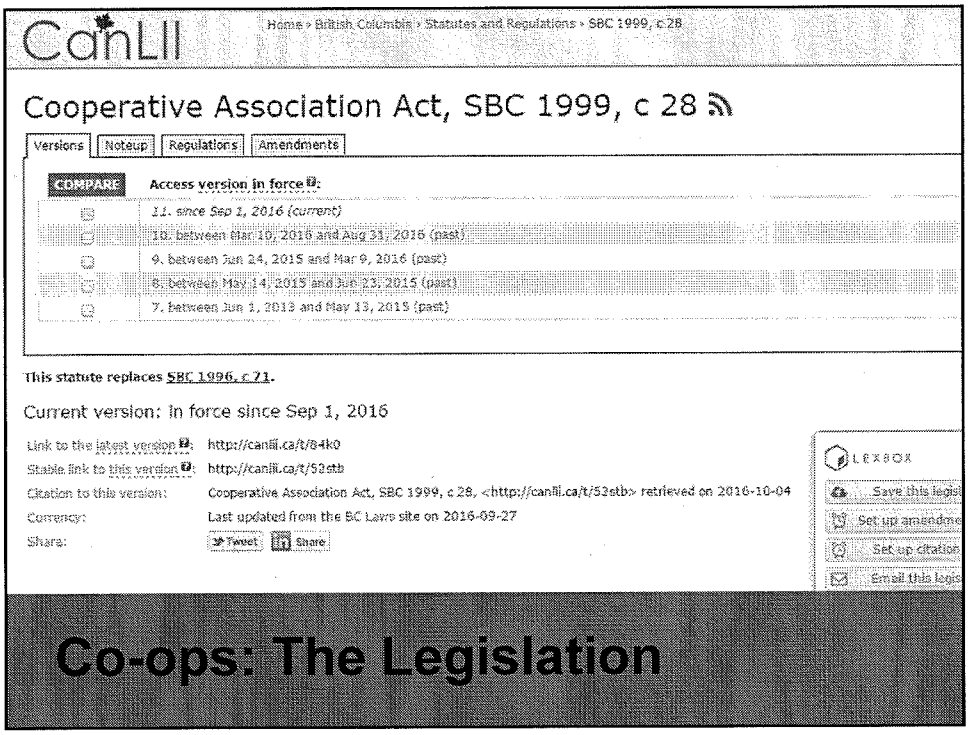
Presentation by Joshua Prowse. October 2016. Explores housing issues involving co-ops, human rights, foreclosure, transitional housing, small claims court, and utility issues

CLAS Community Legal Assistance Society

Overview

- Give a basic overview of some housing issues you might see that fall outside the Residential Tenancy Act
- Provide some tips to help you advocate for clients with these issues
- Contents:
  - Housing Co-operatives
  - Human Rights Code
  - Foreclosure
  - Borderline cases: transitional housing
  - Small Claims Court proceedings where matters are not covered by the RTA
  - Utility issues like BC Hydro and Fortis

CLAS Community Legal Assistance Society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Cooperative Association Act, SBC 1999, c 28
Versions
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11. since Sep 1, 2016 (current)
10. between Mar 10, 2016 and Aug 31, 2016 (past)
9. between Jun 24, 2015 and Mar 9, 2016 (past)
8. between May 14, 2015 and Jun 23, 2015 (past)
7. between Jun 1, 2013 and May 13, 2015 (past)
This statute replaces SBC 1996, c 71.
Current version: in force since Sep 1, 2016
Link to the latest version:
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Stable link to this version:
http://canlii.ca/t/52stb
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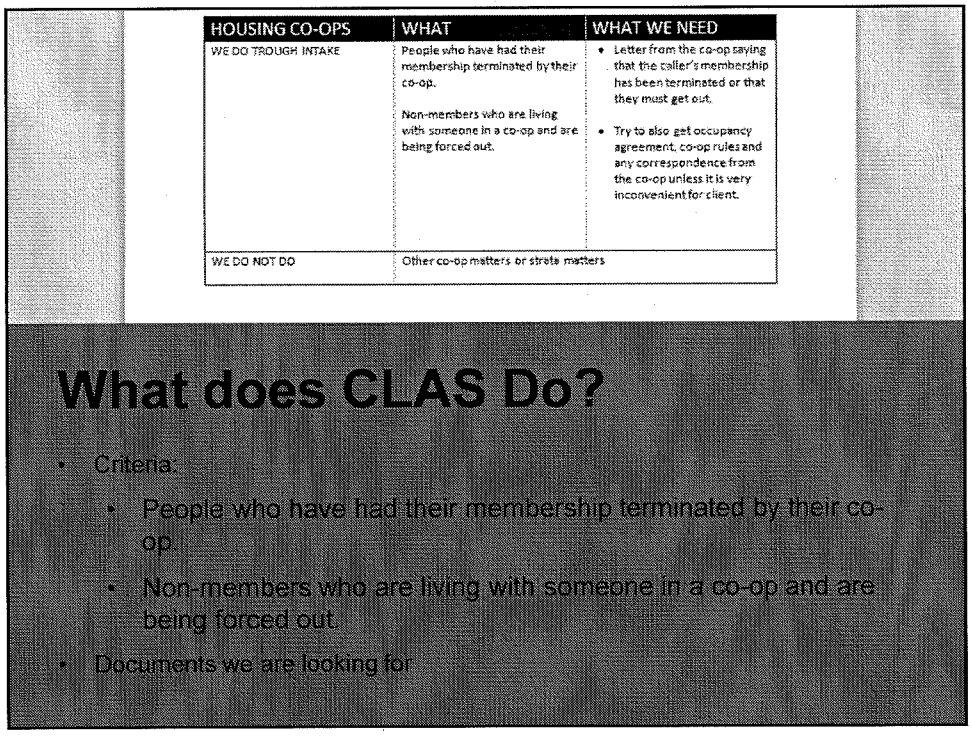
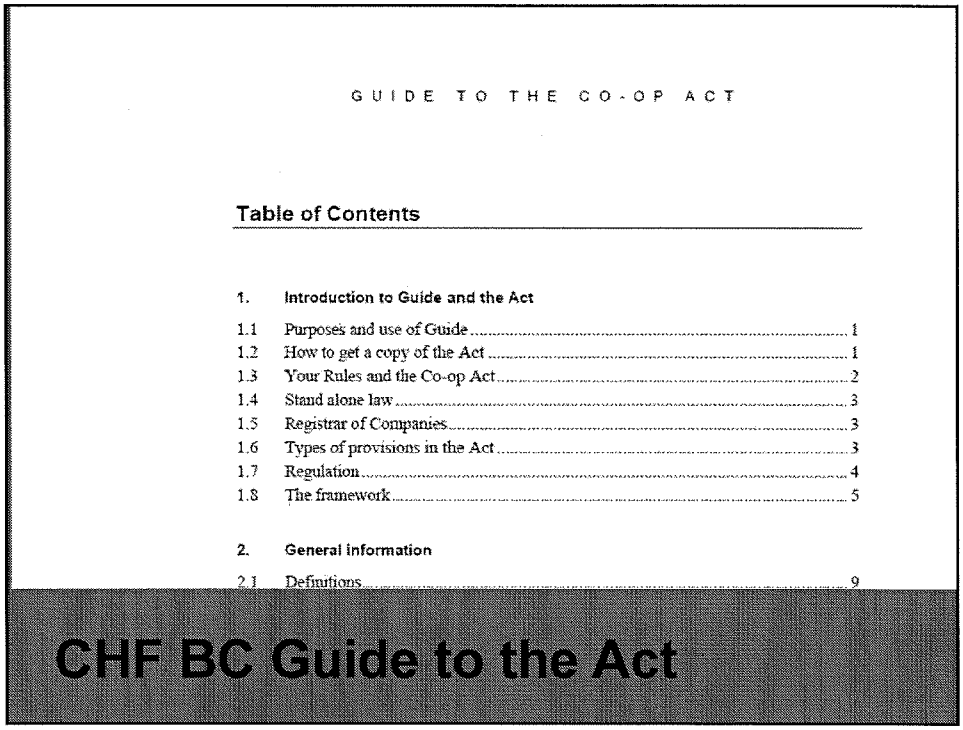
Co-ops: The Legislation


HOUSING CO-OPS
WHAT
WHAT WE NEED
WE DO TROUGH INTAKE
People who have had their membership terminated by their co-op.
Non-members who are living with someone in a co-op and are being forced out.
Letter from the co-op saying that the caller's membership has been terminated or that they must get out.
Try to also get occupancy agreement, co-op rules and any correspondence from the co-op unless it is very inconvenient for client.
WE DO NOT DO
Other co-op matters or strata matters
What does CLAS Do?
Criteria:
People who have had their membership terminated by their co-op
Non-members who are living with someone in a co-op and are being forced out
Documents we are looking for

CHF BC as a referral



GUIDE TO THE CO-OP ACT

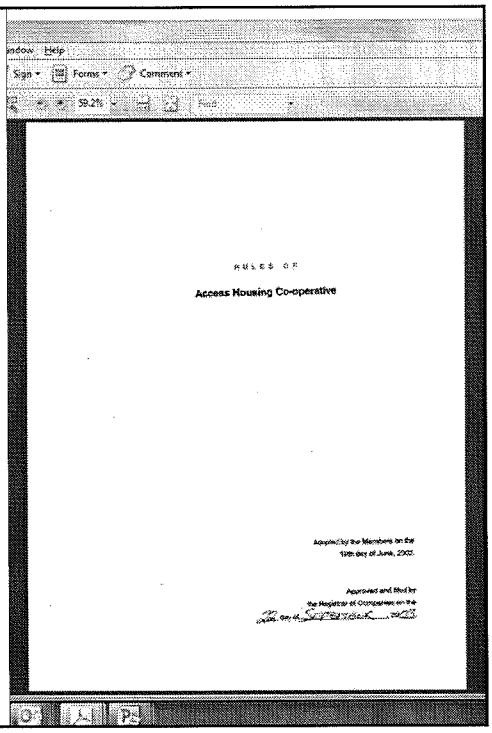
Table of Contents

CHF BC Guide to the Act

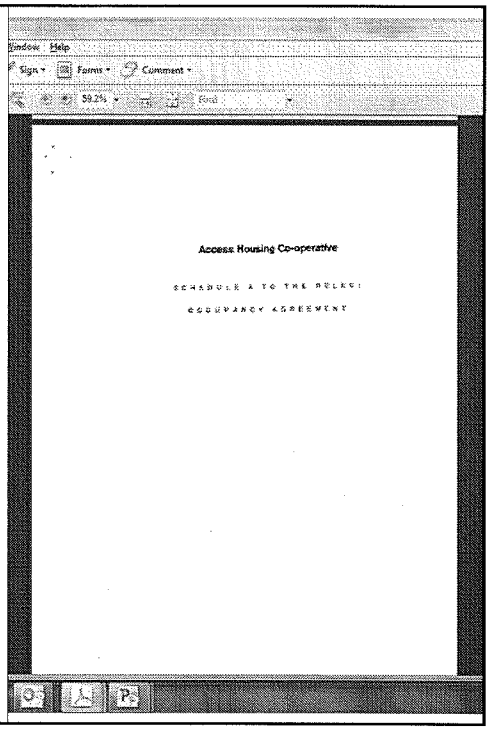
The Eviction Process

- First step: get the documents
- Rules of the co-op
- Occupancy Agreement of the co-op
- Other documents

Co-op Rules



Occupancy Agreement



16.04 Effective date of termination

If the Directors terminate this Occupancy Agreement pursuant to Subsection 16.03, it shall deliver to the Member at least 30 days' written notice of termination and such notice shall state the effective date on which the Occupancy Agreement is terminated.

16.05 Possession of the Unit

The right of the Member, and that of any person residing in the Unit, to possession or occupancy of the Unit shall terminate if the Directors terminate this Occupancy Agreement as provided herein.

Old Concept:

- Two types of evictions:
  - A. Membership termination
  - B. Occupancy agreement termination
- (Rule saying that termination of occupancy agreement = deemed withdrawal of membership in co-op)

CHF BC Chairing Meetings

Membership Agreement Termination

- 3 reasons why a co-op can terminate
  - Member hasn't paid rent/occupancy charges
  - Material breach of the agreement
  - Member has engaged in conduct detrimental to the housing co-op
- Act sets out procedural protections
- Specific steps the co-op has to go through
- Eviction process has to respect rules of procedural fairness

Membership Agreement Termination

ation of membership in a housing cooperative

35 (1) A housing cooperative may provide in its rules for the termination of the membership of a member.

(2) Rules referred to in subsection (1) and the rules that a housing cooperative may adopt under subsection (3) of this section are subject to this section and sections 36 to 39.

(3) A housing cooperative by its rules may adopt either of the following grounds as constituting grounds for termination of the membership of a member who has a right to possession or occupancy of a residential premises that is dependent on the member's membership:

(a) The member has not paid rent, occupancy charges or other money due by the member to the housing cooperative in respect of the residential premises and has not rectified the non-payment within a reasonable time after receiving written notice to do so from the housing cooperative.

(b) The member

(i) has not paid rent, occupancy charges or other money due by the member to the housing cooperative in respect of the residential premises, or

(ii) in the opinion of the directors, based on reasonable grounds, has breached another material condition of an agreement between the member and the housing cooperative relating to the member's

(A) possession or occupancy of the residential premises, or

(B) use of the property of which the leased premises form part,

and has not rectified the non-payment or breach within a reasonable time after receiving written notice to do so from the housing cooperative.

(4) Subject to any rule of a housing cooperative for termination of membership, and to subsections (5) and (6), a housing cooperative may terminate the membership of a member if the member has not paid an ordinary assessment to the housing cooperative.

(5) A housing cooperative may exercise the powers under this section to terminate the membership of a member only by a resolution of the directors requiring a majority of at least 3/4 of all the directors and passed at a meeting of the directors called to consider the resolution.

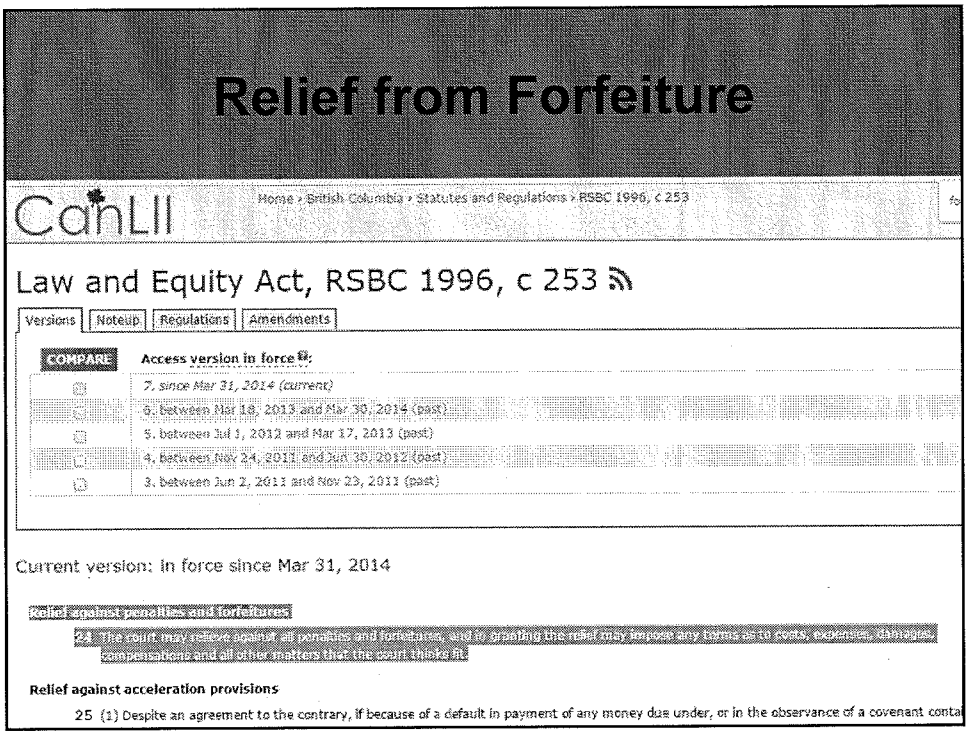
(6) Sections 156 and 208 do not apply to termination under this section of a membership in a housing cooperative.

f association respecting termination of rights or membership

Relief from Forfeiture

- Ask court to forgive breach by co-op member
- One-time opportunity
- Court and co-op must not have previously forgiven a breach
- Limited circumstances (usually a monetary debt that can be repaid immediately)
- TALK TO CO-OP'S LAWYER TO TRY TO SETTLE

Relief from Forfeiture



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Law and Equity Act, RSBC 1996, c 253

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- 5. between Jul 1, 2012 and Mar 17, 2013 (past)
- 4. between Nov 24, 2011 and Jun 30, 2012 (past)
- 3. between Jun 2, 2011 and Nov 23, 2011 (past)

Current version: in force since Mar 31, 2014

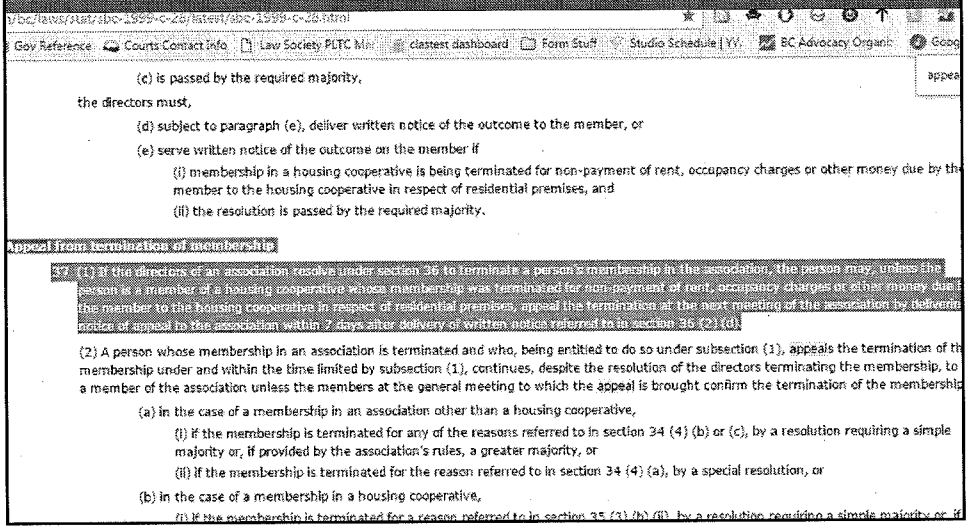
Relief against penalties and forfeitures

24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, payment, damages, compensation and all other matters that the court thinks fit.

Relief against acceleration provisions

25 (1) Despite an agreement to the contrary, if because of a default in payment of any money due under, or in the observance of a covenant conta

Appeal To Membership



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(c) is passed by the required majority,

the directors must,

(d) subject to paragraph (e), deliver written notice of the outcome to the member, or

(e) serve written notice of the outcome on the member if

(i) membership in a housing cooperative is being terminated for non-payment of rent, occupancy charges or other money due by th member to the housing cooperative in respect of residential premises, and

(ii) the resolution is passed by the required majority.

Appeal from termination of membership

37 (1) If the directors of an association resolve under section 36 to terminate a person's membership in the association, the person may, unless the person is a member of a housing cooperative whose membership was terminated for non-payment of rent, occupancy charges or other money due by the member to the housing cooperative in respect of residential premises, appeal the termination at the next meeting of the association by delivering notice of appeal to the association within 7 days after delivery of written notice referred to in section 36 (2) (d).

(2) A person whose membership in an association is terminated and who, being entitled to do so under subsection (1), appeals the termination of th membership under and within the time limited by subsection (1), continues, despite the resolution of the directors terminating the membership, to a member of the association unless the members at the general meeting to which the appeal is brought confirm the termination of the membership

(a) in the case of a membership in an association other than a housing cooperative,

(i) if the membership is terminated for any of the reasons referred to in section 34 (4) (b) or (c), by a resolution requiring a simple majority or, if provided by the association's rules, a greater majority, or

(ii) if the membership is terminated for the reason referred to in section 34 (4) (a), by a special resolution, or

(b) in the case of a membership in a housing cooperative,

(i) if the membership is terminated for a reason referred to in section 35 (3) (b) (ii), by a resolution requiring a simple majority or, if

Appeal To Court: Deadline and Grounds

(b) in the case of a membership in a housing cooperative,

(i) if the membership is terminated for a reason referred to in section 35 (3) (b) (ii), by a resolution requiring a simple majori appeal provided by the housing cooperative's rules, a greater majority, or

(ii) if the membership is terminated for the reason referred to in section 35 (4), by a special resolution.

(2.1) If the members of a housing cooperative confirm the termination of a person's membership under subsection (2) (b), the housing cooperative must

(a) promptly serve the person with

(i) a notice that the resolution or special resolution confirming the termination was passed by the members, and

(ii) a notice in the prescribed form of the person's right to appeal the termination under subsection (3), and

(b) comply with other prescribed conditions.

(3) If a person's membership in a housing cooperative is terminated, the person may appeal the termination to the court

(a) within the following time periods:

(i) if the membership was terminated for non-payment of rent, occupancy charges or other money due by the member to the housing cooperative in respect of residential premises, within 10 days after the date on which the notice referred to in section 36 (2) (e) was served on the person;

(ii) if the membership was terminated for any other reason, within 30 days after the date on which the notice referred to in subsection (2.1) (a) (i) of this section was served on the person, and

(b) on any one or more of the following grounds:

(i) the housing cooperative failed to observe the principles of natural justice in terminating the membership;

(ii) the decision of the housing cooperative is not reasonably supported by the facts;

(iii) the decision of the housing cooperative is not authorized by section 35.

(3.1) Despite section 171, a person who has commenced an appeal in accordance with subsection (4) of this section continues to be a member of the association for the purposes of an application under section 172.1, and may include with the appeal an application under section 172.1 for an order of possession.

(4) An appeal to the court under subsection (3) must be commenced in accordance with Rule 19-3 of the Supreme Court Civil Rules by notice of

Appeal To Court: Fees and Deadline

(f) any circumstances the registrar considers relevant.

mination of member – breach of material condition or conduct detrimental

4 (0.1) The prescribed form for the purposes of section 37 (2.1) (a) (ii) of the Act is Form 9 of Schedule C.

(1) If the members of a housing cooperative confirm the termination of a membership under section 37 (2) (b) of the Act, the housing cooperative must comply with the following conditions:

(a) Repealed. [B.C. Reg. 12/2014, s. 1 (b).]

(b) at the written request of the appellant, if the appellant is not in arrears for any monthly housing charge, issue to the appellant the amount of the filing fees made payable to the court registry in which the notice of appeal is to be filed.

(2) If there is a dispute between the appellant and the housing cooperative respecting the amount of the monthly housing charge, the amount of the monthly housing charge referred to in subsection (1) (b) is the amount of that charge that is not in dispute.

(3) The request under subsection (1) (b) must be made within 10 days' notice of the day this appellant is served with the notice under section 37 (2.1) (a) (i) of the Act.

(4) If the appellant fails to make the request under subsection (1) (b) within the period set out in subsection (3), the housing cooperative may, but need not, issue the amount of the filing fees.

(5) If the housing cooperative has issued an amount under subsection (1) (b) and the court upholds the decision of the members to terminate the appellant's membership, the amount paid under subsection (1) (b) is a debt due to the housing cooperative from the appellant.

[am. B.C. Regs. 142/2010, s. (a); 12/2014, s. 1 (a) and (b).]

mination of member – nonpayment

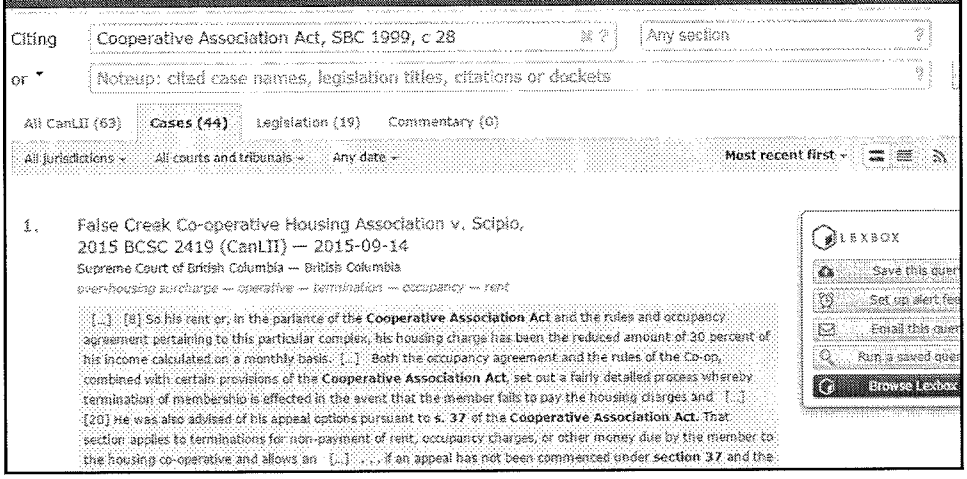
1.1 The prescribed form of a written notice for the purposes of section 36 (2) (e) of the Act is Form 9.1 of Schedule C.

[en. B.C. Reg. 12/2014, s. 1 (c).]

ealed

5 Repealed. [B.C. Reg. 12/2014, s. 1 (d).]

Recent Cases: Last Year 1 Case (Relief from Forfeiture)



Common Co-op Questions

- Under what circumstances can the co-op withdraw any rent subsidies?
- What happens if the co-op doesn't submit a rent subsidy application to BC Housing?
- How to advocate for co-op residents who have lost their subsidy or their employment and can't get it back?
- What are co-ops obligated to do when showing units to perspective buyers (advanced warnings, etc.)?
- Are co-ops in Vancouver not covered under the Standards of Maintenance By-law?

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Advance warnings re: showing unit. Look to occupancy agreement.

25.03 Entry for non-emergency

Where an emergency does not exist, a Co-op employee, agent, or Director shall enter the Member's Unit only if:

[a] the Member consents; or

[b] the Directors give the Member 24 hours' written notice that access is required for a reasonable purpose.

Vancouver standards of maintenance bylaws apply?

3. APPLICATION

3.1 The provisions of this By-law apply to all land and all buildings in the City, and, unless otherwise specified, the owner of said land and/or buildings shall be responsible for carrying out the work or having the work carried out in accordance with the requirements of this By-law.

Subsidy withdrawal

- Most success that I've seen is with contacting the Board and the management company and asking them to advocate
- If it's the board, I generally try to keep them as friends, since so much of what happens in a co-op comes down a popularity contest
- If BC Housing has not approved subsidy, then management company (like CoHo) can sometimes act as an advocate. Also, member can write to BC Housing with more info.
- What tips do you have?

Last annual report: 52 tenancy complaints accepted by the BC Human Rights Tribunal

Respondent 1:

Area of Discrimination

- (✓) Accommodation, service or facility
- ( ) Employment
- ( ) Employment advertisement
- ( ) Publication
- ( ) Purchase of property
- ( ) Tenancy
- ( ) Unions and associations
- ( ) Wages

"Accommodation, service or facility" means an accommodation, service or facility that is customarily available to the public. Examples are hotels, stores, restaurants, schools, government programs, community recreation programs, and stratas.

Grounds of Discrimination

- [ ] Age
- [ ] Ancestry
- [ ] Colour
- [ ] Family Status
- [ ] Gender Identity or Expression
- [ ] Marital Status
- [ ] Mental Disability
- [ ] Physical Disability
- [ ] Place of Origin
- [ ] Race
- [ ] Religion
- [ ] Sex
- [ ] Sexual Orientation

The difference between accommodation and tenancy: *Jackson v. Summerland Motel*, [2016] BCHRTD No. 120

R discriminated against C's on the basis of physical disabilities by failing to remediate their housing unit to the point that it could be occupied without triggering C's allergies.

I2D $10k. Expenses $1500.

Redmond v. Hunter Hill Housing Co-op (No. 2), 2013 BCHRT 276

C is 68 years of age. She has severe osteoporosis and a clubfoot. C requested that the Respondents build a ramp to allow her to safely access her apartment. The Respondents refused.

I2D $15k. Order to build ramp.

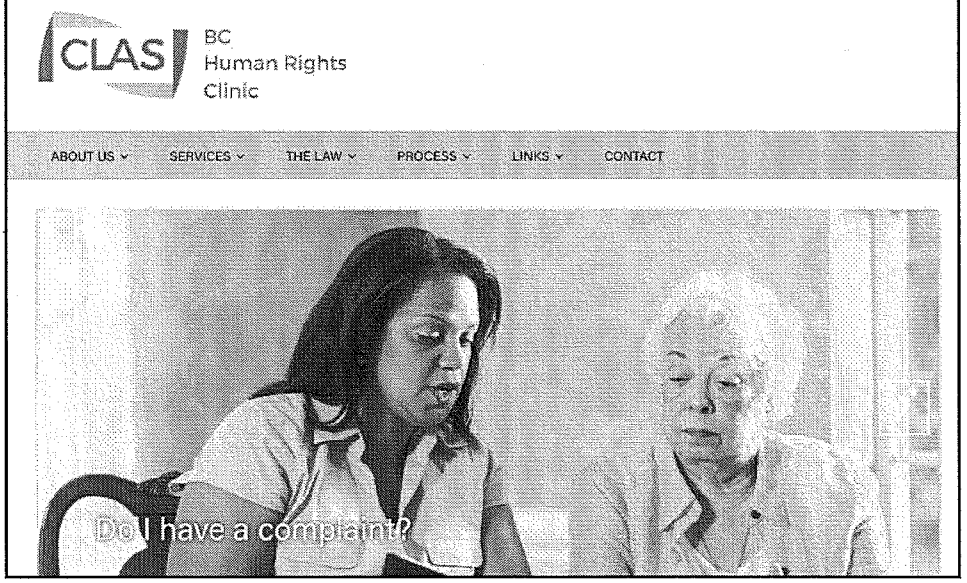
Stewart v. Satorotas Enterprises and others, 2012 BCHRT 442

Women denied rental accommodation due to child.

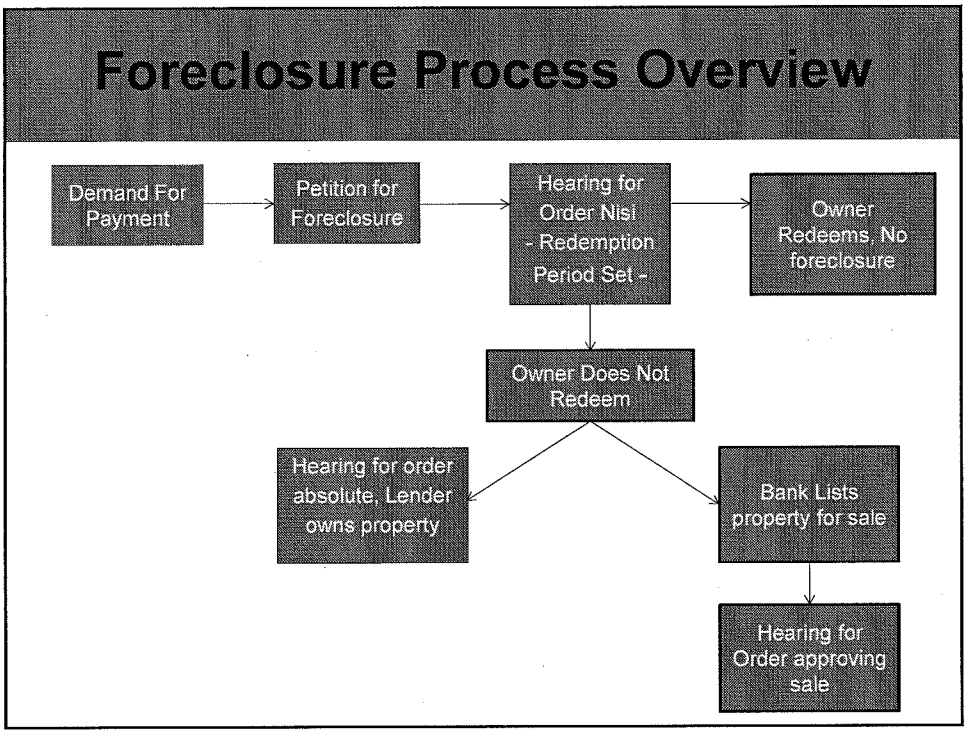
I2D $2.5k.

Horneland v. Wong and another, 2014 BCHRT 3

Referrals



Foreclosure and tenancy



Common Foreclosure Questions

- If a home is under foreclosure, is a tenant no longer protected under the regular eviction timeline?
- What are a tenant's rights under foreclosure?
- If tenants are named and served in the foreclosure proceedings, do they lose their rights as tenants under the RTA?
- If a home is under foreclosure, who does the tenant pay rent to?
- In order to obtain the return of a security deposit after foreclosure, who should the tenant name the claim against during dispute resolution?
- Once a bank has foreclosed, should a tenant pay rent to the bank?

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If a home is under foreclosure, is a tenant no longer protected under the regular eviction timeline?

- 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.
- 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.

What are a tenant's rights under foreclosure?

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.

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.

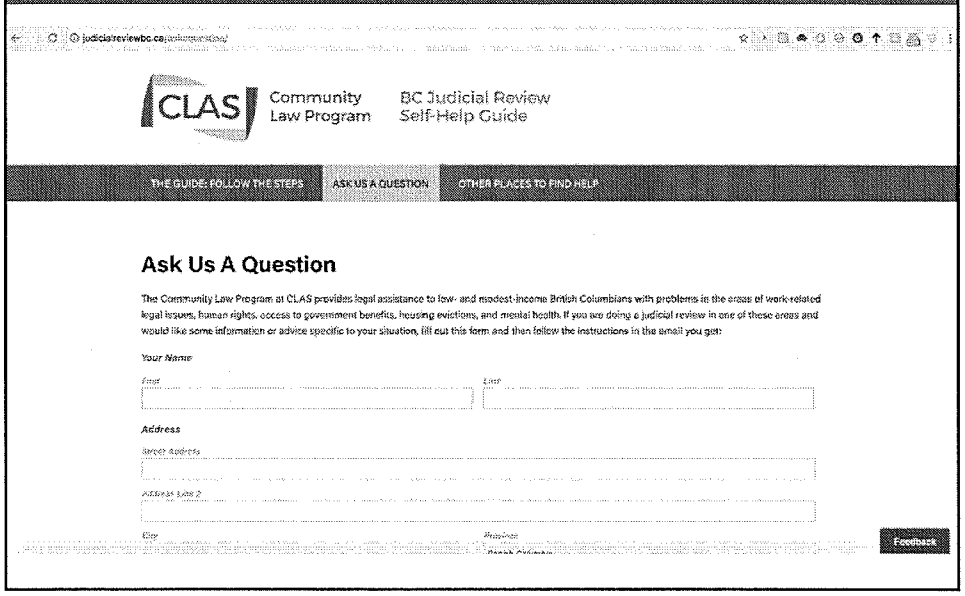
If tenants are named and served in the foreclosure proceedings, do they lose their rights as tenants under the RTA?

- Even if tenants 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.

If a home is under foreclosure, who does the tenant pay rent to?

- 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.

Referrals



Borderline RTA Cases: Transitional Housing

Transitional Housing

What this Act does not apply to

4 This Act does not apply to

(a) living accommodation rented by a not for profit housing cooperative to a member of the cooperative,

(b) living accommodation owned or operated by an educational institution and provided by that institution to its students or employees,

(c) living accommodation in which the tenant shares bathroom or kitchen facilities with the owner of that accommodation,

(d) living accommodation included with premises that

(i) are primarily occupied for business purposes, and

(ii) are rented under a single agreement,

(e) living accommodation occupied as vacation or travel accommodation,

(f) living accommodation provided for emergency shelter or transitional housing,

(g) living accommodation

(i) in a community care facility under the *Community Care and Assisted Living Act*,

(ii) in a continuing care facility under the *Continuing Care Act*,

(iii) in a public or private hospital under the *Hospital Act*,

(iv) if designated under the *Mental Health Act*, in a Provincial mental health facility, an observation unit or a psychiatric unit,

(v) in a housing based health facility that provides hospitality support services and personal health care, or

(vi) that is made available in the course of providing rehabilitative or therapeutic treatment or services,

(h) living accommodation in a correctional institution,

(i) living accommodation rented under a tenancy agreement that has a term longer than 20 years,

(j) tenancy agreements to which the *Manufactured Home Park Tenancy Act* applies, or

(k) prescribed tenancy agreements, rental units or residential property.

So, what's transitional housing?

Factors:

- Is there a specific timeline (how is the end of the transition period determined?)
- Are there requirements for the tenant to participate in a program, therapy, or counselling as a condition of the tenancy?
- Regardless of whether there are requirements for the tenant to participate in a program, does the tenant receive particular supports or programming?
- Have discussions about the transition out of the housing occurred?
- How long has the tenant lived there? ("a tenancy for a term of twenty four (24) months is clearly not transitional")
- Did the tenant previously have a non-transitional housing situation before signing an agreement that says that the RTA doesn't apply? Was consideration offered for the new agreement? Is it unconscionable?

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So, what's transitional housing?

Factors: (cont'd)

- What does the tenancy agreement say? Does it say that the housing is transitional?
- Is the rental amount significant or a slight amount?
- Dictionary definition of "transition"
- Is this a license to occupy or does the tenant have exclusive possession of their unit?
- Some decision look to Section 4(g)(vi) which provides that housing that is made available in the course of providing rehabilitative or therapeutic treatment or services is outside the scope of the Act.
- Is there a previous decision? ("the question of jurisdiction has been argued in a previous hearing, it is *res judicata*, and I do not have the authority to hear it again or vary that finding")
- Does the housing provider receive funding from the provincial government's Provincial Homelessness Initiative or is the housing in a "breaking the Cycle of Homelessness" program?

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So, what's transitional housing?

Factors: (cont'd)

- Is the housing named a shelter?
- Do tenants agree to abide by onerous "house rules"?
- One arbitrator notes that exemption applies to living accommodation *provided for* transitional housing. "I find the use of the words "provided for" goes to the intent of the landlord in providing the accommodation ad less how the tenant views the use of the living accommodation."
- The BC Housing Glossary of Terms defines "transitional housing" as follows: "Housing from 30 days to two or three years that includes the provision of support services, on- or off-site, to help people move towards independence and self-sufficiency. Transitional Housing is often called second-stage housing, and includes housing for women fleeing abuse."

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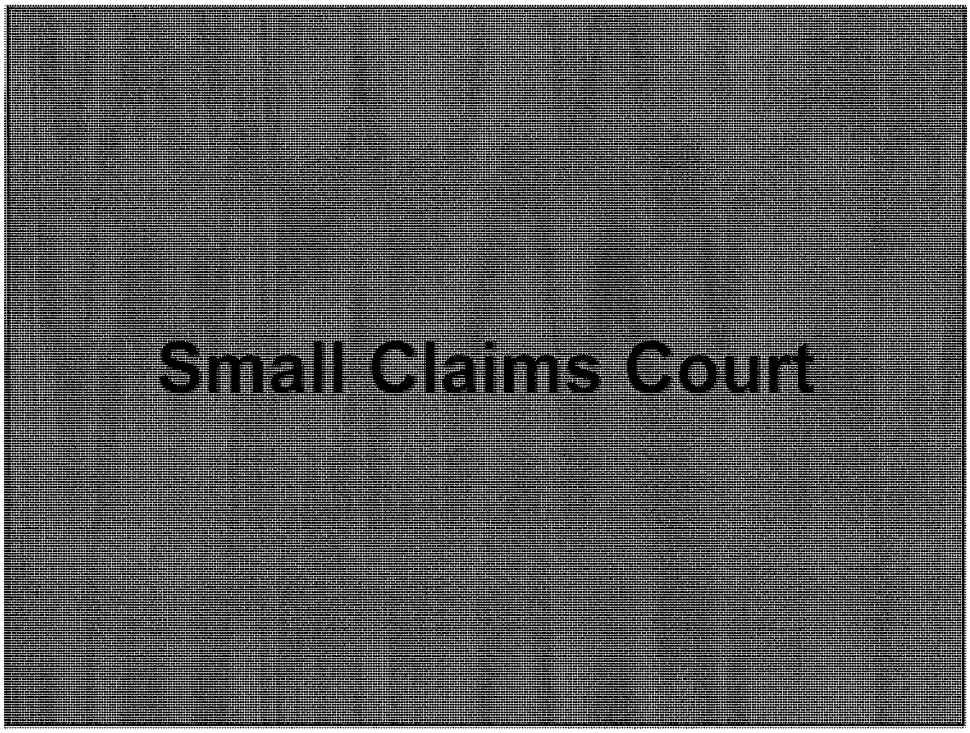

What do you argue in small claims court?

In housing that is not covered by the RTA, one can establish an entitlement to damages where they prove:

1. The existence of a contract between;
2. A breach of the contract; and
3. A loss suffered as a result of the breach.

In the alternative, an argument can be framed around common law tenancy rights.

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1. Existence of a contract

1. The Contract

First, it is clear that there was a contract between the Tenant and the Defendant. The Program Agreement states that the Defendant will provide accommodation in recognition of the need for stable accommodation to maintain substance-free living, and grants the Tenant the right to occupy the accommodation, subject to the terms of the Agreement. The Tenant occupied her unit in the Transition House almost a year and a half. She had exclusive occupancy of her unit for a term and paid monthly rent of $375.00 in accordance with the Agreement.

2. Breach of the Contract

The Defendant breached its obligations to the Tenant when it evicted her from her unit in the Transition House without any notice, in writing or otherwise. This was a breach of the contract between the parties. Additionally, as a resident with exclusive occupancy of accommodation for a term, the Tenant was a common law tenant of the Defendant, which owed the Tenant reasonable notice of termination as an implied term of the agreement.

The Ontario Superior Court in Keith Whitney Homes Society found that a resident in non-profit housing provided by a charitable organization was in fact a tenant at common law, although the housing in question was not covered by residential tenancy legislation. In that case, the Court relied on the House of Lords' decision Street v Mountford, which held that where "residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy." As such, common law rights afforded to tenants, including reasonable notice, apply.

3. Damages

As a result of the Defendant's actions in terminating her occupancy agreement without notice, the Tenant has suffered pecuniary and non-pecuniary damages. The Tenant has shown that she incurred losses of at least $823.45 as a direct result of the Defendant's breach. In addition, the Tenant has suffered extreme mental distress as a direct result of the Defendant's actions, for which she is entitled to compensation from the Defendant.

Thank you

CLAS Community Legal Assistance Society

LAW FOUNDATION
PROVINCIAL ADVOCATES TRAINING CONFERENCE 2016

HOUSING ISSUES OUTSIDE THE RESIDENTIAL TENANCY ACT

This session will:

- Give a basic overview of some housing issues you might see that fall outside the *Residential Tenancy Act*; and
- Provide some tips to help you advocate for clients with these issues.

Presented by: Joshua Prowse and Erin Pritchard
Based upon materials originally developed by Jess Hadley, Kendra Milne, Kevin Love, and Laura Johnston
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INDEX

HOUSING CO-OPS

There are two types of housing co-ops in BC:

- Non-profit housing co-ops. These co-ops are subsidized by BC Housing or CMHC and charge new members only a nominal amount to purchase shares upon joining the co-op. After that, members must pay monthly housing charges that are sometimes referred to as rent. These housing charges are often below market value, and can be tied to the members' income. Non-profit co-ops are run by a board of directors elected by the members of the co-op.
- Equity co-ops. These are not subsidized. In order to join an equity co-op, each member purchases shares in the co-op for full market value. Members can make a profit when they sell their shares upon leaving the co-op.

This paper deals only with non-profit housing co-ops, not equity co-ops. Both types of housing co-op are governed by the *Cooperative Association Act* ("*CAA*").

1. Housing co-ops are not covered by the *Residential Tenancy Act*

Section 4 of the *Residential Tenancy Act* (the "RTA") sets out that the RTA does not apply to:

> *(a) living accommodation rented by a not for profit housing cooperative to a member of the cooperative…*

This section deals with housing situations that fall under s. 4(a) of the RTA: in other words, situations where the client is a member of the co-op, and is renting a unit from the co-op. We will not address situations where a tenant is a non-member of the co-op but is renting from a member. That situation would be covered by the *Residential Tenancy Act.*

2. First step: get the documents

You will need the following documents to help a client that has a legal issue with her housing co-op:

- Legislation: the *Cooperative Association Act* ("*CAA*"), which governs all co-ops and has specific provisions that apply to housing co-ops.
- Guide to the legislation: the Guide to Co-op Act, produced by the Co-operative Housing Federation of BC ("CHF BC") and available on the Federation's website. It is somewhat out of date in that it does not incorporate changes to the Act over the last two years, but it is still a useful guide given that caveat.
- Rules: the rules of the housing co-op you're dealing with.
- Occupancy Agreement: the occupancy agreement your client entered into with the co-op (might be a schedule to the rules of the co-op).
- Other documents: any correspondence between your client and the co-op, documents from the client's co-op file if available, and copies of any policies of the co-op that apply to your client's situation.

3. Useful resources

The Co-operative Housing Federation of BC (CHF BC) website has a lot of useful information on the operation of non-profit co-ops. They can also be a good organization to bring into some types of difficult meetings to act as a chair and ensure that fair procedures are followed.

4. Assumptions made in these materials

We are making the following assumptions in this presentation:

- Your client is a member of a housing co-op residing in a unit she rents from the co-op, or she resides with a co-op member and her interests are not adverse to the member's interests.
- The co-op you are dealing with has adopted the CHF BC Model Rules and Occupancy Agreement, or a similar set of rules and a similar occupancy agreement.
- The co-op is a non-profit housing co-op.

If these assumptions don't apply to your client's situation, the information in these materials may not apply. Contact CLAS or another lawyer for advice.

5. Membership Termination

A housing co-op can evict your client by terminating her membership in the co-op (since the right to reside in a co-op is contingent on membership in the co-op). This is the only way that a co-op member may be evicted from their co-op.

Section 35 of the CAA sets out the three grounds on which a co-op may terminate membership:

1. Money owed to the Co-op: A co-op can terminate membership where the member owes housing charges, occupancy charges or other money to the co-op. Under this ground, the co-op must give the member notice of the intended termination, and a reasonable time to pay.
2. Breach of the occupancy agreement: A co-op can also terminate where the member has broken a material condition of the occupancy agreement. Again, under this ground the co-op must give the member notice of the intended termination, and a reasonable chance to fix the breach.
3. Conduct Detrimental: Finally, a co-op may terminate membership where the member has engaged in conduct that is "detrimental to the co-op."

The CAA does not define the terms "breach of a material condition" or "conduct detrimental". Look at the specific co-op's rules and/or occupancy agreement to see if they set out what behaviour will be covered by these terms. See also the CHF BC *Guide to the Model Rules*, which sets out some examples.

There is a specific procedure that the co-op must to follow carefully to terminate your client's membership. It includes the following steps[1]:

i. CO-OP GIVES MEMBER NOTICE TO PAY ARREARS / CORRECT BREACH WITHIN REASONABLE TIME OR MEMBERSHIP WILL BE TERMINATED.

- Notice must be in writing and set out the specific problem and the date by which it must be remedied.

Advocacy Tips:

- Unless there is a very good reason to dispute the co-op's claim, the client must take the warning seriously and deal with the problem by the date in the notice.
- If the client needs more time for a good reason, or needs more information to understand what the problem is, help the client make a written request and keep a record of any response.
- Encourage the client to get legal advice before signing anything. Co-ops will often try to get clients to sign an agreement that waives their appeal rights, in exchange for one-time forgiveness of a breach.

ii. CO-OP GIVES MEMBER AT LEAST 7 CLEAR DAYS' NOTICE[2] OF A DIRECTORS' MEETING THAT WILL CONSIDER THE TERMINATION.

- The notice must be delivered by mail or in person, or in some other manner permitted in the co-op's rules.
- The notice must include the reason for termination; the date, place and time of the directors' meeting; and notice that the client can attend with a lawyer or advocate.

iii. DIRECTORS OF CO-OP HOLD A MEETING TO CONSIDER THE TERMINATION. THE DIRECTORS' MEETING MUST COMPLY WITH THE RULES OF NATURAL JUSTICE, WHICH REQUIRE:

- The member must be allowed to attend the meeting with a lawyer or representative.
- The member must be presented with all the information the directors are considering;
- The member must have a chance to make submissions, answer questions, and provide a defence against the termination;
- The directors can only base their decision on information related to the reasons for termination set out in the notice;
- The directors must not be biased in making the decision.

NOTE: The directors may discuss the decision privately before making a decision.

Advocacy Tips:

- Make sure the client attends the directors' meeting!
- Help the client prepare to speak about how she might resolve the problem, including a time frame for resolution and how the problem can be avoided in future.
- If the client disputes the termination, help the client prepare any evidence to support her position.

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[1] See the CHF BC Guide at pages 22-29 for more details.

[2] The 7 days doesn't include the day the notice is received, or the day of the meeting.

- Help the client prepare a letter to give to the directors setting out the above points. This is especially useful if the client is uncomfortable speaking to the directors. *See the Precedents section below.*

iv. THE DIRECTORS MUST VOTE ON A RESOLUTION TO TERMINATE THE CLIENT'S MEMBERSHIP.

- To pass a resolution to terminate membership, the resolution must be supported by ¾ of all directors (not just ¾ of the directors present at the directors' meeting).
- The directors must notify the member of their decision within 7 days.
- The notice of decision must be sent by mail, in person, or in a manner permitted by the rules.
- The notice must set out whether the resolution to terminate membership was (1) withdrawn, (2) defeated because ¾ of directors didn't support it, or (3) passed by at least ¾ of the directors.
- The notice of decision notice MUST set out the process to appeal.

v. THE MEMBER MAY APPEAL THE DIRECTORS' DECISION TO A GENERAL MEMBERSHIP MEETING.

- Except where a membership is being terminated for non-payment of housing charges, the member may send the co-op notice of the appeal within 7 days of receiving notice of the directors' decision to terminate.
- The directors can choose to call a special general meeting to decide the appeal, or can wait until the next annual general meeting.
- Until the appeal is decided, the member has full membership rights.
- This is not the case for non-payment terminations, in which an expedited process applies which involves going to court.

vi. THE CO-OP MUST GIVE PROPER NOTICE OF THE GENERAL MEMBERSHIP MEETING:

- You will need to look at the co-op's rules to see what is required.
- If the decision on the appeal requires a special resolution, the co-op must give at least 14 days' notice of the general meeting.

vii. THE GENERAL MEMBERSHIP MEETING MUST COMPLY WITH THE PRINCIPLES OF NATURAL JUSTICE, WHICH REQUIRE:

- The member must be allowed to attend the meeting with a lawyer or representative.
- The member must be presented with all the information relating to the termination;
- The member must have a chance to make submissions, answer questions, and provide a defence against the termination;
- The co-op members can only base their decision on information related to the reasons for termination set out in the notice; and
- The members must not be biased in making the decision.

Advocacy Tips:

- Make sure the client attends the meeting!
- Advise the client to gather as much support as possible from other members of the co-op, and try to get supportive members to attend the meeting. Although this might be embarrassing, the more members your client can get out to vote for her, the better.
- Help the client prepare to speak at the meeting about how she might resolve the problem, including a time frame for resolution and how the problem can be avoided in future.
- If the client disputes the termination, help the client prepare any evidence to support her position.
- Help the client prepare a letter to give to the directors setting out the above points. *See the Precedents section below.*

viii. THE GENERAL MEMBERSHIP MUST VOTE ON A RESOLUTION REGARDING THE MEMBERSHIP TERMINATION.

- The reason for termination will determine what type of resolution is required – special resolution or general resolution. If the termination is for a breach of a material term of the occupancy agreement, then an ordinary resolution is required. If the reason for termination is for conduct detrimental to the co-op, then a special resolution is required.
- The rules of the co-op will set out whether the resolution must be passed by a simple majority, or more.

Advocacy Tips:

- Check whether the co-op has use the proper type of resolution (special or general), and see whether it observed the notice requirements for that type of resolution. If not, your client may be able to argue the termination vote was invalid.
- Check whether the required number of votes were obtained.

ix. THE CO-OP MUST GIVE THE MEMBER WRITTEN NOTICE CONFIRMING THE GENERAL MEMBERSHIP'S DECISION AT THE GENERAL MEETING.

- The notice must be given promptly.
- The notice MUST include a Notice of Right To Appeal form (form 9 or 9.1 of the *Cooperative Association Regulation* depending on the reason for the termination).

x. THE MEMBER HAS 30 DAYS FROM THE DATE OF THE NOTICE OF GENERAL MEMBERSHIP DECISION TO APPEAL TO THE BC SUPREME COURT.

NOTE: before appealing, the client should speak with a lawyer.

- The member can appeal to BC Supreme Court if:
  - The rules of natural justice were not followed in the termination process.
  - The decision to terminate membership was not based on facts.
  - The decision does not comply with section 35 of the CAA.
  - If the member requests an appeal, she is allowed to remain in the co-op unit until the appeal is determined.

- At the Supreme Court hearing:
  - The court can hear any information it thinks is important.
  - The member can explain why there is a ground to appeal the termination, the co-op can give reasons for the termination, and the co-op can also ask the court for an order of possession.
- The co-op must pay the member's legal fees for the appeal, but only if:
  - The member requests it in writing within 10 days of being notified of the general membership decision;
  - The member does not owe any housing charges.
- If the court upholds the co-op's decision to terminate, the co-op can recover the member's legal fees as a debt to the co-op.

xi. IF THE MEMBER DOES NOT APPEAL THE DECISION OF THE GENERAL MEMBERSHIP, THE CO-OP CAN APPLY TO THE BC SUPREME COURT FOR AN ORDER OF POSSESSION.

- The co-op cannot force the member to vacate without an order of possession from the court.
- Before granting an order of possession, the Court must determine whether the rules of natural justice were followed in the termination process.
- If the member does not appeal from the general membership decision, then the member ceases to be a member and has no rights as a member as of the date of the decision of the general membership.

6. Relief from forfeiture

If a co-op member is being evicted for failing to pay a debt to the co-op, then relief from forfeiture may be available to her.

Relief from forfeiture is a one-time-only opportunity to ask the BC Supreme Court to forgive a wrong (usually a debt) - and give the wrongdoer another chance so that she does not "forfeit" her housing.

A member can only obtain relief from forfeiture where:

- It is possible for the client to remedy the wrong completely. This is why debts are the usual subject matter for relief from forfeiture applications – more complicated interpersonal wrongs are not easy to fully rectify. The client must be able to repay the entire debt at the time of the court application.
- The client has never previously had a wrong forgiven by the Court (this is a one-time opportunity). Nor has the co-op previously forgiven a wrong in exchange for the member's agreement to waive her right to seek relief from forfeiture.
- The client must have acted reasonably and must not have intentionally caused the wrong.

It will also help if the client has some sympathetic circumstances.

If you think relief from forfeiture is an option for your client, then it is a good idea to speak with the co-op's lawyer and make a proposal that the client will remedy the debt by a specific date and that, if the co-op refuses to reinstate her membership to occupancy agreement, the client will apply for

relief from forfeiture. Typical co-op rules set out that the co-op cannot terminate the occupancy agreement without 30 days notice, so there is often some time for the client to try to come up with a plan to remedy the debt before the co-op can apply to the court for an order of possession.

If the client cannot resolve the matter by negotiating with the co-op, she may need to apply to Court for relief from forfeiture. If so, she should speak with a lawyer as soon as possible.

7. Precedents

We have prepared the following 2 precedents for dealing with co-op issues:

- #1: Example Letter to Directors re: Sally Smith - Termination of Membership and Occupancy Agreement.
- #2: Template Letter to Directors requesting more information on termination of membership.

These precedents are at the end of these materials.

Please use caution in using these precedents and make sure you understand how the precedent applies to your client's situation. If in doubt you should contact CLAS or another lawyer.

CO-OP HOUSING PRECEDENT #1

SAMPLE LETTER TO DIRECTORS OR TO GENERAL MEMBERSHIP)

NOTE: This is an example of a letter that could be submitted by the member to either the Directors or the General Membership. It is intended to give you and idea of what could be in such a letter, but you will need to draft a letter that applies to your client's situation.

Sally Smith
1234 16th Street
Vancouver, BC
V0V 0V0

December 3, 20XX

Dear Members of the ABC Housing Co-operative Board of Directors:

Re: Termination of my Membership and Occupancy Agreement

As you know, this meeting is being held to decide if my co-op membership will be terminated.

The termination of my membership will mean **losing my home and the home of my children**, which, for reasons outlined below, will create immense hardship for my family. **I ask that you please try to keep in mind how losing your home would affect you, and take the time to carefully read the following information before making this very important decision**.

I currently receive a significant housing subsidy and my only source of income is disability benefits. After paying my co-op housing charges and my utilities, I live on a very limited income. I cannot afford to move into a market rental unit and there are significant waitlists for other subsidized housing.

We are all members of a cooperative, and the International Cooperative Alliance defines cooperative values as follows:

> *Co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity. In the tradition of their founders, co-operative members believe in the* ***ethical values of honesty, openness, social responsibility and caring for others.***[3]

Liability

My co-op membership is being considered for termination because I failed to repay the $1234.00 cost of repairing my unit from damage resulting from a flood in my unit.

---

[3] See the Co-operative Housing Federation of BC's website at: http://www.chf.bc.ca/pages/about3.asp

The Board of Directors says that I am liable under section 11.03 of the Co-op's Occupancy Agreement, which states:

> *The Member shall be liable for any damage to any part of the Lands, Unit or the Development caused by a pet of the member or by those for whom the Member is responsible by law or caused by the wilful negligent act or omission of either the Member or the Member's family, guests, agents, employees or any other occupant of the Unit.*

I do not dispute that I have not paid the $1234.00, the cost to repair my unit. **I have not paid this amount because I am not liable for the damage.**

First, I am not liable for the damage because in order to attract liability, as highlighted in section 11.03 above, the damage must result from a "wilful negligent act or omission". **Wilful is defined as "intentional; deliberate".**[4] **I did NOT deliberately cause a flood in my unit and had no intention of doing so.** No one from the Co-op has ever suggested that I caused the flood intentionally, therefore section 11.03 does not apply to me and I am not liable for the damage.

Second, I am not liable for the damage because **I did not act negligently**. I was aware that there was a problem with the sink and I wrote to the Board of Directors on October 4th, 2009, the day before the flood occurred (attachment "A"). I acted reasonably by noticing that there was a problem and requesting that it be repaired before any damage occurred.

Third, as I have stated from the beginning and as the Board of Directors have failed to investigate, **I did not cause the flood in my unit**. At the very least, the cause of the leak is undetermined because:

- The cost of the repair was high due to a very large volume of water. As explained by a licensed plumber, that amount of water could not have resulted from a plugged sink, as the Board of Directors suggests (attachment "B");
- The sink that flooded was replaced just prior to the flood, and the installation company told me that they did not have a licensed plumber working at that time. One of the restoration workers noted that the valve on the sink was loose, which is consistent with it being replaced improperly by the workers.

Repayment

I live on a very limited income after my housing and utilities are paid out of my benefits. **$1234 is a significant amount of money for me to repay.** Although it is my opinion that I did not cause and am not liable for the damages, it would be an immense hardship for my entire family to move. As I mentioned, I cannot afford market rentals and there are significant waitlists for other subsidized housing. In addition, my health has deteriorated due to the stress of this situation and the possible termination of my membership.

However, in order to save my home and only for that reason, **I would be willing to repay all or part of the damages through a repayment agreement with the Co-op.** Because I am on a very fixed income, the maximum that I can pay per month is $25. Again, I do not think I am responsible for the damage, but I am desperate to save my home.

---

[4] Definition from the Compact Oxford English Dictionary.

Other Concerns

I feel that the termination of my membership is not really about repayment for damages, but is about other personal family problems that I have experienced in the past and have been a concern in the Co-op. If that is a consideration to you when you make your decision on how to vote today, **please let me know your concerns so that I have an opportunity to address them**. I have done all that I can to try to alleviate any past problems.

Please take the time to consider the above with the cooperative values of honesty, openness, social responsibility and caring for others in mind. The termination of my membership in this housing Co-op will create immense hardship and stress for me and my children, and all due to damage for which I believe I am not responsible and have had little opportunity to question.

Please put yourself in my position when you make your decision tonight.

Yours very truly,

Sally Smith

CO-OP HOUSING PRECEDENT #2

LETTER TO DIRECTORS OR MANAGER
RE: TERMINATION OF MEMBERSHIP

December 3, 20XX

Dear CO-OP BOARD OF DIRECTORS/MANAGER:

Re: Termination of membership
CLIENT'S ADDRESS

CLIENT has come to my office for assistance. I understand that HE/SHE received a letter from the Co-op indicating that HIS/HER co-op **membership** may be terminated.

CLIENT does not know why the Co-op is threatening to terminate HIS/HER **membership**. I am requesting that the Co-op put its detailed reasons for termination in writing, so that CLIENT has an opportunity to address the issues. Until HE/SHE knows the specifics of the Co-op's concerns, it is impossible for CLIENT to take any steps to remedy the situation.

I look forward to hearing the co-op's response to my above requests.

Yours very truly,

ADVOCATE

HUMAN RIGHTS

1) The Law

Human rights issues can arise is all sorts of housing situations in BC, whether the housing is covered by the Residential Tenancy Act or not. Section 10 of the Human Rights Code in BC prohibits discrimination in tenancy situations:

> *Discrimination in tenancy premises*
> *10 (1) A person must not*
> *(a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or*
> *(b) discriminate against a person or class of persons regarding a term or condition of the tenancy of the space,*
> *because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age or lawful source of income of that person or class of persons, or of any other person or class of persons.*

This is subject to the following exceptions:

> *(2) Subsection (1) does not apply in the following circumstances:*
> *(a) if the space is to be occupied by another person who is to share, with the person making the representation, the use of any sleeping, bathroom or cooking facilities in the space;*
> *(b) as it relates to family status or age,*
> *(i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age, or*
> *(ii) a rental unit in a prescribed class of residential premises;*
> *(c) as it relates to physical or mental disability, if*
> *(i) the space is a rental unit in residential premises,*
> *(ii) the rental unit and the residential premises of which the rental unit forms part,*
> *(A) are designed to accommodate persons with disabilities, and*
> *(B) conform to the prescribed standards, and*
> *(iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons, at least one of whom has a physical or mental disability.*

The code also prohibits discrimination in accommodation, as opposed to tenancy:

> *Discrimination in accommodation, service and facility*
> *8 (1) A person must not, without a bona fide and reasonable justification,*
> *(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or*
> *(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public*
> *because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or class of persons.*

This is subject to the following exceptions:

> *(2) A person does not contravene this section by discriminating*
> *(a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or*
> *(b) on the basis of physical or mental disability or age, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.*

For more information, see the page on the BC Human Rights Tribunal website for more details about making out a case in this area: http://www.bchrt.bc.ca/human-rights-duties/housing/tenancy.htm

2) Summaries of Past Successful Cases Regarding Discrimination in Tenancy

Tenancy S. 10	Ground	Case	Factors	Remedy
	PD	Redmond v. Hunter Hill Housing Co-op (No. 2), 2013 BCHRT 276	R discriminated against C's on the basis of physical disabilities by failing to remediate their housing unit to the point that it could be occupied without triggering C's allergies. R did not make enough effort to find out what could be done and therefore could not be said to have determined there would by UH. (Failure to engage procedural aspects of accommodation?)	I2D $10k Expenses $1500
	PD	Stewart v. Satorotas Enterprises and others, 2012 BCHRT 442	C is 68 years of age. She has severe osteoporosis and a clubfoot. C resided on the main floor of an apartment. The entrance to the Apartment Building is by way of five concrete steps. C required a walker for mobility. C requested that the Respondents build a ramp to allow her to safely access her apartment. The Respondents refused.	I2D $15k Ordered to build ramp
	PD Source of Income	James obo James v. Silver Park Campsites and another (No. 2), 2012 BCHRT 141	The Respondents discriminated against C based on his disability and source of income when they rejected four Applications to rent a manufactured home pad.	I2D $10k
	Source of Income	Desjarlais v. Kanganilage and another, 2012 BCHRT 243	I find C's complaint of discrimination, on the basis of his lawful source of income, justified.	I2D $1,100
	PD	McDaniel and McDaniel v. Strata Plan LMS 1657 (No. 2), 2012 BCHRT 167	Strata's failed to deal with smoke coming into disabled couples suite, was patronizing and did little for 3 years, and did not fulfill duty to inquire.	Husband $2k I2D Wife $4,500 I2D Expenses $1,500
	PD – FS	Petterson and Poirier v. Gorcak	Neighbours suspected C might key a car, start a fire or harm their pets. R	Son I2D $9k Mom I2D $6k

		(No. 3), 2009 BCHRT 439	heard that C (son) had threatened to kill a cat, uttered death threats and other serious accusations. C and his mom (also a C) were evicted. C perceived to have MD, mom filed under FS	12 months differential in rent. Expenses. Appealed to BCSC
	PD, S.O and Source of Income	Bro and Scott v. Moody (No. 2), 2010 BCHRT 8	2 C's established a *prima facie* case of discrimination in tenancy on the basis of sexual orientation (gay), disability (HIV-AIDS) and lawful source of income (CPP). C's physically assaulted & called fags and fairies. Numerous altercations	I2D $15,000 to each C
	MD	Flak v. Andersen, 2015 BCHRT 87	Landlord revoked offer of rental after C declared she suffered from depression	I2D $2k
	MD and Source of Income	James obo James v. Silver Park Campsites and another, 2011 BCHRT 370	C denied tenancy at mobile home park due to MD and Source of Income (disability pension from the Ministry of Housing and Social Development)	C&D I2D TBD upon further subs
	Source of Income	Day v. Kumar and another (No. 3), 2012 BCHRT 49	The fact that C sometimes received social assistance benefits was of such concern to R that, upon learning it, he immediately called to find out if it was true, attended the next day at Social Services to attempt to follow up on it, and then peremptorily reneged on the tenancy agreement... at least part of the reason R withdrew from the agreement was that one of Cs lawful sources of income was social assistance	I2D $2,500 Moving expenses $300
	FS	Horneland v. Wong and another, 2014 BCHRT 3	Women denied rental accommodation due to child	I2D $2,500
	FS	Nicolosi v. Victoria Gardens Housing Co-operative and another (No. 2), 2013 BCHRT 1	C removed from Co-op list due to FS. "... the actions of the Board against C were, at least in part, because of her relationship with Dianne, her daughter and thus, because of her family status as her mother."	I2D $7500 □ is to be placed at the top of the VGHC waiting list and offered the next two-bedroom unit that becomes available. The Board will consider C's application on the basis that the Membership Committee has recommended her and that all references have been successfully checked.

3) Summaries of Past Successful Cases Regarding Discrimination in Accommodation

Accommodation Service or Facility S. 8	Ground	Case	Factors	Remedy
	PD	Leary v. Strata Plan VR1001, 2016 BCHRT 139	C experienced an adverse impact related to her disability due to secondhand smoke in her suite. This impact was long-standing and supported by medical Evidence. R did not properly inquire into the extent and impact, how to accommodate or whether it would amount to undue hardship.	I2D $7,500
	PD	Shannon v. The Owners, Strata Plan KAS 1613 (No. 2), 2009 BCHRT 438	Strata discriminated against C in not allowing him to retain the solar screen to reduce the use of in-home air conditioning, which exacerbated his physical disability. The Strata did not justify its conduct, it would not have caused it undue hardship.	I2D $2500 Costs TBD by parties. Trib awarded costs for failure of R to accept reasonable offer – Reverse Dar Santos case.
	PD	*Mahoney obo Holowaychuk v. The Owners, Strata Plan #NW332 and others,* 2008 BCHRT 274	R's failed to provide wheelchair access in a strata	C&D No I2D (none asked for) R's ordered to get architectural drawings and quotes. If quotes in line with estimated cost presented at H, R's ordered to install wheelchair ramp.
	Family Status	Fraser v. ING Insurance Co., 2004 BCHRT 163	Foster mother denied renewal of her home insurance when a foster child intentionally destroyed property.	$1,000 I2D C&D
	Sexual Orientation	Eadie and Thomas v. Riverbend Bed and Breakfast and others (No. 2), 2012 BCHRT 247	Gay couple denied reservation at B&B due to owner's religious beliefs.	I2D $1,500 to each C Cost for attending hearing

FORECLOSURE ON A TENANT'S LANDLORD

This section deals with situations where a tenant's housing is affected because her *landlord* is under foreclosure.

1) Summary of the Law

This is what the LSS publication "Can't Pay Your Mortgage? What you can do if you're facing foreclosure" (January 2015) says about foreclosure proceedings insofar as they affect tenants:

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.

2) First step: get the documents

You will need the following documents to assist a client whose landlord is facing foreclosure:

- Petition, Affidavits, and other court documents: Your client has probably become aware of the foreclosure because he or she has been served with court documents. If not, you should obtain these from the local court registry right away. These documents will help you understand what stage the foreclosure process is at. See the previous section on foreclosure.

- Tenancy agreement: This will provide helpful information such as the start date of your client's tenancy, and any end date on the tenancy, which may affect her situation.

3) File a Petition Response

If a petition for foreclosure has been filed with the court, and your client resides in the property under foreclosure, your client is entitled to file a court form called a Response to Petition, and should do so right away. Filing a response – even if the tenant takes no position on the relief sought – ensures that the she will continue to get notice of what is happening in the proceeding. Once filed, the client needs to serve the Response to Petition to all the other parties in the case (the Petition will set out the delivery address for the foreclosing lender).

See the Precedents section below for a sample.

4) Asserting tenancy rights despite the foreclosure

Many lenders in BC seem to think that when a property is under foreclosure, tenants' rights under the *Residential Tenancy Act* are somehow voided. Lenders frequently expect that when a property is ordered sold, the court can automatically order the tenants to leave. In fact courts should not order long-term tenants to leave unless they have received proper notice and compensation under the RTA. This is different if the tenant moved in after the foreclosure proceedings commenced. We encourage tenants to assert the right to proper notice and compensation under ss. 49, 51 and 52 of the *RTA*. We enclose a sample letter you can use to do this.

If necessary, a tenant can attend in court and argue for her tenancy rights. This might be necessary if the lender is asking for an Order Absolute or an Order Approving Sale that requires the tenant to vacate the property without proper notice.

If the client is planning to go to court to argue for her rights under the *RTA*, we encourage your client to contact CLAS for some ideas about what to tell the judge.

5) Sample Response to Petition for a tenant involved in a foreclosure proceeding

No. ########
_____ Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

NAME(S)

PETITIONER

AND:

NAME(S)

RESPONDENTS

RESPONSE TO PETITION

Filed by: <<name>>, tenant at <<address>> (the "Tenant" of the "Property")

THIS IS THE RESPONSE TO the petition of <<date>>.

Part 1: ORDERS CONSENTED TO

The Tenant consents to the granting of the orders set out in the following paragraphs of Part 1 of the petition: **...**

Part 2: ORDERS OPPOSED

The Tenant opposes the granting of the orders set out in the following paragraphs of Part 1 of the petition: **...**

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Tenant takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the petition: **...**

Part 4: FACTUAL BASIS

1. The Tenant is a residential tenant at <<address>> (the "Property"). The tenancy began <<date>>.

2. The Property is the subject of this foreclosure proceeding.

3. The Tenant files this response so she may be provided with all documents and notice of all hearings in this foreclosure proceeding and, if necessary, she be permitted to appear in court and explain her situation before the petitioner is awarded an order of vacant possession of the Property.

4. The Tenant's position is that her tenancy transfers to the purchaser of the Property.

5. In the alternative, if this Court orders that the tenancy is terminated, the Tenant requests that she be given reasonable notice before she is required to vacate the Property and an order that the Tenant's damage deposit be paid from the sale proceeds of the Property.

Part 5: LEGAL BASIS

The Tenant will rely on the following:

a) *Residential Tenancy Act,* S.B.C. 2002, c. 78;
b) In particular, *Residential Tenancy Act,* ss. 93, 94, which state:

> Obligations pass with transfer or assignment of land
> 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.
>
> 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;

c) Rules of Court; and
d) The inherent jurisdiction of this Court.

Part 6: MATERIAL TO BE RELIED ON

Such material as the Tenant shall advise and the court shall permit.

The Tenant estimates that any future application in this matter will take the Tenant less than 15 minutes.

Date: <<current date>>

_____
Signature of petition respondent
<<name>>

Tenant's address for service: <<name>>
<<address>>

Fax number for service (if any): <<fax>>
Email address for service (if any): <<email>>

6) Precedent letter asserting tenancy rights

December 3, 20XX

WITHOUT PREJUDICE

Dear LENDER:

Re: Bank v. Landlord et al
Foreclosure of ADDRESS

NAME, the tenant at the above property, has contacted me about the foreclosure proceedings at the above property.

My client asserts his/her rights under the *Residential Tenancy Act,* particularly ss. 49, 51 and 52.

- Tenants are entitled to reasonable and proper notice, as well as one month's rent as compensation, if they are to be evicted for the landlord's own use of the property.

- The fact the residence is under foreclosure does not cancel these rights.

Please give me and my client plenty of notice if and when you apply for an order that requires vacant possession. My client intends to appear in court and inform the judge about their rights under the *Act*.

I enclose an Appearance filed on behalf of NAME.

Yours truly,

ADVOCATE

Enclosure: Appearance

BORDERLINE RTA CASES: TRANSITIONAL HOUSING

1) The statute

The Residential Tenancy Act includes a number of exceptions where it does not apply. One of these is "transitional housing". Another related exception is "living accommodation...that is made available in the course of providing rehabilitative or therapeutic treatment or services":

> *What this Act does not apply to*
> *4 This Act does not apply to*
>
> ...
>
> *(f) living accommodation provided for emergency shelter or transitional housing,*
> *(g) living accommodation*
>
> ...
>
> *(v) in a housing based health facility that provides hospitality support services and personal health care, or*
> *(vi) that is made available in the course of providing rehabilitative or therapeutic treatment or services,*

2) Interpretation

There are often disputes over just whether housing is "transitional" or not. There is no definition of "transitional housing" in the Act, so arbitrators will commonly turn to the dictionary and some of the following factors when deciding whether a given tenancy is covered by the Residential Tenancy Act or not. The following is my summary of factors that arbitrators have looked at:

- Is there a specific timeline (how is the end of the transition period determined?)
- Are there requirements for the tenant to participate in a program, therapy, or counselling as a condition of the tenancy?
- Regardless of whether there are requirements for the tenant to participate in a program, does the tenant receive particular supports or programming?
- Have discussions about the transition out of the housing occurred?
- How long has the tenant lived there? ("a tenancy for a term of twenty four (24) months is clearly not transitional")
- Did the tenant previously have a non-transitional housing situation before signing an agreement that says that the RTA doesn't apply? Was consideration offered for the new agreement? Is it unconscionable?
- What does the tenancy agreement say? Does it say that the housing is transitional?
- Is the rental amount significant or a slight amount?
- Dictionary definition of "transition"
- Is this a license to occupy or does the tenant have exclusive possession of their unit?
- Some decision look to Section 4(g)(vi) which provides that housing that is made available in the course of providing rehabilitative or therapeutic treatment or services is outside the scope of the Act.
- Is there a previous decision? ("the question of jurisdiction has been argued in a previous hearing, it is *res judicata*, and I do not have the authority to hear it again or vary that finding")
- Does the housing provider receive funding from the provincial government's Provincial Homelessness Initiative or is the housing in a "breaking the Cycle of Homelessness" program?

- Is the housing named a shelter?
- Do tenants agree to abide by onerous "house rules"?
- One arbitrator notes that exemption applies to living accommodation *provided for* transitional housing. "I find the use of the words "provided for" goes to the intent of the landlord in providing the accommodation ad less how the tenant views the use of the living accommodation."
- The BC Housing Glossary of Terms defines "transitional housing" as follows: "Housing from 30 days to two or three years that includes the provision of support services, on- or off-site, to help people move towards independence and self-sufficiency. Transitional Housing is often called second-stage housing, and includes housing for women fleeing abuse."

3) Decisions

The following are some summaries of RTB decisions about transitional housing. We had a student volunteer prepare these summaries. If you would like a more complete list, just email me at jprowse@clasbc.net .

Decision Number	Key Facts	Outcome	Definition?	Relevant Factors
112013_Decision2430	-Tenant payed rent of $375.00 each month -Building operated in partnership between BC Housing and City of Vancouver – "stepping stone" and hybrid between single room occupancy and traditional housing tenancy -in a previous decision involving another tenant, an Arbitrator found that parties had entered into a tenancy agreement -as a result of previous decision, landlord asked tenants to sign an Agreement that characterized the housing as transitional and stated that the Residential Tenancy Act does not apply -Another previous decision involving another tenant had found that the housing was transitional – landlord relied on this, asking the RTB to make the same finding	Positive – RTB took jurisdiction	Referred to the definition used in a previous RTB decision: "Without a formal test for finding transitional housing I proceed to consider the interpretation of the above exemption under the reasonable person standard... Ideally the written agreement between the parties would state that the unit is provided as transitional housing and would state how the end of the transition period is determined. Other indications of transitional housing may include requirements for the tenant to participate in a program, therapy or counselling as a condition of the tenancy. I find that where the occupation in the living accommodation is time-limited, or for a defined purpose, and it is clear that the purpose is to enable the tenant to transition to independent living, it is reasonable to conclude the living accommodation is transitional housing"	-Considered prior RTB decision involving same housing providers but distinguished based on the differences in the facts -There was no specific timeline whereby a program participant would need to find alternate accommodations. -Tenant gave undisputed evidence that he received no programming and there is no transition plan or timeline whereby his residency would end. Landlord provided no evidence on this point. -No statement in the Agreement as to how and when the tenancy would end -No discussions as to his transition out of the housing complex have occurred -Tenant not required to participate in any program, therapy or counselling -Tenant lived there for 2 ½ years and no plan in place whereby he is to transition -Arbitrator found that tenant not bound by agreement as it was unconscionable and landlord

				had not demonstrated new consideration was offered for the tenant's agreement to surrender his rights under the Act
Decision 1814_082011	-The tenant paid rent of $650.00 and a security deposit of $250.00 -parties signed an agreement that states the tenancy is not governed by the parties but by policies set out in a separate document (also signed by parties) -tenants argued that the units were "supportive housing units" and not transitional housing within the meaning of the Act	Positive – RTB took jurisdiction	"Transition" meaning indicates a temporary state passing between movement from one point to another, which implies that the accommodation is temporary and time limited or an intermediate step between homelessness or at risk of being homeless and permanent housing -A key determinant of transitional housing therefore would be the length of tenancy offered by housing provider and provision of assistance to move into permanent housing	-one could reasonably conclude that a tenant could become permanently housed in the units -although the tenants came from a shelter, a tenancy agreement was signed with no term indicated, a security deposit was taken, and the rental amount is significant – all these indicators meant that the housing was not exempt from the Act and parties could not contract out -
Decision10039_092008	-Tenant had been in housing for over 4 years -Rent was subsidized by BC Housing -Tenant agreed to abide by covenants with Landlord as the living accommodation was restricted for use as a "Second Stage Transition House Program" according to an addendum signed by tenant and landlord	Positive – RTB took jurisdiction	-Arbitrator considered the ordinary meaning of "transition" as including passing, which meant lasting only a short period of time. - Applying the "inclusive" principle of statutory interpretation in determining the intended meaning of transitional housing, Arbitrator found the exclusion of emergency shelters and transition houses from the application of the Act refers to accommodation of a temporary nature designed to house individuals or families moving from one place to	Since the tenancy had been in place for over four years and could go on indefinitely, it was not transitional

			another, often in emergency situations.	
Decision 1105_102009	-tenant paid rent of $375.00 with security deposit of $500.00 -tenancy was for a fixed term of 24 months at which point tenant was required to vacate -characterized as a week to week tenancy which could be ended by tenant with one week's notice in writing (landlord had no reciprocal right to terminate) -Agreement stated that housing is considered to be transitional and does not fall under the Act	Positive – RTB jurisdiction	"The Act does not define "transitional housing". The ordinary meaning of the word "transition" includes: "a passing from one condition, form, state, activity, place, etc. [Webster's New World Dictionary: Third College Edition]. The definition of "passing" includes: "going by, beyond, past over, or through" and "lasting only a short time; short-lived; fleeting; momentary" -found that "transitional housing" refers to "accommodation that is of a temporary nature designed to house individuals or families moving from one place to another, often in emergency situations."	-"a tenancy for a term of twenty four (24) months is clearly not transitional, regardless that it is characterized as a week to week tenancy -tenancy agreement requires monthly rent and required security deposit in exchange for exclusive possession of the rental unit. -not a license to occupy for the purpose of emergency or transition housing but gives exclusive possession of the rental unit to the tenant in exchange for a monthly rent and security deposit for a significant period of time

SMALL CLAIMS COURT PROCEEDINGS

1) The law related to housing issues in Small Claims Court

In housing that is not covered by the Residential Tenancy Act ("RTA"), one can still deal with many housing disputes in Small Claims Court (Provincial Court). This is also true of relationships that are not covered by the Manufactured Home Park Tenancy Act ("MHPTA").

For example, one can establish an entitlement to damages where they prove:

1. The existence of a contract;
2. A breach of the contract; and
3. A loss suffered as a result of the breach.

In the alternative, an argument can be framed around common law tenancy rights. See, e.g. *Keith Whitney Homes Society v. Payne,* 1992 CanLII 7691 (ON SC).

2) Small claims procedure

For information about the process of filing in Small Claims Court in BC, see a web site such as www.smallclaimsbc.ca. This court has jurisdiction over contractual and many other legal issues where a party is claiming up to $25,000.

3) Examples of the types of housing issues that people deal with in Small Claims Court

- My roommate didn't pay the amount that they owe me for utilities: *Bloomberg v. Barr*, 2015 BCPC 228 (CanLII)
- I was evicted by didn't receive a reasonable amount of notice for my eviction and have losses as a result: *Hitchings v. Anmore Camplands Inc.,* 2008 BCPC 257 (CanLII)
- Issues to do with security deposit return and overholding tenants (note that this case is exceptional because there is also a sale of the property involved): *Wesbild Holdings v. 0899360 B.C. Ltd. & Nijjar,* 2011 BCPC 365 (CanLII)

4) Example of Notice of Claim (Bloomberg v. Barr, 2015 BCPC 228)

1343850

NOTICE OF CLAIM

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

1343850
REGISTRY LOCATION
Vancouver

ROBSON SQUARE
APR 24 2013
PROVINCIAL COURT

NOTICE OF CLAIM

FROM:

NAME Laura Bloomberg **CLAIMANT(S)**

ADDRESS 317 2268 West Broadway

CITY, TOWN, MUNICIPALITY Vancouver PROV. BC POSTAL CODE V6K 2E2 TEL # 604 719-8681

TO:

NAME Christine Barr **DEFENDANT(S)**

ADDRESS 1575 Pemberton

CITY, TOWN, MUNICIPALITY Squamish PROV. BC POSTAL CODE V0N-3G0 TEL # 778 847-9642

WHAT HAPPENED? See attached pages.

24APR13 1305811 RIPU 100.00
20476 1343850

☐ If you need more space to describe what happened, attach another page, mark it "Page 2 of the Notice of Claim" and check this box. A copy of the attached page must accompany each copy of the Notice of Claim.

WHERE? CITY, TOWN, MUNICIPALITY Vancouver PROV. BC

WHEN? October 2012 to April 2013

HOW MUCH?

a See Attached	$
b	$
c	$
d	$
☐ I am abandoning the amount of my claim that is over $25,000 — TOTAL	$
FILING FEES	100.00
SERVICE FEES	
= TOTAL CLAIMED	$

☒ DEBT
☐ OTHER THAN DEBT

TIME LIMIT FOR A DEFENDANT TO REPLY

The defendant must complete and file the attached reply within 14 days from being served with this notice, unless the defendant settles this claim directly with the claimant. If the defendant does not reply, a court order may be made against the defendant without any further notice to the defendant. Then the defendant will have to pay the amount claimed plus interest and further expenses.

The Court Address for filing documents is:

Robson Square Provincial Court
100 - 800 Hornby Street
Vancouver
British Columbia V6Z 2C5

FORM 1

BRITISH COLUMBIA

Residential Tenancy Branch

Legal Advocates Conference
Richmond, British Columbia
October 19, 2016

Janet Donald, Policy Director
Josh Gomez, Policy Analyst

1

BRITISH COLUMBIA

Agenda

- RTB Statistics
- Policy, Legislation & Public Education
- Service Delivery

2

BRITISH COLUMBIA

RTB Personnel

- 29 Arbitrators
- 7 Contract Arbitrators
- 2 Adjudicators
- 46 Information Officers

3

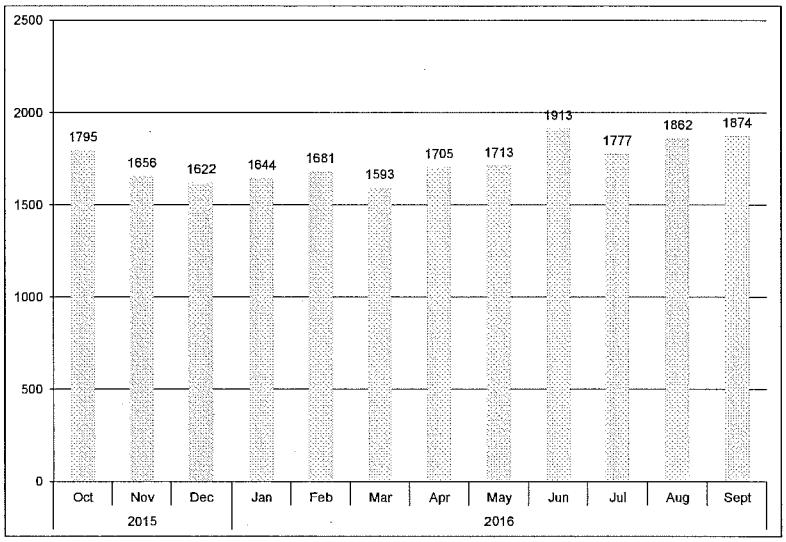
Dispute Applications

(October 2015 – September 2016)

- 20,835
  - 32% filed online
  - 68% filed in-person
  - 53% landlords
  - 47% tenants

4

Number of Applications



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Most Common Reasons Citizens Apply

Tenants

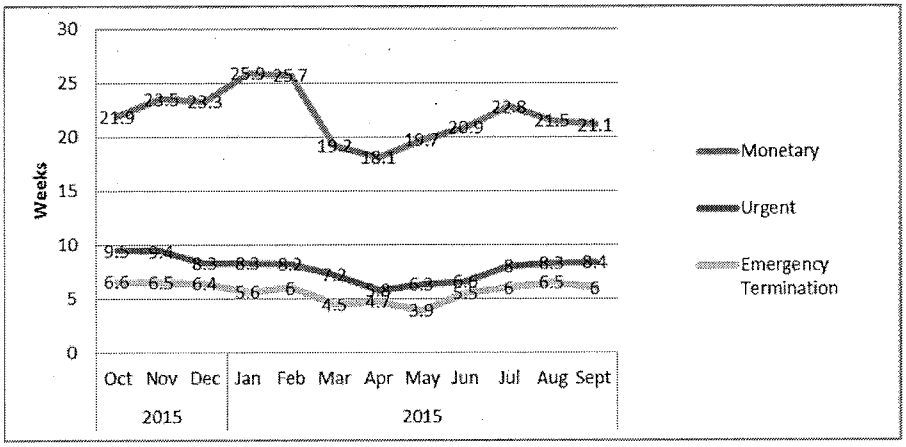
1) Cancel a Notice to End Tenancy
2) Monetary Order for security deposit & Request that landlord pays the filing fee

Landlords

1) Monetary Order for unpaid rent or utilities & Request to End Tenancy
2) Request to End Tenancy

6

Hearing Wait Times



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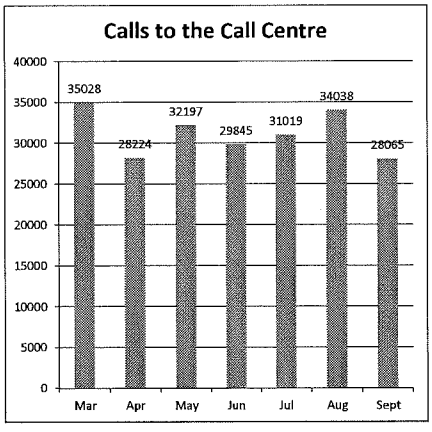
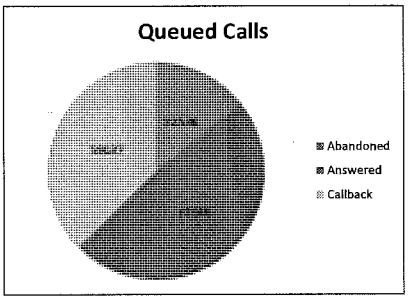
Call Centre





8

BRITISH COLUMBIA

Policy and Legislation

9

BRITISH COLUMBIA

Ending Fixed Term Agreements Under Special Circumstances

- Acceptance into Residential Care
- Fleeing Family Violence

10

BRITISH COLUMBIA

Administrative Penalties

- Report – March 21, 2016
- Penalty Issued – West Hotel

11

BRITISH COLUMBIA

Supportive Housing

- Definition transitional housing
- Guest policies

12

BRITISH COLUMBIA

Policy Guidelines

- Quiet Enjoyment
- Compensation for Damage and Loss
- Assignment and Sublets

13

BRITISH COLUMBIA

Consecutive fixed-term tenancies

- Work is underway

14

BRITISH COLUMBIA

Public Education

15

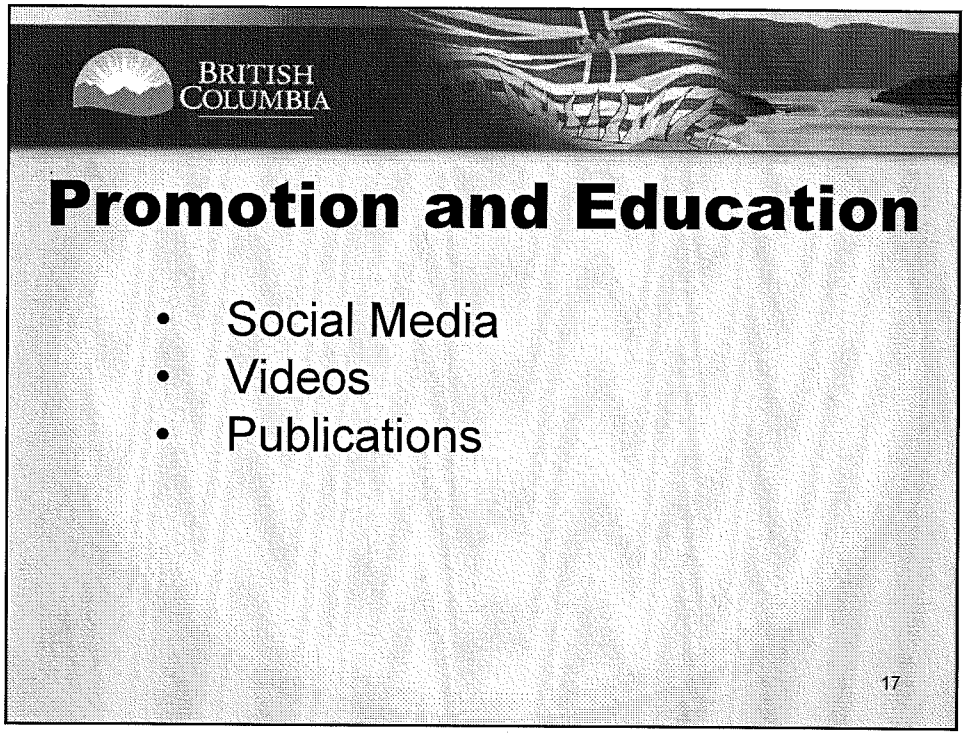
BRITISH COLUMBIA

Information Sessions

From Oct. 2015 to Sept. 2016:

- 50 public education sessions
- 1,800 attendees

16


BRITISH
COLUMBIA
Promotion and Education
• Social Media
• Videos
• Publications
17


BRITISH
COLUMBIA
Service Delivery
18

BRITISH COLUMBIA

Online Application

- Developing new intake system
- Implementation 2017

19

BRITISH COLUMBIA

Online Calculators

Six new online calculators

- Rent increases
- Deposit Interest

20

BRITISH COLUMBIA

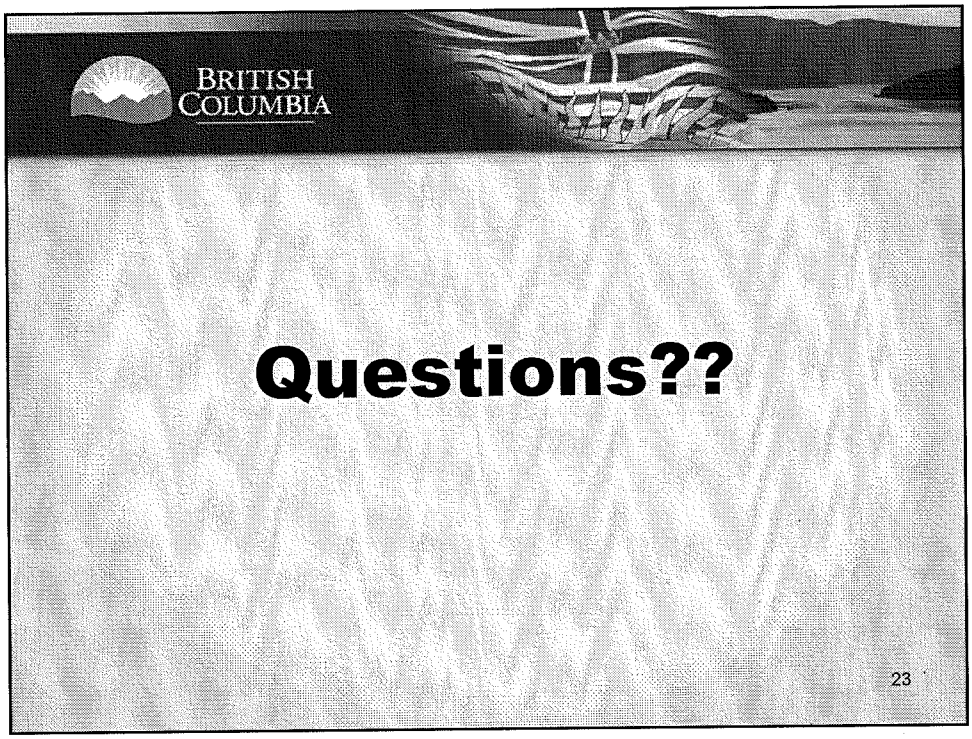
Emailing Decisions

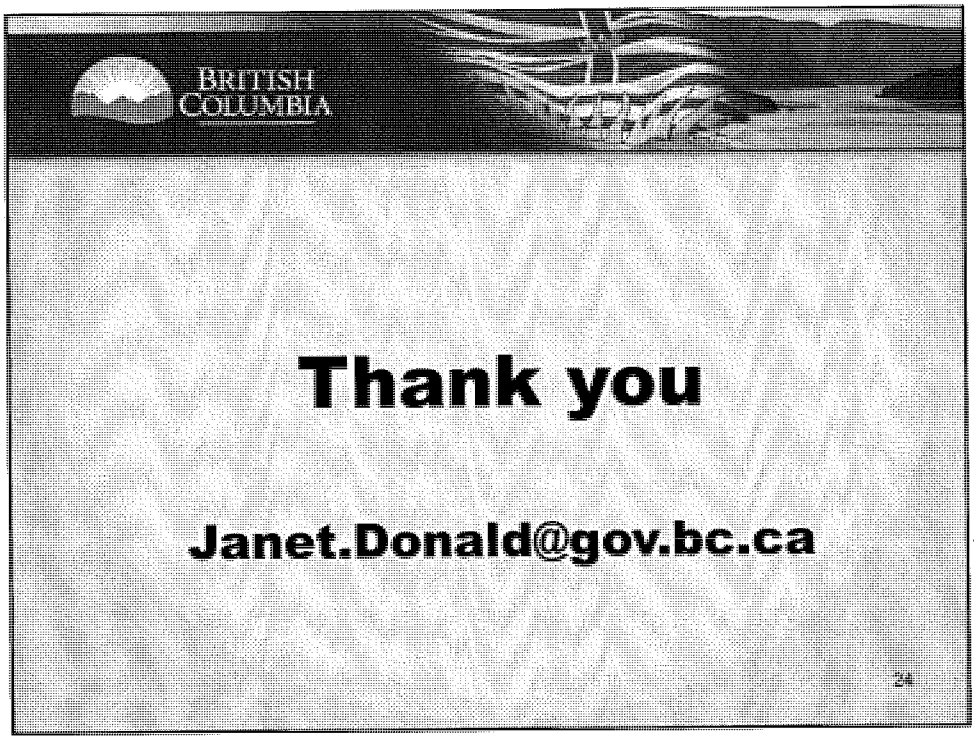
21

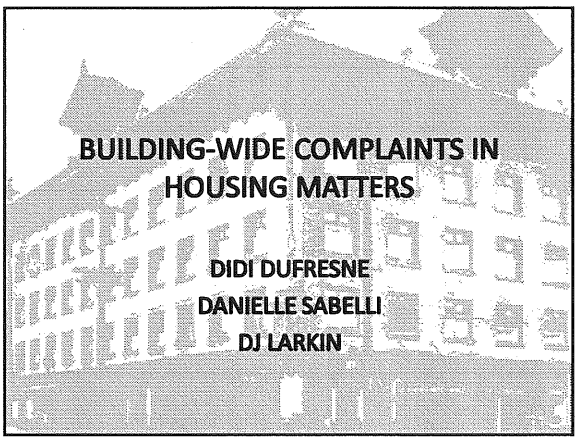
BRITISH COLUMBIA

Solution Explorer

22


BRITISH
COLUMBIA
Questions??
23


BRITISH
COLUMBIA
Thank you
Janet.Donald@gov.bc.ca
24



BUILDING-WIDE COMPLAINTS IN HOUSING MATTERS

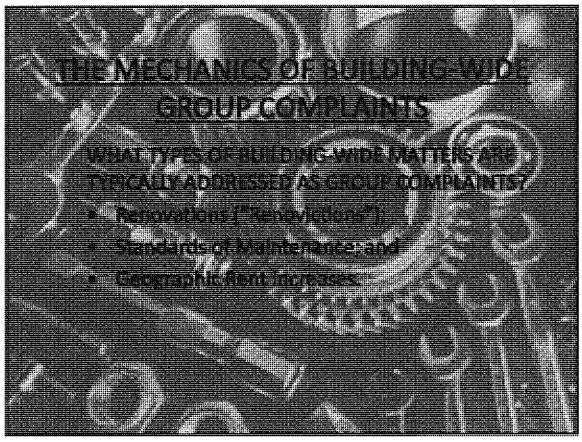
DIDI DUFRESNE
DANIELLE SABELLI
DJ LARKIN

HOW WILL YOU BECOME AWARE OF BUILDING-WIDE ISSUES

- Means by which you may become aware of a building-wide issue:
  - A tenant may have received a notice to vacate, which has also been provided to some or all of the other tenants in the building;
  - Media coverage of a matter;
  - You office may receive a call through the local government; and
  - Activist tenants.

COMMUNICATING WITH TENANTS-CHALLENGES

- Landlord may control mail distribution.
- Landlord may not allow you into the building to communicate with tenants.
- Obtaining the assistance of an authorized tenant representative (ATR) or another tenant may jeopardize their tenancy.



"RENOVICTIONS"

- "Renoviction" group complaints may arise when all tenants or some tenants are given a 2 month notice to end the tenancy for landlord's use of the property including demolition of the building, conversion of the property, and major repairs/renovations.

"RENOVICTIONS" CONT"D

Such complaints may be conducive to dispute resolution where:

- Tenants would like to preserve their tenancies, and
- The landlord does not have the legal grounds to evict all or some tenants of the building (does not have the requisite permits or good faith requirement); and
- The landlord may be known to have a propensity for issuing notices to end the tenancy for landlord's use of the property for the purposes of "emptying" the entire building or some units.

STANDARDS OF MAINTENANCE (SOM)

- SOM group complaints may arise where a landlord has terminated or restricted a service or facility, particularly one that is essential to the use of the rental unit, or has failed to maintain a property in compliance with the health, safety and housing standards.

STANDARDS OF MAINTENANCE (SOM) CONT'D

- Such complaints may be conducive to group dispute resolution where:
  - The nature of the service or facility is one that affects all or many tenants (e.g. elevators, heat, hot water);
  - The nature or magnitude of the failure to maintain a building has building-wide ramifications (e.g. pest infestation, mould, unstable flooring, water damage).

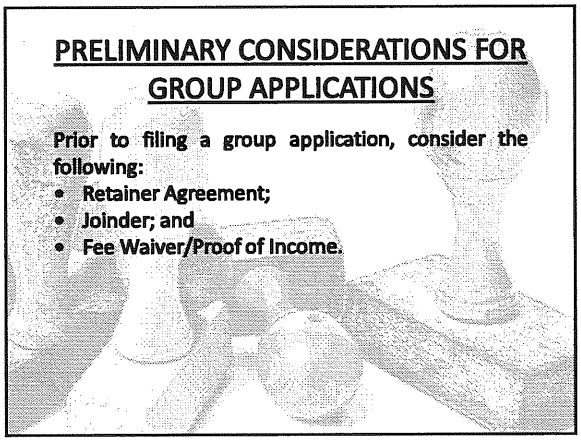
GEOGRAPHIC RENT INCREASE

- Geographic rent increases can lead to massive rent increases for every unit in a building at one time on the basis that:
  - The rent on similar units in the same geographic area are significantly higher;
  - The landlord has had to complete significant and unexpected renovations; or
  - The landlord is incurring an unforeseen financial loss.

GEOGRAPHIC RENT INCREASE CONT'D

- Such complaints may be conducive to group dispute resolution where:
  - Many or all units in a building have received a notice of an exceptional rent increase;
  - The rent increase is significantly about the standard amount allowable under regulation;
  - The increase puts the security of tenure of many tenants at risk; and
  - The specific factual basis for the rent increase is the same or similar across multiple units.

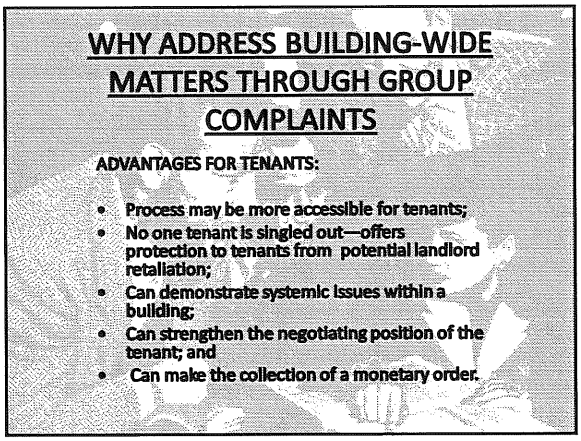
PRELIMINARY CONSIDERATIONS FOR GROUP APPLICATIONS



Prior to filing a group application, consider the following:

- Retainer Agreement;
- Joinder; and
- Fee Waiver/Proof of Income.

WHY ADDRESS BUILDING-WIDE MATTERS THROUGH GROUP COMPLAINTS



ADVANTAGES FOR TENANTS:

- Process may be more accessible for tenants;
- No one tenant is singled out—offers protection to tenants from potential landlord retaliation;
- Can demonstrate systemic issues within a building;
- Can strengthen the negotiating position of the tenant; and
- Can make the collection of a monetary order.

WHY ADDRESS BUILDING-WIDE MATTERS THROUGH GROUP COMPLAINTS

ADVANTAGES FOR ADVOCATES:

- Expediency;
- More individuals become aware of your organizations' services; and
- Can leverage support for your organization.

WHAT ARE THE RISKS OF ADDRESSING BUILDING-WIDE ISSUES THROUGH GROUP APPLICATIONS

DIFFICULTIES WITH MANAGING CLIENTS' EXPECTATIONS:

- Communicating the limits of the law;
- Communicating the your limits as an advocate; and
- Timeframes.

WHAT ARE THE RISKS OF ADDRESSING BUILDING-WIDE ISSUES THROUGH GROUP APPLICATIONS

POTENTIAL CONFLICTS BETWEEN CLIENTS:

- General;
- Social; and
- Legal.
- Anticipate the potential conflicts and outline how you will address conflicts between the group in the retainer agreement.

WHAT ARE THE RISKS OF ADDRESSING BUILDING-WIDE ISSUES THROUGH GROUP APPLICATIONS

CONFIDENTIALITY (considerations for the retainer agreement):

- Specify the information you are obligated to share (any relevant information regarding the matter); and
- Determine the course of action if information is obtained that puts any member of the group in conflict with the rest of the group, or if a contentious issue arises.

WHAT ARE THE RISKS OF ADDRESSING BUILDING-WIDE ISSUES THROUGH GROUP APPLICATIONS

- MANAGING CLIENTS AND MAINTAINING CONTACT:
  - Confirm the preferred method of communication.
  - If you are unable to reach all members of the group, consider how broad your instructions may need to be.
  - Consider the use of an authorized tenant representative ("ATR").

MANAGING CLIENTS AND MAINTAINING CONTACT CONT'D:

If you use an ATR, ensure the following:

- The ATR is reliable;
- You and the ATR both understand the ATR's abilities and limitations;
- The ATR is able to communicate to the entire group;
- Despite the use of an ATR ensure each tenant in the group still has access to you; and
- The instructions you obtain from the ATR reflect the wishes of the group.

WHAT ARE THE RISKS OF ADDRESSING BUILDING-WIDE ISSUES THROUGH GROUP APPLICATIONS

UNINTENDED CONSEQUENCES OF GROUP APPLICATIONS FOR DISPUTE RESOLUTION:

- Large scale SOM issues may result in the landlord selling the property, "renovictions", or closure of the building by the city; and
- Tenant's who have suffered greater damages may not receive damages to compensate them for the full extent of their loss.
- Collections of monetary orders more likely to succeed.

WHEN YOU SHOULD CONSIDER FILING FOR A SEPARATE RTB HEARING (for a client who would otherwise be part of the group complaint)

- Complaints seeking compensation for damages may require separate RTB hearings.
- Individual circumstances drive the complaint—consider the quantum of damages.
  - Individual circumstances to consider:
    - The floor the tenant occupies in relation to other amenities, whether the tenant has any disabilities, tenant's lifestyle etc.
- Certain complaints will generate the same results for every client (geographic rent increase).

ONCE YOU HAVE DECIDED TO FILE A GROUP APPLICATION...

TAKE THE APPROPRIATE AMOUNT OF TIME TO GET IT RIGHT

- Be cognizant of the actual urgency (or lack thereof) of the situation.
- SOM issues may not require the same sense of urgency as group notices to end the tenancy do.
- Timelines related to geographic rent increases are set by either the landlord or the RTB.

TAKE THE APPROPRIATE AMOUNT OF TIME TO GET IT RIGHT

- Ensure you give yourself enough time before filing the group application to complete the following:
  - Determine the final size of the group;
  - Meet with the entirety (or majority) of the group to best understand the wishes and strengths of the group;
  - Gather supportive evidence;
    - Conduct surveys, knock on tenants' doors, obtain personal statements, third party evidence (City of Vancouver SOM database)
  - Ensure all applications are complete; and
  - Arrange a set of meeting dates.

ETHICAL OBLIGATIONS

- Advisable to recommend independent legal advice.
- Get written consent.
- Have a plan devised to protect sensitive personal information of the tenants.
- Duty to the client
  - Duty of loyalty
- Duty to multiple clients
  - must not act or continue to act for a client where there is a conflict of interest, except as permitted;
  - May need to consider withdrawing representation of the interests diverge greatly (if timeframe permits).

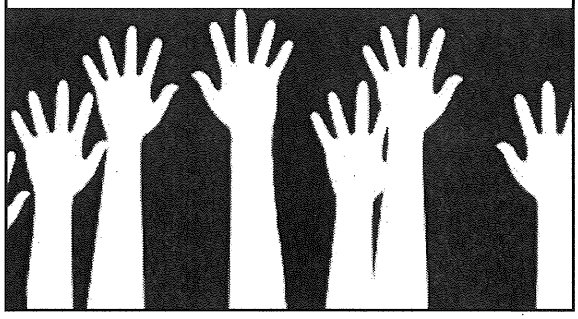
ETHICAL OBLIGATIONS CONT'D

Joint retainers

- Precedent letters available on the Law Society of BC website; and
- The default in retainer letters is generally that you stop representing any of them if a conflict arises, but a good joint retainer can circumvent this.

- Managing individual tenant's personal health information in SOM matters.
- Tenant outreach—distributing correspondence ("letter of concern" & "door knocking") to tenants.

QUESTIONS??



JOINT RETAINERS FOR GROUP COMPLAINTS

Note: The goal of such retainers is to:

- explain the risks of entering into a join retainer, including:
  - the nature and limitations of confidentiality within a joint retainer context;
  - conditions upon which a joint retainer may be terminated for one or more clients, or for all clients; and,
- give notice to the client that the advocate may continue to act for the group even where the retainer is terminated with one of them.

Note: The following is additional language that you may consider integrating into your existing retainers for joint dispute resolutions. This is NOT intended to replace existing retainer conditions or information regarding confidentiality and termination of the retainer.

Draft Retainer language

Confidentiality:

> [Organization name], its [lawyers/advocates], and any lawyers working as retained experts, will keep your case confidential, subject to the following express exemptions:
>
> - Because this in an agreement to represent more than one client, no relevant information we receive from one of you or from any other source with respect to this matter can be treated as confidential from the others.

Ending the relationship:

> [Organization name] is free to withdraw its services at any time if it has good reason, including in the following circumstances:
>
> - You fail to keep us up-to-date on how we can contact you or fail to respond to our requests in a timely way.
> - [Organization name] learns of a conflict of interest that would make it unethical for its [lawyers/advocates] to continue to act for you.

- **Note:** You may want to specify how quickly you expect clients to respond to your requests. For example: "48 hours, unless another timeframe has been arranged."

Joint Retainer:

Note: The following text is based on the ethical obligations by which lawyers are bound in British Columbia. While Law Society of B.C. rules of conduct apply to lawyers who are called to the bar in B.C., it is advisable to maintain similar ethical standards in relation to joint retainers.

We confirm that we agree to act for all of you jointly with respect to the Dispute Resolution. Representing you jointly simply means that we will be engaged to act for all of you on the same matter at the same time. We are allowed to act jointly for clients only when their interests are not in conflict. We believe your interests are currently not in conflict; however, it is possible that your interests could diverge or even conflict in the future.

Prior to agreeing to represent you jointly, we must raise certain issues with you and obtain your consent as to the course to be followed in the future if a conflict arises. The following conditions will apply to our joint representation of you:

a) We owe each of you a duty of undivided loyalty. This means that we must act in each of your best interests at all times and must not favour the interests of one of you over the interests of another, or allow anything to interfere with our loyalty to each of you or our judgment on your behalf. If we are unable to fulfill this duty of undivided loyalty to each of you, we will have to withdraw.

b) No information we receive from one of you or from any other source with respect to the Dispute Resolution can be treated as confidential from the others. This means that, as long as the joint retainer continues, we must disclose relevant information to all of you. However, should we receive information that makes it clear that we are in a conflict by acting for you jointly, or if a contentious issue arises between you, we must cease acting for all of you in the matter unless the conflict or contentious issue is resolved or the circumstances of a permitted continuing relationship apply as set in paragraph (e). In the event the conflict or contentious issue is not resolved, however, we would not be permitted to disclose that information to you.

c) If we act for one of you in a matter separate from this one, and we receive confidential information from that separate matter that is relevant to the Dispute Resolution, we will have to withdraw from the Dispute Resolution unless we receive the consent of the client in the separate matter to disclose that information.

d) If a conflict or contentious issue arises among you, you have the option to settle the conflict or contentious issue by direct negotiation with one another, or we may be permitted to assist you in attempting to resolve an issue if all of you agree. To that end, we may retain a third party to help resolve the conflict or contentious issue. If the conflict or contentious issue is resolved by direct negotiations, we may continue to represent all of you.

e) If a conflict or contentious issue arises between you that is not resolved, then we may cease representing one or more of you and continue to act for the rest of you in order for the Dispute Resolution to proceed.

f) If one or more of you decide to withdraw from the case, if we cannot get in touch with one or more of you, or if we cannot get instructions from one or more of you, you agree that [Organization name] may continue to act for the remaining clients who want to continue with the dispute resolution, who we can contact, or from whom we can obtain instructions.

Although joint representation of a number of clients has advantages, there are aspects of the joint representation that could lead to the potential problems we have outlined above. If a conflict arises that cannot be resolved, [Organization name] may not be able to continue representing you.

Note: Subsections e) and f) are different than many standard joint retainers and are designed to ensure that the matter can proceed even if not all of the clients remain part of the process or continue to be represented by counsel. This is used in cases where a matter is being perused on behalf of multiple people and counsel (or an advocate) want to ensure that the matter can proceed in the best interests of the remaining clients even if not all clients are able to or choose to proceed (so long as it is in the interests of the remaining clients and all other ethical obligations are met). Subsection f) does not appear in all joint retainers.

Here is an example of alternative language for provision e). This explicitly requires consent of all of the clients to continue acting for one or any of them:

e) If a conflict or contentious issue arises between you that is not resolved, then we may at our option cease representing both of you or, if both of you agree, we may continue representing one of you if our ethical obligations permit us to do so.

Note: Regardless of what language you use, you will need to get consent to continue acting for the remaining clients if a conflict or contentious issue arises that cannot be resolved.

If you get your clients to sign a consent form akin to the "Notice of Self-Representation" and explain when and how it may be used in the retainer agreement (see below for details), then you have consent of the client who will no longer be represented. You will need to confirm with your remaining clients that you will continue to act for them.

Independent legal advice:

> We require (or we advise) that you obtain independent legal advice before you agree to the terms of this retainer.

Note: This provision in not strictly obligatory. It is not strictly required that a client be advised to obtain independent legal advice prior to signing a joint retainer. However, it is advisable to do so wherever possible to ensure that a client's decision to enter into a joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than another.

In practice this may be challenging. It is advisable to consult with your supervising lawyer if you have any concerns regarding any client's ability to enter into a joint retainer in an informed, genuine, and uncoerced manner. If at all possible, clients should receive independent legal advice prior to entering into a joint retainer.

CONSENT WHEN YOU CEASE TO ACT FOR A CLIENT

Note: The purpose of getting consent from the client to act for themselves in certain circumstances when they enter into the retainer agreement is to:

- Ensure your client understands the consequences of failing to maintain contact.
- Allow you to more easily continue with representation of a group of clients where you have lost contact with one or more client.
- To provide you with written consent from the client that you can submit to the Residential Tenancy Branch should you need to withdraw from representing some members of the group.

Note: This notice is optional and provided only for your consideration. There is no requirement to provide written notice to the RTB if you cease to act for a client. You may provide such notice by letter, orally at a hearing, or by using this notice. You may get the consent of the client regarding these matters through the retainer agreement itself. This additional form is designed to A. give you something to submit, if necessary or desirable, to the RTB, and B. to ensure that the consent of your client is clear and explicit.

Draft Retainer Language

"Notice of Self-Representation":

> Appendix A to this retainer agreement attaches Notices of Self-Representation for each of you. This form allows us to advise the Residential Tenancy Branch that we will no longer be representing you and you will be representing yourself in the dispute resolution hearing. The address for service listed in the Notice will become the address to which Residential Tenancy Branch documents will be delivered. Delivery of documents from the Residential Tenancy Branch may trigger deadline for further action. You will be responsible for meeting those deadlines should you no longer be represented by [Organization name].
>
> We require that each of you sign a Notice. In situations set out in paragraphs [Paras on Ending the Relationship] above – if we cannot contact you or get instructions from you, or where there is a conflict of interest with other clients who are party to this retainer agreement – we may file the Notice without any further instructions from you.

Note: Each advocate owes a duty of undivided loyalty to each of their clients. Regardless of having prior written consent, you:

- must attempt to contact your client if and when you intend to end the retainer to inform them of your intention to withdraw as their advocate;

- should consult with your supervising lawyer prior to making a decision to end a client relationship during a Dispute Resolution process if you cannot contact your client to get their consent at the time of the relationship breakdown.

Note: Tenants have the right to be represented by an advocate and, when appearing with a tenant, no written consent to act for the tenant is generally required.[1] There is no RTB form to cease acting as an advocate. Despite not having a mandatory form, there are several advantages to having a client sign a Notice of Self-Representation:

- Where an advocate has indicated to the RTB that they are representing multiple clients, it is important to ensure that the decision maker knows who is and is not represented prior to the commencement of the hearing. Providing written confirmation when you cease to act for a client protects that person's interests by ensuring that the decision maker is aware of their status. This can be done by letter from the advocate, however, having a consent from the client may provide clarity and protection in the event that the client is unhappy that you have ceased to represent them.
- By having a client sign a Notice of Self-Representation at the time they enter into the joint retainer and by including the above language in joint retainer, you have the opportunity to ensure that the client is fully informed of the repercussions of failing to respond to requests, not providing up-to-date contact information, not giving instructions, or failing to resolve a conflict or contentious issue with another client(s).
- Where you represent multiple clients and have lost touch with one or more of them, you still have a duty to act in the best interests of all your clients. This may assist you to cease acting for those individuals who you cannot contact or get instructions from, and continue acting for your remaining clients, thus protecting the interests of the clients with whom you still have contact.

Note: In addition, or in the alternative, you may wish to review your retainer to determine the scope of your instructions. If you have temporarily lost contact with a client or are unable to get instructions, the scope of instructions contained in the retainer may provide you with the authority you require to take certain actions. If you believe that your client intends to continue the retainer and that the lack of contact or instructions is temporary, you have an obligation to act in your client's best interests. It is advisable to seek guidance from your supervising lawyer on what steps in the dispute resolution process you are authorized to take without securing further explicit instructions.

---

[1] Residential Tenancy Branch, *Policy Guideline 26: Advocates, Agents and Assistants*, September 27, 2013

NOTICE OF SELF-REPRESENTATION

Note: This form is based on a BC Supreme Court form. It is not an official RTB form, nor is it a required form in entering a joint retainer or representing clients at the RTB. This template is provided as guidance only.

Note: Prior to entering into a joint retainer or requesting that your clients sign a Notice of Self-Representation you should consult with a supervising lawyer.

File No._____

RESIDENTIAL TENANCY BRANCH
DISPUTE RESOLUTION SERVICES

Between:

[NAME]

Tenant

And

[NAME]

Landlord

NOTICE OF SELF-REPRESENTATION

TAKE NOTICE that I now intend to act personally in this proceeding in place of [Advocate Name].

Dated: _____ _____

Signature of [NAME]

My address for service is:

Fax number address for service (if any):

E-mail address for service (if any):

BRITISH COLUMBIA

Tenant's Request to Join Applications for Dispute Resolution

#RTB – 19

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.

The *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* state that the director may schedule two or more dispute resolution proceedings to be heard together if the matters are related and it is logical to do so.

The matters to be determined are concerning the premises located at:

DISPUTE ADDRESS:

site/unit number	street number and street name	city	B.C. province postal code

We, the undersigned tenants, state:

- the applications have the same matter(s) in dispute with the landlord and the filing fee for an Application for Dispute Resolution has been paid or a fee waiver granted in each file;
- the applications are being filed under the same section(s) of the *Residential Tenancy Act* or the *Manufactured Home Park Tenancy Act*;
- each matter in dispute concerns the same landlord and is about the same building, residential property or manufactured home park; and
- **as parties to related applications for dispute resolution, we hereby request the director make an order to join the following files:**

LEAD APPLICANT: **PARENT FILE #:**

last name | first and middle names

UNIT/SITE #: **DATE:** (day/month/year) **SIGNATURE:** _____

APPLICANT: **FILE #:**

last name | first and middle names

UNIT/SITE #: **DATE:** (day/month/year) **SIGNATURE:** _____

I authorize ☐ the lead applicant ☐ or the following person to represent me in this matter:

RESPONDENT: *(if entry is a business name, use the 'last name' field box to enter the full legal business name)*

last name | first and middle names

ORDER

The director hereby orders that the dispute resolution proceedings referred to in this application be joined and heard together.

For director: _____ **Date:** _____

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

Tenant's Request to Join Applications **PARENT FILE #:** ______

APPLICANT: **FILE #:** ______

last name ______ first and middle names ______

UNIT/SITE #: ______ **DATE:** ______ (day/month/year) **SIGNATURE:** ______

I authorize ☐ the lead applicant ☐ or the following person to represent me in this matter: ______

APPLICANT: **FILE #:** ______

last name ______ first and middle names ______

UNIT/SITE #: ______ **DATE:** ______ (day/month/year) **SIGNATURE:** ______

I authorize ☐ the lead applicant ☐ or the following person to represent me in this matter: ______

APPLICANT: **FILE #:** ______

last name ______ first and middle names ______

UNIT/SITE #: ______ **DATE:** ______ (day/month/year) **SIGNATURE:** ______

I authorize ☐ the lead applicant ☐ or the following person to represent me in this matter: ______

APPLICANT: **FILE #:** ______

last name ______ first and middle names ______

UNIT/SITE #: ______ **DATE:** ______ (day/month/year) **SIGNATURE:** ______

I authorize ☐ the lead applicant ☐ or the following person to represent me in this matter: ______

APPLICANT: **FILE #:** ______

last name ______ first and middle names ______

UNIT/SITE #: ______ **DATE:** ______ (day/month/year) **SIGNATURE:** ______

I authorize ☐ the lead applicant ☐ or the following person to represent me in this matter: ______

APPLICANT: **FILE #:** ______

last name ______ first and middle names ______

UNIT/SITE #: ______ **DATE:** ______ (day/month/year) **SIGNATURE:** ______

I authorize ☐ the lead applicant ☐ or the following person to represent me in this matter: ______

BRITISH COLUMBIA

Tenant's Application for Dispute Resolution

#RTB – 12-T

For RTB Use only: File #

☐ This application is being made under the *Manufactured Home Park Tenancy Act*

☐ This application is being made under the *Residential Tenancy Act*

TENANT(s): (Applicant(s): the person asking for dispute resolution)
If additional space is required to list all parties, use and attach the *Schedule of Parties* (form RTB-26).

Full Name:

first and middle name(s) | last name

first and middle name(s) | last name

Applicant Address: (address for service of documents or notices--where material will be given personally, left, faxed or mailed)

unit/site # | street # and street name | city | province | postal code

daytime phone number | other phone number | fax number for document service

☐ Yes, a *Schedule of Parties* (form RTB-26) is being used to add more Applicants to this application and is attached.

☐ Yes, the **Mailing Address** is different from the Applicant Address, and is attached.

DISPUTE ADDRESS: (address of the rental unit or manufactured home site)

unit/site # | street # and street name | city | province: BC | postal code

LANDLORD(s): (Respondent(s): the other party to the dispute)
If additional space is required to list all parties, use and attach the *Schedule of Parties* (form RTB-26).

Full Name: *(if entry is a business name, use 'last name' field box to enter the full legal business name)*

first and middle name(s) | last name

first and middle name(s) | last name

Respondent Address:(address for service of documents or notices--where material will be given personally, left, faxed or mailed)

unit/site # | street # and street name | city | province | postal code

daytime phone number | other phone number | fax number for document service

☐ Yes, a Schedule of Parties (form RTB-26) is being used to add more Respondents to this application and is attached.

☐ Yes, the **Mailing Address** is different from the Respondent Address, and is attached.

TO FILE THIS APPLICATION:

Submit your application and a copy of your available evidence in-person to:

- RTB Burnaby: 400 – 5021 Kingsway
- Any Service BC Office

Do not give a copy of the Application to the Respondent(s) until the Residential Tenancy Branch accepts it and you have paid the application fee or obtained a fee waiver.

RTB use only – date stamp & initial

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NATURE OF DISPUTE:

For RTB Use only: File # ____

More time needed for application process

☐ Allow a tenant more time to make an application to cancel a *Notice to End Tenancy*..... MT

Date the *Notice to End Tenancy* referred to in this application was received: ____ ____ ____ day month year

Dispute an additional rent increase

☐ Dispute an additional rent increase..... DRI

Cancel a *Notice to End Tenancy* issued for the following reason (**attach** a copy of the Notice):

☐ Tenant does not qualify for subsidized housing..... CNQ

☐ Tenant's employment with landlord has ended..... CNE

☐ Cause ..... CNC

☐ Landlord's intention to convert manufactured home park to another use..... CNLC

☐ Landlord's use of the rental property..... CNL

☐ Unpaid rent or utilities..... CNR

Monetary Order for the following reason:

☐ Cost of emergency repairs..... MNR

☐ For money owed or compensation for damage or loss under the Act, regulation or tenancy agreement.... MNDC

☐ Return of all or part of the pet damage deposit or security deposit..... MNSD

The request for a Monetary Order is for the following amount: $ ____

Provide a detailed calculation of the amount in the 'Details of the Dispute' box below.

Landlord's action sought

☐ Comply with the Act, regulation (state section in the 'Details of the Dispute' box below), or tenancy agreement (attach a copy)..... OLC

☐ Make emergency repairs for health or safety reasons..... ERP

☐ Make repairs to the unit, site or property..... RP

☐ Provide services or facilities required by law (state Act and section in the 'Details of the Dispute' box below)..... PSF

☐ Return the tenant's personal property..... RPP

☐ Suspend or set conditions on the landlord's right to enter the rental unit..... LRE

Tenant's action sought

☐ Obtain an Order of Possession of the rental unit or site..... OPT

☐ Allow access to (or from) the unit or site for the tenant or the tenant's guests..... AAT

☐ Authorize a tenant to change the locks to the rental unit..... LAT

☐ Allow a tenant to assign or sublet because the landlord's permission has been unreasonably withheld..... AS

☐ Allow a tenant to reduce rent for repairs, services or facilities agreed upon but not provided..... RR

Other:

☐ Recover filing fee from the landlord for the cost of this application..... FF

☐ Serve documents (not including Notice of Hearing package) in a different way than required by the Act..... SS

☐ Other (provide details in the 'Details of the Dispute' box below)..... O

DETAILS OF THE DISPUTE:

In two or three sentences, describe the issue. Include any dates, times, people or other information that says who, what, where and when the issue arose or the event occurred. When you are asking for a Monetary Order, include a detailed calculation and a copy of the *Monetary Order Worksheet* (form RTB-37). Attach a separate sheet if necessary. Any additional sheets must be numbered and signed.

Signature: _____ **Date:** ____ ____ ____ day month year

last name | first and middle name(s)

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

BRITISH COLUMBIA

Schedule of Parties

For RTB Use only: File # _____ #RTB – 26

If the form you are completing does not have enough room for additional applicants or respondents, use this Schedule of Parties to continue. It is to be filed with your completed application.

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.

PARTY'S NAME and ADDRESS

Note: if the 'Legal Name' of a party is a 'business name', enter the full business name in the 'last name' box'.

(Check one) ◯ **Landlord** ◯ **Tenant** Other _____

Full Legal Name:

Last name | First name | Middle name(s)

Address

Unit or site # | Street # | Street name | City | Province | Postal Code

Area code | Home phone number | Area code | Business phone number | Area code | Fax number

(Check one) ◯ **Landlord** ◯ **Tenant** ☐ Other _____

Full Legal Name:

Last name | First name | Middle name(s)

Address

Unit or site # | Street # | Street name | City | Province | Postal Code

Area code | Home phone number | Area code | Business phone number | Area code | Fax number

(Check one) ◯ **Landlord** ◯ **Tenant** ☐ Other _____

Full Legal Name:

Last name | First name | Middle name(s)

Address

Unit or site # | Street # | Street name | City | Province | Postal Code

Area code | Home phone number | Area code | Business phone number | Area code | Fax number

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

BRITISH COLUMBIA

Monetary Order Worksheet

#RTB-37

Note: This worksheet will help you submit and present your evidence in a clear and organized manner. Use this worksheet when submitting evidence to the Residential Tenancy Branch and to the other party. For more information on serving evidence, visit our website: www.gov.bc.ca/landlordtenant

File #: _____

You are the: ☐ Applicant ☐ Respondent

You are the: ☐ Landlord/Agent ☐ Tenant/Agent

Your full name *(if name is a business name, enter the full legal business name in the 'last name' box)*

last name or the full legal business name _____ first and middle name(s) _____

last name or the full legal business name _____ first and middle name(s) _____

Dispute Address: *(as recorded on the tenancy agreement)*

site/unit number _____ street number and street name _____ city _____ B.C. province _____ postal code _____

Your monetary claim is for:

- ☐ Unpaid rent/utilities
- ☐ Costs of repairing damage
- ☐ Cleaning costs
- ☐ Keeping/Returning all or part of deposits
- ☐ Emergency repairs
- ☐ Other losses: _____

In support of your claim, you are submitting copies of the following documents:

- ☐ Tenancy agreement
- ☐ Move-in inspection report
- ☐ Move-out inspection report
- ☐ End of tenancy notice
- ☐ Forwarding address notice
- ☐ Rent increase notice
- ☐ Returned cheques
- ☐ Utilities bills
- ☐ Photos (numbered and labelled)
- ☐ Receipts (itemized on reverse side)
- ☐ Invoices (itemized on reverse side)
- ☐ Written estimates (itemized on reverse side)
- ☐ Letters/statements from third parties
- ☐ Other: _____

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.

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

Attach copies of receipts or professional estimates to support your claim.
Please number each document for easy reference.

Document Number	*Receipt / Estimate From*	*For*	*Amount*
#1			$
#2			$
#3			$
#4			$
#5			$
#6			$
#7			$
#8			$
#9			$
#10			$
		Total monetary order claim	**$**

Attach additional page(s) if necessary.

_____
Print name

_____ _____
Signature Date
Landlord/Agent/Tenant
(please circle correct one)

BRITISH COLUMBIA

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:

unit/site # _____ street # and street name _____ city _____ province _____ postal code _____

daytime phone number _____ other phone number _____

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

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)

OFFICE USE ONLY

Low-income cut-off $ _____

☐ Approved ☐ Not approved

Notes:

Information officer

Cashier transaction No. _____

Cashier's initials _____

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

Fee Waivers

[s. 59(4) and 79(4) Residential Tenancy Act and s. 52(4) and 72(4) Manufactured Home Park Tenancy Act]

Tenants and landlords with little to no income may apply for dispute resolution without paying the filing fee. This is called a fee waiver.

The Residential Tenancy Branch (RTB) will determine whether a person qualifies for a fee waiver. Each application is considered on an individual basis.

The RTB *may* waive a filing fee for:

- Application for Dispute Resolution, or
- Application for Review of Decision or Order of an Arbitrator.

Applying for a fee waiver

To request a fee waiver, you must submit:

- an Application to Waive Filing Fee (form RTB-17)
- proof of income
- the application form being filed, such as your application for dispute resolution.

Income can be proved by providing a copy of your:

- Income Assistance statement. You may get this from the Ministry of Social Development after completing its Release of Information Form.
  Be sure to indicate you want your income information released.
- Employment Insurance benefits statement
- Pension statement(s)
- Recent pay stub(s) from employer(s) of everyone living in the household
- Two most recent bank statements.

The Residential Tenancy Branch will review your application, and may ask you questions or request more paperwork.

Eligibility based on low income

The Residential Tenancy Branch uses the Low Income Cut Off tables published by Statistics Canada to determine whether someone qualifies for a fee waiver.

Household size

The Low Income Cut Off tables take into account the number of people living in a household, and the size of their community.

The Residential Tenancy Branch considers a household to be the number of people living at the same address under the same tenancy agreement.

Declaration

The Application to Waive Filing Fee includes a declaration stating the information is true. The applicant must sign this declaration. It is against the law to make a false declaration.

Special notes

The Residential Tenancy Branch (RTB) may consider exceptional circumstances when deciding whether to waive your fee. You should be prepared to provide proof of your exceptional circumstance, and explain how it impacts your ability to pay the fee.

You may be required to pay a waived fee if:

- you do not take part in your hearing and do not have a valid legal reason for your absence; or
- you do not notify the RTB at least three full business days before the hearing that you will not be able to take part in your hearing.

For more information...

Office Locations:

Burnaby: 400 -5021 Kingsway

Contact us for office hours

Any Service BC Office

Public Information Lines:

1-800-665-8779 (Toll free)

Greater Vancouver: 604-660-1020

Victoria: 250-387-1602

Email: HSRTO@gov.bc.ca

Website: www.gov.bc.ca/landlordtenant

Resources and Services

- Update on Aboriginal Law and Resources for Clients (Day 1) (see Tab 1)
- Using MyLaw BC (Day 2)
- PLEI Plenary (Day 3)

No Materials

Materials to be provided
at the
Provincial Training Conference

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/custody 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 child or children. 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.

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.

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.

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 does not have to permanently reside in BC or hold Canadian citizenship to qualify for legal representation.

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 contract for one lawyer. We will only issue a separate contract if there is a conflict between the two people that prevents one of the lawyers from representing both parties.

NOTE: If a client does not qualify financially for legal aid they may be able to go to court and make a "JG" application. Before a client can apply for a "JG" application the client must apply for legal aid. They must be refused by the legal aid intake worker, then they must ask, in writing, for that decision to be reviewed. The client will be sent a letter along with our booklet "If You Can't Get Legal Aid for Your Child Protection Case", which explains how to apply to the courts for a court appointed lawyer to assist them with their matter.

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, offences under the Schools Act, etc., 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.

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

Contracts for refugee and protected persons claims made in Canada include:

- preparation of a Basis of Claim form, and
- preparation for and representation at refugee hearings before the Refugee Protection Division (RPD) of the Immigration and Refugee Board.

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 contracts 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
- applications by spouses or partners with conditional permanent residence who are leaving the relationship before the end of the two-year conditional cohabitation period
- sponsorship appeals to the Immigration Appeal Division of the Immigration and Refugee Board where the applicant is in Canada and faces a risk of removal
- other immigration cases if coverage is unclear

Justice Innovation and Transformation Initiatives (JITI) Pilots

Expanded Family LawLINE

The Family LawLINE is a telephone advice service that provides brief next-step help for people representing themselves. Clients with a family law issue can access this service through the Legal Services Society provincial call centre, engage with a lawyer over the telephone, and share documents by email or fax. Lawyers work from their own offices across the province and engage with clients through a free remote access telephone system.

The Family LawLINE has recently expanded from being solely a brief advice line to include a few additional telephone appointments with the same lawyer. This expanded service enables Family LawLINE lawyers to provide qualifying clients with greater continuity of advice and support on the same legal matter. Lawyers will help clients prepare documents for court and other legal processes, and provide coaching and guidance to help clients represent themselves more effectively.

The Family LawLINE will provide the following:

- Interpreters if clients need services in languages other than English
- Information and advice on court processes, both Provincial and Supreme Court
- Information and advice on options for resolving legal issues out-of-court
- Referrals to other services, including online resources and other public agencies
- Assistance with preparing documents for court
- Coaching to help people who are representing themselves through all stages of court and other collaborative processes
    - Coaching will help the client understand the law relevant to their particular case, make more effective court appearances, present evidence properly, prepare for negotiation and settlement, and use Public Legal Education and Information (PLEI) tools.

To qualify for the Family LawLINE service, you must:

- Qualify financially
- Have an eligible family law issue
- Not have a lawyer already working for you

To access the Family LawLINE service:

- To find out if you are eligible for this service, call the Legal Services Society provincial call centre at 604-408-2172 (for Greater Vancouver) or toll free 1-866-577-2525 Monday to Friday from 9:00 am to 3:00 pm (Wednesday to 2:30 pm).

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).

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 contract under the *CFCSA Tariff*. If the issues cannot be resolved collaboratively and the applicant meets coverage and financial eligibility guidelines for a CFCSA representation contract, LSS may appoint a lawyer to complete the case.

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).

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 contract 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 contract, 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

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.

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

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.

CFCSA cases

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. Merit considerations include:

- the applicant's issue is significant;
- the outcome will benefit the applicant and/or his/her children if the case is successful;
- the applicant has a reasonable likelihood of success;
- a reasonable person of modest means would themselves pay to pursue the case;
- the applicant does not have other viable options, other than legal representation, to deal with the issue; and
- there is remaining LSS budget available to fund the case.

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 contract 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 documents that might support their request for a review.

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

Skills

- Researching Wills and Family Law Resources on CanLII (Day 2)
- Resisting Burnout with Justice Doing (Day 2)
- Online Research on Government Sites: MSDSI and RTB (Day 3)
- Drafting Settlement Agreements in Residential Tenancy and Welfare Matters (Day 3)
- Advanced Ethics: Discussions for Senior Advocates in Poverty and Family Law (Day 3)

Legal Services Society

2016 Provincial Training Conference

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THE LAW FOUNDATION OF BRITISH COLUMBIA

Research Wills and Family Law

Using CANLII, Clicklaw and Wikibooks

Katrina Leung

October 18, 2016

COURTHOUSE LIBRARIES | BC

Katrina Leung,
Liaison Lawyer,
Courthouse Libraries BC

Agenda

1. Clicklaw

2. Clicklaw Wikibooks

3. LSLAP Law Students' Legal Advice Program

MY LAW - BC -

4. CanLII

- Facts and Scope of Database

4. **Strategies for Research**

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First thing first - the basics

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Clicklaw

Clicklaw.bc.ca

- Search using the **search toolbar** or click on **specific topics** like “Family Law” for results
- **Mobile friendly** website – use it on your smartphone
- Use **HelpMap** to search for services by topic and/or city
- Use **Common Questions** to get directed to good starting points for everyday questions – send us suggestions!

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Clicklaw

How to stay up-to-date

- **Subscribe to our Blog:** http://blog.clicklaw.bc.ca (type in your email on the left hand column and hit 'subscribe') – we went over the posts under the "family law" tag
- **Follow us on Twitter: @clicklaw**
- **Like us on Facebook: /clicklaw**

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Clicklaw

SOLVE PROBLEMS. FIND HELP.

About Clicklaw: 中文（简体） | 中文（繁體） | ਪੰਜਾਬੀ | 한국어 | فارسی | more

Home | Solve Problems | Learn & Teach | Reform & Research | HelpM

Search Clicklaw Go

Welcome to Clicklaw

This site provides legal information, education and help for British Columbians. What is here for you?

solve legal problems | learn & teach the law | reform & research the law | HelpMap

Solve Problems

Understand your rights, solve legal problems

Your money
- Debt
- Pensions, benefits & welfare

Your family
- Children & te
- Family law
- Health
- Personal planning
- Wills & estates

Your daily life
- Accidents & injuries
- Consumer

Your safety
- Abuse & family violence
- Victims of crime

Your communities
- Aboriginal
- Disabilities
- Immigrants & refugees
- Seniors
- Women

Your legal system
- Alternatives to court
- Courts & tribunals

HelpMap

Find someone in your community who can help with legal problems.

Learn & Teach

Access resources that build awareness of laws and how the legal system works.

Reform & Research

Access resources that feature analysis and reform of the law and the legal system.

What's new on Clicklaw

Intro to LSLAP - a Clicklaw Contributor
Free legal advice for low-income people in Metro Vancouver by...
March 23, 2015

Online Dispute Resolution in British Columbia

HelpMap

Find those who can help with legal problems within British Columbia.

Two different ways for you to find help:

1 Search the HelpMap for law related help with a Keyword OR Location.

divorce or Van Go

Vancouver
Vanderhoof

OR

2 Select a Topic to start your search on HelpMap:

Your money
- Debt
- Pensions, benefits & welfare
- Taxes & finances

Your family
- Children & teens
- Family law
- Health
- Personal planning
- Wills & estates

Your daily life
- Accidents & injuries
- Business & non-profits
- Cars & getting around

Your safety
- Abuse & family violence
- Victims of crime

Your communities
- Aboriginal
- Disabilities
- Gays, lesbians, trans & bisexuals
- Immigrants & refugees
- Seniors
- Women

Your legal system
- Alternatives to court
- Courts & tribunals
- Crimes & offences

Find someone to talk with

Quick access to toll-free phone numbers for legal information or advice available to British Columbians.

Looking for an advocate?

If you can't find one on the HelpMap, try PovNet's Find an Advocate.

Clicklaw

SOLVE PROBLEMS. FIND HELP.

divorce Go

Refine your search results

Topic

- Abuse & family violence (1)
- Alternatives to court (2)
- Children & teens (1)
- Consumer (1)
- Courts & tribunals (1)
- Debt (1)

see more topics...

Section clear selected

- [x] HelpMap (3)

Location clear selected

- [x] Vancouver (3)

Language

- English (3)

Type of service

- Legal advice, representation or advocacy (1)
- Information or self-help (2)
- Counselling or support (1)
- Government services (2)

Your search results

Showing 3 results

Sort by: relevance

A **Supreme Court Family Duty Counsel**

If you are a person with a low income experiencing separation or divorce, you may be eligible for up to three [illegible] of free legal advice from Supreme Court ... + more details

From Legal Services Society

Topics: Abuse & family violence; Children & teens; Family law; Legal help & lawyers

Vancouver

Vancouver Robson Square, 290 - 800 Hornby Street, Vancouver, V6Z 2C5

Family Justice Centres

Family Justice Centres operate across BC to provide services to British Columbians going through separation or divorce. Each centre is staffed by accredited ... + more details

From BC Ministry of Justice

Topics: Alternatives to court; Family law

B Vancouver

203-1651 Commercial Dr, Vancouver, BC, V5L 3Y3

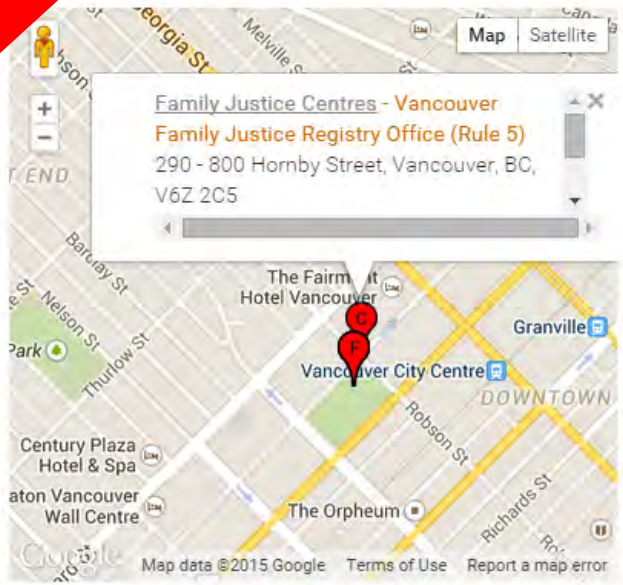
C Vancouver Family Justice Registry Office (Rule 5)

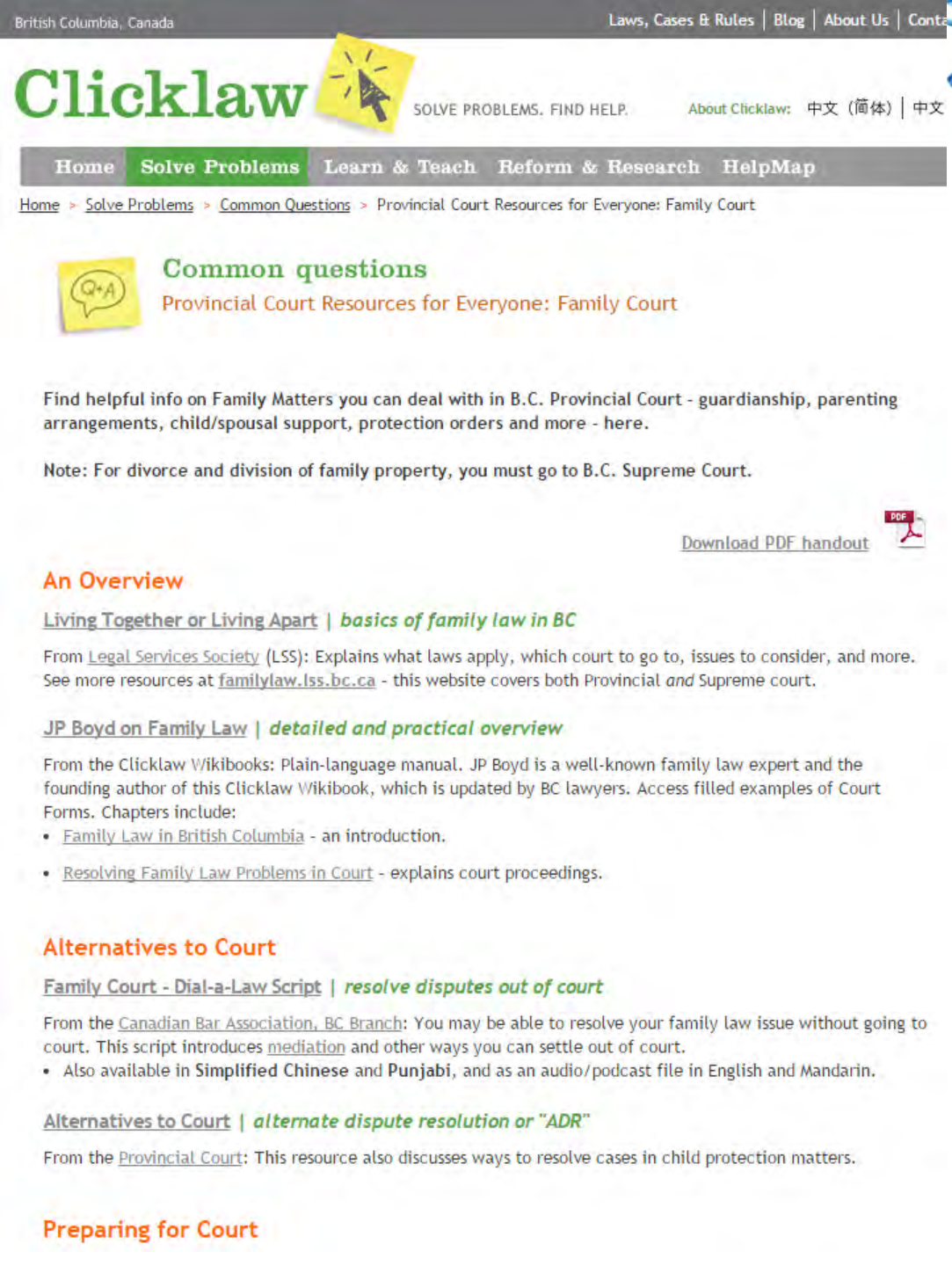
290 - 800 Hornby Street, Vancouver, BC, V6Z 2C5

D Vancouver Family Justice Registry Office (Rule 5)

203-1651 Commercial Drive, Vancouver, BC, V5L 3Y3

+ all locations





Clicklaw

Provincial Family Court Resources

- **bit.ly/clicklawpcf**
- Other Provincial Court resources: bit.ly/clicklawprovct

COURTHOUSE LIBRARIES | BC

Popular questions

I'm applying for probate; where can I find forms?
I'm the executor of a will; what are my first steps?
How do I apply for welfare?
I want to find out about BC disability benefits
I've been dismissed (fired) without just cause
What is a representation agreement?
Our marriage is over; do we have to go to court?

+ View all common questions

New or updated questions

I've been turned down for CPP disability benefits
I want to contest or dispute a will. What can I do?
A family member just died. What do I need to do?
Where can I find rules, forms and guides for court?
Family, civil & criminal law - what's the difference?
Small Claims Court vs Supreme Court of BC - what's the difference?

+ View the Clicklaw Blog

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New addition to @Clicklaw Wikibooks from the @CBA_BC covering 130+ legal topics: blog.clicklaw.bc.ca/2015/04/15/cl

CBABC @CBA_BC 14 Apr
#bclawweek off to a great start with launch of @CBA_BC Dial-A-Law Wikibooks @Clicklaw thanks

Tweet to @Clicklaw

Solve Problems
Abuse & family violence
Consumer
Debt
Employment
Family law
Victims of crime
+ All topics A-Z

Learn & Teach
Programs & courses
Teaching materials
Introduction to the legal system
Courts & tribunals
Children & teens
+ More topics

Reform & Research
Legal needs & innovative solutions
Environment
Rights & citizenship
Victims of crime
+ More topics

HelpMap
Talk to someone

Laws, Cases & Rules
Forms, self-help guid

Clicklaw Wikibooks
JP Boyd on Family Law
Legal Help Guide
Tenant Survival Guide
People's Law School Wikibooks

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s involved
licklaw content criteria
Suggest a resource
Clicklaw Blog
Contact us

Using Clicklaw (videos)

Operated by Courthouse Libraries BC
Funded by the Law Foundation of BC

What are Clicklaw Wikibooks?

- **Kind of looks and acts like *Wikipedia***

Clicklaw Wikibooks

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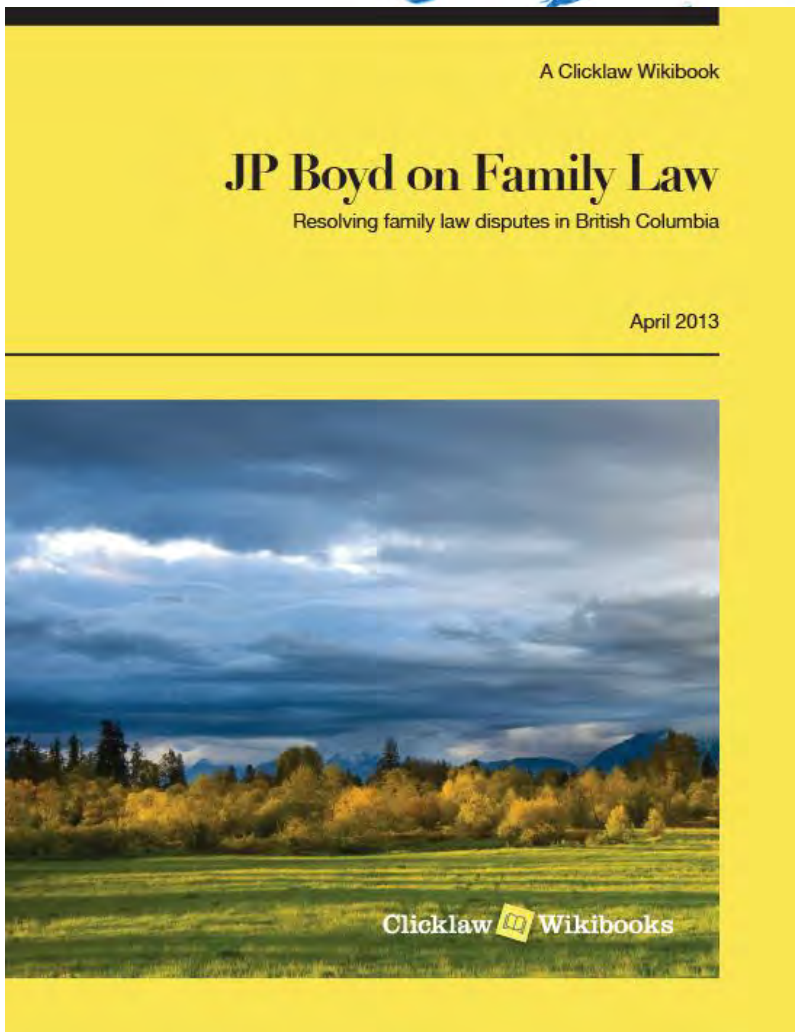
JP Boyd on Family Law

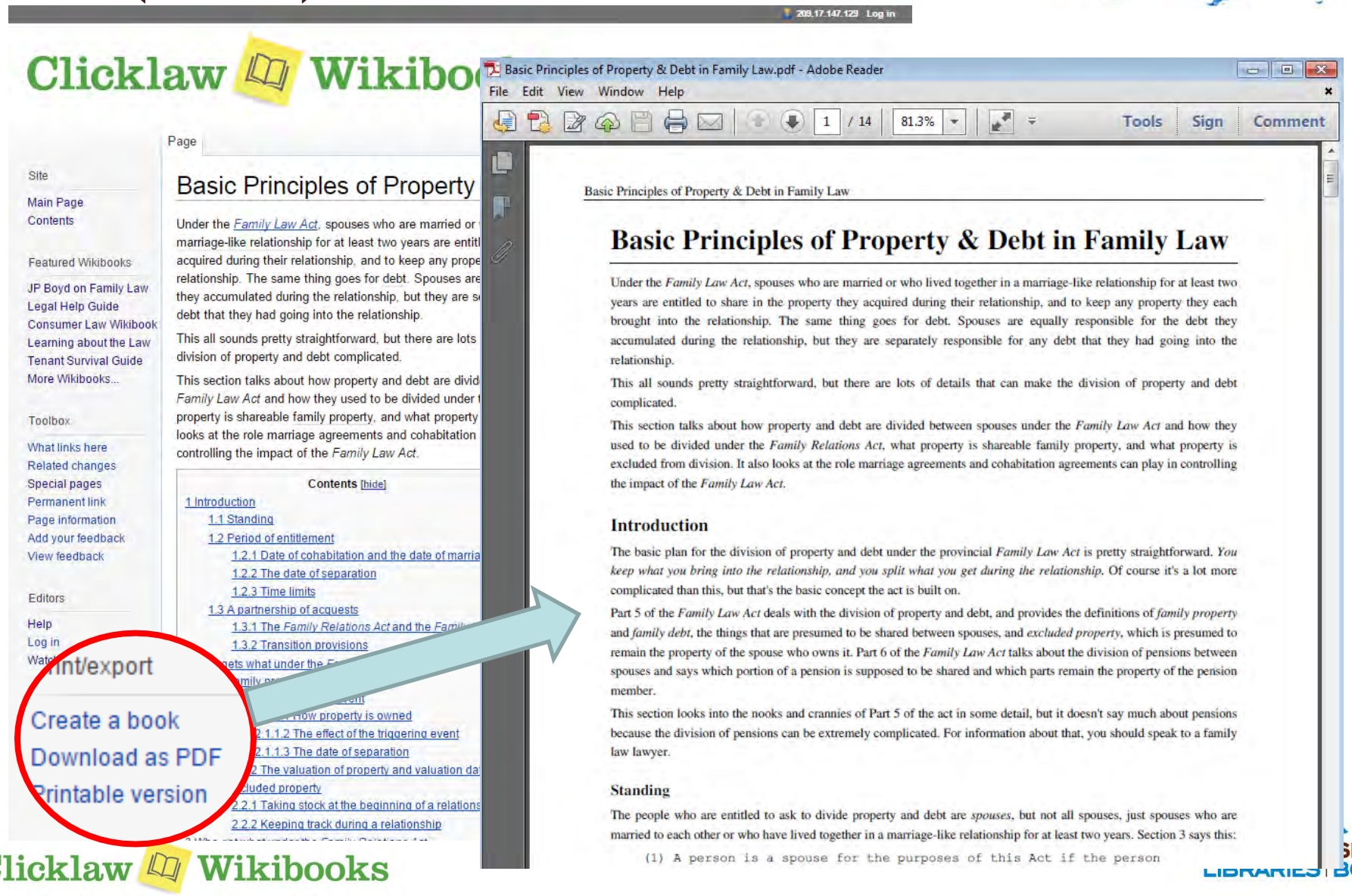
- Successor to www.bcfamilylawresource.com
- 30+ lawyer and judge editors.
- 1000+ pages of family law help materials.
- Published conventionally in small run and available print-on-demand.
- Over 15,500 unique views monthly.



Clicklaw Wikibooks

COURTHOUSE LIBRARIES | BC

Clicklaw Wikibook Formats (PDF)



Clicklaw Wikibook Formats (other)

- Full book in PDF, EPUB or print-on-demand

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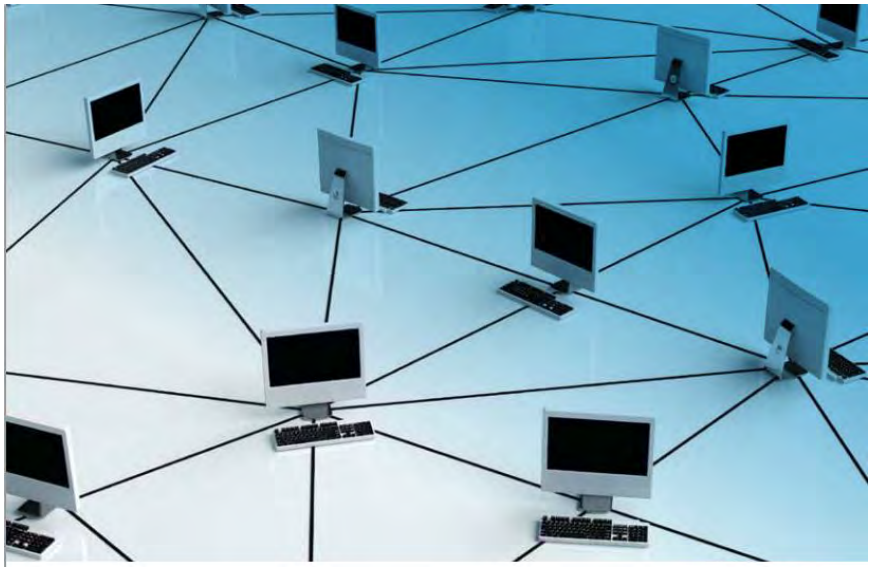
What?



STRATEGIC PRIORITIES 2012 TO 2014

CanLII

2001– one legislative and 18 case collections

2011- nearly 7 million site visits, 1 million documents over 200 collections.

2012- survey revealed nearly 9 in 10 responding lawyers use CanLII with 56% of them starting their research there.

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Scope of CanLII's Database

"CanLII now grows by more than 120,000 judgments a year, approximately 20 per cent of which are older cases that add depth to our collection."

– *Colin Lachance, President and CEO of CanLII*

In 2013, CanLII increased the size of its Ontario court collection by nearly 25%. Adding cases dating back to the 1930s, it was the single largest one-time addition to its database. Made possible by LSUC funding.

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Tips for Conducting Research

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1. Plan and prepare

COURTHOUSE LIBRARIES | BC

Something broad?

- Don’t reinvent the wheel
- Browse using keywords
  - Clicklaw / Wikibooks / Commentary?
- Keep it expansive
- Use boolean (see next tip)
- Read headnotes

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Something specific?

- Search by judge, party or counsel names
- Search by fact pattern

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2. Using Boolean Terms

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Learn to Boolean

One of the greatest challenges of online searching is that too much information is a bad thing – boolean is the answer to this.

Boolean is a way of combining terms to make your searching more precise.

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Basic boolean works with

- AND search AND seizure
- OR teenager OR adolescent
- NOT bylaw NOT strata
- “ ” “family law act”

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Basic boolean works with

- /s construction /s defect
-
- () (bylaw OR by-law) /5 tree NOT (strata OR condominium)

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Let’s give it a try…

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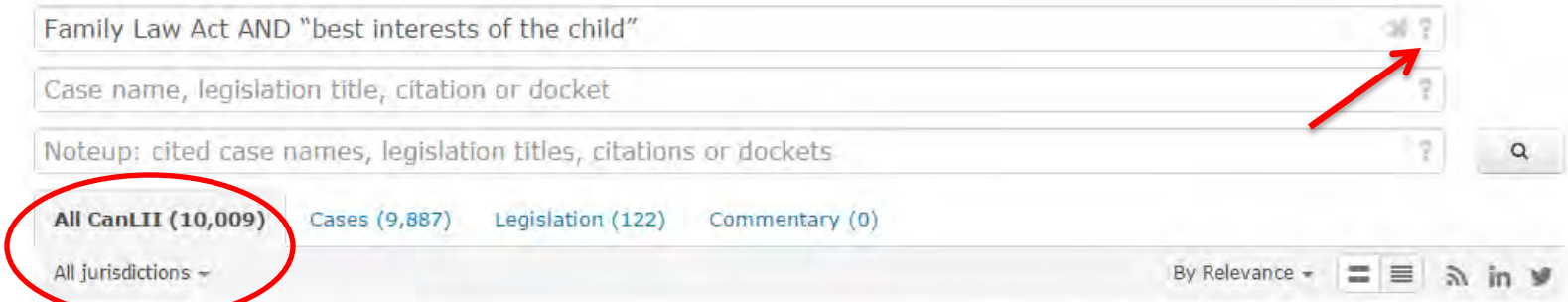
Quick Tips



1. Gill v. Canada (Citizenship and Immigration), 2008 FC 613 (CanLII) — 2008-05-15
Federal Court — Canada (Federal)
best interests of the child — aunt — interests of the child analysis — overseas — factors

[...] [13] In the **family law** context, it is well established that the **best interests of the child** analysis should not focus on harm, although the presence or absence of harm [...] CIC itself recognizes in its policy manual that the **best interests of the child** analysis requires a contextual approach by reference to **family law**: [...] of the `**Best Interests of the Child**' Standard" (1989), 34 S.D.L. Rev. 459; R. H. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 **Law** & Contemp. [...]

cited by 9 documents

2. Young v. Young, [1993] 4 SCR 3, 1993 CanLII 34 (SCC) — 1993-10-21
Supreme Court of Canada — Canada (Federal)
best interests of the child — religious — access — custodial parent — non-custodial parent

[...] **Family law** - Custody - Access - **Best interests of the child** - Access parent insisting on instructing children on religion - Custodial parent and children objecting to religious instruction - Court ordering that access parent [...] **Family law** - Children - **Best interests of the child** - Access parent insisting on instructing children on religion - Custodial parent and children objecting to religious instruction - Court ordering that access parent discontinue [...] Constitutional **law** - Charter of Rights - Freedom of religion - Freedom of expression - Divorce **Act** requiring that orders concerning children only take into account "the **best interests of the child**" - Access parent [...]

cited by 2144 documents CanLII Connects

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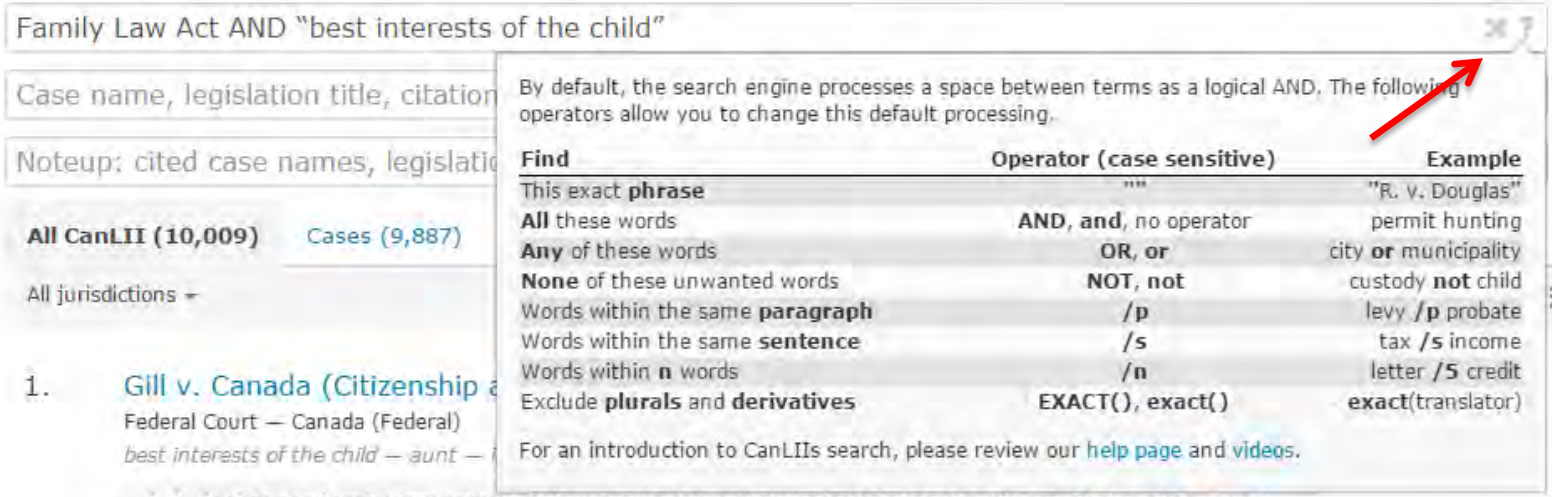
Quick Tips



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Why Learn to Boolean?

Search syntax for Quicklaw, WestlawNext Canada and CanLII

FEATURE	QUICKLAW	WESTLAWNEXT CANADA	CANLII
Default connector	Defaults to phrase search unless using natural language search option	Defaults to plain language search unless proximity command or truncation used in query Boolean queries, including all Search in Result refinements, default to OR	Defaults to AND
Searching without Boolean commands	Use natural language option under Basic Search on Home page	Type terms into query box without connectors or truncation	Type terms into query box without connectors
Order in which Boolean commands are evaluated	1. phrase 2. terms in parentheses 3. OR 4. proximity connectors (/n, PRE/n, /S, /P, /SEG) 5. AND 6. AND NOT	1. phrase in quotation marks 2. terms in parentheses 3. OR 4. proximity connectors (+n, /n, +S, /S, +P, /P) 5. AND 6. %	1. phrase in quotation marks 2. terms in parentheses 3. OR 4. proximity connectors (/n, /S, /P) 5. NOT 6. AND

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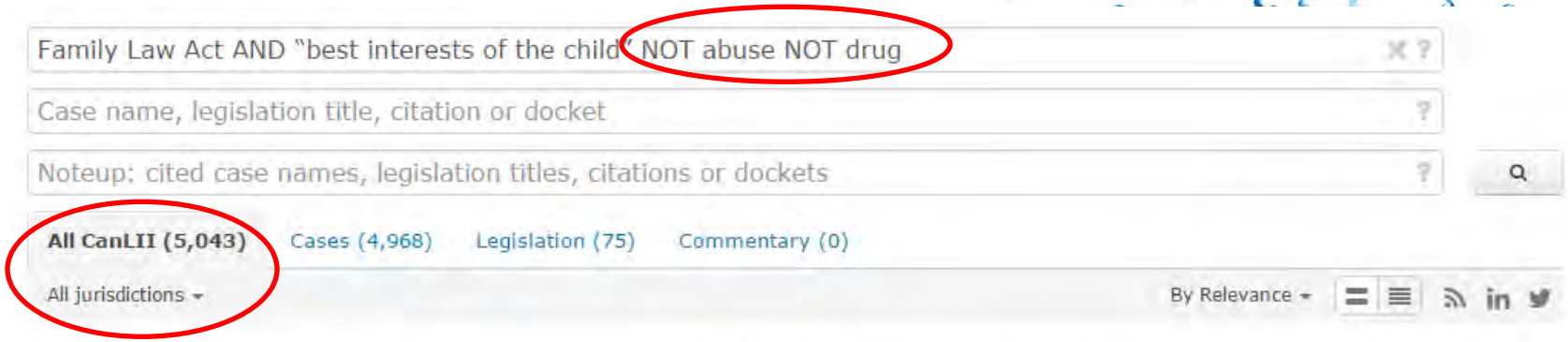
3. Turn off search terms

-You can de-select or exclude certain search terms



1. Gill v. Canada (Citizenship and Immigration), 2008 FC 613 (CanLII) — 2008-05-15

Federal Court — Canada (Federal)

best interests of the child — aunt — interests of the child analysis — overseas — factors

[...] [13] In the **family law** context, it is well established that the **best interests of the child** analysis should not focus on harm, although the presence or absence of harm [...] CIC itself recognizes in its policy manual that the **best interests of the child** analysis requires a contextual approach by reference to **family law**: [...] of the `**Best Interests of the Child**' Standard" (1989), 34 S.D.L. Rev. 459; R. H. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 **Law** & Contemp. [...]

cited by 9 documents

2. Ek v. Canada (Minister of Citizenship and Immigration), 2003 FCT 526 (CanLII) — 2003-04-28

Federal Court — Canada (Federal)

best interests of the child — uncle — reunited with her parents — undeserved hardship — siblings

[...] Based on all evidence, I have concluded that the **best interests of the child** are to leave Canada and return to Cambodia and be reunited with her parents and **family**. [...] must show that the decision maker erred in **law**, proceeded on the basis of a wrong or improper principle, or **acted** in bad faith (Mohammed v. Canada (Minister of [...] on all the evidence, I have concluded that the **best interests of the child** are to leave Canada and return to Cambodia and be reunited with her parents and **family**... [...]

cited by 2 documents

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4. Choose your jurisdiction

-You can run a general search and then narrow it down to a specific jurisdiction

-Or you can start by only searching one jurisdiction

Family Law Act AND "best interests of the child" NOT abuse NOT drug

Case name, legislation title, citation or docket

Noteup: cited case names, legislation titles, citations or dockets

All CanLII (781) | Cases (771) | Legislation (10) | Commentary (0)

British Columbia | Clear filters | By Relevance

There are 22 decisions from the Supreme Court of Canada that match your search. Add them to your results.

1. J.D.S. v. W.S., 1984 CanLII 297 (BC CA) — 1984-10-25
Court of Appeal — British Columbia
superintendent — best interests of the child — adoption — native — petition

[...] involving adoption, guardianship, custody, access to or maintenance of a child, or proceedings under the **Family** and Child Service **Act**, the court shall consider the **best interests of the child**. [...] The Adoption **Act** does not oust the jurisdiction of the Supreme Court, confirmed by s. 5 and s. 7 of the **Family** Relations **Act**, R.S.B.C. 1979, c. 121. [...] The **law** on the question of custody is dominated by the principles set out in s. 47 of the **Law** and Equity **Act** in these words: [...]

cited by 8 documents

2. Spokes v. B.C., 1993 CanLII 544 (BC SC) — 1993-04-30
Supreme Court of British Columbia — British Columbia
best interests of the child — access — jurisdiction — permanent — parens patriae

[...] I am not satisfied that this court can use the provisions of the **Law** and Equity **Act** to claim authority which is not contained in the **Family** and Child Service [...] the adoption, guardianship, custody, access to or maintenance of a child or proceedings under the **Family** and Child Service **Act**, the court shall consider the **best interests of the child**. [...] of the **Family** and Child Service **Act**. The provisions of the **Family** and Child Service **Act** must be read in conjunction with s. 47 of the **Law** and Equity **Act**. [...]

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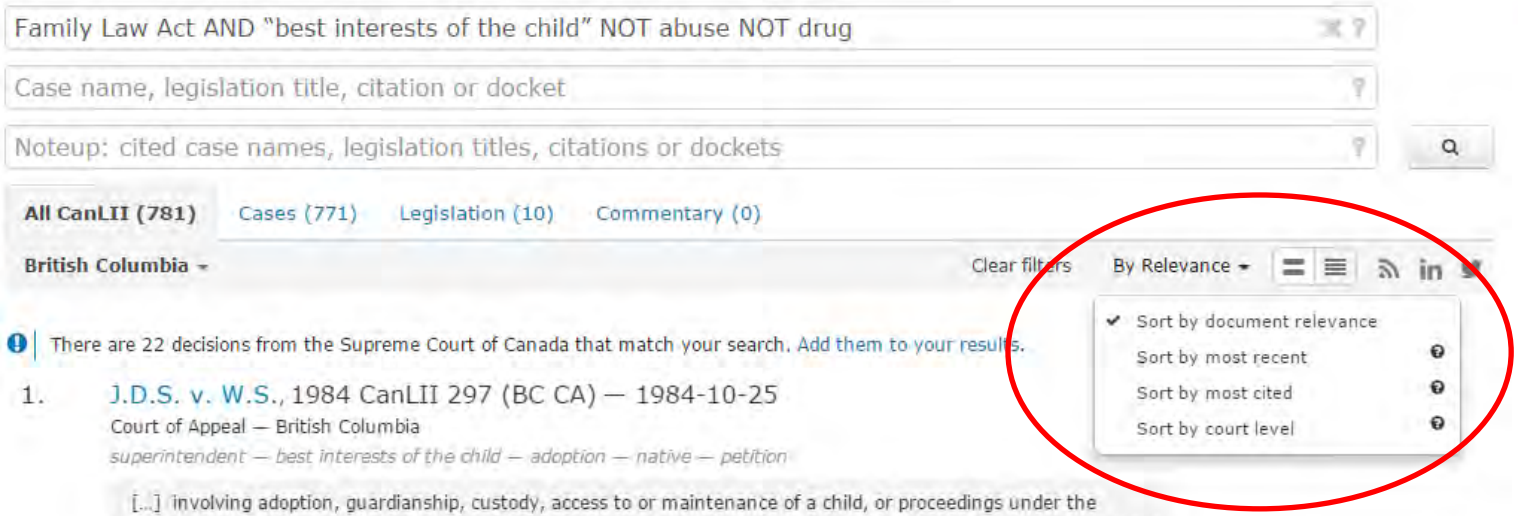
4. Sort by Court Level

-Default sorting is by “Relevance”

-You can change this to sort by “Court Level”



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5. Identify Your Source

-If you don’t limit your search CanLII will run it across all content.

-But you can still choose to only view cases, legislation or commentary from your results.

COURTHOUSE LIBRARIES | BC

Thank you!

training@courthouselibrary.ca
librarian@courthouselibrary.ca

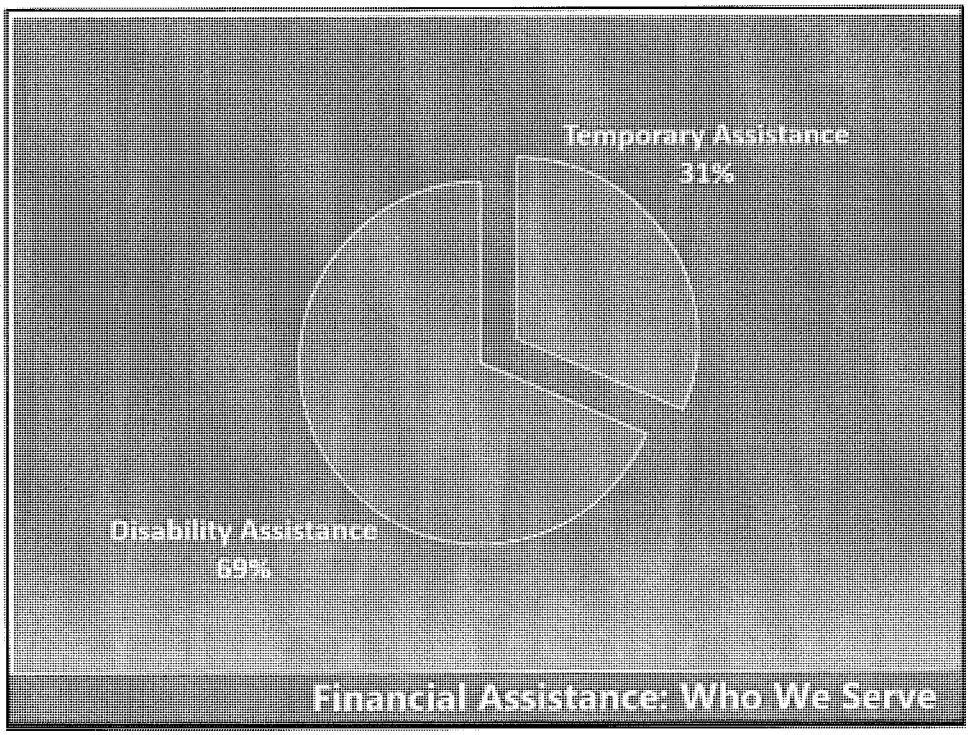
No Materials – discussion session

Online Tools:
Ministry of Social Development and Social Innovation

BRITISH COLUMBIA
Ministry of Social Development and Social Innovation

What We Do

- BC Employment and Assistance
- Work BC
- Accessibility Secretariat
- Social Innovation



500,000

Service Requests

1,400,000

Calls to the Call Centre

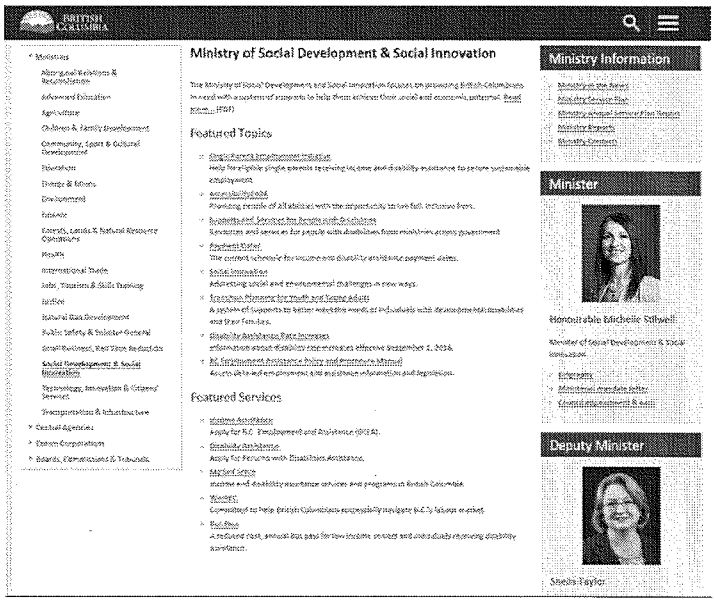
Annual Statistics

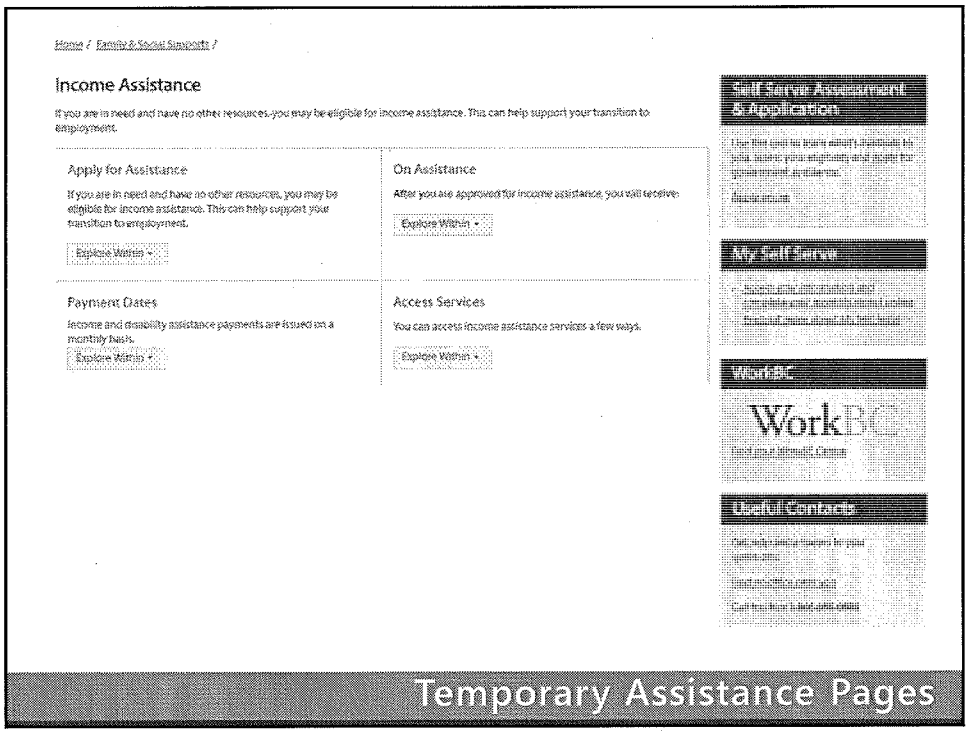
"Improve ministry website and make it more user friendly"

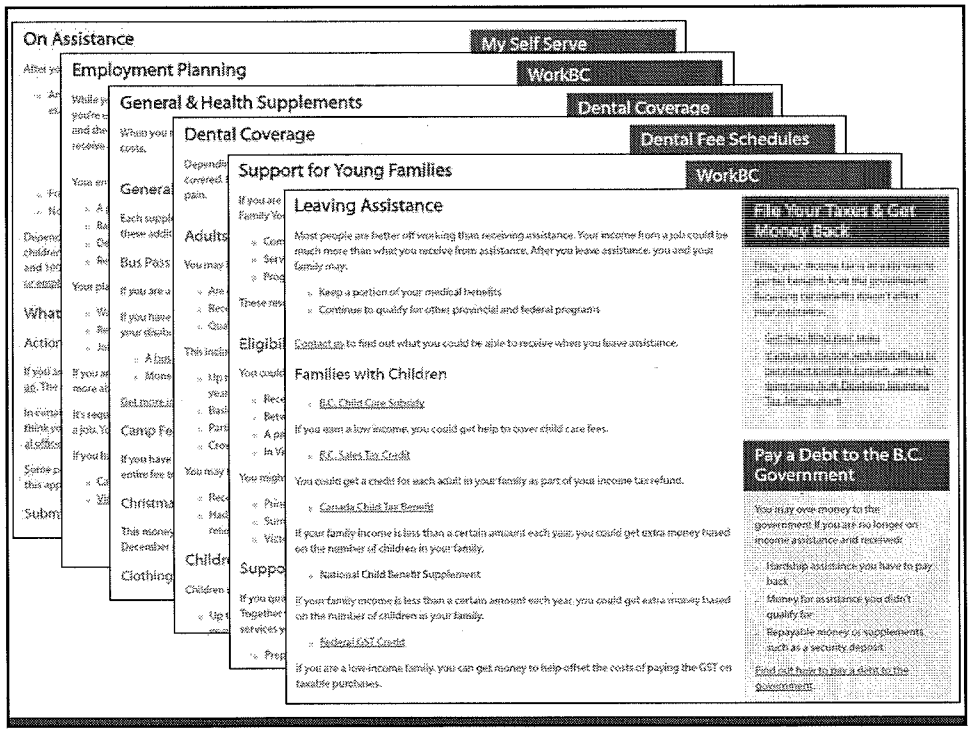
"Expand the services available online"

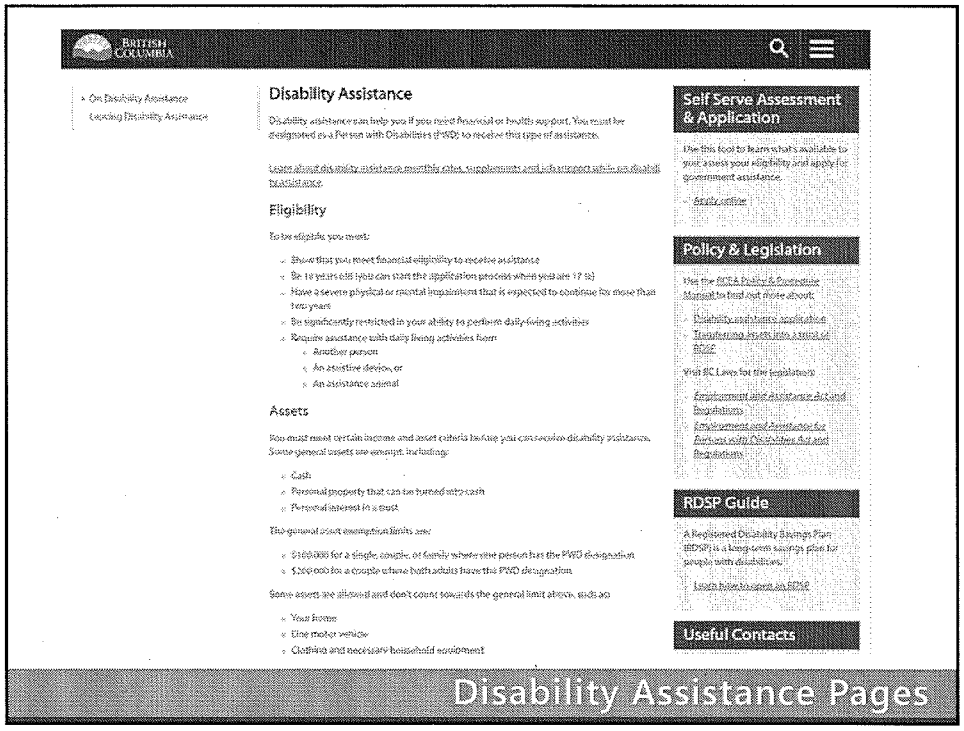
What We Heard About Online Services

Ministry Website

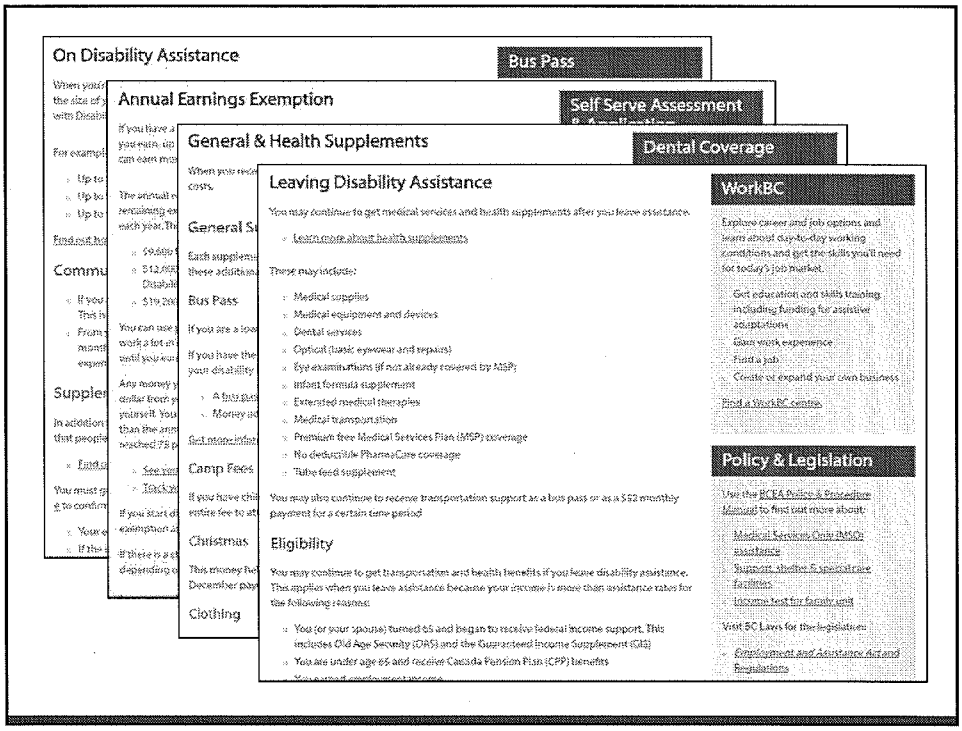



Home / Family & Social Supports /
Income Assistance
If you are in need and have no other resources, you may be eligible for income assistance. This can help support your transition to employment.
Apply for Assistance
If you are in need and have no other resources, you may be eligible for income assistance. This can help support your transition to employment.
Explore Within
On Assistance
After you are approved for income assistance, you will receive:
Explore Within
Payment Dates
Income and disability assistance payments are issued on a monthly basis.
Explore Within
Access Services
You can access income assistance services a few ways.
Explore Within
Self Serve Assessment & Application
My Self Serve
WorkBC
Useful Contacts
Temporary Assistance Pages

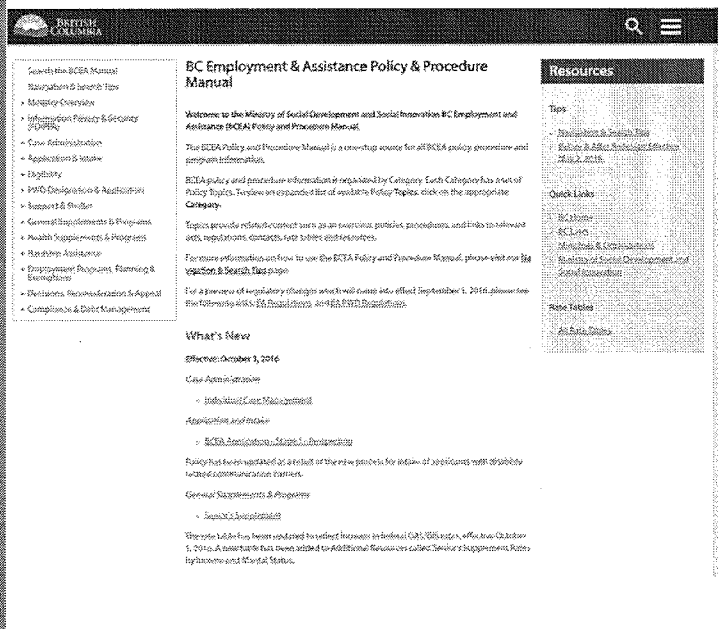

On Assistance
My Self Serve
Employment Planning
WorkBC
General & Health Supplements
Dental Coverage
Dental Coverage
Dental Fee Schedules
Support for Young Families
WorkBC
Leaving Assistance
Most people are better off working than receiving assistance. Your income from a job could be much more than what you receive from assistance. After you leave assistance, you and your family may:
Keep a portion of your medical benefits
Continue to qualify for other provincial and federal programs
Contact us to find out what you could be able to receive when you leave assistance.
Families with Children
B.C. Child Care Subsidy
If you earn a low income, you could get help to cover child care fees.
B.C. Sales Tax Credit
You could get a credit for each adult in your family as part of your income tax refund.
Canada Child Tax Benefit
If your family income is less than a certain amount each year, you could get extra money based on the number of children in your family.
National Child Benefit Supplement
If your family income is less than a certain amount each year, you could get extra money based on the number of children in your family.
Federal GST Credit
If you are a low-income family, you can get money to help offset the costs of paying the GST on taxable purchases.
File Your Taxes & Get Money Back
Pay a Debt to the B.C. Government
You may owe money to the government if you are no longer on income assistance and received:
Hardship assistance you have to pay back
Money for assistance you didn't qualify for
Repayable money or supplements, such as a security deposit
Find out how to pay a debt to the government.



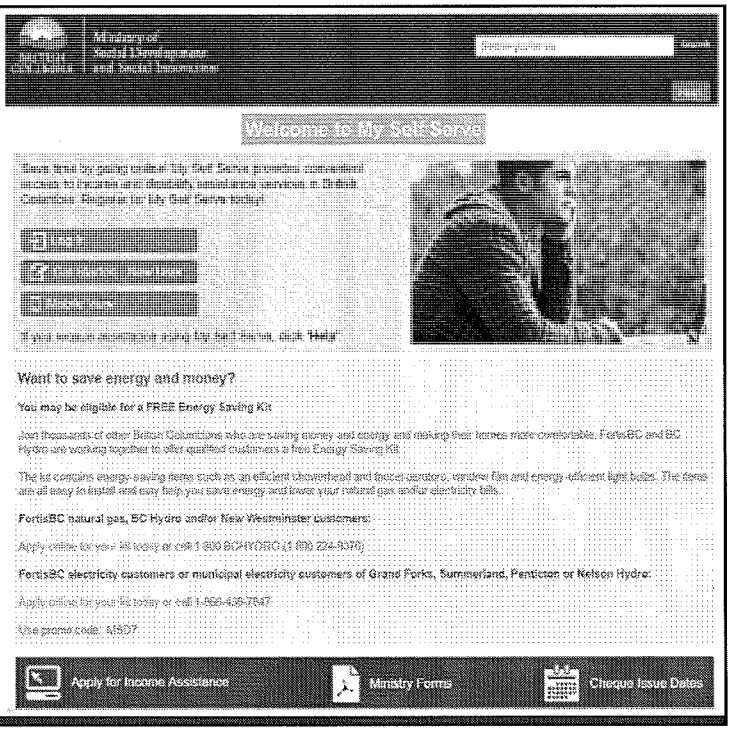
Disability Assistance Pages



BCEA Policy & Procedure Manual



My Self Serve



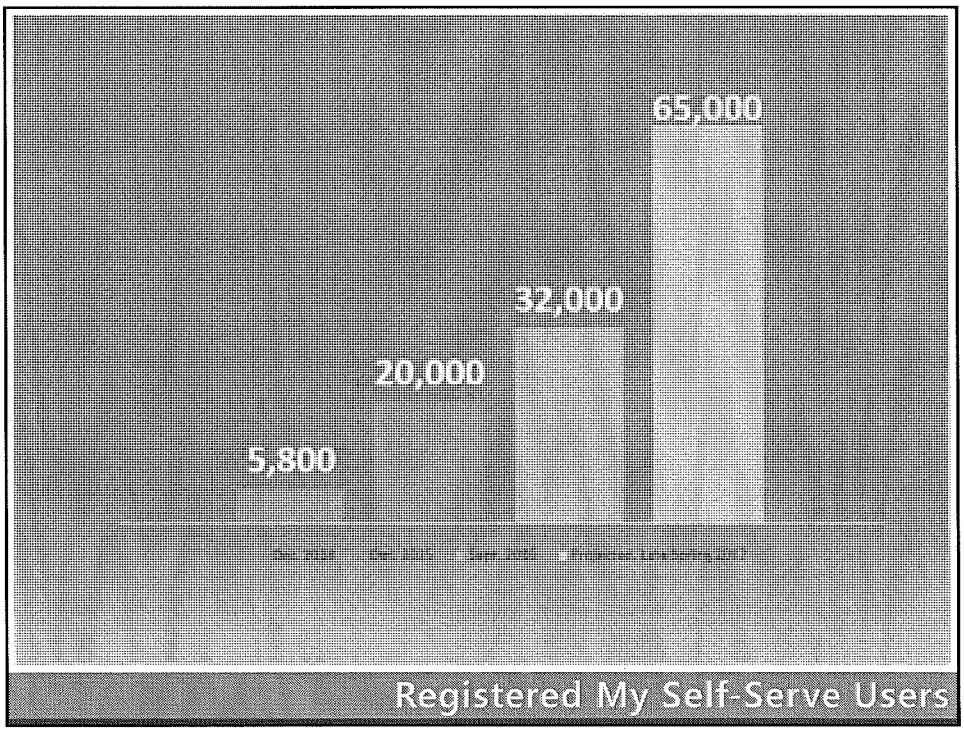
Why Use My Self-Serve?

Access Information

Submit Documents

Receive Messages

Request Services



Ministry of
Social Development
and Social Innovation

BRITISH COLUMBIA

Residential Tenancy Branch

RTB's Business Transformation Initiatives

Provincial Training Conference for Legal Advocates

Alexis Gordon, Policy Analyst

October 20, 2016

BRITISH COLUMBIA

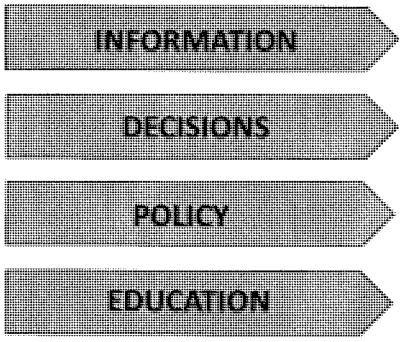
Agenda

- About the Residential Tenancy Branch
- About the Civil Resolution Tribunal
- Online Tools for Landlord and Tenants
  - Solution Explorer
  - Online Application for Dispute Resolution
  - Calculators
- Questions / Comments / Discussion

About the Residential Tenancy Branch

- Branch of government that provides information and dispute resolution services related to tenancy issues
  - *Residential Tenancy Act* and Regulation; and
  - *Manufactured Home Park Tenancy Act* and Regulation

Services Delivered:



Residential Tenancy Branch: Business Transformation Client Contact Data

About the Civil Resolution Tribunal

- The RTB is working with the CRT to implement online dispute resolution and information services
- The CRT launched Solution Explorer in July (for strata disputes; small claims underway)
- First online tribunal in Canada (actually, in the world!)
- Improve access to information for British Columbians
- Navigating dispute resolution for tenancy issues can be difficult:
  - Wait times can be lengthy
  - Issues can be complex
  - Time consuming and expensive

Residential Tenancy Branch: Business Transformation Client Contact Data

Solution Explorer

Bring information to where people are: At home, At work, At a coffee shop

Access to information anytime, anywhere: Just need internet connection

Assist with early resolution and self resolution

If self resolution is not feasible, user will be better educated about rights and responsibilities

Residential Tenancy Branch: Business Transformation Client Contact Data

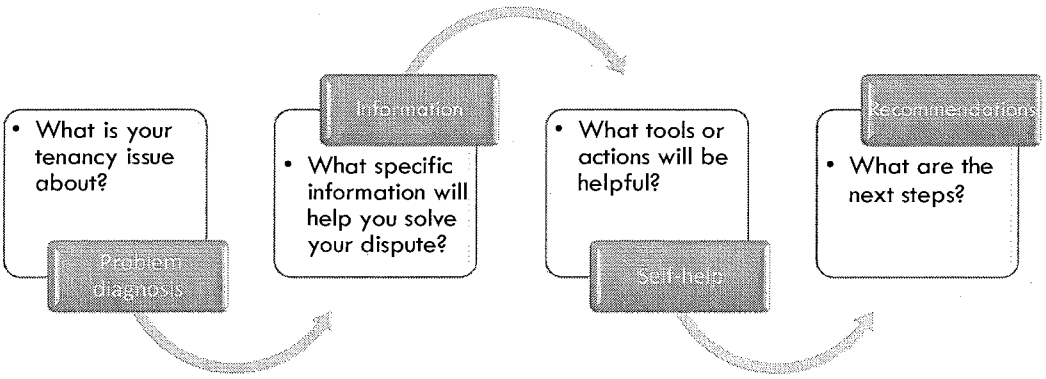
Solution Explorer

What is it and how will it work?

- Solution Explorer: front-end of resolving disputes; a guided pathway
- Targeted pieces of legal info in plain language
- SE will ask simple questions such as:
  - "Are you a tenant or a landlord?" (example answer: tenant), and then,
  - "What is your dispute about?" (example answer: my landlord is increasing my rent")
- Along the way, the user will be given resources such as a template letter or short, bulleted info sheet
  - Available 24/7
  - Mobile-friendly
  - Save 'exploration(s)' and come back later when it works for you
- **Goal:** to resolve issue early without using the dispute resolution system

Residential Tenancy Branch: Business Transformation Client Contact Data

Solution Explorer

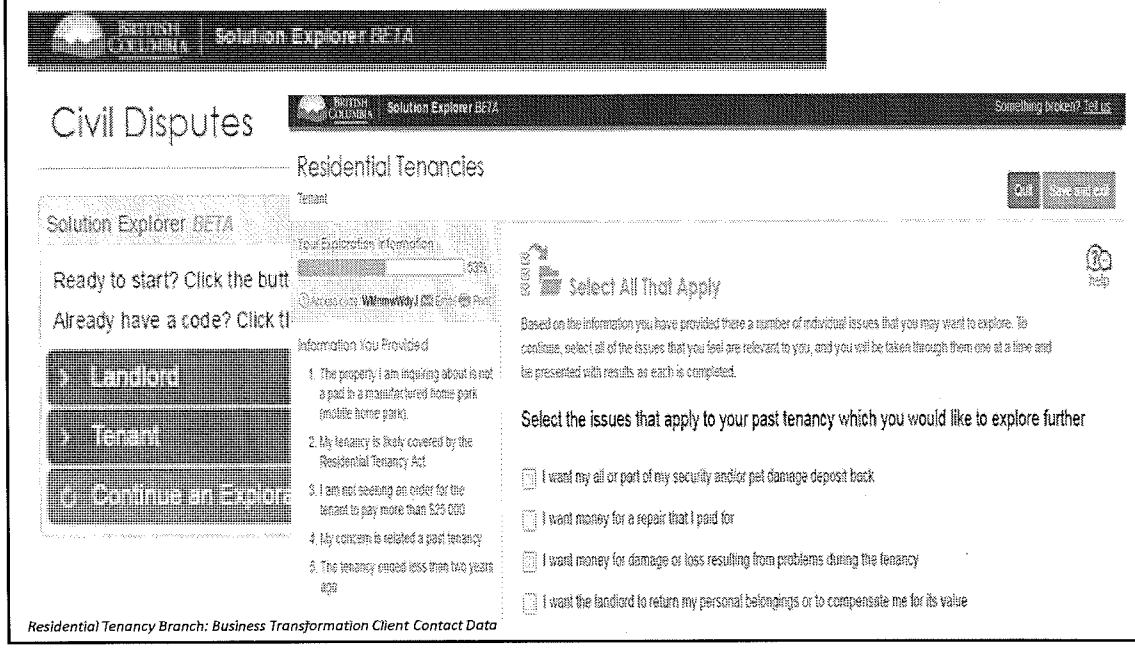


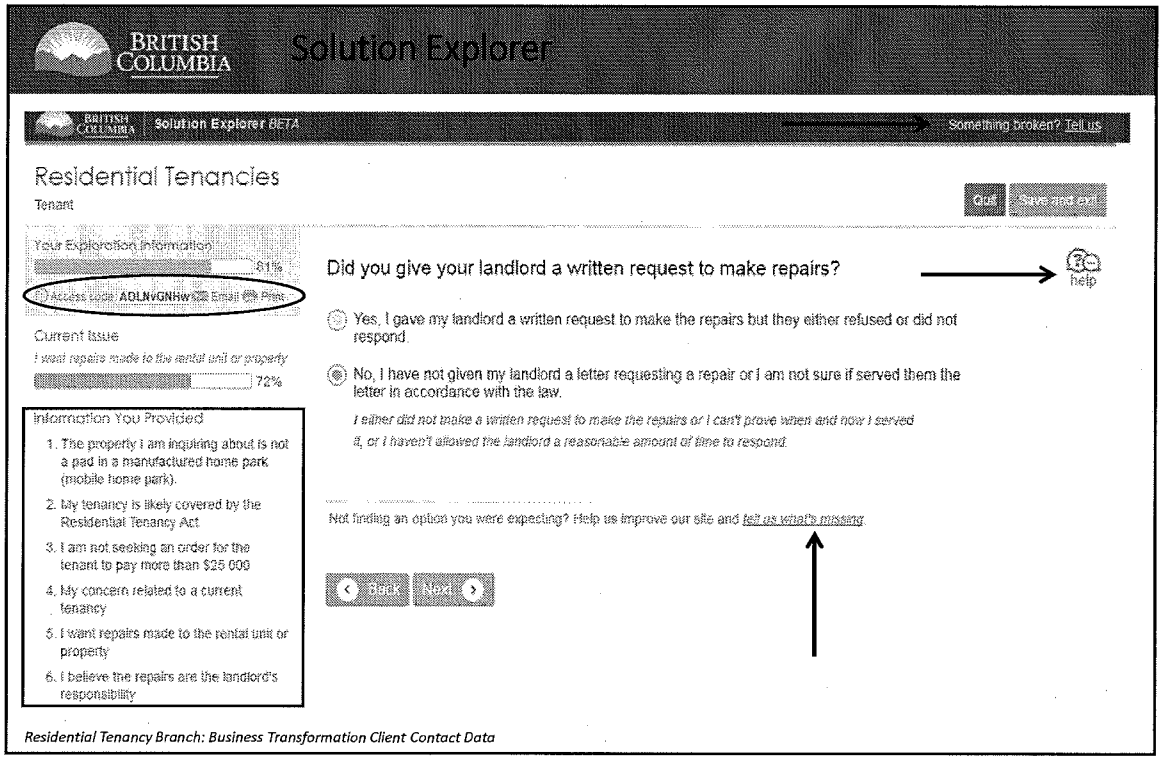
- Bite-sized pieces of legal information tailored to users dispute(s)
- Offer tools and resources in an attempt to self-resolve dispute(s)
- If self-resolution unsuccessful, user will better understand rights, responsibilities and next steps
- User can start an application for dispute resolution at any point
- Avoid perils of disputes left unresolved (physical, emotional, financial stress)
- Devote resources to front end = earlier resolution
- Existing RTB services can be used for more complex issues

What About Those Who Can't Access Technology?

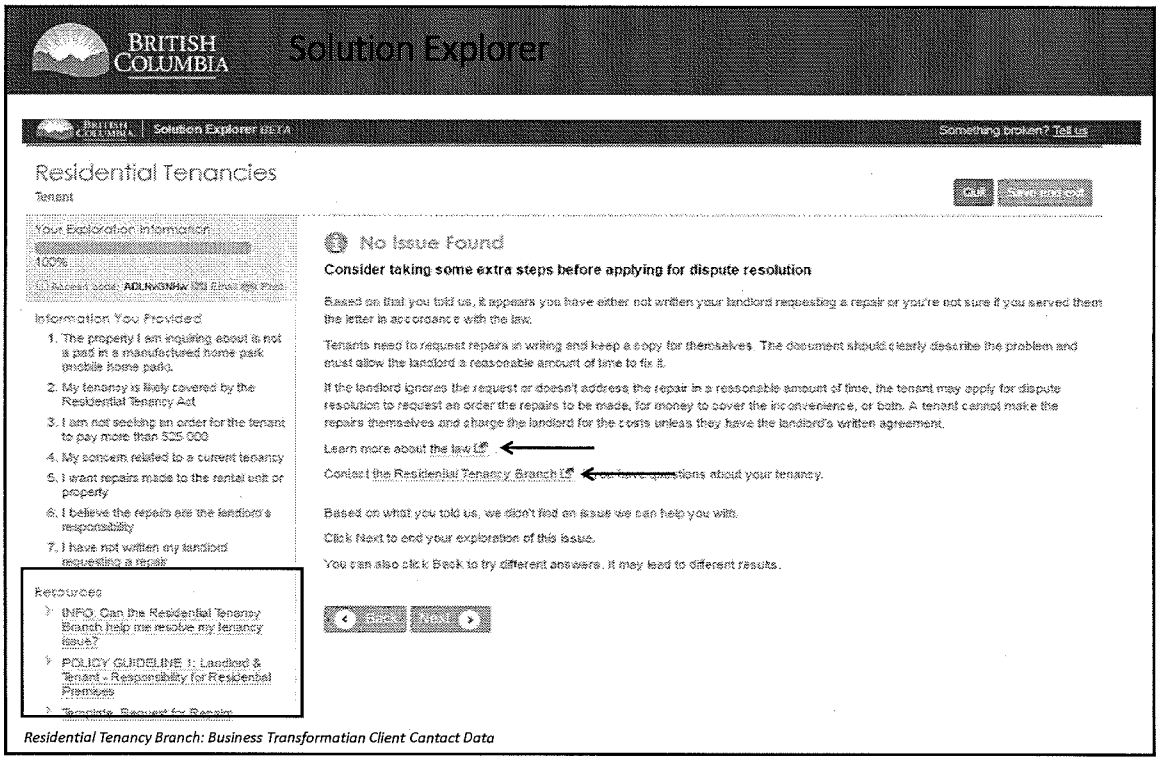
- Technology can break down barriers but also create them
- Solution Explorer is designed with user limitations/barriers taken into account and is written in plain language
- The Solution Explorer is not:
  - Replacing existing services
  - Legal advice
  - Formal Dispute Resolution
- Existing supports and services (telephone, email, in-person) will remain available

Solution Explorer





Residential Tenancy Branch: Business Transformation Client Contact Data



Residential Tenancy Branch: Business Transformation Client Contact Data

Online Application for Dispute Resolution

Targeted Improvements

- Design for touch or mouse
- Ask simple questions, one at a time
- Gather full contact info for all applicants, respondents and agents
- Only show claims that apply to the circumstances of the applicant
- Reduce 'kitchen sink applications'
- Make it easy to go back and switch any information

Residential Tenancy Branch: Business Transformation Client Contact Data

Online Application for Dispute Resolution

The Yes/no question shows or hides the associated issues below. Yes = Show associated issues.

Notices to end tenancy would include a Category (i.e.. Cause or unemployment), User Notice Date, User Notice Method, and User Description

The Yes/no question shows or hides the associated issues below. Yes = Show associated issues.

Monetary issues would include a User Amount field that is totaled up to give the total requested amount

This only appears if a monetary request is selected above. If user answers Yes, MNSD issue is added to application.

Residentiol Tenancy Branch: Business Transformation Client Contoct Data

BRITISH COLUMBIA Calculators

Calculators

There are six web tools to help tenants and landlords determine deadlines and calculations:

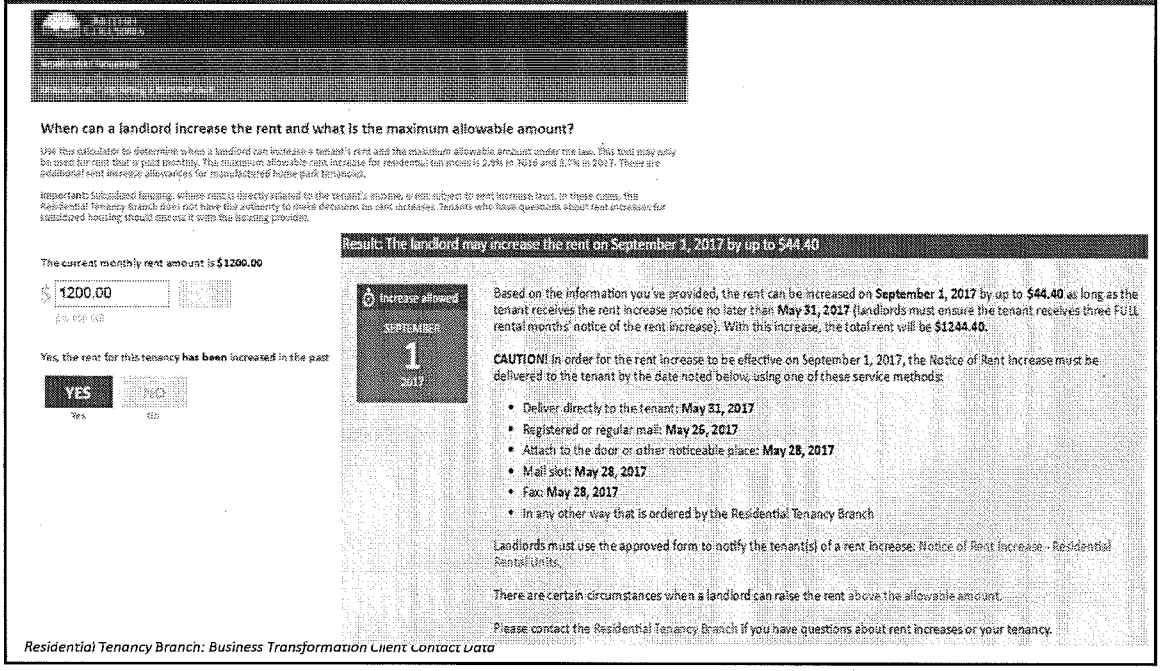
1. Deadline to Dispute a Notice to End Tenancy
2. Deposit Interest Calculator
3. When a tenant should receive their deposit
4. When and how much can the rent be increased
5. When a landlord can file for an Order of Possession
6. When a landlord must return the deposit or apply to keep it

Check them out!

www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators

Residential Tenancy Branch: Business Transformation Client Contact Data

BRITISH COLUMBIA Calculators



When can a landlord increase the rent and what is the maximum allowable amount?

Use this calculator to determine when a landlord can increase a tenant's rent and the maximum allowable amount under the law. This tool may only be used for rent that is paid monthly. The maximum allowable rent increase for residential tenancies is 2.9% in 2016 and 3.7% in 2017. There are additional rent increase allowances for manufactured home park tenancies.

Important: Subsidized housing, where rent is directly related to the tenant's income, is not subject to rent increase limits. In these cases, the Residential Tenancy Branch does not have the authority to make decisions on rent increases. Tenants who have questions about rent increases for subsidized housing should discuss it with the housing provider.

The current monthly rent amount is $1200.00

$ 1200.00

Yes, the rent for this tenancy has been increased in the past

YES NO

Result: The landlord may increase the rent on September 1, 2017 by up to $44.40

Increase allowed SEPTEMBER 1 2017

Based on the information you've provided, the rent can be increased on **September 1, 2017** by up to **$44.40** as long as the tenant receives the rent increase notice no later than **May 31, 2017** (landlords must ensure the tenant receives three FULL rental months' notice of the rent increase). With this increase, the total rent will be **$1244.40.**

CAUTION! In order for the rent increase to be effective on September 1, 2017, the Notice of Rent Increase must be delivered to the tenant by the date noted below, using one of these service methods:

- Deliver directly to the tenant: **May 31, 2017**
- Registered or regular mail: **May 26, 2017**
- Attach to the door or other noticeable place: **May 28, 2017**
- Mail slot: **May 28, 2017**
- Fax: **May 28, 2017**
- In any other way that is ordered by the Residential Tenancy Branch

Landlords must use the approved form to notify the tenant(s) of a rent increase: Notice of Rent Increase - Residential Rental Units.

There are certain circumstances when a landlord can raise the rent above the allowable amount.

Please contact the Residential Tenancy Branch if you have questions about rent increases or your tenancy.

Residential Tenancy Branch: Business Transformation Client Contact Data

BRITISH COLUMBIA

Questions / Comments / Discussion

Alexis Gordon
Alexis.Gordon@gov.bc.ca

Settlement Agreements

Tips and best practices related to settlement agreements in tenancy, co-op, and employment matters. October 2016.

CLAS Community Legal Assistance Society

Why do people want settlements?

- Avoiding the risk and stress of a hearing
- Speedy resolution
- Control over the process and the outcome rather than relying on an arbitrator or tribunal member to impose a decision – ideally with more enduring settlements as a result
- A range of creative and detailed outcomes not available as traditional legal remedies
- Privacy and confidentiality
- Preservation of ongoing relationships

Preparation to Reach a Settlement

- Identify the problem
- Clarify the client's goals
- Understand the needs and interests of the other side

When Settlements Happen

Negotiated between parties prior to a hearing.

Parties draft settlement documents.

Mediated by an arbitrator, such as at a Residential Tenancy Branch hearing.

Arbitrator records terms of settlement as a decision.

Settlement Privilege

- Communications made with a view to reaching a settlement are generally not admitted into evidence except with the consent of the other party to the communication. Also prevents providing the documents to strangers, other parties.
- Writing “without prejudice” neither necessary, nor sufficient, to have a document be protected by settlement privilege, but still a good idea in appropriate cases
- The conditions for such a privilege to attach:
  a. A litigious dispute must be in existence or within contemplation;
  b. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
  c. The purpose of the communication must be to attempt to effect a settlement.

  (The Law of Evidence in Canada, Sopinka, et. al.)

When do you have a settlement?

- A settlement is a contract. A contract is an agreement, not the piece of paper it may be written on.
- Once you have an agreement on key terms, the fact that you haven't settled on the wording of, say, a confidentiality clause, doesn't mean that one side can get out of the deal.
- Key question: Has a settlement been reached (on all essential terms) or merely an agreement to agree (with key terms still to be negotiated?)
- Practice point: Clients can have "buyers' remorse". This is why it is a good idea to get written instructions from a client to make a settlement offer. Discuss with a client that once made, a settlement offer can't be "taken back". Take your own notes to file about client's instructions.
- If you provide a counter-offer on a key term, you are rejecting the previous offer

Written Settlement Agreements

- Components of a settlement agreement
  - Title and Parties
  - Background or Whereas Clauses
  - Consideration
  - Release
  - Jurat
- Optional components:
  - Payment Terms
  - Entire agreement clause
  - Severability
  - Considerations for multi-party agreements
  - Confidentiality clauses
  - Welfare, tax, EI

COMPROMISE AND RELEASE AGREEMENT
Steven Jones v. Local School District
Office of Administrative Hearings Case No. 08-XXXX

MEMORANDUM OF SETTLEMENT

Between:

B. Oss

(the "Employer")

And:

E. M. Ployee

(the "Employee")

(collectively, the "Parties")

Title and Parties

Whereas:

A. The Union filed grievance form no. _____, dated _____, on behalf of the Employee (the "Grievance");

B. The Employee has sought to be reinstated in the Grievance; and

C. This agreement is made between the Parties without precedence and without prejudice to any other current or future matter between the Parties.

Background

X and Y purchased a horse on January 1, 2012, for $50,000.00. X and Y each paid $25,000.00 of the purchase price and considered themselves joint owners of the horse. Differences arose between X and Y concerning the horse. X and Y have agreed to resolve their differences on the terms set forth in this Agreement.

Whereas Clauses or the Background to the Agreement

Therefore, the Parties have mutually agreed to resolve all outstanding complaints, grievances, actions and other claims related to the employment of the Employee with the Employer as follows:

In consideration of the covenants, agreements and representations hereinafter set forth, the Parties, and each of them, agree as follows:

Consideration: Payment, Mutual Promises, etc.

8. The Parties hereby release one another from any liability with respect to any claims (grievances, actions, disputes, complaints, etc.) which have arisen or may arise regarding the Employee's employment, including any claims or potential claims arising under the *Employment Standards Act*, the *Human Rights Code*, other statutes, or at common law;

15. Claims Released by Student and Parents. Upon receipt of the Reimbursement Payment, and the Attorneys' Fees Reimbursement, Student and his Parents, and each of them, on behalf of themselves, and their respective legal representatives, predecessors, successors, heirs, executors, assigns, agents, and attorneys, and each of them, hereby fully and forever release and discharge the District, and its legal representatives, predecessors, successors, heirs, executors, assigns, officers, agents, employees, directors, shareholders, trustees, insurance companies, joint powers authorities and self-insurance pools, and attorneys, and each of them, from any and all claims, demands, covenants, actions, suits, causes of action, obligations, controversies, debts, costs, expenses, attorneys' fees, accounts, damages, losses and liabilities, arising under the IDEA and concomitant provisions of STATE law enacted in compliance therewith, including, but not limited to, any matter or claim which was, or could have been, asserted in the Due Process Proceeding, by reason of any matter, cause or thing whatsoever occurred, done, omitted, or suffered to be done on or before the last day of the Settled Period, which Student and his Parents, or any of them, now owns or holds, or may at any time hereafter own or hold.

Release: Specific to claim or general release for all matters?

This agreement may be signed in counterparts and was executed within the province of British Columbia by all parties.

_____ Date: _____

Employer, per:

_____ Date: _____

Employee

Jurat: Don’t have alone on page

4. The Employer will pay the Employee $10,000, less only minimum statutory deductions (20%), in exchange for the Employee's relinquishment of their established right to reinstatement with the Employer. This payment will be made in the form of a cheque mailed to the Advocate within fifteen working days of all of the Parties signing this agreement (the "Settlement");

1. Settlement Payment:

a. Defendant shall pay Plaintiff a total of $ `Final Amount`.

b. At the time of the Parties' signing of this Agreement, Defendant shall have sent by hand delivery a bank check in the amount of $ `Final Amount` (the "Settlement Payment") to the office of Plaintiff's attorneys, `Plaintiff's Attorney`, by `Delivery Date`.

Payment Terms: method of payment, date for obligation, amount, deductions, characterization of money.

Entire Agreement Clause

This Agreement sets forth the complete and final agreement of the parties. All prior discussions are merged into this Agreement. There are no promises or representations other than those set forth in this Agreement.

This Agreement, along with any exhibits, appendices, addenda, schedules, and amendments hereto, encompasses the entire agreement of the parties, and supersedes all previous understandings and agreements between the parties, whether oral or written. The parties hereby acknowledge and represent, by affixing their hands and seals hereto, that said parties have not relied on any representation, assertion, guarantee, warranty, collateral contract or other assurance, except those set out in this Agreement, made by or on behalf of any other party or any other person or entity whatsoever, prior to the execution of this Agreement. The parties hereby waive all rights and remedies, at law or in equity, arising or which may arise as the result of a party's reliance on such representation, assertion, guarantee, warranty, collateral contract or other assurance, provided that nothing herein contained shall be construed as a restriction or limitation of said party's right to remedies associated with the gross negligence, willful misconduct or fraud of any person or party taking place prior to, or contemporaneously with, the execution of this Agreement.

34. Severability of Terms. If any provision of this Agreement is held to be invalid or unenforceable by a court of competent jurisdiction, that determination shall not invalidate or render unenforceable any other provision of this Agreement.

Severability

Negligence Act, RSBC 1996, c 333

Versions | Noteup | Regulations | Amendments

Access version in force:

1. since Apr 21, 1997 (current)

Liability and right of contribution

4 (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault

(a) they are jointly and severally liable to the person suffering the damage or loss, and

(b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

Negligence of spouse in cause of action that arose before April 17, 1985

5 (1) In an action founded on fault or negligence and brought for loss or damage resulting from bodily injury to or the death of a married person, if one of the persons found to be at fault or negligent is the spouse of the married person, no damages, contribution or indemnity are recoverable for the

Multi-party settlements can raise complicated issues if you are settling with only some opposing parties. Talk to your supervising lawyer. (*BC Ferries*)

Court sides with Globe in dispute over settlement with Jan Wong

JEFF GRAY - LAW REPORTER
The Globe and Mail
Published Monday, Nov. 03, 2014 7:18PM EST
Last updated Monday, Nov. 03, 2014 7:21PM EST

Comments

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AA

The Ontario Divisional Court has sided with The Globe and Mail in its dispute with Jan Wong, a former reporter ordered to pay back a $209,912 settlement with the newspaper after she revealed some of its confidential terms in a tell-all book.

In a decision released on Monday, the court upheld a July, 2013, decision by a labour arbitrator to order Ms. Wong to pay back the settlement, even

Confidentiality Clauses Are Important. Consider the range of options.

Confidentiality: Simple v. Aggressive

These Minutes of Settlement and the terms and conditions thereof are confidential between the parties.

IT IS AGREED AND UNDERSTOOD that _____ shall not disclose, directly or indirectly

a) any of the terms of this Release;

b) any negotiations, process or background facts/allegations that led to this Release;

c) any other information outlined in this Release;

d) any documents or information provided to him as part of the Action, or that relate in any way to any claims made in the Action, regardless of how such documents were disclosed or obtained; or

e) any information concerning the Action or settlement of the Action (including, but not limited to any information that a settlement of the Action has occurred).

to any person or entity, without the express written prior consent of _____ except for such disclosure as may be ordered by a court or regulatory tribunal with authority to make such an order after full and proper prior notice of any such application for disclosure to court or a regulatory tribunal has been provided to _____ with a reasonable opportunity to respond.

Employment and Assistance Regulation, BC Reg 263/2002

"unearned income" means any income that is not earned income, and includes, without limitation, money or value received from any of the following:

(a) money, annuities, stocks, bonds, shares, and interest bearing accounts or properties;

(b) cooperative associations as defined in the *Real Estate Development Marketing Act*;

(c) war disability pensions, military pensions and war veterans' allowances;

(d) insurance benefits, except insurance paid as compensation for a destroyed asset;

(e) superannuation benefits;

(f) any type or class of Canada Pension Plan benefits;

(g) employment insurance;

(h) union or lodge benefits;

(s) awards of compensation under the *Criminal Injury Compensation Act* or awards of benefits under the *Crime Victim Assistance Act*, other than an award paid for repair or replacement of damaged or destroyed property;

(t) any other financial awards or compensation;

(u) Federal Old Age Security and Guaranteed Income Supplement payments;

(v) financial contributions made by a sponsor pursuant to an undertaking given for the purposes of the *Immigration and Refugee Protection Act* (Canada) or the *Immigration Act* (Canada);

(n) rental of land, self-contained suites or other property except the place of residence of an applicant or recipient;

(o) interest earned on a mortgage or agreement for sale;

Welfare concepts: earned v. unearned v. exempt income.

Employment and Assistance for Persons with Disabilities Regulation, BC Reg 265/2002

(1) The following unearned income is exempt:

(a) the portion of interest from a mortgage on, or agreement for sale of, the family unit's previous place of residence if the interest is required for the amount owing on the purchase or rental of the family unit's current place of residence;

(b) $50 of each monthly Federal Department of Veterans Affairs benefits paid to any person in the family unit;

(c) 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;

(d) a payment made from a trust to or on behalf of a person referred to in section 12 (1) *[assets held in trust for person with disabilities]* of this regulation if the payment is applied exclusively to or used exclusively for

(i) disability-related costs,

(ii) the acquisition of a family unit's place of residence,

(iii) a registered education savings plan, or

(iv) a registered disability savings plan;

(d.1) subject to subsection (2), a structured settlement annuity payment made to a person referred to in section 12 (1) of this regulation if the payment is applied exclusively to or used exclusively for an item referred to in subparagraph (i), (ii), (iii) or (iv) of paragraph (d) of this subsection;

Welfare: use the word "award" in the settlement agreement. Track the language of Schedule B to the Regulation, s. 7(1)(c)

46. (1) Return of benefits by employer or other person – If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period, and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

(2) Return of benefits by employer – If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.

Employment Insurance Act, Income Tax Act create joint liability with employers and employees.

"The Employee covenants and agrees to indemnify and save harmless the Employer from and against all claims, charges, taxes, penalties, or demands which may be made by the Canada Revenue Agency under the Income Tax Act (Canada) for any income tax payable by the Employee in excess of income tax previously withheld by the Employer; or related to any employment insurance benefits received by the Employee that are required to be repaid pursuant to the terms of the Employment Insurance Act because of payment of the settlement funds."

Hence, Indemnity Clauses.

Payment	EI Deducted?	Taxed?
Medical Expenses	No	No
Moving expenses	No	
Legal fees	No	No
Education trust (paid directly to school)	No	Yes (but credits may offset)
MSP premium reimbursement	Yes	Yes
Retiring allowance (pre-1996 employment $2000/year in addition to employment, +$1500 pre-1989)	Yes	No
Injury to Dignity	No	No

EI: Obligation to repay depends on characterization of payments. Long list on website.

Resources

Online services

Forms and publications

A to Z index

Enquiries

Withholding rates for lump-sum payments

Combine all lump-sum payments that you have paid or expect to pay in the calendar year when determining the rate to use.

Use the following lump-sum withholding rates to deduct income tax:

- 10% (5% for Quebec) on amounts up to and including $5,000;
- 20% (10% for Quebec) on amounts over $5,000 up to and including $15,000; and
- 30% (15% for Quebec) on amounts over $15,000.

Note

The above rates are a blend of federal and provincial. The Quebec rates shown are only federal. For more information on Quebec's rates, see Guide TP-1015.G-V, Guide for Employers: Source Deductions and Contributions.

Tax: Complicated. Beyond Scope of this presentation. Client will get ILA or sort out at end of tax year.

RTB Telephone Settlements

- Discuss possibility of settlement discussions mediated by arbitrator with client prior to hearing
- Take careful notes in case the arbitrator omits something or there is a dispute about the agreement
- Consider whether terms of settlement have sufficient specificity (who needs to do what by when how and where?)

Simple	Superfluous
If	In the event that
Although	Despite the fact that
Because	Owing to the fact that

- rest, residue, and remainder
- remise, release, sell, and quit claim
- due and payable
- indemnify and hold harmless
- sell, convey, assign, transfer, and deliver

Plain language and redundantly redundant redundancy

Either party may terminate this contract on thirty day's written notice to the other party.

This contract may be terminated at any time by either party on thirty day's written notice to the other party.

Active voice v. passive voice

Checklist (in addition to previous)

- ❑ Provide for execution of the settlement agreement in counterparts (not counterparties)
- ❑ Mutual release or just one side (such as the employee) signing?
- ❑ Reference Letter in employment or tenancy situation?
- ❑ Dates by which the obligations must be performed?
- ❑ Page numbers?
- ❑ Jurat not only thing on page?
- ❑ Number paragraphs
- ❑ Use headings to the extent they increase clarity
- ❑ How will the tribunal be informed that proceedings are withdrawn? (e.g. by email to RTB?)
- ❑ All parties listed correctly with full legal name?
- ❑ Send letter to client advising to report income to Ministry?

[17] In deciding whether it furthers the purposes of the Code to allow a complaint to proceed in the face of a settlement agreement, the Tribunal will consider the terms of the agreement and all of the circumstances in which it was executed. In so doing the Tribunal will consider the following issues:

1. Did the employee understand the significance of the release?

2. What was included either explicitly or implicitly in the language of the release or agreement itself?

3. Was there consideration for the release?

4. Was the complainant in such serious financial need that there was no choice but to accept the package offered?

5. Was there an inequality of bargaining power and a substantially unfair settlement?

6. Is there any evidence of coercion, oppression, abuse of power or authority, or compulsion in order to obtain the release?

7. Was the complainant provided the opportunity to seek independent legal advice?

8. Did the complainant understand his or her rights under the Code?

9. Are there any other considerations particular to the circumstances of the case which may include lack of capacity, timing of the complaint, mutual mistake, forgery, or fraud.

In drafting employment law releases that encompass statutory claims it is therefore helpful to address

What if there is a release and the client wants to bring a claim? These are the questions that the Human Rights Tribunal Asks.

Thank you

CLAS Community Legal Assistance Society

Community Legal Assistance Society

Settlement Agreements: Practice Issues

Prepared by Joshua Prowse of the Community Legal Assistance Society, 2016

Contents

A. Tips for Writing

There is no one correct style for drafting legal documents. It is crucial, however, that these documents be clear and easily understood by the parties whose rights and responsibilities they define. The following are some basic guidelines for clear drafting:

1. organize the content of each document in a logical fashion;
2. use simple, declarative sentences;
3. use the active, not passive, voice;
4. separate different issues into different paragraphs;
5. use subparagraphs rather than lengthy, run-on sentences to organize related issues;
6. define recurring terms initially, and use capital letters for defined terms and proper names only;
7. ensure consistency of substance, terminology, and drafting style both within and among documents; and
8. scrutinize the finished product carefully to ensure that it correctly states the client's situation and accurately reflects his or her instructions (this is particularly important when drafting from precedents).

See more in the BC Administrative Law Practice Manual.

B. Settlement Privilege

Communications made with a view to reaching a settlement are protected by a "strong and broad settlement privilege" that encompasses all documents created for the purpose of negotiating a settlement, whether or not a settlement is reached. Such communications are generally not admitted into evidence except with the consent of the other party to the communication. The exclusionary principle is a rule of evidence.

The policy underlying the rule is to encourage the settlement of disputes. The conditions for such a privilege to attach were succinctly stated by Sopinka, et. al. *The Law of Evidence in Canada, 2nd ed.,* at 810, as follows:

> *(a) a litigious dispute must be in existence or within contemplation;*
>
> *(b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and*
>
> *(c) the purpose of the communication must be to attempt to effect a settlement.*

The leading case in British Columbia on without prejudice communications is *Middelkamp v. Fraser Valley Real Estate Board (1992),* 71 B.C.L.R. (2d) 276 (CA). Middelkamp was an appeal from a ruling of the trial judge granting an order requiring the production of documents relating to a settlement. A five judge panel held that the settlement documents were privileged. McEachern C.J.B.C. clarified the law on the matter, stating (at paras. 18-19):

> *... I find myself in agreement with the House of Lords that the public interest in the settlement of disputes generally requires 'without prejudice' documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a 'blanket', prima facie, common law, or 'class' privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.*
>
> *In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.*

Thus, writing "without prejudice" on correspondence is neither necessary, nor sufficient, to have a document be protected by settlement privilege, but it still a good idea in appropriate cases. It is also important to note that settlement privilege affects not only one's ability to introduce a document in court, but also whether one can provide the document to third parties involved in the litigation or to strangers. Read more in Gavin Marshall, et. al., Breaking Up Is Hard To Do: Selected Settlement Issues, Continuing Legal Education, April 2004.[1]

C. What is a settlement and when do you have one?

Settlement agreements are generally formed in stages. At some point an issue may arise as to whether you actually have a settlement or not. Have you reached a settlement agreement (on all essential terms) or merely an agreement to agree (with key terms still to be negotiated)? Practically, it is a good idea to make this clear when you provide a settlement offer by specifying:

- The settlement offer in writing;
- Adding a sunset clause to the settlement offer so that it expires at a pre-defined time (this is also good for adding pressure to the negotiations); and
- How to accept the settlement offer (in writing? By mailing a cheque?).

To the extent that there is ambiguity about this process, we can look to the caselaw on this subject. There is much judicial consideration of this question. In *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.), Robins J.A. reviewed the applicable distinctions where written documents are required to formalize a contract, at 103:

> *As a matter of normal business practice, parties planning to make a formal written document the expression of their agreement, necessarily discuss and negotiate the proposed terms of the agreement before they enter into it. They frequently agree upon all*

---

[1] http://online.cle.bc.ca//CourseMaterial/pdfs/2004/559_7_1.pdf

> *the terms to be incorporated into the intended written document before it is prepared. Their agreement may be expressed orally or by memorandum, by exchanging correspondence or other informal writings. The parties may 'contract to make a contract,' that is to say, they may bind themselves to execute at a future date a formal written agreement containing specific terms and conditions. When they agree on all the essential provisions to be incorporated in a formal document with the intention that their agreement shall thereupon become binding, they will have fulfilled all the requisites for the formation of a contract. The fact that a formal written document to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract.*

Thus, it is important to keep in mind that a settlement agreement is a form of contract and that contracts are agreements, not the piece of paper that the agreement may be recorded on. Once one side offers to settle and the key terms of the settlement are accepted by the other side, an agreement has been reached – even if it has yet to be written down. This leads to the practice point that because clients can have "buyers' remorse" and try to resile from settlement offers, it is important to impress upon clients that settlement offers can't be "taken back" once accepted. It is a good practice to get written instructions from a client to make a settlement offer (such as via email) or at least to take your own notes to file about a client's instructions.

A question can arise "what if we've agreed that we want to settle and have agreed upon the key terms like the amount of money that will be paid, but now we're getting hung up on some more minor term like a release or confidentiality clause and we just can't agree?" A full discussion of this issue is beyond the scope of this paper, but I provide the following consideration of this issue from the BC Court of Appeal in *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62 (C.A.) for guidance:

> *In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.*
>
> *The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted, then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in the circumstances.*

For more information, see "Settlement and the Effective Use of Releases" by H. Scott MacDonald and Georg D. Reuter, both of Richards Buell Sutton LLP, for the Continuing Legal Education Society of British Columbia, May 2011.[2]

D. Confidentiality Clauses

Consider that there are a range of confidentiality clauses for settlements. If the other side is insisting on a confidentiality clause, you may be able to reach a settlement with a less onerous confidentiality clause. For example, instead of a clause that prohibits your client from disclosing the existence of the settlement agreement altogether, you may agree on one that simply prevents disclosing the amount of any payments, but they can tell others that the matter was settled.

Less aggressive confidentiality clauses:

> *These Minutes of Settlement and the terms and conditions thereof are confidential between the parties. For greater certainty, these Minutes of Settlement are not to be filed with the Court.*
>
> * * *
>
> *IT IS FURTHER AGREED that the terms of the settlement between the parties, including, but not limited to, the amounts or terms of any payments, are confidential and the Releasors will not disclose those facts to anyone, save and except to professional advisors as reasonably necessary, or where required by law.*
>
> * * *
>
> *The Plaintiff agrees that the terms of settlement of this matter shall be kept confidential by him and his confidential advisors and shall not be disclosed to any third party, other than as may be required by law, without the written consent of the Defendant.*
>
> * * *
>
> *Unless compelled by law, the Employee and the Employer will not discuss any of the terms of this Mutual Release with any third party, other than confirming that the Action has settled. This restriction on disclosure does not apply to the Employee or Employer's legal and financial advisors or the Employee's immediate family. The Employer and Employee further agree that they will direct such advisors and family to whom such disclosure is made to keep such terms confidential.*

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[2] http://online.cle.bc.ca//CourseMaterial/pdfs/2011/506_1_1.pdf

More aggressive confidentiality clauses:

CONFIDENTIALITY: The Releasors expressly understand, agree and acknowledge that confidentiality over any money paid in this settlement, including whether there has been any settlement and whether there has been any money paid, is an essential term of settlement without which the Releasees would not have settled. As such the Releasors agree that the terms of settlement, the negotiations leading up to the settlement and the terms of the settlement between the parties, including, but not limited to, whether any funds have been paid in settlement and the terms of any payments and the terms of this Release, are strictly confidential. The Releasors will not disclose those facts to anyone, save and except where required by law or as required to legal or financial professional advisors, provided that such disclosure shall be on the basis of a written undertaking by the recipient of the information to abide by this confidentiality term. The original of each such signed undertaking shall be delivered by the Releasor to the Releasees. The Releasor accepts liability for any breach of this confidentiality provision by the Releasor or any such professional advisors including the Releasor's legal counsel in this settlement.

* * *

IT IS AGREED AND UNDERSTOOD that _____ shall not disclose, directly or indirectly

a) any of the terms of this Release;

b) any negotiations, process or background facts/allegations that led to this Release;

c) any other information outlined in this Release;

d) any documents or information provided to him as part of the Action, or that relate in any way to any claims made in the Action, regardless of how such documents were disclosed or obtained; or

e) any information concerning the Action or settlement of the Action (including, but not limited to any information that a settlement of the Action has occurred).

to any person or entity, without the express written prior consent of _____ except for such disclosure as may be ordered by a court or regulatory tribunal with authority to make such an order after full and proper prior notice of any such application for disclosure to court or a regulatory tribunal has been provided to _____ with a reasonable opportunity to respond.

Note that if a settlement clause merely states that a party may not disclose the "amount" of a settlement, that may not prevent them from saying that there was a settlement, there was money paid, and they were very pleased with the amount, but simply cannot say what it was. For more information, see Daniel W. Burnett, "Confidentiality Clauses in Settlements", Continuing Legal Education Society of British Columbia Paper from June 2011.

E. Entire Agreement Clauses

Entire agreement clauses, also known as merger clauses or integration clauses, are common contractual provisions which seek to prevent a party from later relying on an oral or other representation that was not contained in the settlement agreement. Such clauses can promote certainty about what the parties are agreeing to, and in so doing, ensure that a settlement is final and that the parties understand what they are getting and offering. Here is an example of such a clause:

> *This Agreement sets forth the complete and final agreement of the parties. All prior discussions are merged into this Agreement. There are no promises or representations other than those set forth in this Agreement.*

F. Indemnity Clauses

These are common clauses in agreements where one party is paying money to the other and future tax or employment insurance repayment obligations may arise. Most commonly, these agreements are inserted into settlement agreements between employees and employers. Here is an example of one:

> *The Employee covenants and agrees to indemnify and save harmless the Employer from and against all claims, charges, taxes, penalties, or demands which may be made by the Canada Revenue Agency under the Income Tax Act (Canada) for any income tax payable by the Employee in excess of income tax previously withheld by the Employer; or related to any employment insurance benefits received by the Employee that are required to be repaid pursuant to the terms of the Employment Insurance Act because of payment of the settlement funds.*

G. Welfare (Income Assistance)

If a client is on income assistance, whether regular benefits, or benefits for persons with disabilities, it is important to consider the way that any settlement may interact with their welfare benefits. The *Employment and Assistance Act* and the *Employment and Assistance for Persons with Disabilities Act* create the concepts "earned" and "unearned" income, as well as "exempt" income:

- exempt income: the ministry does not deduct this money from a welfare payment, but it still must be reported to the ministry
- earned income: the ministry could take all or part of this money off a welfare payment (depending on the benefits)
- unearned income: the ministry usually takes each dollar of this money off a welfare payment (but not always)

How money received pursuant to a settlement payment is characterized depends on the facts – why is the settlement payment being made? If it is money that should have been paid as wages,

it may be characterized as earned income. Money that is crime victim's assistance compensation, as well as other awards, is exempt. For example, land claim settlements, eviction compensation, insurance settlements, and other lump sum payments are all exempt up to the maximum amount of assets the household can have.

If income is not exempt, and a client's unearned income is more than they would get in benefits, they will not get a cheque for a month. However, the rest of the money will count as an asset. The ministry will not reduce the benefits for the following month — unless the money received put the client above their asset limit.

This is the text of the *Employment and Assistance for Persons with Disabilities Regulation*, BC Reg 265/2002 about what assets are exempt. Specifically, Schedule B, s. 7(1)(c) of the Regulation reads:

> *(1) The following unearned income is exempt:*
>
> *...*
>
> *(c) 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;*

The *Employment and Assistance Regulation*, BC Reg 263/2002 is identical, except to the extent that the asset limits section is different and the asset limits regime differs. It is a good idea to track the language of this section in any settlement agreement to make the process of claiming the exemption as straightforward for the client as possible.

For more information, see Alison Ward, "Your Welfare Rights: A Guide to BC Employment and Assistance".[3]

H. Employment Insurance

One issue that frequently arises on settlement is the repayment of employment insurance benefits. Concerning the obligation for repayment, the Employment Insurance Act creates a statutory regime of joint liability:

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[3] http://www.legalaid.bc.ca/publications/pub.php?pub=167

Liability for overpayments

43 A claimant is liable to repay an amount paid by the Commission to the claimant as benefits

(a) for any period for which the claimant is disqualified; or

(b) to which the claimant is not entitled.

Liability to return overpayment

44 A person who has received or obtained a benefit payment to which the person is disentitled, or a benefit payment in excess of the amount to which the person is entitled, shall without delay return the amount, the excess amount or the special warrant for payment of the amount, as the case may be.

Return of benefits by claimant

45 If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

Return of benefits by employer or other person

46 (1) If under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to a claimant for a period and has reason to believe that benefits have been paid to the claimant for that period, the employer or other person shall ascertain whether an amount would be repayable under section 45 if the earnings were paid to the claimant and if so shall deduct the amount from the earnings payable to the claimant and remit it to the Receiver General as repayment of an overpayment of benefits.

Return of benefits by employer

(2) If a claimant receives benefits for a period and under a labour arbitration award or court judgment, or for any other reason, the liability of an employer to pay the claimant earnings, including damages for wrongful dismissal, for the same period is or was reduced by the amount of the benefits or by a portion of them, the employer shall remit the amount or portion to the Receiver General as repayment of an overpayment of benefits.[4]

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[4] http://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html?resultIndex=1

It appears therefore, that under the Act the employer has an obligation to withhold EI repayments from the settlement proceeds if it "has reason to believe" that benefits have been paid. The former employee is under a positive obligation to make repayments to EI authorities if any benefits have in fact been received for a period for which the employee is subsequently compensated by a settlement or award of damages for wrongful dismissal. Read more in Gavin Marshall, et. al., Breaking Up Is Hard To Do: Selected Settlement Issues, Continuing Legal Education, April 2004.[5]

It is because of this that many agreements include indemnity clauses which ensure that the employee is responsible for paying any amounts that they owe, even if the government first recovers them from the employer. This is a typical indemnification clause:

> *The Employee covenants and agrees to indemnify and save harmless the Employer from and against all claims, charges, taxes, penalties, or demands which may be made by the Canada Revenue Agency under the Income Tax Act (Canada) for any income tax payable by the Employee in excess of income tax previously withheld by the Employer; or related to any employment insurance benefits received by the Employee that are required to be repaid pursuant to the terms of the Employment Insurance Act because of payment of the settlement funds.*

The obligation to repay EI occurs, essentially, where an employee receives earnings in respect of their employment. There is a whole method of determining how such payments should be allocated under the EI Act, which is important because it can greatly affect how much any overpayment is and for how long the employee is entitled to receive EI. This is a shorthand table that this author has created for himself about whether EI should be deducted, but the reader is cautioned that this is a rough guide only and care should be taken to examine the specific nuances of any case and any characterization of funds:

Payment	EI Deducted?	Taxed?
Medical Expenses	No	No
Moving expenses	No	
Legal fees	No	No
Education trust (paid directly to school)	No	Yes (but credits may offset)
MSP premium reimbursement	Yes	Yes
Retiring allowance (pre-1996 employment $2000/year in addition to employment, +$1500 pre-1989)	Yes	No
Injury to Dignity	No	No

[5] http://online.cle.bc.ca//CourseMaterial/pdfs/2004/559_7_1.pdf

I. Tax Withholding

How tax should be deducted from any settlement monies paid depends on what the money is for. If money is being sent as a lump sum payment, generally the Canada Revenue Agency withholding rates for lump-sum payments will be used to make deductions from the payment. The payer should combine all lump-sum payments that they expect to pay in the calendar year when determining the rate to use for CRA withholding. The rate is 10% on amounts up to $5000, 20% on amounts over $5,000 up to and including $15,000; and 30% on amounts over $15,000. The main practice point is to advise the client to expect some such deductions and then tell them that the actual amount they owe to the government will be finally determined when they file their taxes and report this income.

J. Bringing complaints despite a settlement agreement?

In BC, the Human Rights Tribunal in *Gareau v. Kersey and others*, 2003 BCHRT 87[6], considered the dismissal of a human rights complaint which was filed after the complainant had entered into a settlement agreement and signed a release of liability relating to the termination of her employment. This provides an indication of the factors that the tribunal considered in that case:

> [17] In deciding whether it furthers the purposes of the *Code* to allow a complaint to proceed in the face of a settlement agreement, the Tribunal will consider the terms of the agreement and all of the circumstances in which it was executed. In so doing the Tribunal will consider the following issues:
>
> 1. Did the employee understand the significance of the release?
> 2. What was included either explicitly or implicitly in the language of the release or agreement itself?
> 3. Was there consideration for the release?
> 4. Was the complainant in such serious financial need that there was no choice but to accept the package offered?
> 5. Was there an inequality of bargaining power and a substantially unfair settlement?
> 6. Is there any evidence of coercion, oppression, abuse of power or authority, or compulsion in order to obtain the release?
> 7. Was the complainant provided the opportunity to seek independent legal advice?
> 8. Did the complainant understand his or her rights under the *Code*?
> 9. Are there any other considerations particular to the circumstances of the case which may include lack of capacity, timing of the complaint, mutual mistake, forgery, or fraud.
>
> [18] In all of the circumstances of this case, I am satisfied that it would not further the

---

[6] http://www.bchrt.gov.bc.ca/law-library/decisions/2003/pdf/gareau_v_kersey_and_others_2003_bchrt_87.pdf

For more information, see "Settlement and the Effective Use of Releases" by H. Scott MacDonald and Georg D. Reuter, both of Richards Buell Sutton LLP, for the Continuing Legal Education Society of British Columbia, May 2011.[7]

K. Employment/Tenancy Settlement Agreement Checklist

Some things to consider:

- ✓ Did the employee receive EI? Will the employee need to repay?
- ✓ Provide for execution of the settlement agreement in counterparts
- ✓ Mutual release or just one side (such as the employee) signing?
- ✓ Reference letter in employment or tenancy situation?
- ✓ Dates by which the obligations must be performed?
- ✓ Page numbers?
- ✓ Jurat not only thing on page?
- ✓ Number paragraphs
- ✓ Use headings to the extent they increase clarity
- ✓ How will the tribunal be informed that hearing will not take place?
- ✓ All parties listed correctly with full legal name?
- ✓ Send letter to client advising to report income to Ministry if on welfare?
- ✓ Is the employee being paid out for unpaid vacation? Is there an entitlement to payout of sick leave?
- ✓ Are there final dates for the performance of all obligations?
- ✓ Does the client know about withholding of taxes from settlements?
    - 10% on amounts up to and including $5,000;
    - 20% on amounts over $5,000 up to and including $15,000; and
    - 30% on amounts over $15,000.
- ✓ Unused RRSP contribution room to tax-shelter payout?
- ✓ Does the settlement agreement specify the ROE code?

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[7] http://online.cle.bc.ca//CourseMaterial/pdfs/2011/506_1_1.pdf

CO-OP SETTLEMENT AGREEMENT

Between:

Client

(the "Member")

And:

Co-operative Ass.

(the "Co-op")

(collectively, the "Parties")

Whereas:

A. The Member is a member of the _____ Housing Co-operative and resides at _____ Street, Vancouver, British Columbia (the "Unit");

B. The Co-op is a non-profit housing co-operative providing ___ units with an address of _____, Vancouver, British Columbia;

C. The Member purchased shares in the Co-op for $____ at the time she became a member (the "Share Purchase Price");

D. In or about _____, service technicians from _____ went to the Unit on behalf of the Co-op and produced a report about damage in the Unit;

E. The Unit requires repairs in order to bring it back into a livable condition (the "Required Repairs");

F. The Member and the Co-op have disagreed about the extent of the repairs required and which party has responsibility to pay for some or all of those Required Repairs (the "Dispute"); and

G. The Member and the Co-op have agreed to resolve the Dispute.

Therefore, in consideration of the mutual promises contained herein, the sufficiency of which is hereby acknowledged, the Parties have mutually agreed to resolve all outstanding and potential complaints, actions and other claims related to the membership of the Member in the Co-op as follows:

1. The Member's membership in the Co-op, the Member's right to occupy the Unit, and the Member's obligation to pay housing charges each cease effective _____date____. The Co-op expressly waives the ordinary 60-day notice required to end membership in the Co-op required by the Co-op's rules;

2. The Co-op will pay the Member $_____, such sum being the return of half of the Member's Share Purchase Price. The Member agrees to forfeit the other half of her Share Purchase Price, worth $_____;

3. The Parties release and forever discharge each other of and from any and all actions, causes of action, suits, proceedings, debts, dues, accounts, obligations, covenants, contracts, whether express or implied, claims, demands, damages, indemnity, interest, legal costs or disbursements, losses or injury of any kind or nature, sums of money, grievances, executions and liabilities whatsoever whether in law or in equity, whether known or unknown, which the Member and/or the Co-op had, or now has, or may have in the future against the other party in consequence of any act, transaction, occurrence, thing or event relating to the Member's membership in the Co-op and the Required Repairs;

4. Each Party acknowledges and agrees that it has been represented and advised by legal counsel before entering into this Settlement Agreement, that each party fully understands its terms, and that each party agrees and acknowledges that it has not been influenced to any extent whatsoever in making this Release by any person representing or employed by them;

5. This Settlement Agreement will be binding upon and enure to the benefit of the Member's heirs, executors, administrators, assigns, dependents, and all persons entitled to make any subrogated claims on her behalf or in her name.

6. This Settlement Agreement will be binding upon and enure to the benefit of the Co-op's servants, agents, officers, directors and employees, and their legal successors and assigns.

7. This settlement is a compromise of a dispute claim and this settlement is not to be construed as an admission of liability on the part of any of the Parties; and

8. This Settlement Agreement contains the entire agreement between the Parties and the terms of this Settlement Agreement are contractual and not a mere recital.

IN WITNESS WHEREOF the parties have hereunto executed this Settlement Agreement as at the ____ day of _____, 20XX.

SIGNED, SEALED AND DELIVERED)
by the _____)
Co-operative in the presence of:)
)
_____)
Name)
)
_____)
Address)
_____)
)
_____)
Occupation)

_____
Authorized Signatory:
Print Name:_____

SIGNED, SEALED AND DELIVERED)
by the **Member** in the presence of:)
)
_____)
Name)
)
_____)
Address)
_____)
)
_____)
Occupation)

_____
CLIENT

THE LAW FOUNDATION OF BRITISH COLUMBIA

BEST PRACTICES FOR ADVOCATES
November 2012

This document is intended to serve as a guide to advocates funded by the Law Foundation as to what practices and level of conduct are expected of them. The document does not deal with why these are the best practices to be followed, nor does it explain how to implement these practices. Rather it is meant to provide a touchstone regarding the professional fulfillment of the duties of an advocate. If an advocate does not understand why a particular best practice exists or how to meet the standard expected, they should follow up with their supervisor at work, their supervising lawyer or their program director at the Law Foundation for clarification.

Client Relationships and Professional Responsibility

1. Maintain strict confidentiality regarding all information with respect to a client's file
2. Avoid any conflict of interest regarding a client's file. If there are any questions about a possible conflict of interest, your supervising lawyer should be contacted.
3. Treat all clients with respect and courtesy
4. Clients are entitled to have their files handled in a competent, thorough and timely manner
5. Communicate clearly with clients regarding what you can do for them, and what you cannot do for them, in order to manage client expectations and establish boundaries for your professional well being
6. For every full representation file provide the client with a retainer letter setting out what you will be doing, and what you will not be doing, for that client
7. Respond promptly to any communication from clients
8. Keep clients regularly updated on the status of their file
9. Make use of the Community Advocate Support Line lawyer
10. Know what other resources there are, both within your community and elsewhere, to refer clients to
11. Maintain a collection of current Public Legal Education and Information materials to provide to clients

Opposing Parties

1. Treat all opposing parties with respect and courtesy

2. Respond promptly to any communication from opposing parties

Tribunals and Courts

1. Treat all administrative tribunal members and judges with respect and courtesy

2. Ensure that all procedural requirements of any tribunal or court are met

3. Respond promptly to any communication from tribunals, courts or other government agencies

File Management

1. Utilize the Foundation's key precedent documents, or equivalent documents, for full representation files (intake form, file opening checklist, retainer letters, authorizations to release information, consent for disclosure of information and waiver of confidentiality, file closing form)

2. Any consent for disclosure of information form used must include permission for Law Foundation staff or their agents to review the file

3. Maintain a formalized intake process (what is the process once people contact the office, what happens when they arrive, what are the income criteria, what paperwork is to be completed, what happens at the end of the initial interview)

4. Maintain a bring forward system for all open client files

5. Maintain a conflicts check system for all new clients

6. Maintain a system for identifying and monitoring any limitation periods

7. Have file contents organized chronologically (and in accordance with organization's protocol)

8. Keep and date notes of all substantive conversations and meetings with respect to client files, in particular information received from and advice given to clients

9. Maintain a system for work load management (what types of cases are taken, merit assessment, time allocation parameters)

10. Maintain a system for storing open and closed client files securely and separately

11. Maintain a central file index with a list of all open files and all closed files (containing information such as client name, address, legal matter, file number, date file opened, date file closed)

12. Maintain a list of all open files

13. Ensure the safekeeping of all original documents

14. Maintain a formalized file closing process (criteria for when to close a file, completion of a file closing form, review file with supervising lawyer, file closing letter to client, return of any original documents to client, physical storage of closed files)

Legal Supervision

1. Be familiar with the Foundation's Legal Supervision Requirements, which set out a supervising lawyer's responsibilities in supervising advocates. Bear in mind that the Foundation expects that each advocate should be supervised according to his or her level of competence and experience in each area of law. It is for the supervising lawyer to assess an advocate's competence and experience in each area of law, and to then determine the level of supervision required. A supervising lawyer is responsible for the supervision of an advocate's work in regards to substantive and procedural legal matters

2. Respond promptly to any communication from your supervising lawyer

3. Hold regularly scheduled meetings with your supervising lawyer, and at other times as needed

4. If you think you should ask your supervising lawyer about something, no matter how small – ask

Professional Education

1. Participate in ongoing professional education (Provincial Training Conference, the Foundation's Education and Training Fund)

2. Participate in PovNet

3. Participate in regional calls with the Ministry of Social Development or meetings of groups such as the Front Line Advocacy Workers, as appropriate

4. Keep current on relevant legislation

Law Foundation

1. Respond promptly to any communication from the Foundation

2. Assist with the provision of activity reports to the Foundation, as required by the Foundation's grant

3. Assist with the provision of monthly statistics to the Foundation, as required by the Foundation's grant

4. Be familiar with the Foundation's Advocacy Program Guidelines

5. Comply with any conditions attached to the Foundation's grant

NAME OF ORGANIZATION
ADDRESS

Date:

CLIENT'S NAME
ADDRESS

PERSONAL AND CONFIDENTIAL

Dear Client:

Re: Description of Legal Matter

You have asked me, as legal advocate for Organization to assist you with and income assistance matter – specifically with issue. This letter gives you the following information about our work on your case:

- the level of assistance our organization can provide
- your rights and responsibilities, and
- other important information.

YOUR LEGAL PROBLEM

You have asked for help with describe why the client has come to you for legal assistance

IMPORTANT TIME LIMITS

You should be aware that the following time limits apply to your case:

- date and what has to be done
-

WHAT WE HAVE AGREED TO DO

We have agreed to do the following things for you:

1. help you to ..... ;

2. provide legal information, general guidance and advice on this matter, in my capacity as a Legal Advocate;

3. attend, as your legal advocate, at XXXXX, on date XXXXXXXX and XXXXXXXXXX; and

4. to debrief the hearing with you and inform you of any applicable next steps.

WHAT YOU HAVE AGREED TO DO

You have agreed to do as much as possible to assist us with your own case. This will include:

1. informing us promptly of any change of address or other contact information;

2. informing us promptly of any new facts or changes in circumstances that may affect your case; and

3. giving us copies of all documents in your possession, or that you may be able to obtain, that may be necessary or helpful for your case.

CONFIDENTIALITY

Organization will keep your case confidential unless you authorize us to release information. However, you specifically authorize us to do the following:

1. To disclose to the co-petitioners, if any, all aspects of the case as are necessary in order properly pursue the case.

2. To discuss within our office, or with other appropriate advocacy services, details of all aspects of your case as may be necessary for the proper conduct of your case.

3. If this is a case which raises an issue of concern to low income people throughout the province, to discuss the case with other lawyers, advocates and community groups.

4. We receive funding from the Law Foundation of British Columbia. In order for the Law Foundation to evaluate the effectiveness of the advocacy programs it funds, Law Foundation staff or their agents may request to review your file. This review would be solely to evaluate the services we provide our clients, and information would be kept in the strictest confidence.

FILE

Your file and all its contents belong to Organization. Any papers or documents that you give us will be returned to you at the conclusion of the case, if requested. However, the rest of your file belongs to Organization and will remain with us.

WITHDRAWAL BY YOU

You are free to end our services for any reason and at any time by writing us a letter to that effect.

ORGANIZATION WITHDRAWAL

We also have the right to terminate our services at any time if we have good reason which includes, but is not limited to, the following:

1. You fail to make full disclosure of all facts and all documents (both for and against you) relating to your problem;

2. You fail to keep us informed of your current contact information;

3. We are of the opinion that your case no longer has a reasonable likelihood of success;

4. You fail to co-operate with us regarding any reasonable request or to accept our advise;

5. You have misrepresented facts or failed to disclose important facts;

6. You ask us to do something unethical or illegal;

7. If there are threats, inappropriate language or behavior directed at advocates, staff, or other agencies including government staff or agencies;

If there is anything in this letter that you do not understand or if you have any questions about the services we will be providing you, please contact us.

Yours truly,

Advocate's Name
Organization
Contact information
Days of work

NAME OF ORGANIZATION
ADDRESS

PERSONAL AND CONFIDENTIAL

Date:

CLIENT ADDRESS:

Dear CLIENT:

Re: DESCRIPTION OF LEGAL MATTER

After considering the facts and legal issues involved in your case, we regret that we cannot provide further assistance. As we discussed in our meeting of _____:

SET OUT REASONS YOU CANNOT ASSIST THIS PERSON WITH THEIR PROBLEM
1.
2.
3.

This letter is not an opinion about the merits of your case. In saying that we cannot assist you, we are not expressing an opinion about whether you should take further action.

You should be aware that there may be strict time limitations you have to meet in order to protect your rights. If you do not begin your lawsuit by filing an action within the required time, you could be lose any right to make a claim. Therefore, if you want to continue with your case, you should immediately contact a lawyer to obtain advice about any deadlines and to obtain legal representation. We cannot be responsible for your meeting any outstanding deadlines or limitation dates.

Yours truly,

NAME OF ORGANIZATION
ADDRESS

PERSONAL AND CONFIDENTIAL

Date:

CLIENT ADDRESS:

Dear CLIENT:

Re: DESCRIPTION OF LEGAL MATTER

As we discussed during our meeting, before we could agree to assist you in this matter, we had to investigate whether working for you on this matter could negatively affect the interests of existing or former clients, or if there might be some other reason that we would be unable to adequately represent your interests.

We have performed a conflict of interest check and found that we have a conflict of interest in this case and, therefore, cannot assist you.

Please be aware that there may be time limits on you making a claim. Since time limitations may be critical in your case, if you want to go ahead with your case, you should immediately contact a lawyer or another agent for assistance regarding this matter.

Yours truly,

Ownership of File Contents

The Client is entitled to:

1. originals of all documents existing before they retained the advocate (unless belonging to a third party)
2. originals of letters by the advocate to the client
3. originals of letters sent by third parties to the advocate
4. any expert opinions and medical reports
5. copies of letters sent by the client to the advocate
6. copies of letters sent by the advocate to third parties
7. notes of conversations with witnesses (if the hearing has not been held)
8. memorandum of law
9. transcripts of any proceedings held
10. all legal documents prepared in relation to the file

The Advocate is entitled to:

1. notes of conversations (other than with witnesses, if the hearing has not been held)
2. notes on evidence and notes of submissions to courts and tribunals
3. inter-office memos
4. routine forms such as diary, time or BF forms
5. originals of letters sent by the client to the advocate
6. authorizations and instructions given to the advocate by the client

The documents the client is entitled to must be provided to the client upon demand. The advocate is still entitled to keep copies for their file. The documents the advocate is entitled to do not have to be provided to the client.

What to do with Closed Files

GENERAL CONSIDERATIONS

Advocates are responsible for maintaining the safety and confidentiality of their client's files and should take all reasonable steps to ensure the privacy and safekeeping of client's information. The duty of confidentiality survives the professional relationship and continues indefinitely after the advocate has ceased to act for the client.

Many of the documents in a file belong to the client and it is the advocate's responsibility to ensure these are returned to the client when the file is closed.

When a file is closed determine a destruction date. While some documents in the file will have been disposed of upon closing the file, the destruction date is the ultimate date upon which the balance of the file will be destroyed.

STORAGE OF CLOSED FILES

Closed files should be stored securely, separately from open files. Unused office space is an option for the storage of closed files. Since client confidentiality is a concern, closed files should be stored in areas where only staff have access.

It is advisable to store files at the office for at least two years after closing, because this is the most likely time when access may be needed.

If, after storing closed files on site for two years, space becomes an issue, then renting secure off-site storage space may be necessary.

HOW LONG TO RETAIN CLOSED FILES

There is no universal agreement on how long to retain files. Each organization should develop their own policy on the retention and destruction of files, in consultation with the supervising lawyer for the advocacy program.

As a general guideline, files should be retained for a period of six years after they are closed. This general guideline is taken from the Law Society of BC document *Closed Files - Retention and Disposition*, which is available on their website. That document provides more specifics on retention of closed files, based on area of law, beginning at page 28.

DESTRUCTION OF CLOSED FILES

When it is time to destroy closed files, confidentiality remains a concern. It is not acceptable to throw files in the trash or into a dumpster.

Burring files may be an option, if there is access to a facility that can ensure the complete destruction of all the file contents.

The main destruction method is paper shredding. An organization may choose to purchase or lease its own paper shredder.

Alternatively, organizations may hire a paper shredding company. Many such companies will travel anywhere in British Columbia to shred and then recycle the material. Companies charge by the weight or the volume of the material to be shredded, with some variation depending on location in the province.

Document shredding is also available from some of the off-site file storage businesses.

A more comprehensive examination of the retention and disposition of closed files can be found in the Law Society of BC document *Closed Files - Retention and Disposition, June 2013*

Available: http://www.lawsociety.bc.ca/docs/practice/resources/ClosedFiles.pdf

Legal Services Society

Providing legal aid in British Columbia since 1979

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LawLINE

November 6, 2007

Manjeet K. Chana
Provincial Training Advocacy Conference

Myth vs. Fact: Conflicts of Interest

1. Myth or Fact: **It is a conflict of interest to represent both parties in the same matter (for example, where you are representing both the landlord and tenant in a residential tenancy matter or a husband and wife in the early stages of a family law matter).**

   Fact. You cannot act for both parties in the **same** matter in light of these considerations:

   - Duty to give undivided loyalty to each client. This duty cannot be met if you determine that the two parties have very different interests;
   - Each party may have information that they do not want to the other to know.

   However, you can act for clients who have opposing interests in **different** matters where:

   - The matters you are representing both parties on are substantially unrelated;
   - Both parties are informed you will act for each of them and they both consent;
   - You do not have confidential information about one of them that might reasonably affect the representation of the other.

2. Myth vs. Fact: **It is a conflict of interest to act for multiple clients who appear to be on the "same side" (eg. co-tenants in a residential tenancy matter or a spouse and his or her c/l spouse in a child protection matter).**

   Myth. You may act for two or more clients who may be "on the same side" as long as:

   - You tell each client that you have a duty to give undivided loyalty to each of them and each of them gives their informed consent (in writing, if possible) for you to represent both of them;

- You tell each client that if you get confidential information from one of them, it will have to be disclosed or told to the other;
- You get each client's informed consent for what to do in case you later get information from one client that is relevant to you representing both clients. Your clients agree that if this situation arises, you either (1) cannot disclose the information to the other client and you withdraw from representing both or (2) they agree that you must disclose the information to the other client and continue acting for the clients jointly.

3. Myth vs. Fact: **It is not a conflict of interest to represent a party in a matter where the opposing party is a former client of yours (eg. a wife that you formerly represented in a family law dispute is now a client of another advocate on the other side of your current client, the husband, in the same ongoing dispute);**

Myth. The correct principle is: if you have acted for a client ("A") in a matter, you should not act against "A" in the same or any related matter because you may have confidential information that might affect your representation of your current client ("B"). The exceptions to this rule are:

- "A" is told that you are going to be acting for "B", who is someone adverse in interest to him/her in the same or related matter and "A" gives you informed consent to do so; or,
- your representation of "D", a new client, is substantially unrelated to the representation of "C", your former client, and you do not possess confidential information arising from representing "C" that might reasonably affect the representation of "D".

4. Myth vs. Fact: **It is a conflict of interest to act for a client where his or her interest in a matter competes with a personal or financial interest you have or that of a third party with whom you have a relationship (eg. a family member of yours).**

Fact. Generally speaking, a legal advocate must, if he or she has a financial interest in a matter they are conducting for a client, adopt the position of saying "I can be your business partner or I can be your legal advocate but I cannot be both". Note that a

transaction of sale or purchase between a legal advocate and client will be upheld if the legal advocate can prove:

- that he or she made full disclosure to the client of all relevant information known to him or her;
- that the price was fair; and
- that the client was advised by an independent solicitor to whom all circumstances were disclosed

5. Myth vs. Fact: **When you are sharing an office space with another advocate, it is not a conflict of interest to act on behalf of a client who has an opposing interest to that of a client of another advocate.**

Myth. It is a conflict of interest for an advocate to represent a client whose interest is adverse to a client of another advocate in a space-sharing arrangement. One exception to this is where each advocate who is sharing space discloses in writing to all of his or her clients:

- that an arrangement for sharing space exists;
- the identity of all the advocates who make up the office acting for the client, and;
- that advocates sharing space with the office are free to act for other clients who are adverse in interest to the client.

6. Myth vs. Fact: **A conflict of interest can arise as a result of an advocate transferring from one advocacy office to another.**

Fact. A conflict of interest exists if you transfer from one office to another office and:

- either you or your new office knows or later learns that your former office and your new office each represent a client in the same matter;
- the clients have interests that conflict (opposing co-tenants/co-defendants); and,
- you actually have relevant information about the case that may result in prejudice or unfairness to your former client if the information is disclosed to your new office.

In this situation, your new office has to stop acting for its client unless 3 criteria are met:

- the former client consents to your new office continuing representation; or
- your office can show that it is in the interests of justice that your new office's representation of the client continue; or
- your new office has taken reasonable steps to ensure that there will not be disclosure of the former client's confidential information to anyone else at your new office. This means you cannot participate in any way in your new office's representation of the new client unless the former client consents.

This does not apply to a government employee transferring from one department, ministry or agency to another.

Welfare and Disability Benefits

- Systemic Poverty Law Updates (Day 1)
    - Welfare Update
    - LEAF Briefing Note
- Overlapping Benefits: CPP, OAS, PWD, GIS (Day 1)
- Strategies for PWD Applications and Reconsiderations (Day 1)
    - PWD Appeals Powerpoint
    - Appeal template
    - Working effectively with doctors powerpoint
    - Sample documents
- Discussion Session for Senior Advocates on Welfare Issues (Day 2)
    - Amy Taylor, Kate Feeney document
    - Crown and Bridgework case
    - Jen Matthews (handout at conference)
- Advanced CPP (Day 2)
    - Powerpoint
    - Glossary
    - Cheat sheet
    - cases
- Online Research on Government Sites:MSDSI and RTB (Day 3) (see tab 6)
- Welfare on Reserve (Day 3) (see tab 1)
- Advanced Ethics: Discussions for Senior Advocates in Poverty and Family Law (Day 3) (see tab 6)

Welfare Law Legislative Update: October 1, 2015 to October 1, 2016

*Prepared by Alison Ward, Barrister and Solicitor, Community Legal Assistance Society, October 1, 2016

There have been a number of significant changes to welfare law since the last Provincial Advocacy Training Conference in early October 2015. .

SUMMARY

1. Bundle of December 1, 2015 regulatory changes:

    a) Recurring gifts and inheritances exempted as income for recipients of disability assistance;

    b) Increase in asset exemption level for recipients of disability assistance, and for people on income assistance or PPMB benefits who receive care in a private hospital, special care facility, or are in hospital for extended care;

    c) Elimination of the $8 000 cap on amounts a trust can spend on items or services to promote the person's independence; and

    d) Changes affecting students who receive disability assistance.

2. Guide Dog and Service Dog supplement extended to retired service and guide dogs, and to certification tests

3. Exemption of Worksafe benefits paid to children whose parent(s) died as a result of a work-related accident or of a fatal work injury or accident

4. Policy clarification that some insurance benefits can be considered an "other award" that is exempt up to a family unit's asset level

5. Simplification of PWD application process for prescribed classes of people

6. Nurse practitioners now qualified to complete the PWD application form, section 1

7. Bundle of September 1, 2016 regulatory changes:

    a. Elimination of special transportation subsidy;

    b. Slight increase to PWD support rate and introduction of Transportation Support Allowance; and

    c. Changes to yearly bus pass program for PWDs.

8. Exemption of EI maternity and parental benefits, and EI benefits for parents caring for critically ill children as unearned income

DETAILS

1. Bundle of December 1, 2015 regulatory amendments:

A number of regulatory changes came into effect on December 1, 2015, as follows:

a) **Recurring gifts and inheritances exempted as income for recipients of disability assistance**

Effective December 1, 2015, gifts (including recurring gifts) received by someone with the PWD designation are exempted as income by MSDSI. Prior to this change, only "one time" gifts could be exempted as income for recipients of disability assistance. Inheritances are also now exempt as income for recipients of disability assistance. See EAPD Regulation, Schedule B, section 1(a)(xlviii) & (xlix). The legislation does not define "recurring" gifts, but policy makes it clear it can include, for example, a recurring gift such as a regular amount of money paid to a person with the PWD designation by a relative or friend.

Gifts and inheritances are not exempted as assets for recipients of disability assistance, but see section b for changes in the PWD asset exemption level.

Recurring gifts and inheritances not exempt for income assistance and PPMB recipients

Inheritances are still considered non-exempt unearned income under the EA Regulation (see the new definition of "gift" in section 1 of the EA Regulation).

Non-recurring gifts remain exempt as income for income assistance and PPMB recipients. This rule, which was the result of a court case in the 1990s, has now been codified in the EA Regulation. That is, "gifts, other than recurring gifts" have been specifically exempted as income (see EA Regulation, Schedule A, section 1(a)(xlvii)). The term "recurring gift" is not defined in the legislation. In addition, the definition of "unearned income" in section 1 of the EA Regulation has been amended to specify in subsection (y) that payment of a person's debt or obligation by a third party is now considered a "gift" by MSDSI.

b) **Increase in asset exemption level for recipients of disability assistance, and for people on income assistance or PPMB benefits who receive care in a private hospital, special care facility, or are in hospital for extended care**

Also effective December 1, 2015, a family unit in which one person has the PWD designation can now have assets (that are not otherwise exempted under the welfare legislation) of up to $100 000, without this affecting their eligibility for disability assistance (see EAPD Regulation, section 10(2)(a)). The prior general asset exemption level for family units in this category was $5,000.

Couples where both adults have the PWD designation (or one has the PWD designation and the other's PWD application is awaiting adjudication) now have a

general asset exemption level of $200 000.00 (increased from $10 000). See EAPD Regulation, section 10(2)(b) and (c).

These new PWD asset exemption levels also apply to people applying for income assistance where MSDSI believes the person has a genuine intent to apply for the PWD designation, and to people who have applied for the PWD designation, and are waiting for a decision to be made about their eligibility for that status. See EA Regulation, section (2.1)(a) and (b).

The new $100 000 asset exemption level also applies to a person receiving income assistance or PPBM benefits who receives accommodation and care in a private hospital or special care facility (other than an alcohol or drug treatment centre), or who is admitted to a hospital for extended care. A family unit who has two members in this situation will have an asset exemption level of $200 000. See EA Regulation, section 11(2)(c) and (d).

c) **Elimination of the $8 000 cap on amounts a trust or structured settlement annuity can spend on items or services to promote a person's independence**
Prior to December 1, 2015, if a trust spent more than $8 000 per calendar year on items or services to enhance the independence of the beneficiary of the trust, MSDSI considered expenditures about $8 000 to be the person's income, and those amounts were deducted from the person's disability assistance check (or income assistance or PPMB check, for those few categories of people on income assistance or PPMB that are allowed to have trusts),

As of December 1, 2015, this cap has been eliminated. There is now no limit on the amount of money that can be taken out of a trust to purchase items or services that promote the independence of the beneficiary of the trust. See EAPD Regulation, Schedule B, section 7(1)(d.3)(i), and EA Regulation, Schedule B, section 7(1)(d.3)(i). Structured settlement annuity payments are also affected by this change. That is, there is no longer any dollar cap on the value of items or services to promote independence that can be purchased with structured settlement annuity payments. The Ministry will not consider payments used for that purpose to be the income of a person who receives income assistance or disability assistance benefits. See EAPD Regulation, Schedule B, section 7(1)(d.3)(ii) and EA Regulation, Schedule B, section 7(1)(d.3)(ii).

d) **Changes affecting students who receive disability assistance**

As of December 1, 2015, education and training allowances, scholarships, grants and bursaries, and money withdrawn from an RESP are all exempted as income for people who receive disability assistance. See EAPD Regulation, Schedule B, sections 1(a)(I) & (Ii).

Student loans for recipients of PWD benefits are still only exempt up to the amount of the student's education and daycare costs: see EAPD Regulation, Schedule B, section 8.

2. Guide Dog and Service Dog supplement extended to retired service and guide dogs and to certification tests

Effective January 18, 2016, the guide and service dog supplement of $95 per month is now available to eligible welfare recipients for the maintenance of retired certified guide or service dogs (in addition to active certified guide or service dogs). This change resulted from changes to the *Guide Dog and Service Dog Act*. See EAPD Regulation section 60, and EA Regulation section 62.

A policy change effective June 27, 2015, affects dogs that are going to take a certification test through the Justice Institute of BC. In this case, the supplement can be paid for up to two months before the certification test, to cover travel costs and certification test fee.

3. Exemption of Worksafe benefits paid to children whose parent(s) died in work-related accidents

Effective March 18, 2016, benefits paid under section 17 or 18 of the *Workers' Compensation Act* to the child of a parent(s) who died of a work-related injury or accident, are exempted as income from all welfare benefits. Note that "child" is defined in section 1 and 17 of the *Workers' Compensation Act*, and can include disabled children over 19, and children up to age 25 who are in technical, vocational or academic studies. See EA and EAPD Regulation, Schedule B, section 1(a)(xlvii).

4. Policy clarification that some insurance benefits can be considered an "other award" that is exempt up to a family unit's asset level

Effective July 18, 2016, MSDSI changed its "income treatment and exemption" policy to specify that insurance benefits paid for medical treatment or medical equipment can be exempted as income as an "other award" under EA and EAPD Regulation, Schedule B, section 7(1)(c), up to the family unit's asset level.

5. Simplification of PWD application process for prescribed classes of people

As of September 1, 2016 a simplified, two page application form for the PWD designation can be accessed by people in the following five groups (MSDSI refers to these as "prescribed classes," as they are defined by regulation):

i) A person who receives Canada Pension Plan disability benefits;

ii) A person enrolled in Plan P (Palliative Care) under the Drug Plans Regulation;

iii) A person who has at any time been found to be eligible for payments through MCFD's At Home Program;

iv) A person who has at any time been found eligible by Community Living BC to receiving community living support; and

v) A person whose family has at any time been found by Community Living BC to be eligible for community living support to assist that family in caring for the person.

A copy of the new two-page application PWD designation application for members of these groups is attached.

This regulatory change leaves open the prospect that, in future, the BC government may designate recipients of other government statuses or benefits to be eligible for this simplified application process, if satisfied that eligibility for that status or benefit requires evidence of a mental or physical impairment at least as severe as that required by the PWD designation.

See sections 2(2) and 26(2)(p) of the EAPD Act and section 2.1 of the EAPD Regulation.

6. Nurse Practitioners now qualified to complete the PWD application form, section 1

Effective September 1, 2016, nurse practitioners are now able to complete section 1 of the PWD application form (i.e. the "physician's report") in the same way that a medical doctor can. That is, nurse practitioners can now confirm that a person has a severe mental or physical impairment that is likely to continue for at least two years. Nurse practitioners still remain qualified to complete the assessor's portion of the PWD designation application form.

See section 2(2)(a) of the EAPD Act.

7. Bundle of September 1, 2016 regulatory changes:

a. Elimination of special transportation subsidy

Effective September 1, 2016, the special transportation subsidy was eliminated. Previously, the special transportation subsidy was paid annually on April 1st each year, and made $66 per month available to PWD recipients who were medically unable to take the bus, but only if they lived in an area that had a local bus service (that is, people in rural areas without a local bus service could not qualify for the special transportation subsidy).

b. Slight increase to PWD support rate and introduction of Transportation Support Allowance

Also effective September 1, 2016, there was an increase of $25 per month increase for all recipients of disability assistance. The new maximum support and shelter rate for a single person with the PWD designation is now $931.42 (up from $906.42). See EAPD Regulation, Schedule A, section 2(1).

In addition, a $52 per month "transportation support allowance" (TSA) was introduced for each individual with the PWD designation in a family unit. See section EAPD Regulation,

section 24.1. A single person who elects to receive that in cash would now receive a total of **$983.42** per month. A recipient can choose to receive the transportation support allowance in cash, or in the form of an in-kind bus pass. For more on the TSA and bus passes, see section c below.

> * Note: People who have not been eligible for PWD benefits in the past (e.g. because their income from another source such as CPP disability benefits or private long term disability benefits was above the old maximum PWD rate) may now qualify for PWD as a result of these changes. A single person whose income from other sources is less than $983.42 can apply for the PWD designation (if they do not already have it) and a disability top up to bring their monthly income up to $983.42.

The EAPD Regulation defines the TSA as a form of disability assistance. Section 24.1(3) of the EAPD Regulation makes the transportation support allowance (in cash or in kind) available to a family unit that is not otherwise eligible for support and shelter benefits in a given month because of excess income. For example, someone with the PWD designation who is no longer eligible for monthly support and shelter benefits because the have exceeded their annualized earnings exemption would continue to receive the TSA.

Ministry policy on the "transitional transportation support" provides that people who leave disability assistance for reasons other than excess employment income can retain the transportation support allowance in the following circumstances:

Reason for leaving disability assistance	**Period of Transitional Transportation Support ("TTS")**
A family unit in receipt of disability assistance that ceases to be eligible for disability assistance and transitions to MSO because a person in the family unit is age 65 or older and must be in receipt of a qualifying federal benefit	Recipients who leave disability assistance for these reasons may receive TTS as cash until the end of that calendar year. For example, if a recipient transitions to MSO in June 2017, they may receive TTS from June 2017 until December 2017. Recipients who choose a bus pass may keep their bus pass until the end of the calendar year, although the authority for the bus pass switches from TSA to the low-income seniors bus pass program (see BC Bus Pass Program). There is no fee for this bus pass in the calendar year in which the recipient turns 65. In the next calendar year, the senior will be eligible for the seniors bus pass for an annual fee of $45.
A family unit in receipt of disability assistance that ceases to be eligible for disability assistance and transitions to MSO as a result of a pension or	Recipients who leave disability assistance for this reason may receive TTS until the end of that calendar year.

other payment under the Canada Pension Plan (CPP).	

c. Changes to yearly bus pass program for PWDs

As of September 1, 2016, a person with the PWD designation who receives disability assistance will no longer be able to purchase a yearly bus pass from MSDSI for an annual administrative fee of $45.

Instead, a person with the PWD designation is eligible for the new $52 per month transportation support allowance. After September 1, 2016, a recipient of the TSA can decide if they want to receive the TSA:

a) as $52 cash each month, added to their disability assistance cheque; or

b) as a monthly bus pass from MSDSI. If they elect an in-kind bus pass, no administrative fee is payable (the government had earlier announced a $45 administrative fee would be payable, but changed its mind in June 2016).

This election can be made monthly. That is, a person can switch back and forth between an in-kind bus pass, and the extra $52/month payment, by giving notice to MSDSI (See EAPD Regulation, section 24.1(2)). Notice must be given by the 5th of a month, for a change to take effect on the first day of the following month (e.g. notify by November 5th for a change effective December 1st).

People who want to have a bus pass from MSDSI on an ongoing basis can keep it indefinitely, and no longer need to reapply for a bus pass each year.

People who qualify for the yearly bus pass for reasons other than having the PWD designation are not affected by these changes, and can still buy a yearly bus pass for an annual administrative fee of $45. See EAPD Regulation section 51 and EA Regulation section 66 for a description of who falls in these categories.

8. Exemption of EI maternity and parental benefits, and EI benefits for parents caring for critically ill children as unearned income

Effective October 1, 2016, EI maternity and parental benefits, and EI benefits for parents caring for critically ill children, are exempted as unearned income for recipients of disability assistance, and income assistance.

See the EA and EAPD Regulations, Schedule B, section 7(1)(g).

BRITISH COLUMBIA | Ministry of Social Development and Social Innovation

Persons With Disabilities Designation Application - Prescribed Class

The personal information requested on this form is collected by the Ministry of Social Development and Social Innovation pursuant to sections 26(c) of the *Freedom of Information and Protection of Privacy Act* for the purpose of administering the *Employment and Assistance for Persons with Disabilities Act*. If you have any questions about the collection, use or disclosure of this information, please contact the Ministry of Social Development and Social Innovation at 1-866-866-0800.

Personal Information

Last Name	First Name	Middle Name(s)
Birth Date (YYYY MMM DD)	Personal Health Number	Case Number (for office use only)

The purpose of this form is to collect the information necessary to determine eligibility for the Person with Disabilities designation as a member of a prescribed class of persons under the *Employment and Assistance for Persons with Disabilities Act.*

Declaration and Notification

I, _____, am applying for designation as a Person with Disabilities under the *Employment and Assistance for Persons with Disabilities Act* and I declare that the information provided on this form is true and complete. I understand that the Ministry of Social Development and Social Innovation may verify the information on this form, as necessary to determine and confirm my eligibility for the designation.

To apply for this designation, one of the following statements must be true. Check the box beside the one that applies to you:

- ☐ I am enrolled in BC Palliative Care Benefits - PharmaCare Plan P of the Ministry of Health
- ☐ I have been determined to be disabled for the purposes of the Canada Pension Plan (CPP) and am eligible to receive CPP Disability Benefits from Employment and Social Development Canada
- ☐ I have been determined eligible (now or in the past) to receive community living supports from Community Living British Columbia
- ☐ I have been determined eligible (now or in the past) to receive benefits as a child under the Ministry of Children and Family Development's At Home Program. Choose benefit type:
  - ☐ Medical Benefits
  - ☐ Respite Benefits Only – Children and Youth with Special Needs worker name and contact:

_____

Authorization and Consent

I consent to the Ministry of Social Development and Social Innovation disclosing a copy of this document, including the personal information about me contained in it, to any agency I have identified above.

I consent to any agency I have identified above disclosing to the Ministry of Social Development and Social Innovation all personal information about me and my eligibility for and receipt of benefits or supports under the program operated by that agency.

I authorize the Ministry of Social Development and Social Innovation to indirectly collect from any agency I have identified above all personal information about me and my eligibility for and receipt of benefits or supports under the program operated by that agency for the purpose of assessing my eligibility for designation as a Person with Disabilities and for assistance under the *Employment and Assistance for Persons with Disabilities Act.*

_____ _____

Applicant Signature* Date Signed

* If the Applicant does not have the necessary capacity to sign this Application, it may be signed by a person who has legal authority to act on behalf of the Applicant under section 3 or 4 of the Freedom of Information and Protection of Privacy Regulation. A guardian may act for a child if the authority to make the application described in this document and provide the consents and authorization set out above are within the scope of the guardian's duties or powers. A committee appointed under the *Patients Property Act*, a person acting under a power of attorney, a litigation guardian or a representative acting under a representation agreement, as defined in the *Representation Agreement Act* may act for an adult if the authority to make the application described in this document and provide the consents and authorization set out above are within the scope of that person's duties or powers.

If you are signing this document on behalf of the Applicant, you must state your legal authority to act on behalf of the Applicant and you must attach proof of that legal authority to this Application.

My legal authority to act for the applicant is _____.

Note: Proof of Committee, Power of Attorney, Litigation Guardian, Representation Agreement Representative or Guardian status must accompany this Application

Eligibility Verification (for office use only)

I confirm the person noted above is receiving or has been determined eligible to receive benefits or supports from or under the program or agency indicated below, (please check applicable box):

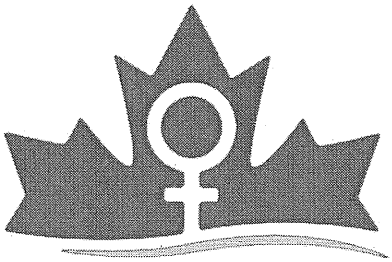
- ☐ BC Palliative Care Benefits (PharmaCare Plan P), Ministry of Health
- ☐ Canada Pension Plan – Disability Benefits Program, Employment and Social Development Canada
- ☐ Community Living BC (Developmentally Disabled or Personal Supports Initiative)**
- ☐ At Home Program, Ministry of Children and Family Development** (check benefit type below):
  - ☐ Medical Benefits
  - ☐ Respite Benefits Only

**If the person noted above has received or was determined eligible to receive benefits or supports under the At Home Program or from Community Living BC, but is not currently receiving those benefits or supports, please also check the applicable box above.

- ☐ Applicant **not** eligible for the program indicated above

Program Authority Signature _____ Date Signed _____

Print Name _____ Office/Department/Branch Name _____



BRIEFING NOTE

AMENDING THE *EMPLOYMENT AND ASSISTANCE ACT* AND THE *EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES ACT* TO BETTER SUPPORT WOMEN'S FINANCIAL INDEPENDENCE

September 2016

BRIEFING NOTE

AMENDING THE *EMPLOYMENT AND ASSISTANCE ACT* AND THE *EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES ACT* TO BETTER SUPPORT WOMEN'S FINANCIAL INDEPENDENCE

PURPOSE

To address the negative impact of BC's income and disability assistance laws on women by recommending amendments to the definitions of "dependent" and "spouse" in the *Employment and Assistance Act* (the "*EAA*") and the *Employment and Assistance for Persons with Disabilities Act* (the "*EAPWDA*"). [1]

SUMMARY

The current definitions of both "dependent" and "spouse" in BC's social assistance legislation disproportionately and negatively impact women by imposing financial dependence on another person. By forcing this financial dependence, the definitions put women at heightened risk of relationship violence, undermine their independence, and prohibit them from entering new relationships that could eventually provide mutual support.

This briefing note recommends specific legislative amendments that will:

- Clarify that only relationships that display significant financial dependence or interdependence are relevant for the purposes of income and disability assistance eligibility;
- Remove financial interdependence by default on the basis that a person indicates a parental role for a child unless a spousal relationship can be established;
- Recognize the legal right of spouses to separate but live in the same residence, consistent with family law;
- Alter the length of cohabitation before a couple may be deemed "spouses" to align with parallel provisions in BC's *Family Law Act* and other provincial legislation;
- Provide guidance on how separated spouses can live together, consistent with BC's *Family Law Act*; and
- Provide clarification on the reconciliation provisions in the current legislation consistent with BC's *Family Law Act*.

[1] *Employment and Assistance Act*, SBC 2002, c 40 and *Employment and Assistance for Persons with Disability Act*, SBC 2002, c 41.

BACKGROUND

The definitions of "dependent" and "spouse" are critical to how the BC Ministry of Social Development and Social Innovation (the "Ministry") determines eligibility for income and disability assistance. In order to be eligible for income or disability assistance, a person must apply on behalf of their entire family unit,[2] and legislative definitions govern who is or is not a member of a given family unit.

Determining the members of a given family unit is crucial for two reasons. First, in order for a family unit to be eligible for income or disability assistance, all members of the family unit must be eligible.[3] As a result, including someone as member of a family unit may disqualify the entire family unit from receiving any assistance. For example, if the Ministry deems a person to be a member of a family unit and that person fails to provide necessary information, has recently quit a job, is on strike, earns too much income, or hold assets in excess of the legislative limits, the entire family unit becomes ineligible for benefits regardless of the needs of the other family unit members.

Second, if a family unit is eligible for assistance, the amount of monthly benefits the family can receive is determined using the whole unit's non-exempt income.[4] If someone is deemed a member of the family unit, that person's income will be used to determine the benefits received by the entire family unit regardless of whether other members actually have access to that income.

Current definitions

Currently, family units are made up of the applicant/recipient and their dependents. Dependents of an applicant/recipient include any person who resides with them and is (1) a spouse, (2) a dependent child, or (3) indicates a parental role for the applicant/recipient's dependent child.[5]

The legislation provides that two people are spouses if they meet one of the following criteria:

- They are married to each other (there is no provision for legal separation while remaining in the same residence).
- They acknowledge to the Minister that they are spouses.
- They are deemed to be spouses because they have resided together for at least three months, or nine of the last 12 months, and the Minister is satisfied that their

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[2] *Employment and Assistance Regulation*, BC Reg 263/2002, s 5(1) ["*EAR*"]; *Employment and Assistance for Persons with Disabilities Regulation*, BC Reg 265/2002, s 5(1) ["*EAPWDR*"].

[3] *EAA*, s 2; *EAPWDA*, s 3.

[4] *EAR*, s 28; *EAPWDA*, s 24.

[5] *EAA* s 1; *EAPWDA*, s 1.

> relationship demonstrates (1) financial dependence or interdependence, and (2) social and familial interdependence, consistent with a marriage-like relationship.[6]

When the definition of spouse was amended in 2006, then Minister Richmond explained the Ministry's goals in defining dependents:

> For the Ministry, dependency is premised on the economic principle of a social unit where there is support or obligation and, if established, considers the income and assets of all parties as available to all members of a family unit.[7]

KEY CONSIDERATIONS

(1) Women are more likely to be found ineligible because of the current definitions

Legal scholars and commentators have noted for some time that dependency eligibility rules regarding income and disability assistance, and particularly those that deem a relationship to be spousal, disproportionately impact women.[8] In addition, courts have also concluded that such provisions discriminate against women.[9]

Statistics in the BC income and disability assistance context are also consistent with these findings. An examination of Employment and Assistance Appeal Tribunal decisions over the last five years illustrates that, in cases that come before the Tribunal, women are more likely than men to be negatively impacted by the definitions of dependent and spouse in BC's legislation. As of June 2016, women headed 48% of all the family units led by single adults receiving income or disability assistance (those potentially subject to the definitions).[10] If the current definitions impact men and women equally, one would expect that women would make up approximately the same percentage of recipients found to be ineligible as a result of the definitions. However, women headed 62% of the families the Tribunal found to be ineligible for assistance under the current definitions, indicating that women are more likely than men to be

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[6] *EAA* s 1.1; *EAPWDA*, s 1.1.

[7] British Columbia, Official Reports of the Legislative Assembly (Hansard) 38th Parl 2nd Sess, Vol 9 No 10 (26 April 2006) at 4049 (Hon C Richmond).

[8] See for example, Rebecca Crookshanks, "Marginalization Through a Custom of Deservingness: Sole-Support Mothers and Welfare Law in Canada" (2012) 17 Appeal 97; Shelley AM Gavigan & Dorthy E Chunn, "From Mothers' Allowance to Mothers Need Not Apply: Canadian Welfare Laws as Liberal and Neo-Liberal Reforms" (2007) 45 Osgoode Hall LJ 733; Martha Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8 Can J Women & L 371.

[9] *Falkiner v Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 212 DLR (4th) 633 (OCA) [*Falkiner*]; *R v Rehberg* (1994), 127 NSR (2d) 331 (SCNS).

[10] Ministry of Social Development and Social Innovation, "BC Employment and Assistance Summary Report" (June 2016). Note: this statistic was calculated based on all recipient families categorized as either a single recipient or a single parent family. The gender breakdown for single parent families, which is not available in the Ministry's monthly caseload summaries, is based on the Ministry's public statements that approximately 90% of single parent families on assistance are headed by women.

negatively impacted.[11] The rates at which women are disproportionately impacted increases further for recipients the Tribunal found to be ineligible because of a deemed spousal relationship (69% were women) and because a co-resident indicated a parental role for their dependent child (73% were women).

The gendered impact of the current definitions amounts to a violation of s. 15 of the *Charter of Rights and Freedoms* because the definitions discriminate against women. As the Ontario Court of Appeal has noted,

> ...social assistance recipients – especially single mothers on social assistance – are [a] historically disadvantaged group. The definition of spouse at issue... perpetuates this historical disadvantage. It creates financial stress from the beginning of the relationships. It reinforces the stereotypical assumption that women will be supported by the man with whom she cohabits and will have access to his resources. And it devalues women's desire for financial independence.[12]

While the definition referred to in the case differs from BC's current definitions, BC's definitions reflects the same discriminatory assumptions: that women will be supported by cohabitants who provide them even minimal supports, as well as the assumption that the financial independence of women is of lesser importance than the Ministry's financial bottom-line.

(2) Only significant financial dependence is relevant to eligibility

When the Ministry includes a spouse or other dependent in a family unit, it treats the individuals as a joint unit for financial eligibility assessment, essentially assuming that the parties are completely financially dependent on each other. However, this consequence has little connection to the relationships that the Ministry's definitions actually capture. Instead, the current definitions focus on whether or not a relationship between two people is spousal in nature, or whether a person is playing some aspect of a parental role for a dependent child. In contrast to the Ministry's assumptions, these relationships do not come with any obligation to provide financial support during the relationship.

The current definitions reflect an archaic and outdated understanding of families and spousal relationships as unions that are primarily economic in nature, an interpretation that has historically disadvantaged women. In contrast, family law has modernized significantly and it is now well-settled that financial dependence is not a determinative

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[11] This statistic was calculated using all publicly available Employment and Assistance Appeal Tribunal decisions that:

- were issued between 2011 and 2016; and
- the Tribunal categorized as "Dependency/ Living Arrangement" decisions, except those that relate to determining whether a child is a dependent child.

[12] *Falkiner*, *supra* note 9 at para 96.

factor when deciding whether a relationship is marriage-like.[13] A spousal relationship may be marriage-like and the individuals in it may maintain totally separate financial lives.

Even in cases where there is some minimal financial dependence or interdependence, it is unfair to treat two people as a joint unit for financial eligibility assessments. For example, the Ministry's own policies suggest that a joint tenancy agreement listing two people as partners, spouses, or a couple is sufficient to establish that they meet all the factors required to be captured within the Ministry's definition of spouse.[14] While entering into a joint tenancy agreement may indicate a minimal level of financial interdependence based on the joint contract, it has no bearing on whether or not two people share finances or financially support each other with day-to-day costs, which is the consideration relevant to the Ministry's goals. Certainly the existence of a joint tenancy agreement does not lead to any obligation for individuals to support each another and it in no way indicates that they are a joint financial unit.[15]

To meet the Ministry's stated goal of capturing relationships in which both parties have equal access to each other's income and assets during a relationship, only relationships that exhibit significant financial dependence or interdependence (i.e. where significant access to income and assets is actually being provided) are relevant. Otherwise, they should not be treated as a joint financial unit.

(3) Indicating a parental role has no bearing on financial interdependence or support obligations

The current provisions have been used to find women ineligible because a co-resident has provided even minimal levels of support for children. For example, in one case before the Tribunal, the occasional purchase of diapers or formula for a baby was enough to deem a dependency relationship despite the fact that the two adults intentionally maintained separate finances and did not support each other financially.[16] The inference from the decision is that the woman in the case should be forced to rely completely on her co-resident, and that the co-resident somehow has an obligation to provide for her and her child, because of this minimal, sporadic support.

Co-parenting may be a useful factor in determining whether or not a relationship is spousal in nature. However, whether or not a co-resident indicates a parental role for a

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[13] *Weber v Leclerc*, 2015 BCCA 492 at 12.

[14] Ministry of Social Development and Social Innovation, BCEA Policy & Procedure Manual, "Family Composition" (undated), online: http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/support-and-shelter/family-composition.

[15] In addition, given that people in receipt of income assistance live in deep poverty, applying for a tenancy as spouses may be done for purely practical reasons. For example, if two roommates can only afford a one bedroom apartment and one person intends to sleep in the living room, as is common, they may hold themselves out as spouses to a landlord to increase the likelihood that they will be granted the apartment.

[16] Employment and Assistance Appeal Tribunal decision 14-88, online: http://www.eaat.ca/CMFiles/Decisions/14-881HWZ-5292015-1797.pdf.

recipient's dependent child has, on its own, no bearing on whether the co-resident has any legal obligation to financially support either the recipient or her child, or whether there is any actual financial interdependence in a relationship.

"Indicating a parental role" for a child does not, on its own, create child support or spousal support obligations in family law.[17] In addition, given that the financial support of children in the form of child support is no longer relevant to eligibility for income and disability assistance, there is no rational basis on which to infer that indicating a parental role for a child leads to financial support obligations that are relevant to income and disability assistance eligibility.

(4) Low income spouses often separate but continue residing together

The current legislative definition of spouse leaves little room for Ministry staff to assess actual financial interdependence in cases of separated spouses who are still legally married and residing together. Even in cases where a recipient makes clear attempts to separate, the Ministry may find her ineligible. For example, in one recent case, a woman was living in her family home and was separated from her abusive husband, who was residing in a travel trailer on the same property. Because he continued to enter the family home despite her objections, the Ministry deemed him to part of the recipient's family unit and found her ineligible for income assistance despite that fact that he refused to provide any financial support. At the time of the Tribunal decision in the case, the recipient had no hot water or gas in her home, was boiling water for bathing, was begging or borrowing money to cover medication and food, and had no funds to rent housing elsewhere. Two levels of Ministry decision-makers and the Tribunal found that the woman was ineligible for assistance because she and her separated husband were a joint financial unit.[18]

Family law allows for both married and common law spouses to separate if they are living their lives separately and at least one spouse has the intention to separate. It is more common for low income couples to continue residing in the same residence because they are unable to afford two homes, but they can separate their lives by not sharing things like meals, a bedroom and social activities. After separation, new financial interdependence is limited; for example, new property obtained after separation does not become family property. There is no principled reason why the Ministry should not recognize separations and the financial independence that flows from them for persons receiving income or disability assistance.

(5) Two years' cohabitation is more appropriate to capture spousal relationships

It appears that BC chose a minimum cohabitation period of three months because Ontario adopted a similar provision. Hansard debates provide very little additional explanation of how the three month period was chosen, aside from then Minister

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[17] See *Family Law Act*, SBC 2011, c 25, ss 3, 39 and 147.

[18] Employment and Assistance Appeal Tribunal decision 16-111, online: http://www.eaat.ca/CMFiles/Decisions/16-1111JBM-692016-4624.pdf.

Richmond's comments that "three months of living together in combination with other signs of a marriage-like relationship are sufficient to determine if the relationship if spousal or just a try-on relationship."[19] However, studies in other jurisdictions directly contradict this rationale.

After a review of Ontario's social assistance laws, the Commission for the Review of Social Assistance in Ontario found that a period of three months' cohabitation is too short for couples to "assess the viability of their relationship before being considered spouses, as couples who are not receiving social assistance usually do."[20] In particular, three months of cohabitation is not long enough for women to "try on" a relationship before being forced into a situation of financial dependency. The Ontario Commission recommended a longer period of cohabitation of one year before a relationship is deemed to be spousal. That length of time was chosen because it was consistent with other provincial statutory benefit schemes.

BC's family law system mandates that relationships become spousal in nature after two years of living together in a marriage-like relationship because financial interdependence is generally not presumed in informal relationships of less than two years. For example, equal rights to family property, reflecting the presumption that most spousal relationships are equal economic partnerships, do not accrue until a couple has lived together for at least two continuous years. No right to spousal support arises until a couple has lived together in married-like relationship for at least two years unless they have a child together. Even in the latter case, aside from couples with an extraordinary income gap between the two parties, it is unlikely that any right to spousal support payments would arise after only three months of cohabitation.

Many statutory schemes in BC use a period of two years of cohabitation to define spousal relationships, including:

- *Cremation, Internment and Funeral Service Act*;
- *Family Compensation Act*;
- *Family Law Act*;
- *Forest Act*;
- *Home Owner Grant Act*;
- *Land (Spouse Protection) Act*;
- *Land Tax Deferment Act*;
- *Members' Remuneration and Pensions Act*;
- *Notaries Act*;
- *Pension Benefits Standards Act*;
- *Property Transfer Tax Act*;
- *School Act*;
- *Utilities Commission Act*;
- *Wills, Estates and Succession Act*; and
- *Workers Compensation Act*.[21]

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[19] *Supra* note 7 at 4049.

[20] Frances Lankin and Munir A Sheukh, *Brighter Prospects: Transforming Social Assistance in Ontario* (2012) at 87-88, online: http://www.mcss.gov.on.ca/documents/en/mcss/social/publications/social_assistance_review_final_report.pdf.

[21] Many of the BC schemes that do not use two years of cohabitation deem a relationship to be spousal simply when two people "live together in a marriage-like relationship" with no minimum period of cohabitation. At least in the context of social assistance, such a definition would violate the *Charter*, as

(6) Amending the definitions would support *A Vision for a Violence Free BC*

The current definitions of spouse and dependent result in women being in what the Ministry defines as "dependent" relationships, reflecting the Ministry's belief that women must be financially dependent on the person they reside with before they can access the Ministry for financial support. In essence, the Ministry is pushing women into significant financial dependence in their relationships in situations where it does not otherwise exist.

As recognized in BC's *A Vision for a Violence Free BC* plan, women living in poverty or with disabilities, like those on income and disability assistance, are at a heightened risk of violence.[22] Financial dependence within relationships increases women's risk of violence and makes it harder for them to leave an abuser.[23] In addition, the current definitions may force women to hide their personal relationships from the Ministry in order to protect their own independence. Out of fear of being reported to the Ministry, these women may be hesitant to call the police or otherwise protect their safety when violence occurs.

By forcing women to rely financially on their cohabitants, the Ministry has imposed a further barrier on women and their children from being able to live free from abuse. The current definitions undermine BC's action to combat violence against women and intrude into a core aspect of one's security of the person and are therefore a potential violation of section 7 of the *Charter*.

(7) Supporting autonomous relationships may allow recipients to become independent from Ministry benefits

The Commission for the Review of Social Assistance in Ontario has noted that forming supportive relationships can lead to financial independence:

> We heard that the imposition of this definition of a spousal relationship, and the obligation to financially support the other partner that it brings so early on, creates a disincentive for people, particularly women and people with disabilities, to try to form relationships with people who are not receiving social assistance. It may cause people receiving social assistance to be fearful about entering into relationships at all. In addition to what we heard, we also considered the research showing that entering into relationships helps support people in moving out of poverty.[24]

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noted by former Minister Richmond: *supra* note 7 at 4047 and 4053. No other scheme uses three months of cohabitation.

[22] British Columbia, *A Vision for a Violence Free BC: Addressing Violence Against Women in British Columbia* (2015), online: http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/bc-criminal-justice-system/if-victim/publications/violence-free-bc.pdf at 6.

[23] *Ibid* at 4-5.

[24] Lankin, *supra* note 20 at 87.

In an effort to reduce reliance on income and disability assistance, the Ministry's current definitions actually dissuade recipients from forming the very relationships that could support them to become financially independent from Ministry benefits. Women are unable to "try on" relationships in a safe way that respects their independence. They are in turn less likely to form long-term, supportive spousal relationships without putting themselves at risk early in a relationship. Similarly, women with disabilities may be forced to forgo relationships that would support their dignity and independence such as a roommate that assists with household tasks. Single mothers experience serious financial consequences and forced dependence if they form relationships that support their parenting. They may be forced to forgo these kinds of supportive relationships, which would benefit women and children, to ensure they remain financially independent.

(8) Choices about how structure personal relationships are fundamental to dignity

Finally, the current definitions place significant power in the hands of Ministry to unilaterally determine when relationships should or should not be interdependent. The right to make autonomous personal decisions free from government interference, including the right to freely decide how personal relationships are structured, is fundamental to the liberty and human dignity protections in s. 7 of the *Charter*.[25] The current definitions interfere with this freedom by creating serious financial and interpersonal constraints on when and how a recipient/applicant chooses to enter into a relationship.

CONCLUSION AND RECOMMENDED AMENDMENTS

Given the above, we seek amendments to the *Employment Assistance Act* and the *Employment and Assistance for Persons with Disabilities Act* to ensure that both schemes support the financial independence of women. In particular, we recommend amendments to ensure that the definitions of "dependent" and "spouse" reflect actual levels of financial dependence in relationships reflected in the Ministry's stated purposes in having such definitions in the first place.

The current definitions force financial dependence in relationships where there may be none, assume financial support obligations when none exist, put women at increased risk of violence and prohibit them from forming supportive relationships. The amendments below will allow the Ministry to assess actual levels of financial dependence in relationships and will better support women's safety, financial independence and dignity.

[25] See for example *R v Morgentaler*, [1988] 1 SCR 30.

Recommended Amendments

Current provisions	Suggested amended provisions
Interpretation **1** (1) In this Act: **[...]** **"dependant"**, in relation to a person, means anyone who resides with the person and who (a) is the spouse of the person, (b) is a dependent child of the person, or (c) indicates a parental role for the person's dependent child; [...] (3) For the purpose of the definition of "dependant", spouses do not reside apart by reason only that a spouse is employed or self-employed in a position that requires the spouse to be away from the residence of the family unit for periods longer than a day.	**Interpretation** **1** (1) In this Act: **[...]** **"dependant"**, in relation to a person, means anyone who resides with the person and who (a) is the spouse of the person, or (b) is a dependent child of the person. [...] (3) For the purpose of the definition of "dependant", spouses do not reside apart by reason only that a spouse is employed or self-employed in a position that requires the spouse to be away from the residence of the family unit for periods longer than a day.
Meaning of "spouse" **1.1** (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if (a) they are married to each other, or (b) they acknowledge to the minister that they are residing together in a marriage-like relationship. (2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if (a) they have resided together for at least (i) the previous 3 consecutive months, or (ii) 9 of the previous 12 months,	**Meaning of "spouse"** **1.1** (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if (a) they are married to each other and they are not separated, (b) they acknowledge to the minister that they are residing together in a marriage-like relationship, or (c) they have resided together for a continuous period of at least 2 years and the minister is satisfied that the relationship demonstrates social and familial interdependence consistent with a marriage-like relationship, and the minister is satisfied that the relationship demonstrates significant

and (b) the minister is satisfied that the relationship demonstrates (i) financial dependence or interdependence, and (ii) social and familial interdependence, consistent with a marriage-like relationship.	financial dependence or interdependence. (2) For the purposes of this Act, (a) married persons may be separated despite continuing to live in the same residence, and (b) the minister may consider, as evidence of separation, (i) communication, by one married person to the other married person, of an intention to separate permanently, and (j) an action, taken by a married person, that demonstrates their intention to separate permanently. (3) For the purposes of this Act, married persons are not considered to have separated if, within one year after separation, (a) they begin to live together again as spouses and the primary purpose for doing so is to reconcile, and (b) they continue to live together as spouses for one or more periods, totalling at least 90 days.

PUTTING IT ALL TOGETHER: WHEN SOCIAL BENEFITS COLLIDE

A Maze of Benefits...

- Income Assistance
- Persons with Disability Benefits
- Canada Pension Plan (CPP)
- Old Age Security (OAS) / Guaranteed Income Supplement (GIS)
- Employment Insurance (EI)
- Workers Compensation (WCB)
- Canada Child Benefit
- Others!

Ministry of Social Development and Social Innovation (MSDSI)

- Income Assistance, Persons with Disability Benefits (PwD), Hardship etc.
- MSDSI considers itself the payer of last resort.
- Most – but not all – other income security benefits are deducted as unearned income.

MSDSI and CPP: What is CPP?

- Federal, government run pension plan.
  - Retirement / early retirement.
  - CPP disability benefits (CPP-D).
  - Survivors benefits.
  - Others!

MSDSI and CPP: Requirement to Apply

- General obligation to pursue income, including CPP benefits:
  - CPP-D if client likely meets earning requirements
  - Early CPP if client is over 60.
- There are exceptions.
- MSDSI screens for people who might qualify for CPP benefits.
- MSDSI can force client to sign a consent to deduction.
- Deducted dollar for dollar.

MSDSI and CPP: Applying for PwD

- Worth applying for PwD even if client getting or expecting large CPP cheque.
- Can possibly get:
  - top up
  - Medical services
  - Bus pass
- Clients receiving CPP-D now get expedited PwD approval.

MSDSI and CPP: Applying for CPP

- Apply for CPP-D proactively. Client keeps retro.
- Before applying for CPP early retirement, assess if eligible for CPP-D:
  - CPP-D generally higher.
  - Will avoid reduced retirement pension.
- Can cancel CPP early retirement within 6 months **OR** if client deemed to have become disabled prior to CPP early retirement becoming payable.
- Max deemed disability 15 months before CPP-D application.
- Can use PwD application filled out in last 12 months to support CPP-D application.

MSDSI and CPP: What to Apply for First?

- Applying for CPP-D first could jeopardize medical services, bus pass etc.
- Consider how much client likely to get from CPP-D. Request statement of earnings from Service Canada.
- Rates have (theoretically) increased; assess whether previously ineligible CPP-D recipients now qualify for PwD.

MSDSI and OAS/GIS: What Are These Benefits?

- OAS: Payment to people over 65.
- GIS: Income tested supplement for low income people over 65.
- Spousal allowance: Allowance for some people aged 60-64 who have a spouse collecting OAS and GIS.
- Surviving Spouse Allowance: Allowance for some people aged 60-64 if their spouse dies.

MSDSI and OAS/GIS: Deductions from MSDSI Benefits

- Generally an obligation to pursue these benefits.
- Deducted dollar for dollar.

MSDSI and OAS/GIS

- GIS will not necessarily compensate for reduced CPP early retirement rate.
  - There are residency requirements for OAS/GIS.
  - Only 50% of CPP deducted from GIS.
- People over 65 must receive GIS / spousal allowance for medical services only.

MSDSI and EI: What Is EI?

- Mandatory social insurance scheme for interruptions in employment earnings.
- Regular benefits for people who lose job for reasons beyond their control.
- Special benefits:
  - Pregnancy / maternity
  - Parental
  - Sickness / medical
  - Companionate care
  - Critically ill children

MSDSI and EI: More People on PwD Eligible?

- Could see increase in people on PwD benefits who benefit from EI:
  - Annualized earnings exemptions.
  - EI calculating benefit rate based on "best weeks", higher EI rate for people with variable earnings.
- Many people can now work enough to qualify for EI without exceeding MSDSI income exemptions.
- Important to consider possibility of EI eligibility.

MSDSI and EI: Hours Needed to Qualify

Region	Hours Needed
Northern BC	490
Southern interior	595
Southern coast	630
Abbotsford	665
Victoria	700
Vancouver	700
All special benefits, all regions	600

Note: These change regularly

MSDSI and EI: What Is Deducted?

- EI Regular, Sickness, and Compassionate Care benefits deducted dollar for dollar.
- EI Maternity, Parental, and Critically Ill Child benefits exempt.

MSDSI and EI: Waiting For EI Claim

- Benefits from MSDSI pending EI application:
  - Generally takes four weeks to process an EI claim
  - Waiting period (only 1 week as of next year)
- Existing PwD clients can get PwD pending EI application.
- Others can apply for hardship.
- Repayable: Must sign a consent to deduct.

MSDSI and WCB

- WCB income replacement benefits are deducted.
- WCB training or medical benefits are not.
- Can apply for MSDSI benefits pending WCB application or appeal.
- Must sign an assignment of benefits.

Different Definitions of Disability

- PwD:
  - Severe mental or physical impairment
  - Severity assessed based on daily living activities
  - At least 2 years
- CPP-D:
  - Severe and prolonged
  - Severity assessed based on long term employability. Is person incapable regularly of pursuing any substantially gainful occupation
  - Prolonged means long continued or indefinite duration
- EI
  - Unable to work because of injury, illness, or quarantine
  - Focus is short term, must last at least 7 day
- WCB
  - Only covers work related injury and disability
  - Must (usually) be disabled from earning full wages, but DO NOT need to be totally unable to work
  - No minimum duration of injury or disability

CPP and WCB

- WCB only considers work related injury, disease, or disability.
- Just because client is totally disabled for CPP-D purposes does not necessarily mean that all disability is due to work.
- WCB deducts 50% of CPP benefits paid with respect to work injury.

CPP and WCB

- Sally is receiving $1,200 from CPP-D. When she applied for CPP-D she reported a back injury and severe depression.
- WCB determines that the back injury is work related but the depression is not.
- WCB determines that Sally is 25% disabled by her back condition.
- $300 of her CPP-D (25%) is deemed to be from the work injury.
- WCB deducts $150 (50%) from her WCB benefits

CPP and EI

- It is possible to qualify for EI after receiving CPP.
- All EI hours must be worked after you start receiving CPP.

QUESTIONS?

PWD Designation - Appeals

Disability Alliance BC

October 10, 2016

Employment and Assistance Appeal Tribunal Authority

Independent, quasi-judicial agency

Established to determine appeals of Ministry decisions under section 17(3) of the *Employment and Assistance Act,* section 16(3) of the *Employment and Assistance for Persons with Disabilities Act,* and section 6(3) of the *Child Care Subsidy Act*, including review of:

> **A decision that results in a refusal to provide income assistance, disability assistance, hardship assistance or a supplement to or for someone in the person's family unit;**

Tribunal Statistics: 2004 - 2015

Year	Appeals Heard (Total)	Decisions Rescinded (Total)	Success Rate (Total)	Notices of Appeal (PWD Designation)
2014/15	564	30	5.3%	183
2013/14	690	45	6.5%	197
2012/13	747	87	11.6%	181
2011/12	841	125	14.9%	218
2010/11	945	216	22.9%	323
2009/10	955	322	33.7%	326
2008/09	830	246	29.6%	320
2007/08	581	157	27%	177
2006/07	840	292	34.7%	384
2005/06	1120	426	38%	458
2004/05	1449	575	39.7%	374

Timeline – Commencement of Appeal and Hearing Date

Employment and Assistance Act

- **21** (1) A person who has a right of appeal to the tribunal must commence the appeal in the prescribed manner within 7 business days of the date the person receives notice of the decision being appealed.

Employment and Assistance Regulations

- **85** (1) A hearing must be held within 15 business days after the appeal form is delivered under section 84, unless the chair of the tribunal and the parties consent to a later date.
- (2) The chair of the tribunal must notify the parties of the date, time and place of a hearing described in subsection (1) at least 2 business days before the hearing is to commence.

Threshold to rescind a decision

Employment and Assistance Act

- **24** (1) After holding the hearing required under section 22 (3) *[panels of the tribunal to conduct appeals]*, the panel must determine whether the decision being appealed is, as applicable,

  (a) reasonably supported by the evidence, or

  (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

- (2) For a decision referred to in subsection (1), the panel must

  (a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and

  (b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.

Appeal Strategies – To Appeal or Not to Appeal?

- Case specific factors to consider in advising a client whether to appeal:
  - Strength of the evidence before the Ministry at reconsideration
  - Quality of the Ministry's reconsideration decision and it's application of the evidence to the legislated PWD eligibility criteria
  - Likely availability and strength of additional supporting evidence
- Contextual factors
  - Appellant success rates at Tribunal
  - Client priorities (principle vs. expediency)

Appeal Strategies – Developing Arguments (1/2)

- Strong arguments will highlight any respects in which the Ministry's decision was not:
  - reasonably supported by the evidence, or
  - a reasonable application of the applicable enactment in the circumstances of the person appealing the decision

(As per, Employment and Assistance Act, s. 24)

Appeal Strategies – Developing Arguments (2/2)

- Is the reconsideration decision:
  - Well-written and free from significant technical mistakes?
  - Cogently argued?
  - Free of apparent bias and prejudice?
- Does the reconsideration decision:
  - Consider all important evidence?
  - Weigh evidence fairly and reasonably?
  - Cite the relevant legislative provisions correctly?
  - Interpret the relevant legislative provisions fairly and reasonably?
  - Apply the available evidence to the relevant legislation fairly and reasonably?
- If the answer to any of the above questions is “No”, this may form part of the basis for the appeal.

Appeal Strategies –New Evidence

- New Evidence at Tribunal vs. New Evidence at Reconsideration
- Look for supporting evidence that :
  - Elaborates on information that was available when the reconsideration decision was made
  - Clarifies some ambiguity in previous evidence
- Often, the most compelling and easiest to obtain evidence will come from the doctor or assessor who completed the original PWD designation application

Appeal Strategies – Advocate Submission

- Introduction
  - Frame the appeal and outline grounds for appeal
- Evidentiary Record
  - List evidence before Ministry at time of reconsideration
  - List any additional evidence being submitted
- Relevant Legislation
  - If you agree the Ministry has correctly cited the relevant legislation you may just wish to acknowledge that the reconsideration decision correctly cites the relevant legislation
  - Otherwise, outline the relevant statutory provisions
- Arguments/Analysis/Discussion
  - Organize distinct arguments under distinct subheadings or using a bulleted list
  - Front-load strongest arguments
  - Strike a balance between thoroughness and succinctness both in choosing which arguments to present and how to present them (May be more effective to present a few strong arguments rather than a multitude of so-so arguments)
  - Use plain language as much as possible
- Conclusion
  - Summarize your arguments
- (Refer to page numbers in the Appeal Record throughout your submission)

Appeal Strategies –Oral Hearings (Before)

- Submit all necessary documents to the Tribunal including Notice of Appeal, Release of Information, advocate submission, and supporting evidence
- Prepare client and any witnesses for the hearing:
  - Where will it take place?
  - What will happen during the hearing?
  - Who will be there?
  - Will the client provide oral testimony?
  - What constitutes appropriate conduct at hearing?

Appeal Strategies – Oral Hearings (During)

- Advocate arguments and oral evidence
  - A well-organized written submission will act as a roadmap for oral arguments
  - Determine when and how any oral testimony will be provided
- Tribunal and Ministry Questions
  - Depending on the nature of the question, the advocate or client may be better positioned to provide a response
- Ministry's Oral Arguments
- Closing Arguments
  - Provides an opportunity to address the Ministry's oral arguments and summarize client's position

Appeal Strategies – Oral Hearings (After)

- Debrief with client
- Follow-up as necessary if any concerns arose during the hearing about the conduct of any parties to the hearing
- If Tribunal panel affirms the Ministry decision
  - Discuss the outcome with client
  - Outline possible next steps
    - Reapply
    - Do Nothing
    - Judicial review (client should seek legal advice)

disability alliance bc

we are all connected

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Advocacy Access Program

Template Appeal Submission – Prepared by Samuel Turcott

Re: Jane Doe – Request to Rescind Denial of PWD Designation

Pursuant to the authority of the *Employment and Assistance Act and Regulations ("*EAA*" and "*EAR*")*; and the *Employment and Assistance for Persons with Disabilities Act and Regulations ("EAPWDA" and "EAPWDR")*, we respectfully request that the Employment and Assistance Appeal Tribunal (EAAT) rescind the reconsideration decision of the Ministry of Social Development and Social Innovation (the Ministry) to deny Jane Doe (Ms. Doe) the Persons with Disabilities (PWD) designation for the reasons outlined in this submission. Having reviewed the information before the Ministry at the time of its decision, we submit that the decision was neither reasonably supported by the available evidence and nor was it a reasonable application of the PWD eligibility criteria set out in the *EAPWDA* and the *EAPWDR*. We further submit that the evidence before the Ministry was sufficient to establish that Ms. Doe meets all PWD eligibility and in particular that she:

- *List disputed PWD eligibility criteria*
- …

Our concerns with the Ministry decision include:

- *List brief description of defects with Ministry decision and factors mitigating in favour of PWD eligibility (e.g. failure to consider relevant information, insufficient weight on important evidence, unreasonable interpretation of legislation)*
- …
- …
- …

Evidentiary Record

The following information was before the Ministry at the time of decision:

- *List evidence with references to page numbers in Appeal Package*
- …
- …

We submit the following supporting information to the evidentiary record in support of Ms. Doe's request:

- *List any new documents being provided at appeal*
- …

Applicable Legislation

We acknowledge that Appendix B of the Ministry's reconsideration decision accurately states the legislated criteria for the PWD designation.

Advocacy Access Program

Arguments

Argument One

Throughout the reconsideration decision, the Minister repeatedly relies upon the term "physical functioning" rather than "physical impairment" in assessing the severity of Ms. Doe's disabilities. The legislative language used in s. 2 of the EAPWDA requires that a severe physical or mental impairment be established. The term "physical functioning" is not a defined term in the legislation. While we acknowledge that physical functioning may be a component in the determination of the severity of a physical impairment overall, the Minister's reliance on "physical functioning" overemphasizes the significance of functional restrictions such as walking, climbing stairs, and lifting rather than considering the severity of Ms. Doe's physical impairment in its entire context . The result is that the Minister's analysis places inadequate weight on Ms. Doe's ulcerative colitis, IBS, and myofascial pain as well as her 12 admissions to the emergency room between April 2014 and May 2016.

Argument Two

...

Argument Three

...

Conclusion

For the reasons outlined above we submit that the Ministry's decision to deny Ms. Doe the PWD designation was unreasonable and ought to be rescinded by the EAAT. *(Briefly summarize key arguments).*

Kind thanks for your time and careful consideration of this important matter.

Sincerely,

Working Effectively with Doctors - PWD Appeals

An opportunity to collect suggestions and tools for working effectively with doctors on PWD appeals

Annette Murray, Disability Alliance BC
advocate@disabilityalliancebc.org

PWD ISSUES OF CONCERN FOR SOME DOCTORS

- Is advocate trying to usurp their authority?
- What are the definitions of terms like severe, restriction, periodic, continuous, Daily Living Activities?
- Is employability a criterion?
- Can PWD designation improve their patient's health?

Issues of Concern – Cont'd

- Patient lives in SRO with no cooking facilities and only small room to keep clean (or cleaning and linen service provided) – how do I evaluate restrictions to meal prep and housework?
- Patient's income is so small there is no money to manage – how do I evaluate financial management skills?

Issues of Concern – Cont'd

- Patient's family does meal preparation, housework, medication and financial management, etc. for them – how do I evaluate functional restrictions and show need for help? (Note: Receiving help does not prove need for help in accordance with the legislation.)

PWD RECONSIDERATIONS AND APPEALS

- ***Humble*** cover letter to explain to the doctor what happened, what info is needed and when (asap) in order to win the appeal and how to send that info to you (fax? Email?)
- Cover letter should explain the criteria and define terms
- See *sample* Recon/Appeal Cover Letter and Doctor's Question Sheet in your course materials

Make it easy

- Make it easy for doctor to generate the information that's needed because the ministry won't pay for doctor's work at recon/appeal stage

- Include any ***helpful*** medical reports or medical letters, hospital admission/discharge records, etc.

Make it easy

- The Doctor's Question Sheets save the doctor the trouble of writing a letter themselves and targets the criteria for PWD

- Note: The ministry will not accept a suggestion version of the question sheet with the doctor's signature. Doctor must answer questions themselves

Addressing doctors' concerns

- Authority, definitions of terms, employability and health benefits – address on cover letter.
- Meal preparation – suggest doctor answer as if client had their own kitchen and enough money for good food.
- Financial management – suggest doctor answer as if client had enough money to pay bills.
- Housework – suggest doctor say family/landlord /roommate helps because the client needs it.

Addressing doctors' concerns

- How can the doctor offer different information at appeal than on the form without appearing foolish or dishonest?

If client's health got worse or if client under-reported or if new information about client's condition emerged since the application, suggest that the doctor say so, perhaps with a specific leading question on doctor's question sheet.

Challenges

Dr who filled out form is away for extended period, retired or moved away and new doctor won't write appeal letter.

- Psychiatrist or other specialist may write letter
- Less powerful but:
  - Registered psychologist, clinical counsellor, outreach worker, family member, landlord or other person who knows client well

Challenges

Doctor is averse to paperwork and needs something quick.

Writing a letter and having doctor sign it has not been as effective as the following methods:

- Get client to do another self-report (and sign and date it) that effectively targets criteria for PWD designation and use a doctor's question sheet with only one question: Do you agree with your patient's self-report dated [state date].

- Assessor did a good job on Section 3 – use a doctor's question sheet with only question: Do you agree with the Section 3 Report prepared by X on date X (attached)?

Challenges

Client under-reported severity, functional restrictions and need for help in Section 1 of the form.

- Help client do a revised Section 1. Get them to date and sign it. Client can explain that they under-reported due to embarrassment, concern about losing child custody*, etc.

* Before addressing this issue, suggest client discuss concerns with their lawyer if there is a custody battle.

Challenges

Much of form was good but page 11 (and/or page 16 if the person has a severe mental health impairment) was weak given client's health.

- Offer the doctor a blank page 11 (and/or 16 as appropriate) to fill out along with a filled-in version of suggestions
- Get client to sign and date a new self-report and give dr question sheet asking if dr agrees with client's new self-report

Challenges

The whole form was very weak.

- If it's a good case (i.e. compelling health situation) it may be overturned at recon/appeal with strong new information from doctor –use Doctor's Question Sheet and ask doctor to redo page 12 (and 18 if applicable) as discussed here previously

  - Note: remember to tweak the letter 's last paragraph to request receipt of p 11 and/or 16 in addition to letter

Thank you!

Annette Murray, Advocate

Disability Alliance BC

604-872-1278

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www.disabilityalliancebc.org

May 18, 2016

Dear Dr:

Re: X – DOB X – Disability appeal

Despite your caring work on his PWD application form, X was denied PWD and has asked us for assistance with his appeal for denial of the person with disability (PWD) designation. As you may know that designation is not permanent and will provide your patient with a little more money and medical coverage to aid in health promotion. Unlike with Canada Pension Plan Disability, employability is not at issue.

We are hopeful that a little more information from you will clarify the severity of your patient's impairment and the consequent ongoing restrictions in ability to perform daily living activities independently in a timely fashion and because of that, need for (not necessarily receipt of) assistance from other people.

A restriction means that someone takes significantly longer than normal to do a task, that they can't do it at all or that they can't do it without significant encouragement and/or help from another person. A restriction is considered continuous if it's unpredictable or ongoing; it is considered periodic if it only happens *sometimes* when the person needs to do the task.

After interviewing your patient and reviewing the application and Ministry decision, and in order to save you time and facilitate communication with the Ministry, I have enclosed a doctor's question sheet with the some questions for you to answer that target the criteria for PWD. For your convenience, I have also included a copy of the questions with answers suggested for your consideration. Because restrictions in daily living activities and need for help are key criteria, I am enclosing a blank page 12 along with a filled-in version of suggestions.

Thank you for taking time to respond to this request. The government does not pay doctors for their valuable work on appeals, and neither can we afford to pay you since we are a non-profit, non-government organization. Unfortunately the time allowed to file appeals is very short. If you decide to assist your patient in this way we need your response as soon as possible. **May I suggest you fax the doctor's question sheets and page 12 as filled out by you to me Attn: X fax X as soon as possible**.

Thank you for considering this matter.

To Whom It May Concern:

Re: X - Eligibility for Disability Benefits (PWD)

Dear Dr: *These are suggested answers for good copy that will be submitted you're your patient's appeal. Your own letter is also welcome. This format is devised to target critieria for PWD and save you time.*

The following questions are posed to the applicant's doctor in order to assist in determining eligibility for the disability designation.

---

1. When the impact of his conditions on his daily functioning is considered, does your patient have a severe impairment? If so, please explain:

Yes. Major depressive disorder and generalized anxiety disorder and takes appropriate medications. Has had CBT but severe mental impairment remains.

2. Is your patient's level of activity significantly reduced as a direct result of his impairment?

Yes.

3. Is his ability to cope with the stresses of daily life, make appropriate decisions in a timely manner, and interact with other people significantly restricted by his mental impairment?

Yes.

4. How often is he significantly restricted in his ability to perform daily living activities by one or more of his recurring symptoms?

Daily.

5. Overall, do your patient's health limitations significantly restrict his ability to perform a range of daily living activities on an ongoing basis such that he needs significant ongoing help (please describe help needed)?

Daily living activities

2 (1)For the purposes of the Act and this regulation, **"daily living activities"**,
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self-care;
(viii) manage personal medication, and
(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

- If yes, which ones?

Yes.
Meal prep, personal self-care, housework, financial management, transportation – low motivation so not done as often as needed
Shopping and moving about outdoors – fearful of leaving domicile
Decision-making, interacting (very withdrawn and isolating self), memory, concentration, executive

6. As a result of his health restrictions can you confirm that your patient needs significant ongoing help to manage DLAs?

- If yes, help with which daily living activities?

Daily encouragement to do personal self-care, meal preparation and housework, to go outside his home and to drive
Significant ongoing help with shopping, reminding to pay bills, psychological counselling

7. How often does he need help with DLAs?

Daily

Dear Dr: These are suggestions. You cannot just sign off on this page if you agree, you need to answer the questions yourself and sign, date and stamp the good copy that follows herein, or write your own letter. Thank you.

To Whom It May Concern:

Re: X - Eligibility for Disability Benefits (PWD)

The following questions are posed to the applicant's doctor in order to assist in determining eligibility for the disability designation.

---

1. When the impact of his conditions on his daily functioning is considered, does your patient have a severe impairment? If so, please explain:

2. Is your patient's level of activity significantly reduced as a direct result of his impairment?

3. Is his ability to cope with the stresses of daily life, make appropriate decisions in a timely manner, and interact with other people significantly restricted by his mental impairment?

4. How often is he significantly restricted in his ability to perform daily living activities by one or more of his recurring symptoms?

5. Overall, do your patient's health limitations significantly restrict his ability to perform a range of daily living activities on an ongoing basis such that he needs significant ongoing help (please describe help needed) ?

- **If yes, which ones?**

Daily living activities

2 (1)For the purposes of the Act and this regulation, **"daily living activities"**,
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self-care;
(viii) manage personal medication, and
(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

- If yes, which ones?

6. As a result of his health restrictions can you confirm that your patient needs significant ongoing help to manage DLAs?

- If yes, help with which daily living activities?

7. How often does he need help with DLAs?

Physician's signature

Date

Office stamp:

October 8, 2016

Dear Doctor:

Re: x – DOB x - Disability appeal

Despite your caring work on the application, X was denied the disability (PWD) designation and has asked us for assistance with her appeal. A PWD designation will provide your patient with a little more money and medical coverage to aid in health promotion. Unlike with Canada Pension Plan Disability, employability is not at issue.

We are hopeful that a little more information from you will clarify the severity of your patient's impairment and her restrictions in daily living activities and need for (not necessarily receipt of) assistance from devices and/or other people so that the Ministry can approve her PWD application.

A restriction means that someone takes significantly longer than normal to do a task, that they can't do it all or that they cannot do it without significant encouragement and/or help from another person or assistive device. A restriction is considered continuous if it is ongoing or periodic if it only happens sometimes when the person needs to do the task.

After interviewing your patient and reviewing the application and Ministry decision, and in order to save you time and facilitate communication with the Ministry, I have enclosed a doctor's question sheet with some questions for you to answer. For your convenience I have also included a copy of the questions with answers suggested for your consideration in answering the questions yourself. Since restrictions in daily living activities and need for help are key criteria, I have also included a blank page 12 along with a filled-in version for your consideration.

Thank you for taking the time to respond to this request. The government does not pay doctors for their valuable work on appeals and neither can we afford to pay you since we are a non-profit non-government organization.

Unfortunately the time allowed to file appeals is very short. If you decide to assist your patient in this way, we need your response as soon as possible. **May I suggest that you fax the doctor's question sheets and page 12 to me (Attn: X, Fax X) as soon as possible.** Thank you for considering this matter.

Sincerely,

To Whom It May Concern:

Re: X - Eligibility for Disability Benefits (PWD)

Dear Dr: These questions and answers are not intended to substitute for your professional expertise. They are designed to target the criteria for PWD and to save you time since we cannot afford to pay you for your work on the appeal.*

The following questions are posed to the applicant's doctor in order to assist in determining eligibility for the disability designation.

When the impact of her medical conditions on her daily functioning is considered, does your patient have a severe impairment? If so, please explain:

Yes. Severe fibromyalgia, CFS and right L4L5 facet arthropathy. Takes appropriate medications. Must use cane and needs handle bars around the home.

Is your patient's level of activity significantly reduced as a direct result of her impairment?

Yes.

How often is your patient significantly restricted in her daily functioning by one or more of her medical conditions?

Daily

Overall, do your patient's health limitations significantly restrict her ability to perform a range of daily living activities on an ongoing basis?

Daily living activities

2 (1)For the purposes of the Act and this regulation, **"daily living activities"**,
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self care;
(viii) manage personal medication, and
(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

Yes
Meal preparation – very limited standing, cutting/chopping, lifting pots
shopping, driving/using transit, housework, moving about outdoors and performing personal self care – very restricted flexibility, standing, sitting, walking, bending, lifting, carrying
walking – max 1-2 blocks exacerbates pain and fatigue
stairs – max 5 steps exacerbates pain and fatigue
lifting – NONE
remaining seated – max 1 hour exacerbates pain and fatigue
significant restrictions to concentration, short term memory, ability to organize and complete tasks and maintain social relationships because of severe chronic pain, exhaustion and reactive depression

As a result of her health conditions can you confirm that your patient needs significant ongoing help from other people and/or assistive devices?

Yes
Needs significant ongoing help with meal preparation, housework, shopping, transportation (driving very limited by pain), and emotional support as she is becoming withdrawn and isolated due to severe chronic pain and exhaustion.
Uses cane and needs grab bars around the home.

If your patient needs significant help with activities of daily living, how often does she need this assistance?

Daily

Dear Dr: The following pages have questions for you to answer if you are willing Unfortunately, the ministry will not accept your sign-off on this version of the questions.

To Whom It May Concern:

Re: X - Eligibility for Disability Benefits (PWD)

The following questions are posed to the applicant's doctor in order to assist in determining eligibility for the disability designation.

When the impact of her medical conditions on her daily functioning is considered, does your patient have a severe impairment? If so, please explain:

Is your patient's level of activity significantly reduced as a direct result of her impairment?

How often is your patient significantly restricted in her daily functioning by one or more of her medical conditions?

Overall, do your patient's health limitations significantly restrict her ability to perform a range of daily living activities on an ongoing basis?

Daily living activities

2 (1)For the purposes of the Act and this regulation, **"daily living activities"**,
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self care;
(viii) manage personal medication, and
(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

As a result of her health conditions can you confirm that your patient needs significant ongoing help from other people and/or assistive devices?

If your patient needs significant help with activities of daily living, how often does she need this assistance?

Physician's signature **Date**

Office stamp:

2016 Provincial Advocacy Training Conference
Wednesday October 19, from 8:30 to 10:00 a.m.

Welfare Law for Senior Advocates

Presentation by: *Amy Taylor, the Advocacy Centre*
Kate Feeney, BCPIAC

Summary of Legal Issue:

Please include a short description highlighting the legal issue at play in your case

The Ministry automatically considers two people who are (1) legally married; and (2) residing together to be part of the same family unit, even when those two people have separated. This approach gives rise to two legal issues:

(1) How should the Ministry define residing together for the purposes of defining the family unit? Does the definition of residing together include married people who are living "separate and apart" under the same roof or on the same property?

(2) Is it discriminatory for the Ministry to automatically consider two people who are married, but living "separate and apart" under the same roof or on the same property, as part of the same family unit?

Summary of Facts:

Please include a brief summary of the most important facts in the case.

- "Cindy" separated from her estranged husband, "Doug," approximately 3 years ago. However, she and Doug continue to live "separate and apart" on the same property in a rural area outside of Castlegar. Cindy lives in their jointly owned house and Doug lives in a travel trailer in the yard. Doug withdrew financial support from Cindy at the time of their separation. Cindy has no independent source of income.

- Doug was abusive during the relationship and continues to be abusive toward Cindy. Cindy tries to minimize any interactions with Doug, but he insists on accessing the house at his pleasure to do things such as laundry or watch TV. Cindy cannot afford legal proceedings to divorce and divide assets and she cannot afford to move somewhere else.

- In September 2015, Cindy started receiving income assistance as a sole recipient; in December 2015, she obtained PWD status. Around November 2015, Cindy requested a utilities crisis supplement—at that time, the Ministry said it became aware of her living arrangement with Doug and commenced an eligibility review. In December 2015, the Ministry asked Cindy to reapply for assistance with Doug as part of her family unit. Cindy did not reapply because she disagreed with the characterization of Doug as part of her family unit and because Doug was uncooperative. In January 2016, the Ministry cut off her assistance and assessed an overpayment for the months that she had received assistance.

Steps taken and outcome at each step:
(i.e. what procedures did you follow and what was the outcome of each step along the way? E.g. filed for reconsideration – unsuccessful, please give MSDSI's reasons. Then filed at EAAT, etc.)

Reconsideration—unsuccessful

Reasons: *"Mr. is considered to be your spouse as you are legally married. You live on the same property. Mr. uses electricity from the house for his trailer. He uses the bathroom and kitchen facilities in the house. He also uses the house to watch TV. As Mr. Nugent uses the house on a regular basis for daily living activities, the house is still considered as his residence and the trailer is considered to be more of a bedroom/sitting room adjacent to the house. The trailer is not self-sufficient as a stand-alone or separate suite. Consequently, in the opinion of the minister, you reside with Mr."*

EAAT—unsuccessful

Reasons: *"The issue in this case is not whether the nature of the relationship between X and the appellant is such that they are separated but whether X resides with the appellant. A person's residency denotes a physical presence, not a level of engagement in a relationship with any other person in the same residence…Where one resides is the physical place where one lives, not how one engages with others who may share the same residence. The panel finds that the word "reside" is not ambiguous and cannot be interpreted so broadly as to encompass and be dependent upon the nature of the relationship between residents…Based on the regular daily use by X of most areas of the house to attend to routine activities of living, despite having separate sleeping accommodation, the panel finds that the ministry has reasonably viewed the house as the residence of X."*

Judicial review—settled

The Ministry of Justice lawyer offered to settle the judicial review by setting aside the reconsideration and EAAT decisions and remitting the matter back to the reconsideration stage. We agreed to this proposal because the reconsideration branch has more discretion than the EAAT to change the original decision.

Second reconsideration—successful

Soon after we settled the judicial review, a second reconsideration decision was issued. Pursuant to the reconsideration decision:

- Cindy was back on PWD effective immediately;
- The Ministry agreed to pay Cindy back payments for the months she was off of PWD;
- The Ministry erased the $4,000 overpayment assessed against Cindy; and
- The Ministry will be changing its policies re: married but estranged spouses (note: the policies apparently have not yet been finalized).

Reasons: *"It is the minister's opinion that you have separated yourself from Mr. to the greatest extent you believe is possible under your circumstances. There is a significant level of physical separation sufficient enough to consider you and Mr. to not be residing with each other.*

Human rights complaint—ongoing; there is an early settlement meeting scheduled.

What was challenging about this case:

- The Ministry has no publically available policy on its interpretation of "residing together." Given the challenging standard of review in a judicial review application (patent unreasonableness), we had concerns that the EAAT's narrow interpretation of "residing together" would be upheld.

- We questioned whether we should be encouraging Cindy to create more physical separation from her abusive ex, rather than taking steps to maintain the status quo. We recognized, however, that it is Cindy who has to make the very personal decisions about her living arrangements.

Lessons learned from this case:

- Combining a judicial review with a human rights complaint (where possible) not only increases pressure on the Ministry to settle, it also creates two avenues for positive outcomes. In this case, now that Cindy is receiving assistance again, we can try to negotiate some systemic changes via the human rights complaint without the urgency created by Cindy's lack of income.

Ministry of Social Development and Social Innovation

EMPLOYMENT AND ASSISTANCE RECONSIDERATION DECISION

The collection, use and disclosure of personal information is subject to the provisions of the *Freedom of Information and Protection of Privacy Act*. If you have any questions about the collection, use and disclosure of this information, please contact your local Employment and Assistance Centre.

REQUESTOR INFORMATION

Name		Reconsideration SR No. (ICM)
Address		
City	Postal Code	Case No.

DECISION UNDER CONSIDERATION (Summarize the request and original decision)

You are requesting the minister to reconsideration of the decision to deny assistance.

SUMMARY OF FACTS (Summarize the relevant facts, based on the request and the evidence provided)

~ Please see Appendix A ~

APPLICABLE LEGISLATION

~ Please see Appendix A ~

RECONSIDERATION DECISION

~ Please see Appendix A ~

CERTIFIED TRUE COPY
MINISTRY OF SOCIAL DEVELOPMENT
MAR 0 4 2016
RECONSIDERATION BRANCH

ENCLOSED: ☒ ALL DOCUMENTS CONSIDERED BY THE MINISTRY ☒ NOTICE OF APPEAL TO THE EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL

SIGNATURE	NAME AND TITLE	DATE (YYYY MMM DD)
Lamoureux	P. Lamoureux, Reconsideration Officer	2016 MAR 03

If this decision is appealable to the Employment and Assistance Appeal Tribunal, and you wish to appeal this decision, you may complete the enclosed *Notice of Appeal to the Employment and Assistance Appeal Tribunal* form and return it to the Appeal Tribunal. This Reconsideration Decision and attached documents constitute the appeal record. A sealed copy of this appeal will be kept by the Ministry.
Pursuant to subsection 22(4) of the *Employment and Assistance Act*, a tribunal panel may admit as evidence only:
(a) the information and records that were before the minister when the decision being appealed was made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

APPENDIX A – Summary of Facts

You were in receipt of disability assistance as a sole recipient.

On September 28, 2015 you stated you were living with your ex-spouse and did not have the funds to move out. You state you jointly own your residence with your ex-spouse, Mr. [redacted] and that he pays the mortgage.

On November 23, 2015 you stated your ex-spouse pays had been paying all the bills. Your file was referred for an eligibility review.

On November 26, 2015 you explained that your ex-spouse lives in a trailer on the property and you live in the house.

On December 4, 2015 you were advised you would be required to apply for assistance with Mr. [redacted] as a dependent on your file in order to maintain eligibility. A letter was sent to you requesting that you contact the ministry to initiate application for assistance on behalf of your spouse.

On January 6, 2016 you advised Mr. [redacted] lives in a trailer on the property and uses electricity from the house using an extension cord. You confirmed he uses the bathroom in the house. You stated you now have the hydro bill in your name and Mr. [redacted] pays the gas bill.

On January 8, 2016 you stated that although your ex-spouse lives on the property you are not together as a couple. You stated Mr. [redacted] would not provide any financial support and would not provide any documentation required to add him to your file. You did provide a copy of Mr. [redacted] February 4, 2015 Bankruptcy documents listing himself as married and you as his spouse. You confirmed you were still legally married and had not intiated separation or divorce.

On January 19, 2015 a letter was sent to you advising you were no eligible for assistance due to failure to apply for assistance on behalf of your entire family unit. You requested the minister to reconsider the decision.

You returned the signed Request for Reconsideration forms on February 17, 2016. You requested an extension of the submission time limits in order to complete your submission. Your completed submission prepared by Amy Taylor, Advocate, the Advocacy Centre, was received on February 25, 2016. Ms. Taylor submits you are legally married to [redacted] you jointly own the property where you both reside, you separated approximately 3 years ago, you do not socialize, you do not do laundry or clean for [redacted] you are not allowed in [redacted] trailer, [redacted] pays the mortgage and property taxes, the power for [redacted] trailer comes from the house, [redacted] uses the kitchen, bathroom and watches TV in the house, [redacted] does not provide financial support for your daily living expenses, you pay the Shaw Cable bill, [redacted] refuses to apply for assistance as a dependent on your file and will not provide any of the required documents and you require medications that you will no longer be able to afford.

NAME: [redacted]
DATE: March 3, 2016

APPENDIX B – Reconsideration Decision

All the information relevant to your request has been reviewed. The minister has determined you are not eligible for assistance due to failure to apply for assistance on behalf of your entire family unit.

Under Section 5 of the Employment and Assistance for Persons with Disabilities Regulation a person is not eligible for assistance if they do not apply on behalf of their entire family unit.

Under Section 1 of the Employment and Assistance for Persons with Disabilities Act a family unit is defined as the applicant/recipient and their dependents. A dependent is defined as the spouse of the applicant/recipient and who resides with the applicant/recipient.

Under Section 1.1(1)(a) a spouse is defined as two persons who are married for the purposes of administering this Act and Regulation.

[redacted] is considered to be your spouse as you are legally married. You live on the same property. Mr. [redacted] uses electricity from the house for his trailer. He uses the bathroom and kitchen facilities in the house. He also uses the house to watch TV. As Mr. [redacted] uses the house on a regular basis for daily living activities the house is still considered as his residence and the trailer is considered to be more of a bedroom/sitting room adjacent to the house. The trailer is not self-sufficient as a stand- alone or separate suite. Consequently, in the opinion of the minister, you reside with Mr. [redacted]

As you reside with Mr. [redacted] and he is your spouse he is considered to be your dependent. As a dependent he is part of your family unit. You are not eligible for assistance as you have not included Mr. [redacted] in your application for assistance.

NAME: [redacted]
DATE: March 3, 2016

APPENDIX C – Legislation

Employment and Assistance for Persons with Disabilities Act

Interpretation
1 (1) In this Act

"dependant", in relation to a person, means anyone who resides with the person and who
(a) is the spouse of the person,
(b) is a dependent child of the person, or
(c) indicates a parental role for the person's dependent child; (B.C. Reg. 131/2012)
(B.C. Reg. 193/2006)

"family unit" means an applicant or a recipient and his or her dependants;

"spouse" has the meaning in section 1.1;

Meaning of "spouse"
1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if
(a) they are married to each other, or
(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.
(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if
(a) they have resided together for at least
(i) the previous 3 consecutive months, or
(ii) 9 of the previous 12 months, and
(b) the minister is satisfied that the relationship demonstrates
(i) financial dependence or interdependence, and
(ii) social and familial interdependence,
consistent with a marriage-like relationship.
(B.C Reg. 193/2006)

Employment and Assistance for Persons with Disabilities Regulation

Applicant requirements
5 For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless
(a) the family unit does not include an adult, or
(b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

Employment
and Assistance
Appeal Tribunal

April 25, 2016

Appeal No: [redacted]

[redacted]

Melissa Bauer, Manager
Reconsideration and Appeals
Ministry of Social Development and Social Innovation
PO Box 9963 Stn Prov Govt
Victoria BC V8W 9R4

Dear [redacted] and Melissa Bauer:

Re: Employment and Assistance Appeal Tribunal Decision

A panel of the Employment and Assistance Appeal Tribunal (the "Tribunal") heard your appeal on Friday, April 8, 2016. Please note that you were not successful in your appeal.

On behalf of the Chair of the Tribunal, please find enclosed a copy of the decision on your appeal.

Sincerely,

Amy Power
Appeal Coordinator

Enclosure

pc: Amy Taylor, Advocate

Mailing Address:
PO BOX 9994 STN PROV GOVT
VICTORIA BC V8W 9R7

Tel: 250 356-6374
Fax: 250 356-9687
E-mail: eaat@gov.bc.ca

Toll Free Tel: 1-866-557-0035
Toll Free Fax: 1-877-356-9687
Website: www.gov.bc.ca/eaat

RECEIVED
APR 13 2016
EMPLOYMENT & ASSISTANCE APPEAL TRIBUNAL

Employment and Assistance Appeal Tribunal

Tribunal Decision

APPEAL
[redacted]

PART A – Panel Information

On 2016/04/08 a hearing was held, pursuant to Part 3 of the *Employment and Assistance Act*
DATE (YYYY MM DD)

to hear the appeal of [redacted] GA
NAME OF APPELLANT (PLEASE PRINT) FILE NUMBER

By teleconference
ADDRESS

PART B – Persons in Attendance at the Hearing

PANEL CHAIR
Jane Nielsen

MINISTRY REPRESENTATIVE
Jenna Keetch

PANEL MEMBER
Lauren Forsyth

APPELLANT
[redacted]

PANEL MEMBER
Ronald Terlesky

APPELLANT'S REPRESENTATIVE
Amy Taylor

Witnesses

FOR APPELLANT

FOR MINISTRY

FOR APPELLANT

FOR MINISTRY

Other

FOR APPELLANT

FOR MINISTRY

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated March 3, 2016, which held that the appellant is not eligible for disability assistance in accordance with section 5 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) because she has not applied for assistance on behalf of her family unit which includes X, who is both her "spouse" and "dependant" as defined respectively in sections 1.1(1) and 1(1) of the Employment and Assistance for Persons with Disabilities Act (EAPWDA).

PART D – Relevant Legislation

EAPWDA, sections 1(1) and 1.1(1)
EAPWDR, section 5

PART E – Summary of Facts

Information before the ministry at reconsideration

The appellant and X are legally married and are joint owners of a property on which they both reside. The appellant advised the ministry that she lives in the house on the property while X lives in a travel trailer on the property. X uses electricity from the house via an extension cord, uses the kitchen and bathroom in the house, and watches TV in the house. The appellant is not allowed into the trailer. The appellant told the ministry that she did not have the funds to move and that X refuses to provide any of the documents required to add him to her file. The appellant and X separated 3 years ago, do not socialize and merely tolerate each other's presence. The appellant pays for the hydro while X pays the mortgage and property taxes.

Information provided on appeal

In her March 31, 2016 appeal submission, the appellant writes that the travel trailer is a fully equipped self-contained unit with a 4 piece bathroom and a kitchen area with a fridge, stove top, oven, sink and storage. There is also a dining/lounge area with additional storage. It is equipped with an electric/propane furnace and all the needed "hook ups" for power, water sewer, TV/cable etc. None of these services are set up. As co-owner of the house, X feels it is his right to use the bathroom, kitchen, and laundry at his convenience with no regard for the appellant's privacy and personal space. The appellant also describes long-standing difficulties and abuse in her relationship with X. Once separated, X withdrew all financial support for the appellant. The appellant is currently without running hot water and the gas heat is disconnected. She relies on a small space heater and must boil water for bathing and cleaning. Since her ministry assistance was discontinued in November 2015, she has had no choice but to beg and borrow in order to get medication and food; her main reason for applying for assistance was to get help to pay for her inhalers. The appellant has been unable to find an affordable place to rent.

The appellant also submitted a March 24, 2016 letter from a friend who describes difficulties experienced by the appellant during her marriage to X, and that they have not been an intimate couple for years, and an undated note from her aunt who states that to the best of her knowledge, the appellant and X lead separate lives.

The appellant's advocate provided a 39-page submission which restates some of the available information but is largely comprised of argument with attached case law. The argument is summarized in Part F of the panel's decision.

At the hearing, the appellant stated that there have been no attempts to sell the house, noting that its value wouldn't be realized given the need for major repairs. The appellant states that when applying for assistance she disclosed her living arrangements and does not know why ministry records don't reflect that fact. She acknowledged that she was identified as a dependant on X's most recent bankruptcy documents but that she does not know why X did that and only became aware of X's bankruptcy application after it was made.

At the hearing, the ministry reviewed information in the appeal record, and sought to clarify that the

appellant was provided with assistance, despite shelter documents not being provided at the time of application, because she was fleeing an abusive relationship. The ministry was aware that the appellant and X jointly owned a home when the appellant applied for assistance but was not aware that the appellant and X were in the same house.

The ministry did not object to the admission of the additional information provided by the appellant on appeal. As the new information comprised additional details consistent with the previous information, it was admitted by the panel as information in support of the information and records before the ministry at reconsideration pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

Issue under appeal

The issue under appeal is whether the ministry decision which held that in accordance with section 5 of the EAPWDR the appellant is not eligible for disability assistance because she did not apply on behalf of her family unit is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. That is, was the ministry reasonable in determining that X is both the spouse and dependant of the appellant and therefore part of her family unit as defined in sections 1.1 and 1 of the EAPWDA?

Relevant Legislation – sections 1(1) and 1.1 of the EAPWDR and section 5 of the EAPWDA

Interpretation

1 (1) In this Act…

"dependant", in relation to a person, means anyone who resides with the person and who

(a) is the spouse of the person,

(b) is a dependent child of the person, or

(c) indicates a parental role for the person's dependent child;

"family unit" means an applicant or a recipient and his or her dependants;

"spouse" has the meaning in section 1.1;

Meaning of "spouse"

1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they are married to each other, or

(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.

(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they have resided together for at least

(i) the previous 3 consecutive months, or

(ii) 9 of the previous 12 months, and

(b) the minister is satisfied that the relationship demonstrates

(i) financial dependence or interdependence, and

(ii) social and familial interdependence,

consistent with a marriage-like relationship.

Applicant requirements

5 For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless

(a) the family unit does not include an adult, or

(b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

Appellant's position

The appellant's position is that while legally married to X, she does not reside with him and therefore he is not her dependant or a member of her family unit. She does not consider herself to be "living" with X as they lead separate lives. They share services and facilities, despite the appellant's objection, but they do nothing together other than argue and "exist" on the same property.

In support of this argument, the appellant's advocate notes that "reside" is not defined in the legislation and argues that when considering other legislative schemes respecting family and tax law, and Canada Pension Plan (CPP) benefits legislation, the courts have held that married individuals under the same roof may be viewed as "living separate and apart" so that individuals are not penalized by loss of access to benefits or entitlements because of their financial situations. A number of cases are referenced, including *Gartner v. Canada*, in which the court held that the wife was eligible for the Canada Child Tax Benefit as assessed solely on her income because she and her spouse were living separate and apart while under the same roof. The advocate also cites section 3(4) of the provincial *Family Law Act* which provides that "spouses may be separated despite continuing to live in the same residence..." In the appellant's circumstances, having been separated from X, she has the right to seek a divorce, apply for spousal support, and to seek a division of CPP pension credits earned during the marriage prior to its breakdown.

That "reside" should be interpreted so as not to include X as the appellant's dependent family member is also supported by section 8 of the *Interpretation Act*, jurisprudence and the principles of statutory interpretation, which require a large and liberal interpretation of benefits conferring

legislation and that doubts or ambiguities arising from the language of the legislation be resolved in favour of an applicant.

The advocate argues that by forcing the appellant to apply for assistance on behalf of X as part of her family unit, she is being stripped of the benefits of separation. Furthermore, to view X as part of the appellant's family unit gives rise to possible exposure to liability for debts incurred by X subsequent to the time the marriage broke down because the *Family Law Act* assesses what are considered to be family debts for which both spouses are equally responsible as those incurred prior to separation.

If the appellant is forced to apply for assistance on behalf of X, she will not be able to meet her basic needs, including her medications, will lose her transportation and telephone resulting in further isolation and risk due to her health issues, and will be forced back into an abusive relationship. This would be an absurd result which is not consistent with a principle objective of the EAPWDA and EAPWDR which is to promote the health and well-being of persons with disabilities, specifically those with limited financial means.

Ministry's position

The ministry's position is that because the appellant and X live on the same property with X using electricity from the house, the bathroom and kitchen facilities, and the house to watch TV, X is using the house on a regular basis for daily living activities and therefore the house is still considered as his residence. The trailer is not self-sufficient as a stand-alone or separate suite; rather, the trailer is more of a bedroom/sitting room adjacent to the house. As the appellant resides with X, and he is her spouse, he is the appellant's dependant and part of her family unit as defined in the EAPWDA and in accordance with section 5 of the EAPWDR, to be eligible for assistance the appellant must apply for it on behalf of her family unit.

Panel Decision

In this case, there is no dispute that the appellant and X are spouses as defined in section 1.1(1)(a) of the EAPWDA as they are legally married to each other. Consequently, the panel finds that the ministry reasonably considered them as spouses for the purposes of the EAPWDA and EAPWDR. If the appellant and X were not legally married, the assessment of whether or not they were spouses would be determined under section 1.1(2) which requires a length of residency together with financial and social and familial interdependence. These markers of the nature of the relationship between two persons are not a consideration for spouses who are legally married.

The issue in this case is whether X is a spouse who "resides with" the appellant and is therefore a dependant as defined in section 1(1) of the EAPWDA. The appellant's advocate argues that in accordance with the case law, the appellant and her spouse live separate and apart and therefore do not reside together.

The courts have long held that married persons can be found to "live separate and apart" within the same dwelling. Each case is determined based on its unique facts with factors including conjugal

relations, division of domestic chores, intention to separate, social interactions, and financial constraints on one or both parties, being among those considered by the court. The appellant's advocate has provided case law where the courts determined that married spouses were living separate and apart for the purposes of determining eligibility to seek benefits that arise from separation including *Gartner v. Canada* in which the court found as fact that both spouses lived in the same "Residence" and held that two "co-habiting" spouses can be considered as living separate and apart under the same roof for the purpose of assessing eligibility for Canada Child Tax Benefit. However, in the cases cited, the issue was not where the spouses resided but whether the nature of the relationship between the spouses was such that they should be considered "separated." That the issue of whether spouses are "separated" in the eyes of the law is not the same as the issue of "residency" is also supported by the language of section 3(4) of the *Family Law Act*, which states that married spouses may be considered to be separated despite continuing to live in the same residence.

The issue in this case is not whether the nature of the relationship between X and the appellant is such that they are separated but whether X resides with the appellant. A person's residency denotes a physical presence, not a level of engagement in a relationship with any other person in the same residence. The Canadian Oxford Compact Dictionary defines "reside" as "(of a person) have one's home, dwell permanently." Black's Law Dictionary, Fifth Edition, defines "reside" as "Live, dwell, abide, sojourn, stay, remain, lodge." Where one resides is the physical place where one lives not how one engages with others who may share the same residence. The panel finds that the word "reside" is not ambiguous and cannot be interpreted so broadly as to encompass and be dependent upon the nature of the relationship between residents.

The panel must consider whether the ministry reasonably viewed the house the appellant resides in as also being where X resides. In reaching its decision, the ministry notes that the trailer is not a stand-alone or separate suite and that X regularly uses the house for his daily activities. That this is the case is apparent from the appellant's evidence that X regularly uses the bathroom, kitchen, laundry facilities, and watches TV in the home, irrespective of her objections. Based on the regular daily use by X of most areas of the house to attend to routine activities of living, despite having separate sleeping accommodation, the panel finds that the ministry has reasonably viewed the house as the residence of X. Therefore, the panel finds that the ministry reasonably determined that X resides with the appellant and as he is her spouse he is also her "dependant" and part of her "family unit" as defined in section 1 of the EAPWDA.

Conclusion

For the above reasons, the panel finds that the ministry's reconsideration decision that determined that the appellant is not eligible for assistance as she has not applied on behalf of her family unit as required by section 5 of the EAPWDR is a reasonable application of the legislation in the circumstances of the appellant. The ministry's reconsideration decision is confirmed.

APPEAL # [redacted]

PART G – Order

THE PANEL DECISION IS ☒ UNANIMOUS ☐ BY MAJORITY (Check one)

THE PANEL ☒ CONFIRMS THE MINISTRY DECISION ☐ RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? ☐ YES ☐ NO

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) ☐ and/or Section 24(1)(b) ☒

and

Section 24(2)(a) ☒ or Section 24(2)(b) ☐

PART H – Signatures

SIGNATURE OF CHAIR	DATE (YYYY MMM DDD)
Jane Nielsen	2016/04/08
PRINT NAME	
Jane Nielsen	

SIGNATURE OF MEMBER	DATE (YYYY MMM DDD)
Jane Nielsen	2016/04/08
PRINT NAME per	
Lauren Forsyth	
SIGNATURE OF MEMBER	DATE (YYYY MMM DDD)
Jane Nielsen	2016/04/08
PRINT NAME per:	
Ronald Terlesky	

BRITISH COLUMBIA
The Best Place on Earth

August 30, 2016

Reconsideration Service Request No: [redacted]
Case No: [redacted]

[redacted]

Dear [redacted]:

Re: Employment and Assistance NEW Reconsideration Decision

Please note this new reconsideration decision replaces the previous reconsideration decision dated March 3, 2016.

After reviewing your Request for Reconsideration and additional information provided, the minister has determined that [redacted] is not a member of your "family unit"; therefore, you should not be denied disability assistance as a sole recipient.

If you would like a copy of the complete reconsideration decision package, please contact the Reconsideration Branch at 250-356-7993. The complete decision package contains your Request for Reconsideration and all documents submitted with it.

If you have any questions about your reconsideration, the appeal process or your file, please contact your Employment and Assistance Office. You may also contact an Employment Assistance Worker at **1-866-866-0800** or visit the ministry website at www.hsd.gov.bc.ca.

Sincerely,

Melissa Bauer
A/Director, Reconsideration and Appeals

Enclosure(s)

Ministry of Social Development and Social Innovation
Reconsideration and Appeals Section
MSDSI-MCFD Legislation, Litigation and Appeals Branch
PO Box 9963 Stn Prov Govt
Victoria BC V8W 9R4
Phone: 250 356-7993
Fax: 1-855-771-8784

BRITISH COLUMBIA
The Best Place on Earth

Ministry of
Social Development
and Social Innovation

EMPLOYMENT AND ASSISTANCE RECONSIDERATION DECISION

The collection, use and disclosure of personal information is subject to the provisions of the *Freedom of Information and Protection of Privacy Act*. If you have any questions about the collection, use and disclosure of this information, please contact your local Employment and Assistance Centre.

REQUESTOR INFORMATION

Reconsideration SR No. (ICM)
[redacted]

Name		
[redacted]		
Address		
[redacted]		
City	Postal Code	Case No.
[redacted]	[redacted]	[redacted]

DECISION UNDER CONSIDERATION (Summarize the request and original decision)

You are requesting the minister to reconsideration of the decision to deny assistance.

SUMMARY OF FACTS (Summarize the relevant facts, based on the request and the evidence provided)

The following is a summary of the key dates and information related to your Request for Reconsideration:

On January 19, 2016 you were mailed a letter advising that you were not eligible for assistance as a single person.

On February 17, 2016 you submitted your signed Request for Reconsideration. You requested an extension and once was granted. Additional information was received February 25, 2016.

On March 3, 2016 the ministry completed its review of your Request for Reconsideration.

On April 8, 2016 Employment and Assistance Appeal Tribunal confirmed the ministry decision.

On August 16, 2016 based on a recent update made to ministry policy, your request for reconsideration including additional submission was reviewed.

APPLICABLE LEGISLATION

Employment and Assistance for Persons with Disabilities Act Sections 1, 1.1
Employment and Assistance for Persons with Disabilities Regulation Section 5

If this decision is appealable to the Employment and Assistance Appeal Tribunal, and you wish to appeal this decision, you may complete the enclosed *Notice of Appeal to the Employment and Assistance Appeal Tribunal* form and return it to the Appeal Tribunal. This Reconsideration Decision and attached documents constitute the appeal record. A sealed copy of this appeal will be kept by the Ministry.
Pursuant to subsection 22(4) of the *Employment and Assistance Act*, a tribunal panel may admit as evidence only:
(a) the information and records that were before the minister when the decision being appealed was made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

Ministry of
Social Development
and Social Innovation

EMPLOYMENT AND ASSISTANCE RECONSIDERATION DECISION

RECONSIDERATION DECISION

~ Please see Appendix A ~

CERTIFIED TRUE COPY
MINISTRY OF SOCIAL DEVELOPMENT
SEP 0 2 2016
RECONSIDERATION BRANCH

ENCLOSED: ☒ ALL DOCUMENTS CONSIDERED BY THE MINISTRY ☒ NOTICE OF APPEAL TO THE EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL

SIGNATURE	NAME AND TITLE	DATE (YYYY MMM DD)
	Melissa Bauer, A/Director, Reconsideration and Appeals	2016 Aug 30

If this decision is appealable to the Employment and Assistance Appeal Tribunal, and you wish to appeal this decision, you may complete the enclosed *Notice of Appeal to the Employment and Assistance Appeal Tribunal* form and return it to the Appeal Tribunal. This Reconsideration Decision and attached documents constitute the appeal record. A sealed copy of this appeal will be kept by the Ministry.
Pursuant to subsection 22(4) of the *Employment and Assistance Act*, a tribunal panel may admit as evidence only:
(a) the information and records that were before the minister when the decision being appealed was made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

APPENDIX A – Reconsideration decision

All the information relevant to your request has been reviewed. The minister has determined you should not be denied assistance as a sole recipient due to a dependency relationship with [redacted]

Background

On April 20, 2015 you spoke to a ministry worker regarding your application for Income Assistance. You advised that you had a joint mortgage with your ex-spouse, who you had separated from. You stated you did not have the mortgage documents. You were advised that you would not be eligible to recieve shelter funds until documentation regarding your actual shelter cost could be comfirmed.

On April 21, 2015 you were determined eligible for Income Assistance. You were issued pro-rated April Support $150.89.

Effective December 1, 2015 you were approved for Persons with Disabilities designation.

On January 19, 2016 you were mailed 2 letters. One letter advised that you were not eligible for assistance as a sole recipient. The second letter advised that an overpayment of $4011.85 had been calculated due to receiving assistance for which you were not eligible to receive between April 2015 and December 2015. The letter advised that an appointment had been scheduled for Tuesday January 26, 2015. You did not attend the scheduled appointment and the debt was subsequently added to your file.

On January 27, 2016 your file was closed.

On January 28, 2016 you requested reconsideration. A request for reconsideration package was completed advising that you were denied assistance due to being in a dependency relationship. You were denied assistance for failure to apply on behalf of the entire family unit.

Legislation

Under Section 5 of the Employment and Assistance for Persons with Disabilities Regulation a person must apply for assistance on behalf of the entire family unit.

Under Section 1(1) of the Employment and Assistance for Persons with Disabilities Act, **family unit** is defined as an applicant or a recipient and his or her dependants. A **dependant** is defined as anyone who resides with the person and who is the spouse of the person. Under Section 1.1(1)(a), two persons are spouses of each other if they are married to each other.

Decision

You are legally married to Mr. [redacted] and you jointly own the property which you live on. Information has been provided to establish that you reside in the house on the property while Mr. [redacted] resides in the travel trailer parked on the property.

It is the minister's opinion that you have separated yourself from Mr. [redacted] to the greatest extent you believe is possible under your circumstances. There is a significant level of physical separation sufficient enough to consider you and Mr. [redacted] to not to be residing with each other.

As the minister does not consider you to be residing with Mr. [redacted], he is not considered to be your dependant. Therefore, he is not considered part of your family unit. Subsequently, you are eligible for assistance as a sole recipient; providing all other eligibility criteria are met.

Please note: This decision is retroactive to the approval of your application for income assistance in April 2015. As such, you are no longer required to repay $4011.85 the minister previously determined as being an overpayment of assistance. In addition, a back-payment of $5142.78 [$531.42 support + $40 shelter x 9 months = $5142.78] will be issued by the ministry office for disability assistance from January 2016 to September 2016.

APPENDIX B – Legislation

Employment and Assistance for Persons with Disabilities Act

Interpretation
1 (1) In this Act:

"dependant", in relation to a person, means anyone who resides with the person and who
(a) is the spouse of the person,
(b) is a dependent child of the person, or
(c) indicates a parental role for the person's dependent child; (B.C. Reg. 131/2012)
(B.C. Reg. 193/2006)

"family unit" means an applicant or a recipient and his or her dependants;

"spouse" has the meaning in section 1.1;

Meaning of "spouse"
1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if
(a) they are married to each other, or
(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.
(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if
(a) they have resided together for at least
(i) the previous 3 consecutive months, or
(ii) 9 of the previous 12 months, and
(b) the minister is satisfied that the relationship demonstrates
(i) financial dependence or interdependence, and
(ii) social and familial interdependence,
consistent with a marriage-like relationship.
(B.C Reg. 193/2006)

Employment and Assistance for Persons with Disabilities Regulation

Applicant requirements
5 For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless
(a) the family unit does not include an adult, or
(b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

2016 Provincial Advocacy Training Conference
Wednesday October 19, from 8:30 to 10:00 a.m.

Welfare Law for Senior Advocates

Presentation by: *Amy Taylor, the Advocacy Centre*
Kate Feeney, BCPIAC

Summary of Legal Issue:

Please include a short description highlighting the legal issue at play in your case

The Ministry automatically considers two people who are (1) legally married; and (2) residing together to be part of the same family unit, even when those two people have separated. This approach gives rise to two legal issues:

(1) How should the Ministry define residing together for the purposes of defining the family unit? Does the definition of residing together include married people who are living "separate and apart" under the same roof or on the same property?

(2) Is it discriminatory for the Ministry to automatically consider two people who are married, but living "separate and apart" under the same roof or on the same property, as part of the same family unit?

Summary of Facts:

Please include a brief summary of the most important facts in the case.

- "Cindy" separated from her estranged husband, "Doug," approximately 3 years ago. However, she and Doug continue to live "separate and apart" on the same property in a rural area outside of Castlegar. Cindy lives in their jointly owned house and Doug lives in a travel trailer in the yard. Doug withdrew financial support from Cindy at the time of their separation. Cindy has no independent source of income.

- Doug was abusive during the relationship and continues to be abusive toward Cindy. Cindy tries to minimize any interactions with Doug, but he insists on accessing the house at his pleasure to do things such as laundry or watch TV. Cindy cannot afford legal proceedings to divorce and divide assets and she cannot afford to move somewhere else.

- In September 2015, Cindy started receiving income assistance as a sole recipient; in December 2015, she obtained PWD status. Around November 2015, Cindy requested a utilities crisis supplement—at that time, the Ministry said it became aware of her living arrangement with Doug and commenced an eligibility review. In December 2015, the Ministry asked Cindy to reapply for assistance with Doug as part of her family unit. Cindy did not reapply because she disagreed with the characterization of Doug as part of her family unit and because Doug was uncooperative. In January 2016, the Ministry cut off her assistance and assessed an overpayment for the months that she had received assistance.

Steps taken and outcome at each step:
(i.e. what procedures did you follow and what was the outcome of each step along the way? E.g. filed for reconsideration – unsuccessful, please give MSDSI's reasons. Then filed at EAAT, etc.)

Reconsideration—unsuccessful

Reasons: *"Mr. is considered to be your spouse as you are legally married. You live on the same property. Mr. uses electricity from the house for his trailer. He uses the bathroom and kitchen facilities in the house. He also uses the house to watch TV. As Mr. Nugent uses the house on a regular basis for daily living activities, the house is still considered as his residence and the trailer is considered to be more of a bedroom/sitting room adjacent to the house. The trailer is not self-sufficient as a stand-alone or separate suite. Consequently, in the opinion of the minister, you reside with Mr."*

EAAT—unsuccessful

Reasons: *"The issue in this case is not whether the nature of the relationship between X and the appellant is such that they are separated but whether X resides with the appellant. A person's residency denotes a physical presence, not a level of engagement in a relationship with any other person in the same residence…Where one resides is the physical place where one lives, not how one engages with others who may share the same residence. The panel finds that the word "reside" is not ambiguous and cannot be interpreted so broadly as to encompass and be dependent upon the nature of the relationship between residents…Based on the regular daily use by X of most areas of the house to attend to routine activities of living, despite having separate sleeping accommodation, the panel finds that the ministry has reasonably viewed the house as the residence of X."*

Judicial review—settled

The Ministry of Justice lawyer offered to settle the judicial review by setting aside the reconsideration and EAAT decisions and remitting the matter back to the reconsideration stage. We agreed to this proposal because the reconsideration branch has more discretion than the EAAT to change the original decision.

Second reconsideration—successful

Soon after we settled the judicial review, a second reconsideration decision was issued. Pursuant to the reconsideration decision:

- Cindy was back on PWD effective immediately;
- The Ministry agreed to pay Cindy back payments for the months she was off of PWD;
- The Ministry erased the $4,000 overpayment assessed against Cindy; and
- The Ministry will be changing its policies re: married but estranged spouses (note: the policies apparently have not yet been finalized).

Reasons: *"It is the minister's opinion that you have separated yourself from Mr. to the greatest extent you believe is possible under your circumstances. There is a significant level of physical separation sufficient enough to consider you and Mr. to not be residing with each other.*

Human rights complaint—ongoing; there is an early settlement meeting scheduled.

What was challenging about this case:

- The Ministry has no publically available policy on its interpretation of "residing together." Given the challenging standard of review in a judicial review application (patent unreasonableness), we had concerns that the EAAT's narrow interpretation of "residing together" would be upheld.

- We questioned whether we should be encouraging Cindy to create more physical separation from her abusive ex, rather than taking steps to maintain the status quo. We recognized, however, that it is Cindy who has to make the very personal decisions about her living arrangements.

Lessons learned from this case:

- Combining a judicial review with a human rights complaint (where possible) not only increases pressure on the Ministry to settle, it also creates two avenues for positive outcomes. In this case, now that Cindy is receiving assistance again, we can try to negotiate some systemic changes via the human rights complaint without the urgency created by Cindy's lack of income.

Ministry of
Social Development
and Social Innovation

EMPLOYMENT AND ASSISTANCE RECONSIDERATION DECISION

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REQUESTOR INFORMATION

Reconsideration SR No. (ICM): [redacted]

Name: [redacted]

Address: [redacted]

City: [redacted]

Postal Code: [redacted]

Case No.: [redacted]

DECISION UNDER CONSIDERATION (Summarize the request and original decision)

You are requesting the minister to reconsideration of the decision to deny assistance.

SUMMARY OF FACTS (Summarize the relevant facts, based on the request and the evidence provided)

~ Please see Appendix A ~

APPLICABLE LEGISLATION

~ Please see Appendix A ~

RECONSIDERATION DECISION

~ Please see Appendix A ~

CERTIFIED TRUE COPY
MINISTRY OF SOCIAL DEVELOPMENT
MAR 0 4 2016
RECONSIDERATION BRANCH

ENCLOSED: ☒ ALL DOCUMENTS CONSIDERED BY THE MINISTRY ☒ NOTICE OF APPEAL TO THE EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL

SIGNATURE	NAME AND TITLE	DATE (YYYY MMM DD)
Plamoureux	P. Lamoureux, Reconsideration Officer	2016 MAR 03

If this decision is appealable to the Employment and Assistance Appeal Tribunal, and you wish to appeal this decision, you may complete the enclosed *Notice of Appeal to the Employment and Assistance Appeal Tribunal* form and return it to the Appeal Tribunal. This Reconsideration Decision and attached documents constitute the appeal record. A sealed copy of this appeal will be kept by the Ministry.
Pursuant to subsection 22(4) of the *Employment and Assistance Act*, a tribunal panel may admit as evidence only:
(a) the information and records that were before the minister when the decision being appealed was made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

HSD101(05/06/29)

APPENDIX A – Summary of Facts

You were in receipt of disability assistance as a sole recipient.

On September 28, 2015 you stated you were living with your ex-spouse and did not have the funds to move out. You state you jointly own your residence with your ex-spouse, Mr. [redacted] and that he pays the mortgage.

On November 23, 2015 you stated your ex-spouse pays had been paying all the bills. Your file was referred for an eligibility review.

On November 26, 2015 you explained that your ex-spouse lives in a trailer on the property and you live in the house.

On December 4, 2015 you were advised you would be required to apply for assistance with Mr. [redacted] as a dependent on your file in order to maintain eligibility. A letter was sent to you requesting that you contact the ministry to initiate application for assistance on behalf of your spouse.

On January 6, 2016 you advised Mr. [redacted] lives in a trailer on the property and uses electricity from the house using an extension cord. You confirmed he uses the bathroom in the house. You stated you now have the hydro bill in your name and Mr. [redacted] pays the gas bill.

On January 8, 2016 you stated that although your ex-spouse lives on the property you are not together as a couple. You stated Mr. [redacted] would not provide any financial support and would not provide any documentation required to add him to your file. You did provide a copy of Mr. [redacted] February 4, 2015 Bankruptcy documents listing himself as married and you as his spouse. You confirmed you were still legally married and had not intiated separation or divorce.

On January 19, 2015 a letter was sent to you advising you were no eligible for assistance due to failure to apply for assistance on behalf of your entire family unit. You requested the minister to reconsider the decision.

You returned the signed Request for Reconsideration forms on February 17, 2016. You requested an extension of the submission time limits in order to complete your submission. Your completed submission prepared by Amy Taylor, Advocate, the Advocacy Centre, was received on February 25, 2016. Ms. Taylor submits you are legally married to [redacted] you jointly own the property where you both reside, you separated approximately 3 years ago, you do not socialize, you do not do laundry or clean for [redacted] you are not allowed in [redacted] trailer, [redacted] pays the mortgage and property taxes, the power for [redacted] trailer comes from the house, [redacted] uses the kitchen, bathroom and watches TV in the house, [redacted] does not provide financial support for your daily living expenses, you pay the Shaw Cable bill, [redacted] refuses to apply for assistance as a dependent on your file and will not provide any of the required documents and you require medications that you will no longer be able to afford.

APPENDIX B -- Reconsideration Decision

All the information relevant to your request has been reviewed. The minister has determined you are not eligible for assistance due to failure to apply for assistance on behalf of your entire family unit.

Under Section 5 of the Employment and Assistance for Persons with Disabilities Regulation a person is not eligible for assistance if they do not apply on behalf of their entire family unit.

Under Section 1 of the Employment and Assistance for Persons with Disabilities Act a family unit is defined as the applicant/recipient and their dependents. A dependent is defined as the spouse of the applicant/recipient and who resides with the applicant/recipient.

Under Section 1.1(1)(a) a spouse is defined as two persons who are married for the purposes of administering this Act and Regulation.

[redacted] is considered to be your spouse as you are legally married. You live on the same property. Mr. [redacted] uses electricity from the house for his trailer. He uses the bathroom and kitchen facilities in the house. He also uses the house to watch TV. As Mr. [redacted] uses the house on a regular basis for daily living activities the house is still considered as his residence and the trailer is considered to be more of a bedroom/sitting room adjacent to the house. The trailer is not self-sufficient as a stand-alone or separate suite. Consequently, in the opinion of the minister, you reside with Mr. [redacted]

As you reside with Mr. [redacted] and he is your spouse he is considered to be your dependent. As a dependent he is part of your family unit. You are not eligible for assistance as you have not included Mr. [redacted] in your application for assistance.

NAME: [redacted]
DATE: March 3, 2016

[redacted]

APPENDIX C – Legislation

Employment and Assistance for Persons with Disabilities Act

Interpretation

1 (1) In this Act:

"dependant", in relation to a person, means anyone who resides with the person and who

(a) is the spouse of the person,

(b) is a dependent child of the person, or

(c) indicates a parental role for the person's dependent child; (B.C. Reg. 131/2012)

(B.C. Reg. 193/2006)

"family unit" means an applicant or a recipient and his or her dependants;

"spouse" has the meaning in section 1.1;

Meaning of "spouse"

1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they are married to each other, or

(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.

(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they have resided together for at least

(i) the previous 3 consecutive months, or

(ii) 9 of the previous 12 months, and

(b) the minister is satisfied that the relationship demonstrates

(i) financial dependence or interdependence, and

(ii) social and familial interdependence,

consistent with a marriage-like relationship.

(B.C Reg. 193/2006)

Employment and Assistance for Persons with Disabilities Regulation

Applicant requirements

5 For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless

(a) the family unit does not include an adult, or

(b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

Employment
and Assistance
Appeal Tribunal

April 25, 2016

Appeal No: [redacted]

[redacted]

Melissa Bauer, Manager
Reconsideration and Appeals
Ministry of Social Development and Social Innovation
PO Box 9963 Stn Prov Govt
Victoria BC V8W 9R4

Dear [redacted] and Melissa Bauer:

Re: Employment and Assistance Appeal Tribunal Decision

A panel of the Employment and Assistance Appeal Tribunal (the "Tribunal") heard your appeal on Friday, April 8, 2016. Please note that you were not successful in your appeal.

On behalf of the Chair of the Tribunal, please find enclosed a copy of the decision on your appeal.

Sincerely,

Amy Power
Appeal Coordinator

Enclosure

pc: Amy Taylor, Advocate

Mailing Address:
PO BOX 9994 STN PROV GOVT
VICTORIA BC V8W 9R7

Tel: 250 356-6374
Fax: 250 356-9687
E-mail: eaat@gov.bc.ca

Toll Free Tel: 1-866-557-0035
Toll Free Fax: 1-877-356-9687
Website: www.gov.bc.ca/eaat

Employment and Assistance Appeal Tribunal

Tribunal Decision

APPEAL [redacted]

PART A – Panel Information

On 2016/04/08 a hearing was held, pursuant to Part 3 of the *Employment and Assistance Act*
DATE (YYYY MM DD)

to hear the appeal of [redacted] GA
NAME OF APPELLANT (PLEASE PRINT) FILE NUMBER

By teleconference
ADDRESS

PART B – Persons in Attendance at the Hearing

PANEL CHAIR: Jane Nielsen	MINISTRY REPRESENTATIVE: Jenna Keetch
PANEL MEMBER: Lauren Forsyth	APPELLANT: [redacted]
PANEL MEMBER: Ronald Terlesky	APPELLANT'S REPRESENTATIVE: Amy Taylor

Witnesses

FOR APPELLANT	FOR MINISTRY
FOR APPELLANT	FOR MINISTRY

Other

FOR APPELLANT	FOR MINISTRY

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated March 3, 2016, which held that the appellant is not eligible for disability assistance in accordance with section 5 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) because she has not applied for assistance on behalf of her family unit which includes X, who is both her "spouse" and "dependant" as defined respectively in sections 1.1(1) and 1(1) of the Employment and Assistance for Persons with Disabilities Act (EAPWDA).

PART D – Relevant Legislation

EAPWDA, sections 1(1) and 1.1(1)
EAPWDR, section 5

PART E – Summary of Facts

Information before the ministry at reconsideration

The appellant and X are legally married and are joint owners of a property on which they both reside. The appellant advised the ministry that she lives in the house on the property while X lives in a travel trailer on the property. X uses electricity from the house via an extension cord, uses the kitchen and bathroom in the house, and watches TV in the house. The appellant is not allowed into the trailer. The appellant told the ministry that she did not have the funds to move and that X refuses to provide any of the documents required to add him to her file. The appellant and X separated 3 years ago, do not socialize and merely tolerate each other's presence. The appellant pays for the hydro while X pays the mortgage and property taxes.

Information provided on appeal

In her March 31, 2016 appeal submission, the appellant writes that the travel trailer is a fully equipped self-contained unit with a 4 piece bathroom and a kitchen area with a fridge, stove top, oven, sink and storage. There is also a dining/lounge area with additional storage. It is equipped with an electric/propane furnace and all the needed "hook ups" for power, water sewer, TV/cable etc. None of these services are set up. As co-owner of the house, X feels it is his right to use the bathroom, kitchen, and laundry at his convenience with no regard for the appellant's privacy and personal space. The appellant also describes long-standing difficulties and abuse in her relationship with X. Once separated, X withdrew all financial support for the appellant. The appellant is currently without running hot water and the gas heat is disconnected. She relies on a small space heater and must boil water for bathing and cleaning. Since her ministry assistance was discontinued in November 2015, she has had no choice but to beg and borrow in order to get medication and food; her main reason for applying for assistance was to get help to pay for her inhalers. The appellant has been unable to find an affordable place to rent.

The appellant also submitted a March 24, 2016 letter from a friend who describes difficulties experienced by the appellant during her marriage to X, and that they have not been an intimate couple for years, and an undated note from her aunt who states that to the best of her knowledge, the appellant and X lead separate lives.

The appellant's advocate provided a 39-page submission which restates some of the available information but is largely comprised of argument with attached case law. The argument is summarized in Part F of the panel's decision.

At the hearing, the appellant stated that there have been no attempts to sell the house, noting that its value wouldn't be realized given the need for major repairs. The appellant states that when applying for assistance she disclosed her living arrangements and does not know why ministry records don't reflect that fact. She acknowledged that she was identified as a dependant on X's most recent bankruptcy documents but that she does not know why X did that and only became aware of X's bankruptcy application after it was made.

At the hearing, the ministry reviewed information in the appeal record, and sought to clarify that the

appellant was provided with assistance, despite shelter documents not being provided at the time of application, because she was fleeing an abusive relationship. The ministry was aware that the appellant and X jointly owned a home when the appellant applied for assistance but was not aware that the appellant and X were in the same house.

The ministry did not object to the admission of the additional information provided by the appellant on appeal. As the new information comprised additional details consistent with the previous information, it was admitted by the panel as information in support of the information and records before the ministry at reconsideration pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

Issue under appeal

The issue under appeal is whether the ministry decision which held that in accordance with section 5 of the EAPWDR the appellant is not eligible for disability assistance because she did not apply on behalf of her family unit is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. That is, was the ministry reasonable in determining that X is both the spouse and dependant of the appellant and therefore part of her family unit as defined in sections 1.1 and 1 of the EAPWDA?

Relevant Legislation – sections 1(1) and 1.1 of the EAPWDR and section 5 of the EAPWDA

Interpretation

1 (1) In this Act…

"dependant", in relation to a person, means anyone who resides with the person and who

(a) is the spouse of the person,

(b) is a dependent child of the person, or

(c) indicates a parental role for the person's dependent child;

"family unit" means an applicant or a recipient and his or her dependants;

"spouse" has the meaning in section 1.1;

Meaning of "spouse"

1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they are married to each other, or

(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.

(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if

(a) they have resided together for at least

(i) the previous 3 consecutive months, or

(ii) 9 of the previous 12 months, and

(b) the minister is satisfied that the relationship demonstrates

(i) financial dependence or interdependence, and

(ii) social and familial interdependence,

consistent with a marriage-like relationship.

Applicant requirements

5 For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless

(a) the family unit does not include an adult, or

(b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

Appellant's position

The appellant's position is that while legally married to X, she does not reside with him and therefore he is not her dependant or a member of her family unit. She does not consider herself to be "living" with X as they lead separate lives. They share services and facilities, despite the appellant's objection, but they do nothing together other than argue and "exist" on the same property.

In support of this argument, the appellant's advocate notes that "reside" is not defined in the legislation and argues that when considering other legislative schemes respecting family and tax law, and Canada Pension Plan (CPP) benefits legislation, the courts have held that married individuals under the same roof may be viewed as "living separate and apart" so that individuals are not penalized by loss of access to benefits or entitlements because of their financial situations. A number of cases are referenced, including *Gartner v. Canada*, in which the court held that the wife was eligible for the Canada Child Tax Benefit as assessed solely on her income because she and her spouse were living separate and apart while under the same roof. The advocate also cites section 3(4) of the provincial *Family Law Act* which provides that "spouses may be separated despite continuing to live in the same residence..." In the appellant's circumstances, having been separated from X, she has the right to seek a divorce, apply for spousal support, and to seek a division of CPP pension credits earned during the marriage prior to its breakdown.

That "reside" should be interpreted so as not to include X as the appellant's dependent family member is also supported by section 8 of the *Interpretation Act*, jurisprudence and the principles of statutory interpretation, which require a large and liberal interpretation of benefits conferring

legislation and that doubts or ambiguities arising from the language of the legislation be resolved in favour of an applicant.

The advocate argues that by forcing the appellant to apply for assistance on behalf of X as part of her family unit, she is being stripped of the benefits of separation. Furthermore, to view X as part of the appellant's family unit gives rise to possible exposure to liability for debts incurred by X subsequent to the time the marriage broke down because the *Family Law Act* assesses what are considered to be family debts for which both spouses are equally responsible as those incurred prior to separation.

If the appellant is forced to apply for assistance on behalf of X, she will not be able to meet her basic needs, including her medications, will lose her transportation and telephone resulting in further isolation and risk due to her health issues, and will be forced back into an abusive relationship. This would be an absurd result which is not consistent with a principle objective of the EAPWDA and EAPWDR which is to promote the health and well-being of persons with disabilities, specifically those with limited financial means.

Ministry's position

The ministry's position is that because the appellant and X live on the same property with X using electricity from the house, the bathroom and kitchen facilities, and the house to watch TV, X is using the house on a regular basis for daily living activities and therefore the house is still considered as his residence. The trailer is not self-sufficient as a stand-alone or separate suite; rather, the trailer is more of a bedroom/sitting room adjacent to the house. As the appellant resides with X, and he is her spouse, he is the appellant's dependant and part of her family unit as defined in the EAPWDA and in accordance with section 5 of the EAPWDR, to be eligible for assistance the appellant must apply for it on behalf of her family unit.

Panel Decision

In this case, there is no dispute that the appellant and X are spouses as defined in section 1.1(1)(a) of the EAPWDA as they are legally married to each other. Consequently, the panel finds that the ministry reasonably considered them as spouses for the purposes of the EAPWDA and EAPWDR. If the appellant and X were not legally married, the assessment of whether or not they were spouses would be determined under section 1.1(2) which requires a length of residency together with financial and social and familial interdependence. These markers of the nature of the relationship between two persons are not a consideration for spouses who are legally married.

The issue in this case is whether X is a spouse who "resides with" the appellant and is therefore a dependant as defined in section 1(1) of the EAPWDA. The appellant's advocate argues that in accordance with the case law, the appellant and her spouse live separate and apart and therefore do not reside together.

The courts have long held that married persons can be found to "live separate and apart" within the same dwelling. Each case is determined based on its unique facts with factors including conjugal

relations, division of domestic chores, intention to separate, social interactions, and financial constraints on one or both parties, being among those considered by the court. The appellant's advocate has provided case law where the courts determined that married spouses were living separate and apart for the purposes of determining eligibility to seek benefits that arise from separation including *Gartner v. Canada* in which the court found as fact that both spouses lived in the same "Residence" and held that two "co-habiting" spouses can be considered as living separate and apart under the same roof for the purpose of assessing eligibility for Canada Child Tax Benefit. However, in the cases cited, the issue was not where the spouses resided but whether the nature of the relationship between the spouses was such that they should be considered "separated." That the issue of whether spouses are "separated" in the eyes of the law is not the same as the issue of "residency" is also supported by the language of section 3(4) of the *Family Law Act*, which states that married spouses may be considered to be separated despite continuing to live in the same residence.

The issue in this case is not whether the nature of the relationship between X and the appellant is such that they are separated but whether X resides with the appellant. A person's residency denotes a physical presence, not a level of engagement in a relationship with any other person in the same residence. The Canadian Oxford Compact Dictionary defines "reside" as "(of a person) have one's home, dwell permanently." Black's Law Dictionary, Fifth Edition, defines "reside" as "Live, dwell, abide, sojourn, stay, remain, lodge." Where one resides is the physical place where one lives not how one engages with others who may share the same residence. The panel finds that the word "reside" is not ambiguous and cannot be interpreted so broadly as to encompass and be dependent upon the nature of the relationship between residents.

The panel must consider whether the ministry reasonably viewed the house the appellant resides in as also being where X resides. In reaching its decision, the ministry notes that the trailer is not a stand-alone or separate suite and that X regularly uses the house for his daily activities. That this is the case is apparent from the appellant's evidence that X regularly uses the bathroom, kitchen, laundry facilities, and watches TV in the home, irrespective of her objections. Based on the regular daily use by X of most areas of the house to attend to routine activities of living, despite having separate sleeping accommodation, the panel finds that the ministry has reasonably viewed the house as the residence of X. Therefore, the panel finds that the ministry reasonably determined that X resides with the appellant and as he is her spouse he is also her "dependant" and part of her "family unit" as defined in section 1 of the EAPWDA.

Conclusion

For the above reasons, the panel finds that the ministry's reconsideration decision that determined that the appellant is not eligible for assistance as she has not applied on behalf of her family unit as required by section 5 of the EAPWDR is a reasonable application of the legislation in the circumstances of the appellant. The ministry's reconsideration decision is confirmed.

APPEAL # [redacted]

PART G – Order

THE PANEL DECISION IS ☒ UNANIMOUS ☐ BY MAJORITY (Check one)

THE PANEL ☒ CONFIRMS THE MINISTRY DECISION ☐ RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? ☐ YES ☐ NO

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) ☐ and/or Section 24(1)(b) ☒

and

Section 24(2)(a) ☒ or Section 24(2)(b) ☐

PART H – Signatures

SIGNATURE OF CHAIR	DATE (YYYY MMM DDD)
Jane Nielsen	2016/04/08
PRINT NAME	
Jane Nielsen	

SIGNATURE OF MEMBER	DATE (YYYY MMM DDD)
Jane Nielsen	2016/04/08
PRINT NAME per	
Lauren Forsyth	
SIGNATURE OF MEMBER	DATE (YYYY MMM DDD)
Jane Nielsen	2016/04/08
PRINT NAME per:	
Ronald Terlesky	

BRITISH COLUMBIA
The Best Place on Earth

August 30, 2016

Reconsideration Service Request No: [redacted]
Case No: [redacted]

[redacted]

Dear [redacted]:

Re: Employment and Assistance NEW Reconsideration Decision

Please note this new reconsideration decision replaces the previous reconsideration decision dated March 3, 2016.

After reviewing your Request for Reconsideration and additional information provided, the minister has determined that [redacted] is not a member of your "family unit"; therefore, you should not be denied disability assistance as a sole recipient.

If you would like a copy of the complete reconsideration decision package, please contact the Reconsideration Branch at 250-356-7993. The complete decision package contains your Request for Reconsideration and all documents submitted with it.

If you have any questions about your reconsideration, the appeal process or your file, please contact your Employment and Assistance Office. You may also contact an Employment Assistance Worker at **1-866-866-0800** or visit the ministry website at www.hsd.gov.bc.ca.

Sincerely,

Melissa Bauer
A/Director, Reconsideration and Appeals

Enclosure(s)

Ministry of Social Development and Social Innovation
Reconsideration and Appeals Section
MSDSI-MCFD Legislation, Litigation and Appeals Branch
PO Box 9963 Stn Prov Govt
Victoria BC V8W 9R4
Phone: 250 356-7993
Fax: 1-855-771-8784

BRITISH COLUMBIA
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Ministry of
Social Development
and Social Innovation

EMPLOYMENT AND ASSISTANCE RECONSIDERATION DECISION

The collection, use and disclosure of personal information is subject to the provisions of the *Freedom of Information and Protection of Privacy Act*. If you have any questions about the collection, use and disclosure of this information, please contact your local Employment and Assistance Centre.

REQUESTOR INFORMATION

Reconsideration SR No. (ICM)		
[redacted]		
Name [redacted]		
Address [redacted]		
City [redacted]	Postal Code [redacted]	Case No. [redacted]

DECISION UNDER CONSIDERATION (Summarize the request and original decision)

You are requesting the minister to reconsideration of the decision to deny assistance.

SUMMARY OF FACTS (Summarize the relevant facts, based on the request and the evidence provided)

The following is a summary of the key dates and information related to your Request for Reconsideration:

On January 19, 2016 you were mailed a letter advising that you were not eligible for assistance as a single person.

On February 17, 2016 you submitted your signed Request for Reconsideration. You requested an extension and once was granted. Additional information was received February 25, 2016.

On March 3, 2016 the ministry completed its review of your Request for Reconsideration.

On April 8, 2016 Employment and Assistance Appeal Tribunal confirmed the ministry decision.

On August 16, 2016 based on a recent update made to ministry policy, your request for reconsideration including additional submission was reviewed.

APPLICABLE LEGISLATION

Employment and Assistance for Persons with Disabilities Act Sections 1, 1.1
Employment and Assistance for Persons with Disabilities Regulation Section 5

If this decision is appealable to the Employment and Assistance Appeal Tribunal, and you wish to appeal this decision, you may complete the enclosed *Notice of Appeal to the Employment and Assistance Appeal Tribunal* form and return it to the Appeal Tribunal. This Reconsideration Decision and attached documents constitute the appeal record. A sealed copy of this appeal will be kept by the Ministry.
Pursuant to subsection 22(4) of the *Employment and Assistance Act*, a tribunal panel may admit as evidence only:
(a) the information and records that were before the minister when the decision being appealed was made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

BRITISH COLUMBIA
The Best Place on Earth

Ministry of
Social Development
and Social Innovation

EMPLOYMENT AND ASSISTANCE RECONSIDERATION DECISION

RECONSIDERATION DECISION

~ Please see Appendix A ~

CERTIFIED TRUE COPY
MINISTRY OF SOCIAL DEVELOPMENT
SEP 0 2 2016
RECONSIDERATION BRANCH

ENCLOSED: ☒ ALL DOCUMENTS CONSIDERED BY THE MINISTRY ☒ NOTICE OF APPEAL TO THE EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL

SIGNATURE	NAME AND TITLE	DATE (YYYY MMM DD)
	Melissa Bauer, A/Director, Reconsideration and Appeals	2016 Aug 30

If this decision is appealable to the Employment and Assistance Appeal Tribunal, and you wish to appeal this decision, you may complete the enclosed *Notice of Appeal to the Employment and Assistance Appeal Tribunal* form and return it to the Appeal Tribunal. This Reconsideration Decision and attached documents constitute the appeal record. A sealed copy of this appeal will be kept by the Ministry.
Pursuant to subsection 22(4) of the *Employment and Assistance Act*, a tribunal panel may admit as evidence only:
(a) the information and records that were before the minister when the decision being appealed was made, and
(b) oral or written testimony in support of the information and records referred to in paragraph (a).

APPENDIX A – Reconsideration decision

All the information relevant to your request has been reviewed. The minister has determined you should not be denied assistance as a sole recipient due to a dependency relationship with [redacted]

Background

On April 20, 2015 you spoke to a ministry worker regarding your application for Income Assistance. You advised that you had a joint mortgage with your ex-spouse, who you had separated from. You stated you did not have the mortgage documents. You were advised that you would not be eligible to recieve shelter funds until documentation regarding your actual shelter cost could be comfirmed.

On April 21, 2015 you were determined eligible for Income Assistance. You were issued pro-rated April Support $150.89.

Effective December 1, 2015 you were approved for Persons with Disabilities designation.

On January 19, 2016 you were mailed 2 letters. One letter advised that you were not eligible for assistance as a sole recipient. The second letter advised that an overpayment of $4011.85 had been calculated due to receiving assistance for which you were not eligible to receive between April 2015 and December 2015. The letter advised that an appointment had been scheduled for Tuesday January 26, 2015. You did not attend the scheduled appointment and the debt was subsequently added to your file.

On January 27, 2016 your file was closed.

On January 28, 2016 you requested reconsideration. A request for reconsideration package was completed advising that you were denied assistance due to being in a dependency relationship. You were denied assistance for failure to apply on behalf of the entire family unit.

Legislation

Under Section 5 of the Employment and Assistance for Persons with Disabilities Regulation a person must apply for assistance on behalf of the entire family unit.

Under Section 1(1) of the Employment and Assistance for Persons with Disabilities Act, **family unit** is defined as an applicant or a recipient and his or her dependants. A **dependant** is defined as anyone who resides with the person and who is the spouse of the person. Under Section 1.1(1)(a), two persons are spouses of each other if they are married to each other.

Decision

You are legally married to Mr. [redacted] and you jointly own the property which you live on. Information has been provided to establish that you reside in the house on the property while Mr. [redacted] resides in the travel trailer parked on the property.

It is the minister's opinion that you have separated yourself from Mr. [redacted] to the greatest extent you believe is possible under your circumstances. There is a significant level of physical separation sufficient enough to consider you and Mr. [redacted] to not to be residing with each other.

As the minister does not consider you to be residing with Mr. [redacted], he is not considered to be your dependant. Therefore, he is not considered part of your family unit. Subsequently, you are eligible for assistance as a sole recipient; providing all other eligibility criteria are met.

Please note: This decision is retroactive to the approval of your application for income assistance in April 2015. As such, you are no longer required to repay $4011.85 the minister previously determined as being an overpayment of assistance. In addition, a back-payment of $5142.78 [$531.42 support + $40 shelter x 9 months = $5142.78] will be issued by the ministry office for disability assistance from January 2016 to September 2016.

APPENDIX B – Legislation

Employment and Assistance for Persons with Disabilities Act

Interpretation
1 (1) In this Act:

"dependant", in relation to a person, means anyone who resides with the person and who
(a) is the spouse of the person,
(b) is a dependent child of the person, or
(c) indicates a parental role for the person's dependent child; (B.C. Reg. 131/2012)
(B.C. Reg. 193/2006)

"family unit" means an applicant or a recipient and his or her dependants;

"spouse" has the meaning in section 1.1;

Meaning of "spouse"
1.1 (1) Two persons, including persons of the same gender, are spouses of each other for the purposes of this Act if
(a) they are married to each other, or
(b) they acknowledge to the minister that they are residing together in a marriage-like relationship.
(2) Two persons who reside together, including persons of the same gender, are spouses of each other for the purposes of this Act if
(a) they have resided together for at least
(i) the previous 3 consecutive months, or
(ii) 9 of the previous 12 months, and
(b) the minister is satisfied that the relationship demonstrates
(i) financial dependence or interdependence, and
(ii) social and familial interdependence,
consistent with a marriage-like relationship.
(B.C Reg. 193/2006)

Employment and Assistance for Persons with Disabilities Regulation

Applicant requirements
5 For a family unit to be eligible for disability assistance or a supplement, an adult in the family unit must apply for the disability assistance or supplement on behalf of the family unit unless
(a) the family unit does not include an adult, or
(b) the spouse of an adult applicant has not reached 19 years of age, in which case that spouse must apply with the adult applicant.

Crown and Bridgework Eligibility Case

BRITISH COLUMBIA | Ministry of Social Development and Social Innovation

EMPLOYMENT AND ASSISTANCE REQUEST FOR RECONSIDERATION

SECTION 1 and 2 TO BE COMPLETED BY WORKER

SR NUMBER

SECTION 1 REQUESTOR INFORMATION

REQUESTOR'S NAME	SOCIAL INSURANCE NUMBER	CASE NUMBER

REQUESTOR'S ADDRESS

WORKER'S NAME	WORKER NUMBER	EMPLOYMENT AND ASSISTANCE OFFICE

SECTION 2 DECISION TO BE RECONSIDERED

The Ministry has reviewed your request and considered all of the factors relevant to the eligibility criteria for Dental and Orthodontic Services (Teeth 26 and 27, Bonded Composite Core, In Conjunction with Crown; Crown, Full Cast Metal). Based on the information provided, your request has been denied.

In order to receive dental and orthodontic services, you must be found eligible under the following legislation:

- Sections 63, 63.1, 64 or 65 of the Employment and Assistance for Persons with Disabilities Regulation as well as Sections 1, 4, 4.1 and 5 of Schedule C

The information provided has not established that all regulatory criteria have been met. Please refer to the original decision letter (attached) for specific details regarding the denial.

The following attachments have been included which complete this reconsideration package:
- Decision Letter
- Relevant Legislation
- Reconsideration and Appeal Process Brochure
- Advocacy Information

ASSISTANCE / ELIGIBILITY HAS BEEN: ☒ DENIED ☐ DISCONTINUED ☐ REDUCED ☐ PWD RESCIND

THE ACT AND / OR REGULATIONS THAT APPLY TO THIS DECISION ARE:
Employment and Assistance for Persons with Disabilities Regulation, Section 63
Employment and Assistance for Persons with Disabilities Regulation, Section 64
Employment and Assistance for Persons with Disabilities Regulation, Section 65
Employment and Assistance for Persons with Disabilities Regulation, Schedule C

MONTH DECISION EFFECTIVE (YYYY-MMM-DD)	RELEVANT DATES:	DATE REQUESTOR INFORMED OF DECISION (YYYY-MMM-DD)
2016-Feb-01		2016-Jun-24
		DATE REQUESTOR MUST SUBMIT FORM BY (YYYY-MMM-DD): 2016-Jul-25

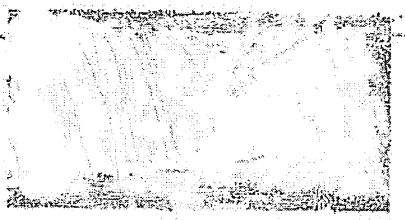
DATE (YYYY-MMM-DD)	EMPLOYMENT AND ASSISTANCE WORKER SIGNATURE
2016-Jun-27	

PACIFIC BLUE CROSS

M

Dental Predetermination Summary

Total submitted amount	$2,069.52
Amount approved by PBC plan	$0.00



Your predetermination request has been approved up to the amount indicated above. For dental claims, this amount includes lab fees if applicable. The detailed calculations are on the reverse of this page.

This predetermination is valid for twelve (12) months from the date of this letter, providing your coverage is still in effect on the date the service is completed or item(s) received and your plan benefits haven't changed.

If there is coverage under more than one Pacific Blue Cross plan, you will receive separate predeterminations showing the amount that is eligible under each plan.

Claim Submission/Payment
The actual amount paid may be different than the amount indicated above if:

1. the patient's plan coverage or eligibility changes.
2. other claims have affected any deductibles and maximums under the plan.

Health claims may be paid directly to the provider if the expense exceeds $1,000. We require a completed Assignment of Payment form to be submitted with the invoice. The form will be sent under separate cover where applicable or can be downloaded from our website at www.pac.bluecross.ca/corp/members/forms/

Dental claims can be paid directly to your dental office and can be submitted either electronically or manually. Discuss with your dental office their preferred method of payment.

If the primary coverage is with another benefits provider, a copy of their payment statement along with a copy of the invoice/receipt must be submitted for the claim to be paid.

Payment will not exceed 100% of the eligible amount under any condition.

PACIFIC BLUE CROSS

M

***IMPORTANT NOTE: Predetermination is only valid for twelve (12) months ***
Please refer to cover page for further details of this predetermination

Details

[illegible]	Tooth	Procedure	Amount	Eligible	Deductible Amount	Patient Covered	Plan Approved Procedure	Plan Approved Amount	Message Code
Policy Number									
020240822	26	23602	90.56	0.00	0.00	100%	23602	0.00	EOS01, PB022, PB046, PB047
020240822	27	23602	90.56	0.00	0.00	100%	23602	0.00	EOS01, PB022, PB046, PB047
020240822	26	27301	954.20	0.00	0.00	100%	27301	0.00	EOS01, PB022, PB046, PB047
020240822	27	27301	954.20	0.00	0.00	100%	27301	0.00	EOS01, PB022, PB046, PB047
Total for Patient			2,089.52					0.00	

EOS01 - This predetermination is missing information. Please refer to the form sent under separate cover for additional details.
PB022 - Pended for Consultant review.
PB046 - This plan has a maximum dollar limit. To ensure active coverage is in place, eligibility must be confirmed for all clients prior to proceeding with any treatment. Please also refer to the Ministry Dental Supplement Fee Guide Preamble for their maximum entitlements.
PB047 - Any questions pertaining to this claim should be directed to (604) 419-2720 or 1-800-663-1207. Processed on behalf of BC Ministry of Social Development Dental Care Plan as administered by PBC.

Advocate Submission

disability alliance bc
we are all connected

tel 604.872.1278
toll Free 1.800.663.1278
formerly BC Coalition of People with Disabilities

Advocacy Access Program

Re: X X – Eligibility for Dental/Crown and Bridgework Supplements

We are writing to request reconsideration of the decision denying Ms. X's request for dental work. The work has been recommended by her dentist at X Health Clinic. Ms. X is a 77 year old women who is eligible for health supplements from the Ministry of Social Development and Social Innovation.

We are very concerned with the quality of the reasons for decision that the Ministry has provided to justify denying Ms. X the requested medical interventions. Having reviewed the relevant documentation we believe that no reasonable person would be able to understand the basis on which her request was denied. The request for reconsideration states in section 2 "The information provided has not established that all regulatory criteria have been met. Please refer to the original decision letter (attached) for specific details regarding the denial." The decision letter in question appears to be a letter from the Pacific Blue Cross dated February 3, 2016. The letter begins "your predetermination request has been approved up to the amount indicated above." The amount indicated is $0.00. No further information as to why the amount is $0.00 is provided on the front of the letter. On the backside of the decision letter is a table which breaks down and confirms that the eligible amount for each of the requested procedures is $0.00 but again no additional information is provided as to why this is the case.

We respectfully submit that merely stating that Ms. X's eligible amount is $0.00 does not constitute adequate reasons for denial. The decision cites legislative provisions that have been considered but does not explain which provisions have been applied to determine that Ms. X is not eligible nor the underlying reasons to justify this application of the law. We acknowledge that there may be reasons to justify the Ministry's decision such as that she has exceeded the allowable dental amount, that the items requested are not covered, or that she has not met specific criteria necessary to be approved. However, the lack of discernable reasons for denying Ms. X's request for dental supplements makes it virtually impossible for her to respond to the Ministry's denial. We further submit that the Ministry owes a duty of procedural fairness in responding to Ms. X's request for health supplements and that the inadequacy of the written reasons provided violates that duty.

We respectfully request that the Ministry either grant Ms. X's request for health supplements or, in the alternative, provide new reasons for denying her request which adequately explains why the requested dental work has not been covered as well as allowing her to submit a new request for reconsideration to respond to that denial.

Kind thanks for your time and consideration of this important matter.

Sincerely,

Samuel Turcott, B.A., J.D.

Director, Advocacy Access Program

Ministry Response to Request for Reconsideration

Re: Employment and Assistance Reconsideration Request

The ministry acknowledges receipt of your Request for Reconsideration, submitted to the ministry on July 22, 2016. I regret to inform you that your Request for Reconsideration cannot be granted because no ministry decision has taken place regarding your eligibility for cores and crowns for tooth numbers 26 and 27.

The ministry acknowledges receipt of the following documents submitted to the ministry in support of your request:

- A Pacific Blue Cross Predetermination Summary dated February 03, 2016, to which is attached a Predetermination indicating cores and crowns are requested for tooth numbers 26 and 27 but $0.00 is approved. The computer generated reasons are provided as follows:
  - EOS01 – This predetermination is missing information. Please refer to the form sent under separate cover for additional details.
  - PB022 – Pended for Consultant review.
  - PB046 – This plan has a maximum dollar limit. To ensure active coverage is in place, eligilbity must be confirmed for all clients prior to proceeding with any treatment. Please also refer to the Ministry Dental Supplement Fee Guide Preamble for their maximum entitlements.
  - PB047 – Any questions pertaining to this claim should be directed to (604) 419-2780 or 1-800-665-1297. Processed on behalf of BC Ministry of Social Development Dental Care Plan as administered by PBC.
- A Request for Reconsideration dated July 22, 2016 to which is attached a submission of the same date completed by Samuel Turcott, Director, Disability Alliance; Advocacy Access Program. Mr. Turcott notes the *"lack of discernable reasons for denying [your] request for dental supplements makes it virtually impossible for you to respond to the Ministry's denial."*

The ministry finds a reconsideration concerning your eligibility for the crowns and cores requested cannot be granted because no ministry decision has taken place regarding your eligibility for these supplements. The Predetermination from PBC to your dental practitioner constitutes a request for more information and does not constitute a denial.

The Reconsideration Officer contacted PBC concerning your case and received the following documents:

- A Standard Dental Claim form dated January 18, 2016 and submitted to PBC by the office of Dr. . The Claim Form indicates cores and crowns are requested for tooth numbers 26 and 27. The fee codes have been changed from 27211 to 27301, because only metal crowns are provided for teeth ending in the numbers 6, 7 and 8, as set out in the Schedule of Fee Allowances-Crown & Bridgework.

Ministry of Social Development and Social Innovation
Reconsideration and Appeals Section
SDSI-CFD Legislation, Litigation and Appeals Branch
PO Box 9963 Stn Prov Govt
Victoria BC V8W 9R4

- A partially completed Crown and Bridge Case Profile Sheet noting that more information is needed.
- A Summary of your Plan Benefits, indicating $480.85 is remaining of your $1000 two-year limit for basic dental services [Ministry Note: Crown and Bridgework are not considered basic dental services and are not deducted from your $1000 limit.]
- A form letter addressed to your dentist, identifying the information that is missing (these items are marked with an "x").

Your dental practitioner is referred to the Fee Guide Preamble (Crown and Bridgework) within the Schedule of Fee Allowances-Dentist (attached). The Reconsideration Officer contacted PBC and was advised the additional information requested from your dental practitioner has not been received and a decision has not been rendered.

Decisions concerning the eligibility for dental supplements are made by PBC on behalf of the minister. The *Employment and Assistance for Persons with Disabilities Act* provides that a person may request a reconsideration of a decision. Information is not submitted with your Request for Reconsideration to demonstrate your dental practitioner has sent the information requested by PBC to make a determination concerning your eligibility for crowns and cores for tooth numbers 26 and 27 or that the request has been denied.

Section 16 of the *Employment and Assistance for Persons with Disabilities Act* sets out that a person may request the minister to reconsider any of the following decisions made under the *Act* or the regulations:

> (a) a decision that results in a refusal to provide disability assistance, hardship assistance or a supplement to or for someone in the person's family unit;
> (b) a decision that results in a discontinuance of disability assistance or a supplement provided to or for someone in the person's family unit;
> € a decision that results in a reduction of disability assistance or a supplement provided to or for someone in the person's family unit;
> (d) a decision in respect of the amount of a supplement provided to or for someone in the person's family unit if that amount is less than the lesser of
>
> (i) the maximum amount of the supplement under the regulations, and
> (ii) the cost of the least expensive and appropriate manner of providing the supplement;
>
> € a decision respecting the conditions of an employment plan under section 9 *[employment plan]*.

The ministry finds that a decision as set out in section 16 of the *Employment and Assistance for Persons with Disabilities Act* has not been made. Therefore, the ministry is not authorized to grant a reconsideration concerning your request for crowns and cores for tooth numbers 26 and 27.

Please note that because no decision regarding your eligibility for crowns and cores has been made, your dental practitioner may submit the information requested by PBC at any time. PBC will then determine your eligibility. If you disagree with the decision made at that time, you may request reconsideration.

Ministry of Social Development and Social Innovation
Reconsideration and Appeals Section
SDSI-CFD Legislation, Litigation and Appeals Branch
PO Box 9963 Stn Prov Govt
Victoria BC V8W 9R4

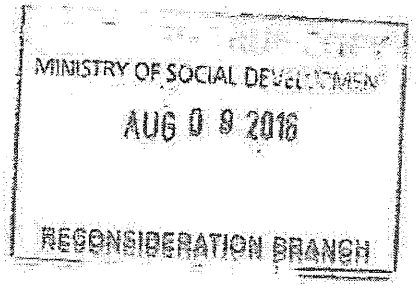
A "Notice of Appeal" form is enclosed. If you wish to appeal this decision, the Tribunal must receive this form within 7 business days of receiving the Ministry's reconsideration decision.

EMPLOYMENT AND ASSISTANCE APPEAL TRIBUNAL
PO BOX 9994 STN PROV GOVT
VICTORIA BC V8W 9R7

Phone: (250) 356-6374 (in Victoria)
Call Toll Free: 1-866-557-0035 (outside greater Victoria area)
FAX: (250) 356-9687 or Toll Free FAX: 1-877-356-9687

If you have any questions about the appeal process or your file, please contact your Employment and Assistance Office. You may also contact an Employment Assistance Worker at **1-866-866-0800** or visit the ministry website at www.hsd.gov.bc.ca.

Sincerely,



Reconsideration Officer

Enclosures

For Information Purposes Only
Mr. Turcott's comments concerning the reasons provided in the PBC Predetermination have been forwarded to a ministry's Strategic Policy Branch for review.

CPP Disability

Canada Pension Plan

CPP is a contributory pension in order to access the benefits of the program a person has to contribute into the plan. The amount of benefits that a person will get from CPP will depend on how much and how long a person has paid into it.

If someone recently stopped working their Statement of Contributions may actually give the amount on the bottom of the page. For people who are applying late though the Statement will have a $0 dollar amount (this does not mean a person cannot collect a disability pension).

Qualifying for CPP Disability

To qualify for CPP Disability a person **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

When applying or appealing a CPP Disability denial the applicant has to prove that they meet the definition of disability. That means at application, reconsideration or appeal Service Canada does not have to prove anything.

It is important that clients are aware of this, especially if they were appealing on their own previously. Many people assume that CPP has to justify their denials rather when it is really the applicant/appellant has to show that they meet the criteria.

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.

The applicant must be able to prove they became disabled by the end of their MQP.

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 ESDCC determines that the applicant became disabled on or after December 1, 2006 and if they have made contributions to CPP for 25 years or more, then they may qualify if they worked and contributed in just three out of the last six years before you became disabled.

Statement of Contributions

A statement of contributions can be obtained by contacting Service Canada at:

Ph: 1-800-277-9914 (English)
Ph: 1-800-277-9915 (French)

Or online with a My Service Canada account.

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.

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.

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.

There are some situations where a person may be still working and also able to collect CPP Benefits.

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)

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…."

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.

CPP and Retroactive benefits

The lump sum retroactive amount begins accumulating four months after the ESDCC has determined the applicant was disabled under the CPP rules.

For most 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.

Starting a reconsideration

If ESDCC 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 process

With a reconsideration new information can be submitted 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.

ESDCC 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.

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.

Late applicants

- ESDCC 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 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 ESDCC 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 ESDCC's reasoning for why they denied your claim.
- Any other documentation that ESDCC may have collected such as clinic notes and specialist reports that you may not have seen.

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?

- ESDCC will only pay for medical letters that they request. People should ask doctors about any costs involved before requesting their letters.
- ESDCC will sometimes reject the opinion of a GP if there is contradictory information from a Specialist.

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.

Things to know while Collecting CPP Disability benefits

- Service Canada has an expectation that people will inform them if they have earnings over $5, 400 (before taxes) in one year.
- Cases may be reassessed due to earnings or periodically. During these assessments CPP will want current medical information.
- For people who leave CPP Disability benefits because they have found employment. They may be able to have their benefits automatically reinstated if:
  - Benefits were stopped less than 2 years ago
  - The disability from the original application has reoccurred
  - Requested within one year from the month the person stopped working.
- If it has been more than 2 years but less than 5 since the benefits stopped a person could contact Service Canada to request a Fast Tracked Reapplication form.

Using Case Law

Tribunals are bound by decisions of the court and case law can become a valuable and powerful tool when you are writing your written submissions.

When weighing what decisions to use keep in mind that while the Tribunal will consider decisions from the Pensions Appeals Board and previous Tribunals they are not bound by them.

Remember to cite all decisions that you use:

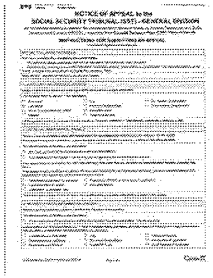
Villani v. Canada (A.G.)[2001] FCA

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.

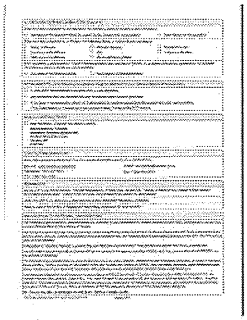
The Appeal will not be considered until all mandatory information has been submitted.

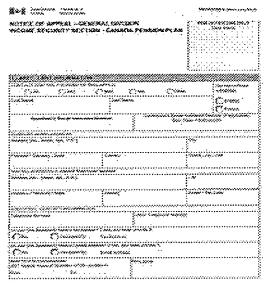


The second page also gives the contact information for the SST.

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

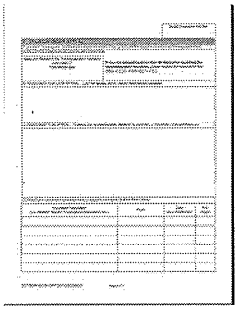


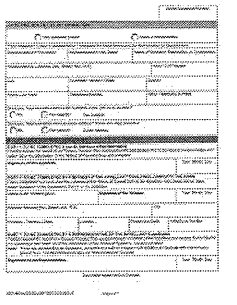


An appeal to the General Division must be filed within 90 days of having received the Reconsideration's denial letter.

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.





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.

The Tribunal Member will consider the following when assessing if they will allow further time to appeal:

- Is there continued intention to pursue the appeal;
- Does the matter disclose an arguable case;
- Is there a reasonable explanation for the delay; and
- Is there prejudice to the other party for allowing the extension.

Things to know while Collecting CPP Disability benefits

- Service Canada has an expectation that people will inform them if they have earnings over $5, 400 (before taxes) in one year.
- Cases may be reassessed due to earnings or periodically. During these assessments CPP will want current medical information.
- For people who leave CPP Disability benefits because they have found employment. They may be able to have their benefits automatically reinstated if:
  - Benefits were stopped less than 2 years ago
  - The disability from the original application has reoccurred
  - Requested within one year from the month the person stopped working.
- If it has been more than 2 years but less than 5 since the benefits stopped a person could contact Service Canada to request a Fast Tracked Reapplication form.

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

Written Submissions

- Provide a written submission in support of the appeal with any new evidence you may have collected.
- In the submission request the hearing style that would best meet your client's needs.
- Let the Tribunal know that you are ready to proceed.

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.

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.

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:

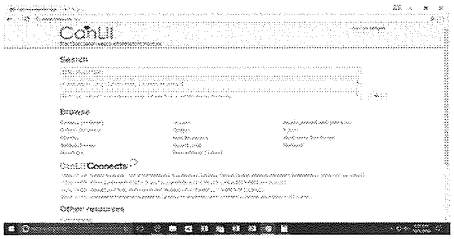
- Appeals referred back because of an error in the application of a legal test, on which both parties have made submissions.
- Appeals referred back because of insufficiency of reasons.

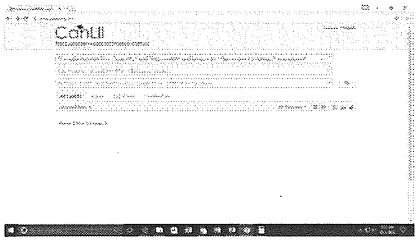
What is the next level of Appeal?

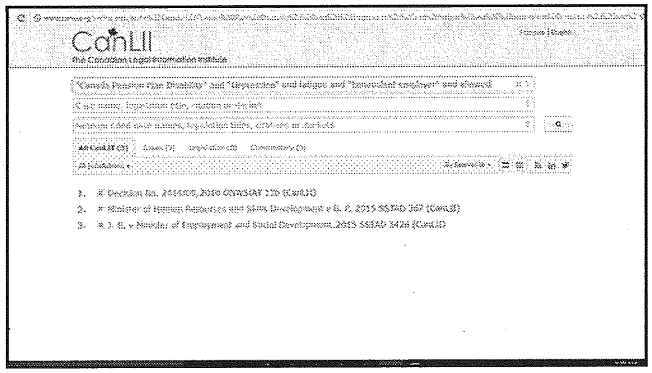
- Once the Appeals Division has given their decision if either party is unhappy the next level of appeal would be Judicial Review before the Federal Court of Appeals.

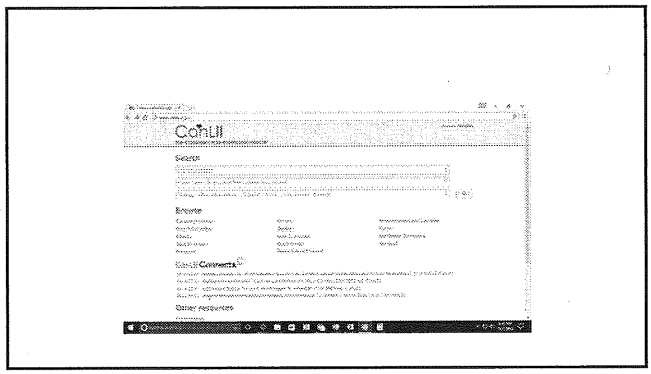
Finding decisions

Decisions are available on CanLII






CanLII
the Canadian Legal Information Institute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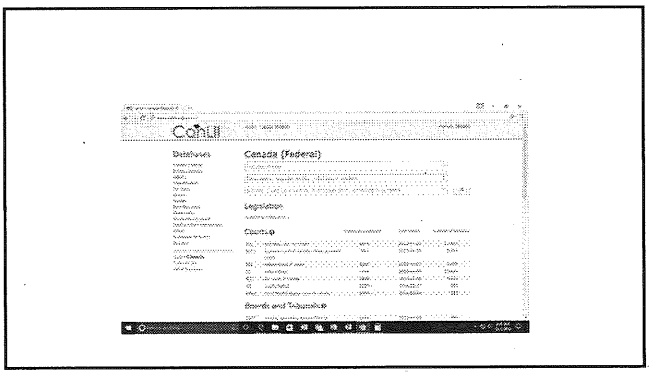
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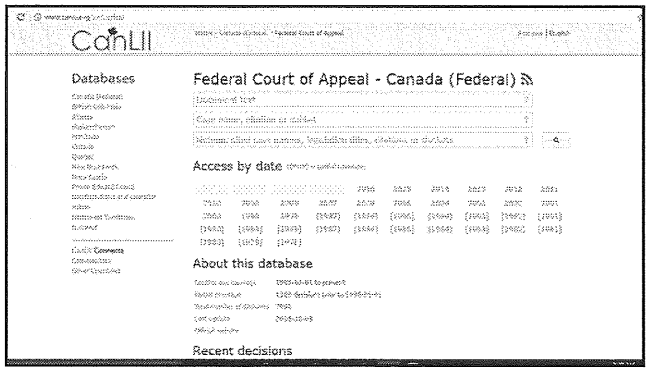
Canada (Federal)
Legislation
Courts
Boards and Tribunals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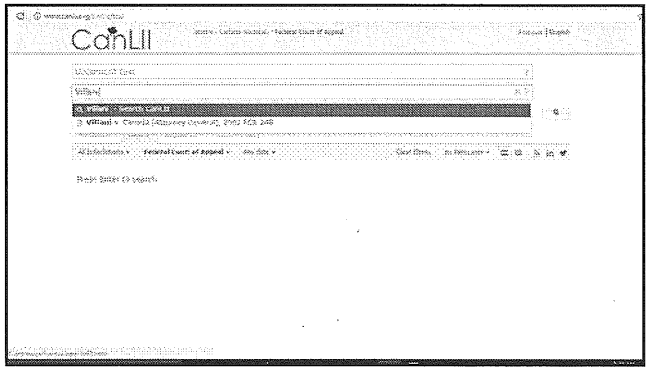
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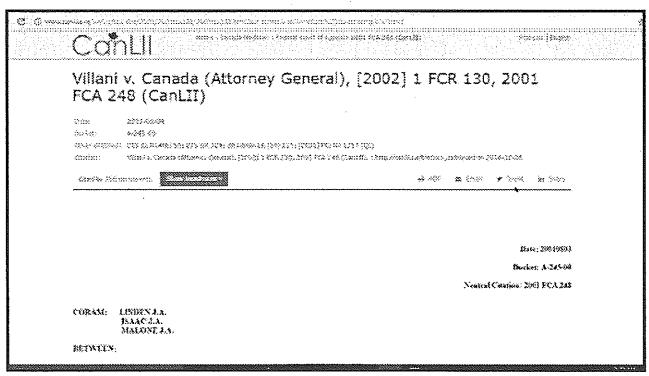
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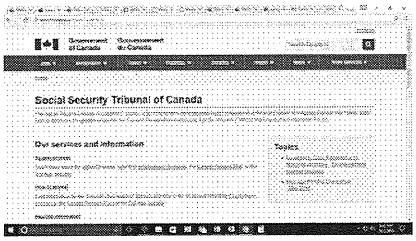

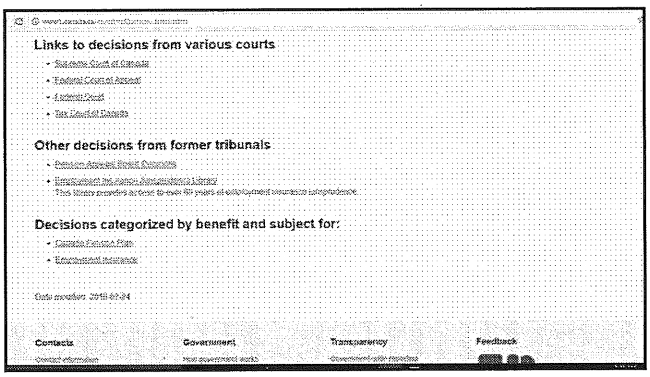

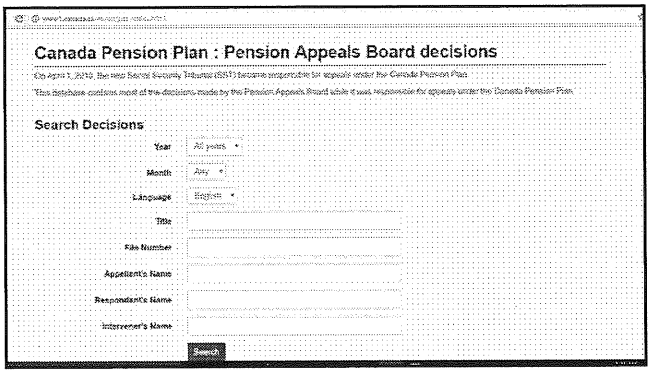

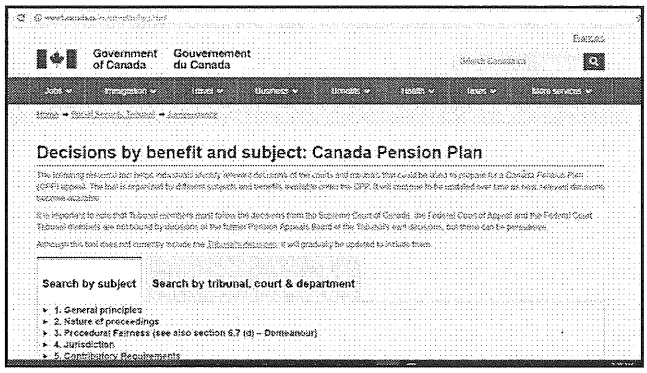

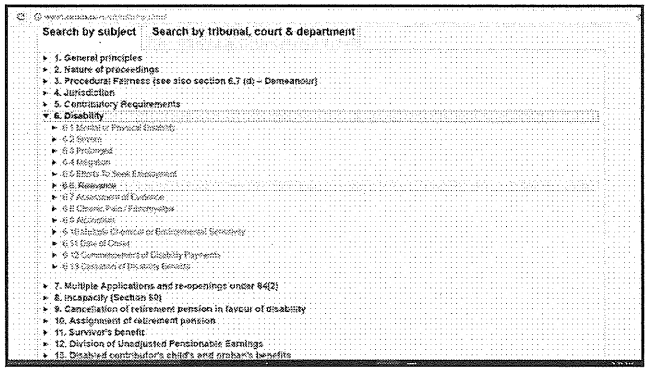

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The annotated Canada Pension Plan/Old Age Security Act will give the names and case numbers for cases that might interest you

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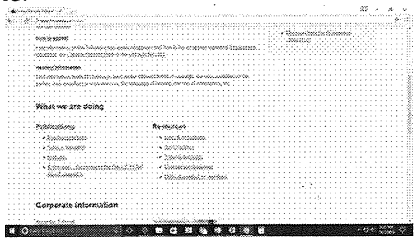

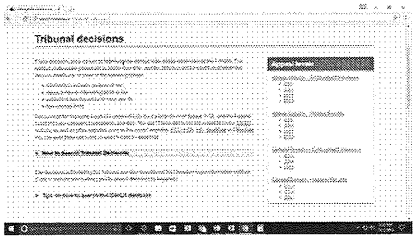

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Decisions of Interest

Villani v. Canada (A.G.)[2001] FCA Attachment 1

Real World

Villani v. Canada (A.G.)[2001] FCA

[29] Accordingly, subparagraph 42(2)(a)(i) of the *Plan* should be given a generous construction. Of course no interpretative approach can be 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 the 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 favor of the claimant for disability benefits.

Villani v. Canada (A.G.)[2001] FCA

(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 boards decision in this case:

Villani v. Canada (A.G.)[2001] FCA

Is her disability sufficiently severe that it prevents her from regularly pursing any substantially gainful occupation?

To address this questions, 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"

Substantial – "having substance, actually existing, not illusory, of real importance, practical."

Gainful – "lucrative, remunerative paid employment"

Occupation – temporary or regular employment, security of tenure

Villani v. Canada (A.G.)[2001] FCA

[38] This analysis of subparagraph 42(2)(a)(i) strongly suggests a legislative intention to apply the severity requirement to a "real world" connect. 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 subparagraphs 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 worked experience

Villani v. Canada (A.G.)[2001] FCA

[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 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 severe if it only provided that disability benefits only to the applicants who were incapable of pursuing any conceivable form of occupation no matter how irregular, ungainful, or insubstantial. Such an approach would defeat the objectives of the *Plan* and result in an analysis that is not supportable on the plain language of the statute.

Inclima v. A.G. Canada (2003 FCA 117) Attachment 2

Work capacity

Inclima v. A.G. Canada (2003 FCA 117)

The Ministry often cites this as a reason why the appeal should be denied:

[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 maintain employment have been unsuccessful by reason of their health.

Emphasis added because it can be possible to argue that an appellant who are not able to look for work as a result of their disabilities may not have to look for work.

Tasse v. MSD (PAB CP24087, November 27, 2006)

Post MQP earnings

Tasse v. M SD (PAB CP24087, November 27, 2006)

[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 straights, 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 alternative weeks at the same rate of pay, i.e. $7.75 per hour.

Tasse v. M SD (PAB CP24087, November 27, 2006)

[15] Does the fact that the Appellant returned to work for brief periods in 2005 and 2006 preclude her from obtaining a pension? In my view it does not. The Federal Court of Appeal has held that it is the responsibility of the Appellant to attempt to return to 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

Tasse v. M SD (PAB CP24087, November 27, 2006)

[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 32 ½ 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 in a nursing home her weekly take home pay calculated at 21 1.2 hour 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 hour and wages this issue would not arise.

Tasse v. M SD (PAB CP24087, November 27, 2006)

[22] Different considerations however are present in this appeal. Ms. Tasse was previously working a regular 40 hour week for a period of approximately ten years. She subsequently was capable of sporadic employment at different jobs with different 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.

[24] "Regular" has been defined as "with consistent frequency." The Oxford Dictionary defines "substantially" as "having substance, actually existing, not illusory." The Webster's 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.

Tasse v. M SD (PAB CP24087, November 27, 2006)

[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.

*P.R. v. Minister of Human Resources and Skills Development, (*2014 SSTGIS 1, GT-110163)

Chronic Pain and Fibromyalgia

*P.R. v. Minister of Human Resources and Skills Development, (*2014 SSTGIS 1, GT-110163)

[22] On October 28, 2008, the Appellants family doctor, Dr. David Leduc, completed his CPP medical report. In it he diagnoses the Appellant with atypical rheumatoid arthritis, chronic polyarthralgia, obstructive sleep apnea, generalized anxiety disorder and depression. He notes that the Appellant had a work injury in the late 1990s that led to an unsuccessful arthroscopy on his left knee. He returned to work and continued to work with restrictions. His pain continued to spread... Dr. Leduc reports that the Appellant is unstable with standing, has pain on rising from the seated position, suffers multiple tender trigger points, has a loss of strength (due to pain) in his keeps, hips and elbows. He is only able to walk short distances with the aid of a cane (often two). At the time of application, the appellant was on Celebrex, Cipralex, Seroquel, and Xana prn [as required]. Other medications have been tried including Arthotec, Codeine contin, Kadian, Elavil, Bextra, Naprosyn, Indocid, all which did not help.

*P.R. v. Minister of Human Resources and Skills Development, (*2014 SSTGIS 1) GT-110163

[36] Where there is the evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada* (A.G.), 2003 FCA 117). While the respondent argues that the Appellant should be able to do some part-time, sedentary work, it should also be noted that his employer made part-time and sedentary work available to the Appellant, which he tried but could not do. In this situation the Tribunal is reminded of *Boyle v. MHRD* (June 10, 2003) CP 18509 (PAB) where it was found that:

> The usual suggestions for the Appellant's retraining or the seeking of other employment although attempted to some extent by [the Appellant], was perceived to be unnecessary as [he]understood a job was always open to him at [his employer], if he could handle it.

Therefore the Tribunal accepts that it was reasonable that the Appellant did not make efforts to seek other employment.

*P.R. v. Minister of Human Resources and Skills Development, (*2014 SSTGIS 1, GT-110163)

[38] The Tribunal also considered whether the Appellant could have been more proactive in his treatment. On this point, the Tribunal agrees there were some instances where he could have done more. For example, he should have continued to pursue an appointment with Dr. Moulton and he should have attempted the CPAP machine on a trial basis.

[39] Nonetheless, when considering the totality of the evidence, the Tribunal does not believe the evidence upholds a finding of an Appellant who routinely disengaged from medical treatment. He has tried an exhaustive list of medications, gone to physiotherapy, seen a number of specialists and undergone numerous tests and investigations. His Functional Abilities Evaluation was cancelled not for malingering, but instead due to an elevated resting heart rate. In fact, Dr. Leduc is clear that the Appellant has exhausted all treatment options when he writes "I know of no treatment that has not been tried or contemplated by myself or his specialists that would improve his condition.

[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 the case, the Appellant has been largely homebound 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 from multiple tender trigger points, have a loss of strength (due to pain) in his keeps, 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 do to the coffee shop. Given his extensive limitation, when considered in the "real world" context (*Villani v. Canada (AG)*, 2001 FCA 248) the Tribunal is satisfied that the Appellant's disability is prolonged.

K.S. and Minister of Employment and Social Development, 2016 SST ADIS 214 AD-15-267

A lack of treatments offered does not mean a refusal on the part of the Appellant.

[6] In its decision dated February 18, 2015, the Appellant filed an Application for leave to appeal with the Appeals Division (AD) of the Social Security Tribunal alleging numerous errors on the part of the GD. On July10, 2015 the AD granted leave on the grounds that the GD may have:

(a) Made an erroneous finding of fact that "most doctors" who evaluated the Appellant suggested that he consult with a psychologist and take antidepressant and antianxiety medications;

(b) Made an erroneous finding of fact that the Appellant refused treatment when in fact he took counselling whenever this form of therapy was available.

(c) Erred in law and fact by obliging the Appellant to mitigate his impairments even though there were extenuating circumstances that may have explained his failure to received treatment, including the fact he was unaware of specific medication recommendations.

(b) "Most Doctors"

At paragraph 31 of its decision, the GD found that "numerous doctors" suggested evaluation and treatment for the Appellant's mental health issues, and at paragraph 33, it suggested that "most doctors" had suggested antidepressant and antianxiety medication and consultations with a psychologist for evaluation and treatment. The GD did not list which doctors it might have been referring to when it used the word "most"

[29] A survey of the treatment providers and assessors who offered mental health recommendations reveals the following list:

- A report dated April 6, 2009 by Mary Kemp, a physiotherapist and occupational therapist, addressed to Dr. Igbinosa, in which she recommended "psychological assistance with his frustrations, with his pain and his perceived level of disability." Ms. Kemp noted that the Appellant preferred to attend a chronic pain program instead.
- A consultation report dated October 29, 2009 by Dr. J.R. Capstick, an anesthesiologist, suggested the Appellant try a tricyclic antidepressant or a SSRI for which appeared to be a combination of anxiety and depression. Dr. Capstick also suggested a mental health referral for counseling and assessment of his anxiety disorder
- A consultation report dated April 7, 2010 by Dr. M. Javidan, a neurologist suggested the Appellant take Clonazepam for anxiety. Dr. Javidan also thought the Appellant would benefit from a psychological referral.
- A consultation report dated August 19, 2010 by Dr. Alan Berkman, an anesthesiologist who suggested the Appellant might benefit from mood-stabilizing drugs such as Cymbalta, although he made it clear this was something he would leave to the family physician.

- A medical-legal report dated June 5, 2012 prepared by Dr. Berkman recommended treatment options including cognitive behavioral therapy, ongoing medication, memory training and probably vocational training.
- In another medical-legal report, dated February 3, 2013, Dr. Berkman again recommended psychological counselling, as means of helping the Applicant cope with his pain' there was no mention that this recommendation was intended to address his anxiety or depression.
- On February 28, 2014 Dr. Berkman noted that he had recommended that the Applicant follow up with the X Regional General Hospital's Interdisciplinary Pain Management Clinic's psychologist, but due to the Applicant's memory problems, he had missed quite a few appointments.
- In November 2014, Jen Mazur, a registered psychologist, stronger suggested that the Applicant receive a neuropsychological assessment to gain a complete picture of his strengths and deficits.

[30] First, I do not accept the Appellant's premise that there is a marked distinction between a "suggestion" and "recommendation." In medical reports, there words are frequently used interchangeably, and when a treatment provider "suggests" a particular therapy, it cannot be said that he or she is doing anything less than saying it "should" be carried out.

[31] Second, I agree with the Appellant that Mary Kemp's recommendation for psychological assistance should be discounted, as she was commenting well outside her expertise as a physical therapist. That said, contrary to the Appellant's assertion, there was more than just a single medical practitioner who suggested he would benefit from mental health treatment: Dr. Capstick, Dr. Javidan and Dr. Berkman all recommended either psychological counseling or psychotropic drug prescriptions, and Dr. Igbinosa documented a prior use of an antidepressant, Effexor, since discontinued.

[32] Treatment received after the MQP is relevant in an assessment of the severity of a claimed disability (as his treatment *not* received after the MQP) where there are indications of some disabling condition that went undiagnosed or untreated during the eligibility period. The record shows that at least four medical practitioners made recommendations with respect to the Appellant's mental health, whether before or after the MQP. Whether this qualifies as "numerous" is a matter of judgement, but I don't think it can be fairly characterized as an error – certainly not one "capricious or perverse" or made with out regard to the record. The same can be said for the GD's use of the word "most" – A majority of the Appellant's doctors, and certainly a majority of those qualified to offer psychological assessments, made recommendations regarding his mental health.

(c) *Refusal of treatment*

[33] Lack of treatment can be taken as evidence that a claimant's injuries are less than severe, but it can also be seen as a failure to "mitigate" one's impairment. Mitigation is defined as the act of reducing the severity, seriousness or painfulness of a loss. Within the CPP regime, the doctrine of mitigation imposes a positive obligation on a claimant to take active steps to regain functionality – typically by following a doctor's recommendations. Refusal to do so entitles a decisions maker to draw an inference that the claimant would have got better if he or she had accepted the treatment.

[34]

A review of the decision, particularly the three-page section headed "Analysis" makes it clear the GD based much of its denial for the Appellant's claim on what it found was the Appellant's refusal to follow medical advice:

[31] The Tribunal must consider whether the Appellant's refusal to undergo treatment is unreasonable and what impact that refusal might have on the Appellant's disability status should the refusal be considered unreasonable.

[31] The Tribunal finds that it was unreasonable for the Appellant not to follow suggestions of antidepressant/antianxiety medications and consultations with a psychologist for his evaluation and treatment

[32] Had the Appellant followed recommendations for mental health treatments of psychological referral, CBT and medication, he may have had more capacity, especially since the evaluator listed depression and anxiety as one of the barrier to employment.

[33]The Tribunal find that the Appellant is not incapable regularly of pursuing any substantially gainful occupation because he did not mitigate his treatment options with regards to his mental health condition and its relationship to his chronic pain after it has been recommended by most doctors who evaluated him.

[34 cont.] In asserting that a CPP disability claimant is obliged to pursue all recommended treatment options, the GD correctly cited *Lalonde v. Canada** although this principle has also been set out more fully in other cases.^ The question before me now is whether the GD was correct in finding the Appellant "refused" to follow medical advice.

* *Lalonde v. Canada (MHRD),* 2002 FCA 211

^ *Giannaros v. Canada (MSD),* 2005 FCA 187, *Kaminski v. Canada (Social Development),* 2008 FCA 225 and *Warren v. Canada (A.G.),* 2008 FCA 377

[35] Although the GD found that the Appellant refused treatment, its decision did not specify where he turned down a medical recommendation. When I look for specific instances in the evidentiary record that document the Appellant's refusal to follow medical recommendations, I come away empty handed.

[36] The GD noted that the Appellant was hospitalized with bipolar disorder in 1996, although he did not agree with the diagnosis. This by itself did not amount to a refusal to accept treatment. The GD found that in 2009 the Appellant was briefly treated with a starting dose of Effexor, which was discontinued due to a lack of effectiveness, but there was nothing to suggest that in doing so he had ruled out psychological counselling.

[37] To be clear, I am not questioning the GD's authority to make an assessment of severity based on the number and type of therapies that were recommended by his treatment providers. However, I must agree with the Appellant's submissions that he has never been explicitly criticized anywhere in the medical record for disobeying medical advice. There is no indication in the evidence, oral or written, that the Appellant ever refused treatment. He testified that he had tried everything his doctors recommended. While he did indicate that he though the 12 step program and the chronic pain clinic were the best strategies for him, at no point did he refuse alternatives. The evidence indicates that the Applicant eventually took advantage of counselling when

[38] For these reasons, I conclude that the GD had no basis in finding that the Appellant did not follow mental health treatments recommended by his physicians.

(d) Extenuating Circumstances

[39] Although the Appellant did not refuse recommended mental health treatments, it is nonetheless true he did not receive them – and it was on this fact that the GD rested much of its decision. The questions that remain are(i) whether there is anything in the lase that required the GD to consider extenuating circumstances that explained or excused a failure to receive treatment; (ii) whether such circumstances existed in this case and (iii) if so , whether the GD discharged its obligation to consider those circumstances.

[40] In *Lalonde,* the case cited by the GD in support of the mitigation principle, the Federal Court of Appeal stated:

"The 'real world' context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should to refusal be considered unreasonable.

[41] The key concept there is reasonableness. Even if it has been established that a claimant did not receive recommended treatment, the decision-maker must still conduct an inquiry into whether there was some good reason for that omission, or at the very least give fair consideration to available evidence on the matter.

[42] In the present case, the Appellant submits that the following factors accounted for his failure to receive treatment for his psychological conditions:

- The reports of Dr. Capstick, Dr. Javidan, and Dr. Berkman were all addressed to his family physician, Dr. Igbinosa, and hew as not aware of their treatment recommendations.
- He relied on his family physician to implement specialist recommendations, and if Dr. Igbinosa did not do so, he cannot be blamed.
- Psychological counselling was not available in his region, and BC Health Services did not cover this service. Both of these factors may have played a role in Dr. Igbinosa not referring him to psychological counselling.
- When he previous took an antidepressant, he saw no improvement and suffered side effects. Dr. Igbinosa did not see fit to prescribe alternative medicines.

[43] In its decision, the GD largely ignores these considerations, addressing only the alleged side effects and lack of efficacy of the Appellant's Effexor trial. At the hearing, the GD questioned the Appellant about that trial and concluded the starting dose was inadequate to treat the Appellant's PTSD, anxiety and depression. Having reviewed the documentary evidence and listening to the relevant extracts from the hearing recording, I see no evidence that the Appellant was prescribed any other antidepressants after the unsuccessful Effexor trial, and find the GD was within its rights to infer from this that the Appellant's psychological impairment was less than severe. However, I remain unsure why Dr. Igbinosa discontinued the Effexor and why he declined to prescribe further antidepressants: Was it because he did not think they were necessary given the Appellant's condition or was it because the Appellant told him he did not want anymore? The GD member did not pursue this line of questioning at the hearing, nor did she make any inquiries into why the Appellant did not seek timely counselling from a psychologist, as had been recommended by specialists

[44] If the GD chooses to make its denial contingent on a finding of insufficient psychological treatment, it must recognize the reality that most claimants depend on their family physician to recommend treatment, as well as implement the recommendations of specialists. Claimants tend to passively accept those recommendations and do what their doctors tell them to do. There was nothing in the evidence to suggest that the Appellant resisted treatment, and if the Appellant's family physician was failing to carry out specialist recommendations or otherwise prescribe what the GD though was appropriate treatment, it should have raised those questions at the hearing and addressed them in the decision.

[45] As noted in the Appellant's submissions, the reports of Dr. Capstick, Dr. Javidan and Dr. Berkman (as well as the letter from Mary Kemp) were all addressed or copied to Dr. Igbinosa. The GD did not ask the Appellant whether hew as aware of their recommendations that he receive psychological counselling or, if he was whether he took any steps on his own to get it. There was evidence before the GD that psychological counselling was not readily available prior the end of the MQP, and as indicated by Dr. Capstick's October 2009 comment that a clinical psychologist was no longer associated with his clinic. In his February 2013 report, Dr. Berkman mentioned that in August of the previous year the Appellant saw a psychologist (as of February 2013), which suggests that he was willing to receive treatment when it was recommended to him, but an obstacle may be the availability. It does not appear, however, that the GD canvassed this issue at the hearing and there is certainly no discussion of it in its decision.

[46] All of the above persuades me that the GD did not give adequate consideration to issues of awareness and accessibility before dismissing the Appellant's claim for failure to receive treatment. This was not a case that involved a claimant flatly refusing to take recommended treatment. The evidence shows the Appellant was willing to do as his doctors advised when he became aware of it. He tried Effexor but found it ineffective. He testified that he found pain management classes helpful. Counselling was not available in any proximity to make it practicable. Once treatment options became available, he accessed the, and it should not matter whether treatment was offered after the minimum qualifying period.

[47] I find that the GD failed to consider extenuating circumstances to assess whether the Appellant's failure to receive psychological treatment was reasonable as, as the existing jurisprudence suggests it must do.

CONCLUSION

[48] I would allow the appeal on two grounds: First, the GD made an error of fact without regard for the material before it in finding that the Appellant had "refused" treatment. Second, the GD made an error of mixed law and fact by failing to consider extenuating circumstances for the Appellant's failure to receive psychological treatment.

[49] Section 59 of the DESDA sets out remedies that the AD can give on appeal. It is approximate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD member

G.D. v. Minister of Human Resources and Skills Development, 2014
SSTGDIS 3
Appeal No: GT-124101

Applicant refusing treatments due to cost.

[9] the Appellant disclosed that he stopped working following a workplace accident in which he backed up a truck into a loading dock with considerable force. As a result he has severe and ongoing back pain radiating down his left leg to his foot leaving him unable to stand or sit for prolonged periods.

His medications include Lenoltec and Tylenol #3 (both narcotic pain relives), Naproxen (an anti inflammatory pain reliever), Metformin (for high blood sugar) and Myoflex (an OTC topical analgesic."

[11] In the CPP Disability Medical Report dated March 29, 2012 (p. 49), B. Nanar, the Appellant's family physician, wrote that a work injury to Mr. Doel's left buttocks left him with persistent pain on his left side, rendering him unable to sit or stand for prolonged periods of time. Dr. Nanar confirmed diagnoses of diabetes and degenerative disc diseases of the lumbar spine and concluded the prognosis for recovery was poor.

[12] A CT scan of the lumbar spine dated August 5, 2011 indicated multilevel changes, notably moderate narrowing at the L3-L4 of the central canal, lateral recesses and nerve root foramina bilaterally, and moderate to severe stenosis at L4-L5 of both nerve root foramina. There was bilateral spondylosis at L5-S1 with grade 1 anterolisthesis of the L5 vertebral body, and moderate to severe narrowing of both nerve root foramina.

[14] In a letter dated February 22, 2012 Dr. Marmor wrote that there had been no significant change since last consultation. The MRI showed some diffuse degenerative changes but no pressure on the thecal sac or exiting nerve roots. Dr. Marmor concluded that surgical intervention was unlikely to help the Appellant, noting that it was not realistic for him to return to his previous job.

[15] In a letter dated February 22, 2012 Dr. Nanar wrote that the Appellant was unable to sit or stand for prolonged periods of time and was totally disabled of any kind of work

[16] Dr. Nanar's office notes from August 1, 2009 until April 11, 2012 revealed numerous visits, particularly after the Appellant's June 2011 workplace accident.

[26]The Appellant has never attempted to return to work. Asked why not; he replied that when he sits for extended periods ,his pain increases and so does the swelling. When driving a truck, he has to use his left leg to apply the clutch, and the constant on-and-off pressure would only aggravate the pain...

[27] He is unable to sit for very long when he goes to temple. The most he can do is show up and leave. He can walk up to four or five minutes if his gait is slow, one minute if fast.

[28] He can't imagine what type of work he could do. He definitely could not manage any sort of job where he'd have to sit or stand. He wants to work, but his legs and back prevent him from doing so. At nights he only gets one or two hours of uninterrupted sleep at a time, possibly four or five hours in total. He is reluctant to take sleeping pills, as he is already taking several medications.

[34] In this case, the balance of the evidence persuaded the Tribunal that the Appellant does suffer from a severe disability. First, there is objective evidence in the medical record to indicate that there has been significant damage to the Appellant's lumbar spine, most notably the August 2011 CT scan, which showed multilevel degenerative changes, including moderate to severe stenosis at the L4-5 level and L5-S1 nerve root foramina. The Tribunal disagreed with the Respondent that these findings showed no nerve root involvement that would explain the Appellant's pain and notes that these changes were not present in the pre-accident February 2010 ultrasound, which is consistent with the Appellant's account that he suffered a traumatic injury in June of 2011. Also enhancing the Appellant's credibility were Dr. Nanar's office notes, generated in the context of treatment indicating a marked increase in the frequency of the Appellant's visits after his accident.

[35] The Tribunal found it mildly surprising that the Appellant had never been referred to an orthopedic specialist, given the degenerative changes in his spinal column; however, he was seen by a neurologist, Dr. Mamor, who ruled out surgical intervention and clearly stated that it was "not realistic" for the Appellant to return to his previous job.

[36] The question arises, then, whether he was capable of doing some alternative type of work that might have accommodated his pain. Applying the *Villani* criteria, the Tribunal was hard pressed to imagine what else the Appellant could do given his age, education, and work experience. Now 57 years of age, the Appellant does not even have the equivalent of a High School education and done nothing else in his working life except low-skilled manual labor. He would be an unlikely candidate for a job in the retail sector and is probably too old to acquire new, marketable skills. He would be an unlikely candidate for a job in the retail sector and is probably too old to acquire new marketable skills.

[37] The Tribunal's one reservation lay in whether the Appellant had done everything reasonably possible to overcome his injuries and regain functionality. Here, the record was mixed; while the Appellant did undergo physiotherapy following his workplace accident, he received only five sessions. Dr. Marmor felt that he would have benefitted from further physiotherapy, but the Appellant testified that he didn't have the resources to pay for it, the WSIB having rejected his application for coverage. In the end the Tribunal accepted this explanation are reasonable and valid.

Gathering information

See handout #6

Gathering Information

- Family doctor
- Specialist
- Allied health professional
- Family
- Friends
- Employers / Previous employers

Glossary

ESDC	Employment and Social Development Canada – Service Canada falls under this portion of the federal government. It has had different names in the past.
CPP	Canada Pension Plan
CPP-D	Canada Pension Plan Disability benefits
CPP-ER	CPP Early Retirement (also "Early Retirement) – can be started after 60
CPP- R	CPP Retirement
MQP	Minimum Qualifying Period – the minimum period of time a person must have worked and contributed to CPP in the years immediately before they became disabled **(This is the date a person has to show they were disabled by).**
Severe	A disability that is severe is one that would stop a person from doing any sort of work.
Prolonged	A disability that is likely to be long continued or result in death
Late Applicant Provision	Allows someone to collect CPP Disability even if their MQP is in the past. For example if my MQP is December 21, 2009? I could apply for CPP Disability benefits **but** I would have to prove by that date I was so disabled I could not do any sort of work.
Child Rearing Dropout	CPP will drop the years a primary care giver was taking care of a child under the age of seven. This can increase the rates CPP will pay.
Credit Split	If a relationship dissolves between a marriage or common-law relationship in some cases Service Canada can combine both parties' credits during that relationship and split them evenly between the two (there are rules / criteria availed on Service Canada's website or in any of our CPP D publications.
Incapacity Provision	If an applicant is medically incapable of forming or expressing the intent to apply for a CPP Disability pension and were also incapable of asking another person to apply on their behalf and it has been within a year since they regained the capacity retroactive benefits can be back dated beyond the application.
Sheltered Employment	Employment involving simple and closely supervised tasks. Output and performance goals at set to the person's ability. Sheltered employment is therapeutic and usually done through public, psychiatric and mental health programs.

Benevolent Employer	Employment that is done by a person, company, or business rather than the public / mental health programming. A benevolent employer is one who will vary the job expectations to accommodate an employee's disability. A benevolent employer is one who would lower performance expected, job demands, lowered expectations of productivity or outpt.
Reconsideration	The first stage of appeal. Within 90 days a person whose CPP D application was denied can ask for a reconsideration in writing (with original signature)
Social Security Tribunal (SST)	Tribunal separate from Service Canada that people can appeal to if their Reconsideration is denied.
SST General Division	The first stage of appeal with the SST. You can submit new information at this stage.
SST Appeals Division	The second stage of appeal with the SST. Leave to appeal must be granted and that is awarded in very specific situations.
Judicial Review	If either party is unhappy with the Appeals Division's decision they can the next level of appeal is Judicial Review before the Federal Court of Appeals.

1. Biography. Where did you grow up? What was your life like growing up? If your conditions started in childhood how did they progress over the years? What was your career? What is your living situation like? Do any people live with you?

   As you conditions progressed (or suddenly occurred) how has your life changed?

   What did work mean to you?

   What impact has not being able to work had on your mental health?

   Describe what you and your life were like before and after your conditions stopped you from working.

2. What was the highest level of education you obtained? If you do have post-secondary education describe what symptoms prevent you from using your education and background as transferrable skills. If you wouldn't be able to obtain that level of education now mention that. If your conditions have impacted your ability to make use of the skills or information you could access and use easily mention that and describe how.
3. If you've tried going to school to retrain describe how you were accommodated in your classes. If you were missing classes. If you required extensions on deadlines ....
4.

Sitting

How long can you sit for?

- How long on an "average" day? How many times per day could you sit for that length of time?
- How long on a "bad" day? How many times per day could you sit for that length of time?
- Do you have days where you cannot sit at all? Describe what symptoms you have then.

If you cannot predict in advance if you are going to have an "average", bad, or so bad there is no sitting day mention that. If you don't know how long or how often you can sit next week mention that.

What are the symptoms that get worse when you are sitting?

- Stiffness
- Restlessness
- Agitation
- Headache
- Numbness
- Fatigue ...etc

Include anything sitting makes worse.

If you have chronic pain how does sitting impact your pain? Describe how the pain changes during sitting.

Do you have any problems getting in and out of furniture or chairs? If so mention and describe them. Do you get "trapped" after sitting to long? Mention it.

You may want to think about how you could describe the pain you have while you are sitting. Does it increase? If so where and how. Mention if the pain from sitting ever becomes so severe it is difficult to focus, think or concentrate. Do you get stiffness? If so how does sitting increase it? Other symptoms might include things like: increased headaches, numbness in feet, sharp shooting nerve pain, and increased fatigue. Do you have any difficulties getting in and out of chairs? If you get "trapped" in a chair after sitting too long mention it. Do you get dizziness when you stand up? Do your legs give out? Do you have to use a cane or another person? Do you limp after sitting too long? Are you very slow after sitting? Describe what symptoms are happening and how long it lasts for.

Even if your disabilities are not physical they can impact your sitting. Do you sit too long because you struggle to motivate yourself to get out of the chair? Do you end up feeling restless? Do you have to fidget? Do you move frequently?

Do you have to recover from sitting? If so mention it.

Standing

How long can you stand for?

- How long on an "average" day? How many times in one day could you stand for that length of time?
- How long on a "bad" day? How many times per day could you sit for that length of time?
- Do you have days where you cannot stand at all? Describe what symptoms you have then.

If you cannot predict in advance if you are going to have an average, bad or no standing type of day mention it. If you don't know how often or for how long you can stand next week mention it.

What are the symptoms that get worse when you are trying stand?

- Stiffness
- Fatigue
- Swelling
- Agitation
- Numbness... etc

If you have chronic pain how does standing impact your pain? Describe how the pain changes while you are standing.

You may want to think about how you could describe the pain you have while you are standing. Does it increase? If so where and how. Mention if the pain standing ever becomes so severe you cannot focus, think or concentrate. Do you get stiffness when you try to stand? Describe what it feels like and where you feel the stiffness.

Have you ever had your legs give out on you while standing?

If you experience vertigo what is it like to try to stand during that?
If you have seizures are you at risk for a fall?
Do you ever have difficulty remembering what you stood for / why you are standing?

Walking (How long and how far?)

Most people overestimate how far they can walk. If you have access to the internet I want you to load up google maps. Use their walking directions to get a sense of what distance you are walking.

How far can you walk?

- How far on an average day? How long does it take you to make it that distance? Do you have to stop while walking that far? If so at what distance? How many times in a day could you walk that far?
- How far on a "bad" day? How long would it take you to make that distance? Do you have to stop while walking that far? If so at what distance? How many times a day could you walk that far?
- Do you have days where you are not able to walk at all? If so mention it and describe what symptoms you have.

If you cannot predict in advance if you are going to have an average, bad , or no walking day mention it. If you don't know how long or how far you would be able to walk next Thursday mention it.

What are the symptoms that get worse when you are walking?

- Stiffness
- Fatigue
- Disorientation
- Feeling easily overwhelmed
- Overstimulation
- Panic attacks
- Anxiety... etc.

Are there any safety risks when you are walking?

- Unpredictable falls?
- Unpredictable seizures?
- Walking so slowly you cannot cross the road before the lights change.
- Disorientation?
- Poor memory?

How far on an average day? How about on a bad day? If the distance isn't consistent and if it changes unpredictably mention that. Does walking increase any of your symptoms?

If you have pain when you are walking describe the pain. Does walking increase any of your other symptoms? Please mention them too. Other symptoms could include things like: weakness, fatigue, poor balance, limp...

Lifting and Carrying (How much and how far?)

Most people over estimate how much they can lift. Consider that items that weigh about 1 lbs include a shoe, ½ L of liquid, pack of butter with 4 sticks. Items weighing about 2 lbs include a 1 L of milk. If you cannot lift more than a 2L that is under 5lbs.

What weight can you comfortably lift? How long could you sustain that? How far you could walk holding that weight. Do you unpredictably drop things? Do you throw things without meaning to? Does lifting increase any of your symptoms? If so please describe them.

Do the after effects of lifting trigger nausea or headaches? Does it increase your fatigue? If so describe that. Do you get shortness of breath with exertion? Does it result in chest pain?

If the weight isn't consistent mention that. Talk about the unpredictability. Give any examples of any troubles you have ended up in.

Do you have to recover from lifting? If so describe what symptoms you are having and how long it takes to fully recover.

If there are children in your life that you cannot pick up mention that.

Reaching

Can you reach above your head? How long could you hold that for? Does reaching increase any of your symptoms? If so describe what symptoms you get and how they become worse. Does reaching increase:

- Headaches
- Fatigue
- Dizzy spells
- Vertigo
- Pain
- Muscle spasms
- Fatigue
- POTS ... etc

Can you reach behind yourself? Do you have any difficulties putting on a shirt or jacket? If you difficulty reaching far enough for personal hygiene tasks like post toilet wiping mention it. It may be embarrassing but it can help illustrate how severe your condition is.

Can you reach down? Could you reach your feet? Do you have difficulty getting things off of low shelves?

Bending

Can you bend from standing? Could you easily bend to pick something up off of a floor? If not what are the steps involved with bending? What symptoms are worse afterwards? Does it increase:

- Pain
- Stiffness
- Dizziness
- Poor balance
- Muscle weakness
- Fatigue... etc

Can you bend from sitting? What symptoms are worse because of bending? Does it increase:

- Pain

- Stiffness
- Dizziness
- Poor balance
- Muscle weakness
- Fatigue...

Can you bend multiple times? Do you have to recover after bending?

Have you ever become "stuck" after bending? Describe what parts of your body were stuck and what it felt like.

Do you have to recover from bending? What things do you do to recover?

Can you predict how many times you can bend? Or how far you could bend on any given day? For example two Sunday's form now do you know how many times you could bend or how far?

Balance

Would you rate your balance as poor? Do you have a history of falls? If so describe the symptoms that happen when you fall. Can you predict when it is going to happen? What injuries did you sustain?

Can you safely go up and down stairs?
Can you safely walk on uneven ground?
Can you safely look up or down as you walk?

Do you get vertigo?

Personal care: Dressing

How often do you get dressed? If you do not get dressed every day please mention it.

- How many days in a row will you wear the same clothing?
- How many days in a row will you stay in the clothes you've slept in?

If you are getting dressed what symptoms make it more difficult?

- Stiffness,
- Poor range of motion
- Pain
- Weakness
- Poor coordination
- Nausea
- Fatigue
- Loss of motivation
- Poor memory – forgetting
- Difficulty with time management
- Negative self-talk
- Difficulty making decisions on what to wear
- Having to change multiple times per day due to conditions – hyperhidrosis, O.C.D., colitis, bladder leakage, staining the clothes due to a symptom... etc

If you get dressed from sitting mention it. If you dress slowly because of your symptoms describe what it is like. Do you get dizziness when you try to straighten up? Do you stiffen up or have muscle spasms? Even if you are getting dressed are there any parts of it that strain you?

If getting dressed increases your fatigue or is something you have to rest and recover from please mention that and describe.

Do you make mistakes and put clothes on backwards or inside out without realizing it? If that is because of your symptoms mention and describe it.

Have you had to stop wearing certain items of clothing because of your conditions? If so please describe them.

Personal Care: Bathing

If you cannot safely bathe at home alone mention it and describe the safety risk. If you cannot have a bath / shower because of your symptoms mention that too.

If you are not bathing daily or as often as you used to mention it and describe the symptoms that affect you. How many days will you go without bathing? If so mention it and describe what symptoms are happening on those days. If you forget to bathe sometimes mention that.

If you do micro baths with a cloth and sink because you aren't able to bathe that day mention it. What symptoms are happening on those days?

If you have to bathe a number of times a day mention that.

- Showers
- Can you stand in the shower? If you can't or if it increases your symptoms mention it. Do you use a shower seat? Do you use any grab bars or other assistive devices? If so mention them.
- Are there any parts of your body you cannot reach to clean? Think from head to toe. If any are difficult mention and describe what it is like.
- Do you get shortness of breath with the steam?
- Does the enclosed space of the shower increase anxiety or trigger a panic attack?
- When you are in the shower are you cleaning your body?
- Have you slipped in the shower?
- If you don't have the motivation to shower daily mention it.

- Baths
- Can you get all the way down into the tub and then back up easily? If you can't or if doing so increases your symptoms mention it. Do you use a bath bench or any transfer bars? If so mention them.
- Are there any safety issues with bathes like a risk of drowning?

Does your skin react to the water? For example if you have severe psoriasis hot water can be difficult to tolerate?

If bathing takes you much longer to do than it used to. Mention that. Break it down into the tiny steps and describe the symptoms you have at each one.

If you have to recover from bathing describe that as well.

Personal Care: Grooming

- Shaving
- Washing face
- Hair care
- Foot care
- Nail care
- Dental care
- Washing and Drying hands.. etc

If your symptoms impact if / how you complete grooming activities describe what symptoms and how for any area impacted.

Do you have the motivation to do these tasks as often as you used to? Do you forget to do any of them? If so describe what that is like?

Does fatigue impact how often or how well you can groom yourself?

If you have difficulty standing how does that impact grooming? If you have poor coordination or weakness in your hands how has that changed grooming for you?

Are there grooming activities that you used to do but have totally stopped? If so mention that, describe why and give approx. dates of when you stopped.

Bowel Functions

Do any of your conditions result in constipation or diarrhea? If so mention that and describe which. How many times per day would you have a bowel movement? Any blood or mucus in your stool. Any abdominal or intestinal cramping?

Any incontinence issues.

Do you have to plan trips outside of the home around bathroom access? When you are outside of the home do you have to bring clothes to change into should you not be able to get to a bathroom in time?

How many hours per day do you spend managing either your diarrhea or constipation?

Bladder Functions

Do any of your conditions cause urinary issues? Do you have urinary hesitance? Do you have urinary urgency? Do you have frequent urination? Urinary incontinence?

Sleeping

When was the last time you had a solid 8 hours of refreshing and restorative sleep? If you have insomnia mention it and describe what it is like. If you oversleep describe that. If you have a mixture of the two mention that and describe how each impacts your life.

Do you fall to sleep during the day time?

Do you wake up frequently during the night? If you do describe why

Do you have nightmares, flashbacks or night terrors at all?

Eating

Do you miss meals because of nausea or because you are vomiting?
Because of your conditions do you have any difficulties with chewing or swallowing foods? If you have dysphasia mention it.
Are you able to use a knife and fork unassisted? If not describe what symptoms prevent you?
Do you have the motivation to eat? Mention if you have any eating disorders and describe how much time, concentration, energy is taken up by it.
Do you have any food compulsions or rules?
Do you have any severe allergies that are triggered by being in the same area as a food item?
Do you ever drop or throw food items / utensils during your meal? If so what symptoms are happening then?

Cooking

If you used to enjoy cooking. If you were a good cook. Mention that here. How has cooking changed because of your conditions?

If you have problems standing / sitting how does that impact food preparation?
If you have problems with bending / reaching what is getting food out of cupboards or the oven like?

Because of your conditions are there any safety issues in the kitchen? Poor coordination can make knife chopping difficult. Weakness in the arms, shoulder or back can make lifting hot pots and pans dangerous. Numbness in the hands can result in injuries... etc

Do you have the motivation to cook? Do you get the same enjoyment out of cooking?

Do you forget about things? Are you losing track of time and burning things? Do you forget to put in an ingredient? Or do you ever get interrupted and then add the same ingredient twice?

Following a recipe or instructions while cooking do you have any difficulties? If you've tried to and struggled describe the symptoms. Do you have difficulty thinking? Do you get confused? Do you forget steps? Do you get impatient and skip steps? If you have pain does it ever get so severe you can't focus on what you are cooking?

Do your family or friends get upset because you eat foods past their expiration dates? Have you become ill because of this?

If cooking is more difficult what are the symptoms? For example:

- Stiffness,
- Poor range of motion
- Pain
- Weakness
- Poor coordination

- Nausea
- Fatigue
- Loss of motivation
- Poor memory – forgetting
- Difficulty with time management
- Negative self-talk

Do you have to recover from cooking? If so how?

Shopping

Because of our conditions have you had to change how or when you shop? If so describe.

Do you have days where you cannot shop at all? Describe what symptoms you are having then. If you cannot predict in advance when you will or will not be able to go in the future mention that.

Do you have to recover from shopping? If so describe what the symptoms you are trying to recover from are. How long does this process take?

What other symptoms get worse when shopping?

- Pain
- Fatigue
- Difficulty making decisions
- Hypervigilance
- Photosensitivity
- Anxiety
- Agitation

Do you go for periods of times where you just go without because you are unable to shop for yourself? Or would you if you didn't have people in your life helping you with the shopping?

Do you forget to buy things when you are at the store? If you make a list and you forget your list mention it. Do you forget things at the store? If you walk away without your groceries or your debit card or change mention all of those things. What are the symptoms that are going on at that time?

Do you get overwhelmed by the choices you have to make when at the store? If you may not be able to focus or concentrate on what you are buying mention that.

Do any of your symptoms increase when you are standing in a line up? If so describe them.

When you get home from shopping if you cannot put the groceries away right away talk about that. If you have to recover from shopping what things do you have to do? How long does it take you to recover?

Household maintenance - Cleaning

Because of your conditions do you clean less often? Does it take you longer to clean? Do you let things go undone for longer periods of time? Have you had to change or lower your standards of clean? Do you have to clean more often? Do you have people in your life who are cleaning for you?

If so what tasks are they doing? What symptoms were you having that were so severe someone else stepped in?

What symptoms make cleaning more difficult?

- Stiffness
- Poor range of motion
- Weakness
- Limited lifting and carrying
- Loss of motivation
- Overwhelmed
- Difficulty with time management
- Difficulty starting and finishing tasks
- Loss of motivation
- Pain
- Cleaning obsessions / compulsions

If cleaning increases your fatigue or is something you have to recover from please mention and describe it.

Some cleaning tasks to think about include:

- Sweeping
- Mopping
- Washing dishes
- Putting away clean dishes
- Laundry
- Scrubbing / cleaning the bath tub
- Toilet
- Counter tops
- Dusting
- Making the bed
- Organizing
- Tidying

Do you make mistakes when you are cleaning? Do you forget about things you were doing like laundry?

Does cleaning increase your fatigue? If it is something you have to recover from mention that and describe the symptoms you are having in the moment.

If you have conditions like psoriasis or eczema do water or cleaning products increase your symptoms?

If you have any difficulties with breathing or environmental sensitivities are there certain products that you cannot use at all? What happens if you are exposed to them? Describe the symptoms.

If your energy is limited and you can only do a small number of tasks in a day mention that. On a day where you cleaned the bathroom or did laundry if you wouldn't be able to go grocery shopping or do another comparable task mention that. Describe the symptoms that you have.

If your energy is unpredictable and you couldn't commit to doing x number of household tasks in a day mention that.

If you've had to hire or bring in outside help with cleaning mention that and describe the symptoms that made you unable to do the cleaning on your own.

Vision (seeing)

If you are blind or have a visual impairment mention that here.

Do you get blurred vision? Do you have tunnel vision? Do you get any visual illusions or auras? Do you experience visual hallucinations?

Hearing

If you are Deaf or have a hearing impairment mention that here.

Do you get tinnitus? Muffled hearing? Do you have any auditory illusions or auras? Do you experience auditory hallucinations?

Are there situations or environments that increase the difficulty hearing what other people are saying? Over the phone? When you cannot lip read? In situations where there is background noise?

Speaking / Conversations

What symptoms affect your ability to speak or following conversations?

- Dry mouth
- Loss of voice
- Mute
- Difficulty word finding
- Slurred speech
- Difficulty expressing thoughts and ideas into words
- Frustration / Agitation
- Anxiety
- Difficulty explaining things in a way other people understand
- Slowed processing of information
- Poor memory
- Stutter
- Easily distracted
- Difficulty concentrating or focusing on what other people are saying

If you have chronic pain what is it like to have a conversation with someone during a high pain period of time?
Do you need other people to repeat themselves?
Do you find yourself telling the same people the same information a number of times?

Do people mistake your tone and body language as being angry or agitated when you have high levels of pain?

In situations where voices may be raised do you have increased anxiety?

Reading

If you are illiterate or functionally illiterate mention that.

If you are literate do any of your symptoms affect your ability to read? What symptoms affect reading?

- Poor concentration
- Poor memory
- Slowed processing of information
- Fatigue

Can you hold up a book? Can you read off of smart phone / tv / computer screens. If no describes what happens with your symptoms.

Writing

What symptoms get worse when you are writing?

- Pain
- Stiffness
- Numbness in arms or hands
- Poor grip
- Poor fine motor control

If you cannot write legibly mention that. If your conditions have affected your spelling or your grammar mention them.

Typing

Have your conditions impacted your ability to type? Do you type slower now? Do you make more frequent mistakes when you are typing?

What symptoms get worse when you are typing?

- Pain
- Burning or numbness
- Poor concentration – do you make mistakes?

Do you type slowly?

Computer

How long can you use a computer for?

- How long on an "average" day? How many times per day could you do that?
- How long on a "bad day"? How many times per day could you do that?

Look back over sitting. If you can only sit for a limited length or time how does that affect your computer use?

If you have a computer in your home what sort of things do you use it for? Games? News? Social Media? Streaming? Do any of your symptoms affect how you do these things? If so describe?

Has your computer use changed because of your conditions? Are any of your symptoms made worse by looking at a computer screen?

If finding or understanding information on your computer is difficult because of any of your conditions talk about that as well.

Do you have periods of time where you use a computer much longer than a neurotypical person would?

If something goes wrong with your computer do you have any difficulties problem solving or trouble shooting them?
During a period of brain fog have you ever opened an attachment that was a virus? Have you been taken advantage of by an online scam?

Logging in and out of accounts do you have trouble remembering your passwords? Have you lost of been locked out of any of your accounts because of this?

Concentration
Do any of your conditions affect your ability to focus and concentrate on things? If so mention it and describe. If you cannot focus on a T.V. show or on the plot of movies mention it. If you get easily distracted mention that.

Organization
Do you misplace things often? Do you get overwhelmed by multitasking now? Do you make mistakes when trying to do more than one thing at a time? Are you able to keep the spaces around you organized and tidy?

Learning something new
If you have problems remembering people's names mention that. When you were at your last job were you put into a situation where something about your duties or role or procedures changed and you struggled to adjust to those changes? If you would forget things or make mistakes mention that.

Since stopping work if you've tried to do even something small that was new and struggled because of your symptoms mention it and describe the symptoms. It doesn't have to be anything huge or big.

Cooking something new.
Trying out a new technique or style on something
Picking up the moves in a videogame
Trying to learn a new skill

Problem solving
Do any of your symptoms impact your ability to problem solve? If you are in pain or if you are anxious is it more difficult to find solutions when things go wrong?

Do you find yourself getting overwhelmed by tasks or things that in the past you would have been able to shrug off or fix easily?

Social functioning

Do you have the same interest or stamina for social situations? If you are falling out of touch with your friends mention that. What are the symptoms that make it difficult for you to maintain relationships?

Are you making new friends or meeting new people? If not describe the symptoms that are happening in those moments?

Because of your conditions do people misinterpret your body language?

Are you able to set healthy boundaries with other people?

Do you have any difficulties solving conflicts between yourself and other people?

Does interacting with other people increase your fatigue?

Do you have to recover from social interactions? If so describe what is happening

Do you have to build yourself up into interacting with other people? How long does it take? Are there times where you try but aren't able to do it?

Do you find yourself cancelling plans with other people?

How have your conditions changed your relationship(s) with friends and family?

Typical Day

Describe what you can do on an average of typical day. Break everything down and describe the very small steps you take. For example if getting up out of bed might be done slowly and carefully due to pain and stiffness. You may have to roll into a certain position and rest. Sit up at the edge of the bed and rest. Slowly and carefully stand and rest before you could get up and get dressed.

Bad Day

What can you do on your worst days or bad days? If you are not able to get out of bed or if you struggle to walk from room to room... describe things like that.

If you cannot predict in advance what sort of day you are going to have next week in advance mention that.

Medications

What medications have you tried to date? If you are not sure about the names or when they were started get a print of medications.

Why was each type prescribed? What did it do? How did it help? What side effects did you get? If it was discontinued why was it stopped?

Have you ever turned down a suggested medication? If you have what medication was it? What was your reasoning for turning it down? Was your doctor supportive of that decision? Since then have you tried the medication?

Medical therapies

What different therapies have you tried to date? Include the date you first tried it. The date of the last appointment. These could include therapies like:

- Physiotherapy
- Vestibular therapy
- Chiropractic
- Massage therapy
- Acupuncture
- Naturopathy
- Counselling – Individual
- Counselling group

If you saw no or only temporary improvement of symptoms mention that. Describe in what ways the therapies did not help. What symptoms did you still have afterwards? If you have stopped a therapy type describe why.

Has a doctor ever suggested you try a specific treatment or therapy and you've refused or did not? If so who suggested it, when they suggested it and what therapy was it they suggested. What stopped you from attempting that form of treatment?

Specialists

What doctors have you worked with (or were you working with when you last qualified). When did you start seeing the doctor? What was their impression or assessment?

Last place of employment – career

Where was the last place you worked? If your employer was aware of your disability did they do anything to accommodate you? Were they giving your more time to do the work? Were they changing the job demands? Did they give you're a more flexible work schedule? If they did mention that and then describe why even with those accommodations your symptoms stopped you from being able to work.

If your conditions impacted your attendance or your performance mention that and describe what was happening.

Was this job an attempt at trying a different type of work? If it was mention that (see the next box).

Last place of employment – failed work trial

Where were you working? Was the employer aware of the disability? Did they do anything to accommodate you? Did they change their expectations for productivity to try and accommodate you? Were there any struggles during your training period? Were you making mistakes? Were you missing shifts? Were you getting sent home early because of your condition(s)?

Reasons for having not tried a different type of work

If you haven't tried a different job or a lighter job describe why. Look over your answers to all the earlier areas and what symptoms would stop you from retraining or working at a lighter job?

Reasons for having collected regular EI

This comes up from time to time with CPP D files. If you were collecting regular EI you were telling Service Canada that you were willing and able to do work. If you on CPP D application you say you were so disabled you couldn't do any sort of work there is a conflict there.

Sometimes people go on regular EI because they genuinely do want to work and they weren't yet aware of how much their condition impacts their employability.

Hobbies
List activities you have had to stop because of your conditions. Include when they were stopped and what symptoms caused that.

Supportive Doctors
Specialty:
Name:
Address:
Phone:
Fax:

First appointment with this doctor:
Most recent appointment:

How often do you / were you seeing this doctor?

What treatments did they have you try? How effective were those treatments?

Reasons why you consider this doctor to be supportive:....

Unsupportive doctors

Specialty:
Name:
Address:
Phone:
Fax:

First appointment with this doctor:
Most recent appointment:

How often do you / were you seeing this doctor?

What treatments did they have you try? How effective were those treatments?

Reasons why you consider this doctor to be unsupportive:....

Hospitalization
Since submitting the application for CPP Disability benefits have you been hospitalized as a result of any of your medical conditions? If so mention:

Hospital Name:
Department:
Date in:
Date out:

Reason:

Citation: *G. D. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 3

Appeal No: GT-124101

BETWEEN:

G. D.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Neil Nawaz

HEARING DATE: January 30, 2014

TYPE OF HEARING: Videoconference

DATE OF DECISION: February 13, 2014

PERSONS IN ATTENDANCE

G.D., the Appellant;
P.G., the Appellant's representative.

Also present were Lucie Leduc and Joanne Sajtos, both Members of the Social Security Tribunal, who observed the hearing for training purposes.

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on April 3, 2012. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was by videoconference for the reasons given in the Notice of Hearing dated January 8, 2014.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) Be under 65 years of age;
(b) Not be in receipt of the CPP retirement pension;
(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[6] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[7] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[8] The parties agree and the Tribunal finds that the MQP is December 31, 2013. In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before December 31, 2013.

EVIDENCE

Documents

[9] In his Questionnaire for CPP Disability Benefits dated March 1, 2012 (p. 92), the Appellant disclosed that he stopped working following a workplace accident in which he backed up a truck into a loading dock with considerable force. As a result, he has severe and ongoing back pain radiating down his left leg to his foot, leaving him unable to sit or stand for prolonged periods. His medications included Lenoltec and Tylenol #3 (both narcotic pain relievers), Naproxen, (an anti-inflammatory pain reliever), Metformin (for high blood sugar) and Myoflex (an over-the-counter topical analgesic).

[10] The Appellant was born in 1956 and attended school up to the equivalent of Grade 10 in India, his country of origin. After immigrating to Canada, he worked as a truck driver, most recently for Central Transport Canada of Milton, where was employed for four years until June 28, 2011, the date of his injury.

[11] In the CPP Disability Medical Report dated March 29, 2012 (p. 49), B. Nanar, the Appellant's family physician, wrote that a work injury to Mr. Deol's left buttocks left him with persistent pain on his left side, rendering him unable to sit or stand for prolonged periods of time. Dr. Nanar confirmed diagnoses of diabetes and degenerative disc disease of the lumbar spine and concluded the prognosis for recovery was poor.

[12] A CT scan of the lumbar spine dated August 5, 2011 (p. 53) indicated multilevel changes, notably moderate narrowing at L3-L4 of the central canal, lateral recesses and nerve root foramina bilaterally, and moderate to severe stenosis at L4-L5 of both nerve root foramina. There was bilateral spondylolysis at L5-S1, with grade 1 anterolisthesis of the L5 vertebral body, and moderate to severe narrowing of both nerve root foramina.

[13] In a consultation report dated January 16, 2012 (p. 45), Eric Marmor, a neurologist, relayed the Appellant's complaints of ongoing lower back pain radiating down his left leg into his foot. He reported discomfort with sitting, standing and walking. Dr. Marmor noted that the Appellant's neurologic examination was unremarkable and ordered an MRI. He recommended walking, aqua fitness and possibly physiotherapy.

[14] In a letter dated February 22, 2012 (p. 47), Dr. Marmor wrote that there had been no significant change since the last consultation. The MRI showed some diffuse degenerative changes but no pressure on thecal sac or exiting nerve roots. Dr. Marmor concluded that surgical intervention was unlikely to help the Appellant, noting that it was not realistic for him to return to his previous job.

[15] In a letter dated August 16 2012 (p. 34), Dr. Nanar wrote that the Appellant was unable to sit or stand for prolonged periods of time and was totally disabled of any kind of work.

[16] Dr. Nanar's office notes from August 1, 2009 to April 11, 2012 (pp. 75-85) revealed numerous visits, particularly after the Appellant's June 2011 workplace accident.

[17] An x-ray of the shoulders and AC joints dated October 3, 2009 (p. 86) revealed mild tendinopathy of the right subscapularis.

His disability plan at work didn't cover physiotherapy either. He has never had more than one week of physiotherapy, and does not have enough money to pay for it out of his own pocket. To his knowledge, he has never been to see an orthopedic specialist, nor has he been referred to one. He saw a chiropractor last year, although he doesn't remember the exact number of times—maybe it was eight or nine sessions. It didn't help too much. He paid for this service out of his own pocket.

[23] In 2011, Dr. Nanar prescribed for him a cane, which he uses regularly. Dr. Nanar also referred him to a neurologist, Dr. Marmor, who discussed surgery with him, although he doesn't remember what type.

[24] His current medications are Tylenol #2, Tylenol #3, Naproxen and Metformin. The pain has persisted. It extends from his lower spine to his left foot, which frequently swells.

[25] He does use a computer, but only to read the news, perhaps 10 or 15 minutes per day. He does no household chores, nor does he help with shopping.

[26] The Appellant has never attempted to return to work. Asked why not, he replied that when he sits for extended periods, his pain increases and so does the swelling. When driving a truck, he has to use his left leg to apply the clutch, and the constant on-and-off pressure would only aggravate the pain. He has not driven a truck since his workplace accident, although he continues to drive his personal vehicle, but only when using painkillers and only for 20 minutes at a time. After that point, he has to get out and stretch, whichmight allow him to drive for another 10 minutes. His daughter drove him to the hearing venue this morning.

[27] He is unable to sit for very long when he goes to temple. The most he can do is show up and then leave. He can walk up to four or five minutes if his gait is slow, one minute if fast.

[28] He can't imagine what type of work he could do. He definitely could not manage any kind of job where he'd have to sit or stand. He wants to work, but his legs and back prevent him from doing so. At nights, he gets only one or two hours of uninterrupted sleep at a time, possibly four or five hours in total. He is reluctant to take sleeping pills, as he is already taking several medications.

[18] An ultrasound of the lumbar spine dated February 20, 2010 (p. 90) was normal, apart from minor age-related osteophytes at the disc margins.

[19] In a letter dated June 5, 2012 (p. 107), L. L. Hill, a specialist in sleep medicine, wrote that he had seen the Appellant for complaints of atypical chest pain. Dr. Hill noted that an abnormal electrocardiogram suggested a previous anteroseptal infarction, although an echocardiogram showed no wall motion abnormality to support that diagnosis. Dr. Hill noted that the Appellant displayed a moderate to high likelihood for coronary artery disease by virtue of his uncontrolled diabetes but concluded his pain was non-cardiac in origin.

[20] In a letter dated July 12, 2012 (p. 110), Dr. Hill noted that a nuclear study had revealed normal ejection fraction, with a small to moderate inferior defect consistent with ischemia. Dr. Hill prescribed the Appellant with Altace and Bisoprolol.

Testimony

[21] The Appellant was born in India and attended school as far as Grade 10. After immigrating to Canada in 1988, his first job was as a quality control supervisor at a furniture factory. He also assisted in materials ordering and did some manual labor, although he never received training as a carpenter. He held this job for nine or ten years and then started to drive trucks, having obtained his license in 1991. He was employed by a series of transport contractors for Canadian Tire, driving mainly 18-wheelers on short-haul trips within Ontario. It was a hands-on job, and drivers were expected to pitch in and help unload their trucks of cargo at destinations. There was a lot of heavy lifting—up to 50 kg. On average, he would spend five or six hours per day driving and two or three hours doing manual work. He was required to use a computer on the job, insofar that he used a scanner to read barcodes on skids.

[22] He was injured at work in June 2011. While reversing his truck, he hit a loading dock and injured his back. He thought the pain would go away, but after four days it was still there. He went to see his family doctor, who told him to take one week off work and rest. However, the pain kept getting worse. After another two or three days, he went to the emergency department, But they didn't do much for him. No x-ray was taken at that time. He applied for Worker's Compensation benefits, but WSIB paid for only four or five days of physiotherapy.

SUBMISSIONS

[29] The Appellant submitted that he qualifies for a disability pension because:

(a) He suffers from debilitating pain and swelling in his lower back and left leg, which prevents him from sitting, standing and walking for extended periods;

(b) He has undergone physiotherapy and relies on pain medications, yet he continues to experience severe pain and reduced mobility, rendering him incapable of performing any kind of regular paid employment.

[30] The Respondent submitted that the Appellant does not qualify for a disability pension because:

(a) The neurologist's February 2012 report indicated that the Appellant's back showed some degenerative changes, but no nerve root involvement that would account for the intensity of his pain;

(b) Although he may no longer be able to work as a truck driver, the medical evidence suggests that he retains functionality and is still capable of alternative forms of employment that may be suitable to his limitations.

ANALYSIS

[31] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2013.

Severe

[32] The severe criterion must be assessed in a real world context (*Villani* v. *Canada* (*A.G.*), 2001 FCA 248). This means that when assessing a person's ability to work, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience.

[33] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada (A.G.)*, 2003 FCA 117).

[34] In this case, the balance of the evidence persuaded the Tribunal that the Appellant does suffer from a severe disability. First, there is objective evidence in the medical record to indicate that there has been significant damage to the Appellant's lumbar spine, most notably the August 2011 CT scan, which showed multilevel degenerative changes, including moderate to severe stenosis at the L4-L5 and L5-S1 nerve root foramina. The Tribunal disagreed with the Respondent that these findings showed no nerve root involvement that would explain the Appellant's pain and notes that these changes were not present in the pre-accident February 2010 ultrasound, which is consistent with the Appellant's account that he suffered a traumatic injury in June 2011. Also enhancing the Appellant's credibility were Dr. Nanar's office notes, generated in the context of treatment, indicating a marked increase in the frequency of the Appellant's visits after his accident.

[35] The Tribunal found it mildly surprising that the Appellant had never been referred to an orthopedic specialist, given the degenerative changes in his spinal column; however, he was seen by a neurologist, Dr. Marmor, who ruled out surgical intervention and clearly stated that it was "not realistic" for the Appellant to return to his previous job.

[36] The question arises, then, whether he was capable of some alternative type of work that might have accommodated his pain. Applying the *Villani* criteria, the Tribunal was hard pressed to imagine what else the Appellant could do, given his age, education and work experience. Now 57 years of age, the Appellant does not even have the equivalent of a High School education and has done nothing else in his working life except low-skilled manual labour. He would be an unlikely candidate for a job in the retail sector and is probably too old to acquire new, marketable skills.

[37] The Tribunal's one reservation lay in whether the Appellant had done everything reasonably possible to overcome his injuries and regain functionality. Here, the record was mixed; while the Appellant did undergo physiotherapy following his workplace accident, he

received only five sessions. Dr. Marmor felt that he would have benefited from further physiotherapy, but the Appellant testified that he didn't have the resources to pay for it, the WSIB having rejected his application for coverage. In the end, the Tribunal accepted this explanation as reasonable and valid.

[38] The Appellant's testimony, although vague on details, conveyed forthrightness, and his description of his symptoms and their effect on his ability to function in a vocational setting were credible. The Tribunal gave weight to the Appellant's Canadian work history, which included more than 20 continuous years of earnings. One can reasonably surmise that an individual with his kind of demonstrated work ethic would not have left the labour market unless there was some substantive underlying cause.

[39] In the opinion of the Tribunal, the Appellant's ongoing symptoms of back and leg pain are adequately supported by medical evidence and render him unfit for any sort of employment. Taking a "real world" approach, it is difficult to imagine how a person of the Appellant's age, given his one-dimensional vocational experience, would be able to retrain or secure alternative employment with such physical debilities.

Prolonged

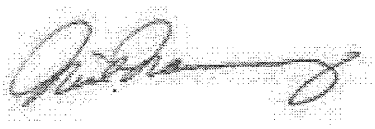
[40] The Tribunal found that the Appellant's disability is long continued. He testified that his back pain goes back to a 2009 workplace injury, and this was corroborated in histories documented in several of the medical reports. The Appellant's condition would also appear to be of indefinite duration, as it is difficult to see how his condition can significantly improve at this late date, even with further physiotherapy or through the use of new pain medications. For these reasons, the Tribunal concluded the Appellant's disability was indeed "prolonged" in accordance with the statutory definition.

CONCLUSION

[41] The Tribunal finds that the Appellant had a severe and prolonged disability in June 2011, the month of his workplace accident. According to section 69 of the CPP, payments

start four months after the date of disability. The Appellant's payments will therefore start as of October 2011.

[42] The appeal is allowed.



Member, General Division

CanLII

Inclima v. Canada (Attorney General), 2003 FCA 117 (CanLII)

Date: 2003-03-04
Docket: A-171-02
Other citations: [2003] FCJ No 378 (QL); 121 ACWS (3d) 363
Citation: Inclima v. Canada (Attorney General), 2003 FCA 117 (CanLII), <http://canlii.ca/t/4h8m>, retrieved on 2016-10-05

Date: 20030305

Docket: A-171-02

Neutral citation: 2003 FCA 117

CORAM: ROTHSTEIN J.A.

SEXTON J.A.

PELLETIER J.A.

BETWEEN:

JOSEPH INCLIMA

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, Tuesday, March 4, 2003.

Judgment delivered from the Bench at Toronto, Ontario,

on Tuesday, March 4, 2003.

REASONS FOR JUDGMENT OF THE COURT BY: PELLETIER J.A.

Date: 20030305

Docket: A-171-02

Neutral citation: 2003 FCA 117

CORAM: ROTHSTEIN J.A.

SEXTON J.A.

PELLETIER J.A.

BETWEEN:

JOSEPH INCLIMA

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario

on Tuesday, March 4, 2003.)

PELLETIER J.A.

[1] This is an application for judicial review of a decision of the Pension Appeal Board. The issue is whether the applicant is severely disabled within the meaning of the *Canada Pension Plan* R.S.C. 1985 c. C-8. The Review Tribunal found that he was not and, on appeal, the Pension Appeal Board came to the same conclusion. The applicant seeks to have the Pension Appeal Board's decision set aside.

[2] Subsection 42(2) of *Canada Pension Plan, supra*, says that a person is severely disabled if that person " is incapable regularly of pursuing any substantially gainful occupation". In *Villani v Canada* 2001 FCA 248 (CanLII), [2002] 1 F.C. 130 at paragraph 38, this court indicated that severe disability rendered an applicant incapable of pursuing with consistent frequency any truly remunerative employment.

[3] This was put into context in paragraph 50 of the same decision where the following appears:

This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed *as will evidence of employment efforts and possibilities.* (emphasis added)

Consequently, 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.

[4] In this case, the Pension Appeal Board reviewed a mass of medical evidence and concluded that even though it showed that the applicant suffered from fibromyalgia and chronic pain disorder, he retained the capacity to work at light to moderate levels. The medical evidence, as is usually the case, was not all to the same effect. It was for the Board to assess that evidence and we find that its conclusion was not unreasonable.

[5] The Board also noted the applicant's failure to attempt to find light duty employment and his failure to take advantage of retraining opportunities.

[6] Taking these elements together, we find that the Pension Appeal Board's application of the statutory test was not unreasonable . Consequently the application for judicial review must be dismissed.

"J. D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-171-02

STYLE OF CAUSE: JOSEPH INCLIMA

Applicant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

DATE OF HEARING: MARCH 4, 2003

PLACE OF HEARING: TORONTO, ONTARIO

REASONS FOR JUDGMENT

OF THE COURT BY: PELLETIER J.A.

DATED: WEDNESDAY, MARCH 5, 2003

DELIVERED FROM THE BENCH AT TORONTO, ONTARIO ON MARCH 4, 2003.

APPEARANCES BY:

Ms. Roseanne Trivieri	For the Applicant
Mr. Michel Mathieu	For the Respondent

SOLICITORS OF RECORD:

Ms. Roseanne Trivieri		
Chown, Cairns		
Barristers & Solicitors	St. Catherines, Ontario	For the Applicant
Mr. Morris Rosenberg		
Deputy Attorney General of Canada		For the Respondent

Citation: *P. R. v. Minister of Human Resources and Skills Development*, 2014 SSTGDIS 1

Appeal No: GT-110163

BETWEEN:

P. R.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER:	Kelley Sherwood
HEARING DATE:	December 17, 2013
TYPE OF HEARING:	Teleconference
DATE OF DECISION:	January 8, 2014

PERSONS IN ATTENDANCE

P.R. – Appellant
Bill Glover, Katherine Wallocha – Observers/ Members of the General Division of the Social Security Tribunal

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on October 29, 2008. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was by teleconference for the reasons given in the Notice of Hearing dated November 20, 2013. The hearing was originally scheduled for December 3, 2013 but was adjourned as the Appellant was missing pages from his medical file.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) Be under 65 years of age;

b) Not be in receipt of the CPP retirement pension;

c) Be disabled; and

d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[6] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[7] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2010.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

EVIDENCE

[10] The Appellant is 54 years old with a grade 12 education. He last worked in 2007. He had been employed by Canada Post for almost 20 years as a nightshift supervisor on the shipping/receiving dock. His job involved coordinating the shipping/receiving of parcels and packages onto/from trucks for the Priority Post division of Canada Post.

[11] The Appellant described the "wear and tear" on his knees from walking on concrete floors for so many years. He had a workplace injury earlier in his career where he hit his knee on a rolling belt. He is unsure of the date but confirms he underwent an arthroscopy on his left knee. He reports that the surgery was only partially successful due to a hole in the meniscus.

The medical reports on file confirm that an arthroscopy took place but describe it as "failed" without further explanation (GT-41-44).

[12] Around 2003, he was given a cart to drive at work. He could no longer walk long distances on the warehouse floor. He began experiencing additional pains. Both knees, his back and feet were sore and he also developed general numbness. Nonetheless, he continued working using his cart for mobility.

[13] His condition worsened in 2006. He described increasing neck pain. He could not move his neck and had to turn his entire body to see around him. He tried to continue to work for a couple of months taking Arthrotec for pain. In early 2007, he started to experience greater numbness in his fingers that would cause his hands to seize up. The combination of symptoms became too much for the Appellant to manage and he left his job in early 2007.

[14] His workplace tried to reintegrate him to a desk job on the dayshift. He was given a job managing and tracking absences of fleet workers. On three occasions he went into the office to attempt this job. The first attempt lasted four hours before he was sent home. He rested for a week and then tried again but only lasted two hours. On his last attempt, he was simply sent home. He tried to type but he experienced a "pins and needles" feeling in his hands that prevented him from doing any desk work. His hands were shaking so badly he could not type.

[15] He has not tried to work at any job since these modified work trials and is now on long-term disability.

[16] Initially, the Appellant underwent a number of investigations in an effort to determine the source of his multiple pains and numbness. While x-rays taken in March 2007 found no abnormalities in his left shoulder, hands and knees, his lumbar spine x-ray showed moderate to advanced degenerative disc disease at L5-S1 with bony spurring, sclerosis and narrowing (GT-57). X-rays of the right shoulder and cervical spine from April 2007 showed no abnormalities (GT-58).

[17] In July 2007, he consulted Dr. John G. Thompson, a rheumatologist he had previously seen in 2002. He ordered further x-rays and blood tests, and suggested the Appellant try Celebrex for his pain. Dr. Thompson is not sure the source of the Appellant's pain, but notes that he says he has had some improvement since leaving work (GT-67). The follow up x-rays are on file. The x-rays of the sacroiliac joints were normal. Bilateral x-rays of the hands and wrists show normal alignment with some small surface pits on heads of the right second and third metatarsals which appear to be degenerative; bilateral feet x-rays show mild osteoarthritis in the first MTP joint in each foot (GT-65).

[18] Also in July 2007, the Appellant had an EMG study performed by Dr. Reda El-Sawy, a physiatrist, which showed no abnormality (GT-59-61). In a follow up report Dr. El-Sawy documents his examination of the Appellant. He found the Appellant to be "pain focused and disability oriented" (GT-63). Dr. El-Sawy notes the Appellant is using a cane on the left side but is able to walk on his tip toes, heels, everted and inverted feet and squat and get up unsupported. Dr. El-Sawy also comments that there is no evidence of wasting of the quadriceps, which is, in his opinion, an indication of good functioning of the knees. The Appellant had a full range of motion in the shoulders. The examination of the spine showed a reduced range of motion of the neck but no other significant abnormalities. The Appellant had full rotation of the dorsal spine in both directions. Dr. El-Sawy did not detect any tenderness over the hand joints. There were no neurological abnormalities identified. Dr. El-Sawy attempted to talk to the Appellant about the stresses in his life, however, the Appellant apparently denied feeling stressed. Dr. El-Sawy referred the Appellant for a sleep study to determine the source of his reported sleep deficits and investigate possible restless leg syndrome.

[19] In December 2007, the Appellant participated in a Functional Abilities Evaluation through CBI Physiotherapy & Rehabilitation Centre (assessor: Rob Karas, physiotherapist). It was organized by his long-term disability insurance provider and scheduled to be a two-day assessment. It was not completed, however, due to the Appellant's elevated resting heart rate. The assessor speculates that this may be due to deconditioning and advises the Appellant to contact his family doctor regarding his cardiovascular health (GT-70-73). At the hearing, the

Appellant confirmed that he has not participated in any further rehabilitation/return to work programs through his insurance company.

[20] The Appellant had a nocturnal polysomnogram study in January 2008 at the Royal Ottawa Hospital conducted by Dr. Alan B. Douglass, Psychiatry. Dr. Douglass diagnosed upper airway resistance syndrome at a moderately severe level with numerous restless leg movements while awake and a long initial insomnia. He recommends that the Appellant try a CPAP machine as well as try to lose weight (GT-74-75). After consulting with the Appellant, Dr. Douglass reports that he is reluctant to try the CPAP machine. In May 2008, there was an attempt to repeat the study using the CPAP machine, however, Dr. Douglass reports that "[the] study was completely unsatisfactory, as he did not fall asleep at all while wearing the CPAP mask" (GT-78). Accordingly, the Appellant was not given a prescription for a CPAP. Dr. Douglass reconfirms his diagnosis of severe upper airway resistance syndrome and questions whether psychiatric insomnia is playing a role in the Appellant's sleep disruption. The Appellant explained at the hearing that the mask "freaked me out" and he was unable to sleep while wearing it.

[21] The Appellant continued to see Dr. Thompson in 2008. Dr. Thompson is not sure the cause of the Appellant's ailments and notes it would be an unusual presentation for rheumatoid arthritis. Again, he ordered more blood work as well as x-rays. He also arranged for a neurology assessment (GT-76). Following a second visit in August 2008, Dr. Thompson notes that the Appellant continues to have arthralgias in various areas, including the shoulders, neck, hands and knees. His medication is of some help. His fatigue persists but there is no prolonged morning stiffness and his energy level is fair. He has continuing numbness in hands intermittently. There has been an onset of pain in the neck over the past month or two. Dr. Thompson finds soft tissue tenderness in 10/18 trigger points. He notes the previously ordered x-rays were unremarkable. Again, he comments that he is not sure what is causing the Appellant's discomfort and looks to the neurological assessment for possible answers (GT-80).

[22] On October 28, 2008, the Appellant's family doctor, Dr. David Leduc, completed his CPP medical report. In it he diagnoses the Appellant with atypical rheumatoid arthritis,

chronic polyarthralgia, obstructive sleep apnea, generalized anxiety disorder and depression. He notes that the Appellant had a work injury in the late 1990's that led to an unsuccessful arthroscopy on his left knee. He returned to work with restrictions. His pain continued to spread until 2007 when he was unable to do even sedentary work. Dr. Leduc reports that the Appellant is unstable with 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 time of the application, the Appellant was on Celebrex, Cipralex, Seroquel, and Xanax prn [as required]. Other medications have been tried, including Arthrotec, Codeine contin, Kadian, Elavil, Bextra, Naprosyn, Indocid, all of which did not help. He has also tried physiotherapy without benefit. Dr. Leduc offers the following prognostic statement:

> [The Appellant] is severely limited in his mobility by his chronic pain. It dominates his activities of daily living with slowed walking and [is] only able to walk short distances. He cannot lift, carry or bend without severe pain. No treatment to date has helped. This is a severe and prolonged condition that is very unlikely to improve (GT-44).

[23] In October 2008, the Appellant saw a neurologist, Dr. L. D. Sitwell, for an evaluation. Dr. Sitwell notes that the Appellant complains of intermittent numbness in both arms, radiating down the legs, hands, digits and "patchy" facial numbness. Still, the only abnormality Dr. Sitwell finds is a subjective positive Tinel's sign at the ulnar grooves bilaterally. He decides to send the Appellant to Dr. Pierre Bourque for a second opinion (GT-81-82). As reported by Dr. Sitwell in a letter from March 2009, Dr. Bourque also found normal neurophysiological studies. However, Dr. Bourque thought there was evidence of ulnar nerve subluxation over the epicondyles bilaterally. As such, Dr. Bourque felt that the Appellant might benefit from anterior transposition of the ulnar nerves. Accordingly, Dr. Sitwell referred the Appellant to Dr. Moulton, a neurosurgeon (GT-83). At the hearing, the Appellant confirmed that he never saw Dr. Moulton. He reports that he followed up twice with his office but never heard back.

[24] Dr. Leduc wrote to the Respondent in June 2009 where he reported that the Appellant suffers from significant pain limitations. He walks with difficulty using a cane and can only manage short distances. He sits in a guarded position due to pain in his low back and can only

tolerate sitting for 15 minutes at a time. On examination he showed marked limitations in his movements due to pain. He could raise his left shoulder laterally to 45 degrees and anteriorly to 110 degrees. His pain persists in his neck, knees, ankle and right hand. He is capable of light infrequent lifting as the pain in his hands makes it difficult to manipulate things. While the Appellant has some mild depressive symptoms typical for someone with his level of disability, in Dr. Leduc's opinion, he does not require psychiatric treatment. Dr. Leduc offers the following conclusion:

> He has had major problems with painful joints for last 9 years. This has gradually evolved from being originally just problems with his knees to now involving joints all over his body. The cause of his pain syndrome is likely multifactorial and has not come under control with standard care. At this point, I do not believe he will ever recover (GT-85).

[25] In November 2009, Dr. Thompson makes a diagnosis of fibromyalgia – by exclusion. He finds soft tissue tenderness in 12/18 tender points. He notes that the Appellant continues to have pain in various areas, including his shoulders, neck, hands, feet and back. A new medication, Gabapentin, has been introduced. As a result, the Appellant is somewhat improved. The plan is to increase the dosage from 100 mg twice daily to 300 mg twice daily (GT-88). At the hearing, the Appellant reported that he stopped taking Gabapentin due to side effects. When asked specifically about capacity to work by the Respondent, Dr. Thompson replied in a letter dated January 2010 that the Appellant's "functional capacity is markedly limited because of severe musculoskeletal pain. He would be unable to do any job requiring even mild physical exertion" (GT-90).

[26] A second letter from Dr. Leduc was received in December 2009 following the Appellant's fibromyalgia diagnosis. In it, he confirms that the Appellant is being treated for chronic musculoskeletal pain syndrome/fibromyalgia and that new medications are being attempted to reduce his pain (Gabapentin). He writes:

> Mr. R. has now been suffering for many years. I know of no treatment that has not been tried or contemplated by myself or his specialist that would improve his condition. I do not believe that he will ever recover sufficiently so that he could return to any meaningful occupation (GT-89).

[27] The Appellant was asked about the gap in the medical reports as his file ends nine months before his MQP in December 2010. As well, there is a reference on file to the Appellant asking the former tribunal (the OCRT) not to contact him between April and October 2010 (GT-115). The Appellant explained that a miscommunication between his employer and insurer had caused an overpayment of approximately $9,000. Due to his reduced income he had no way to repay the money. He was put into a bankruptcy situation and his telephone service was disconnected for a number of months.

[28] His condition today is stable. After trying so many medications, the Appellant has returned to Tylenol Arthritis for pain relief. He continues to take Escitalopram for his anxiety/depression. He sees his family doctor every two months for prescription refills. He also sees Dr. Thompson every six months for follow up visits.

[29] The Appellant believes that the same conditions that prevented him from working in February 2007 still prevent him from working today. He continues to have a "pins and needles" effect in his hands. His face feels numb. He has knee problems that limit his mobility. His back and neck cause him pain that make it difficult to sit. He typically spends his day lying on his back. He explained that he conducted the hearing while lying in his bed.

[30] He relies on his daughter or father to drive him to appointments or get his groceries. He is unable to walk even short distances. He cannot use public transportation as he cannot walk to the bus stop. Occasionally, he will borrow his daughter's car to drive across the street to Tim Horton's. He admitted that he spends most of the day watching television. He described his life as "boring" and wishes that he could work. He has no social life whereas he used to go out frequently to play pool with friends or ride his bike.

[31] His says that he has asked his doctor repeatedly about returning to work but his doctor has advised him not to work as he does not believe the Appellant would last for longer than a few days in the workplace.

SUBMISSIONS

[32] The Appellant submitted that he qualifies for a disability pension because:

a) His employer was willing to accommodate him and he was agreeable to perform light work, but he was unable to do it due to his illness;

b) His regular doctors (Drs. Leduc and Thompson) are clear that he has exhausted all treatment options and still he cannot work;

c) For at least 10 years, he has found it very difficult and painful to walk, sit, stand and even lie down or sleep. Moreover, his condition has not improved since leaving work; and

d) His condition is unpredictable and would make him an unreliable employee.

[33] The Respondent submitted while it is recognized that the Appellant has limitations, the investigations have not identified any serious pathology that would prevent Mr. R. from pursuing work suitable to his condition. Specifically in the Explanation of the Decision Under Appeal (GT-117-119), the Respondent cites evidence that includes:

a) an x-ray report of the left shoulder, both hands and both knees from March 2007, which showed no significant bony or joint abnormality while the x-ray of the lumbar spine showed degenerative disc disease of L5-S1;

b) Dr. El-Sawy's letter, which describes the Appellant as "pain focused and disability oriented";

c) the abandoned Functional Abilities Evaluation, which describes the Appellant as "deconditioned";

d) His refusal to accept a CPAP machine as offered by Dr. Douglass; and

e) Although his rheumatologist indicates he has difficulties due to pain, the Respondent argues that the medical evidence on file does not support a medical condition that would prevent him from all types of work, including part-time sedentary work.

ANALYSIS

[34] The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before December 31, 2010.

Severe

[35] The Appellant provided the Tribunal with a thorough history of his condition. He clarified his prior knee injuries and surgery, which were not well documented on file. He also chronicled his long work history and how he worked for many years with his disability using different modifications to remain in the workforce. He presented a picture of a very accommodating employer who provided him with a golf cart when he could no longer walk the floor of the warehouse, and then tried to train him for a desk job when he could no longer do physical work.

[36] Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition (*Inclima v. Canada* (A.G.), 2003 FCA 117). While the respondent argues that the Appellant should be able to do part-time, sedentary work, it should be noted that his employer made part-time, sedentary work available to the Appellant, which he tried but could not do. In this situation, the Tribunal is reminded of *Boyle v. MHRD* (June 10, 2003), CP 18508 (PAB), where it was found that:

> The usual suggestions for the Appellant's retraining or the seeking of other employment, although attempted to some extent by [the Appellant], was perceived to be unnecessary as [he] understood a job was always open to him at [his employer], if he could handle it.

Therefore the Tribunal accepts that it was reasonable that the Appellant did not make efforts to seek other employment.

[37] The Respondent's Explanation of the Decision Under Appeal portrays an Appellant who is pain focused and less than proactive in his treatment. While the report from Dr. El-Sawy raises questions about the Appellant's condition, his comment about the Appellant being "pain focused and disability oriented" is based on a single visit and does not represent the consensus of the other treating physicians. Therefore, on a balance of probabilities, the

Tribunal does not believe Dr. El-Sawy's comments are sufficient to dismiss a finding of severe.

[38] The Tribunal also considered whether the Appellant could have been more proactive in his treatment. On this point, the Tribunal agrees that there were some instances where he could have done more. For example, he should have continued to pursue an appointment with Dr. Moulton and he should have attempted the CPAP machine on a trial basis.

[39] Nonetheless, when considering the totality of the evidence, the Tribunal does not believe the evidence upholds a finding of an Appellant who routinely disengaged from medical treatment. He has tried an exhaustive list of medications, gone to physiotherapy, seen a number of specialists and undergone numerous tests and investigations. His Functional Abilities Evaluation was cancelled not for reasons of malingering, but instead due to an elevated resting heart rate. In fact, Dr. Leduc is clear that the Appellant has exhausted all treatment options when he writes "I know of no treatment that has not been tried or contemplated by myself or his specialist that would improve his condition" (GT-89). Accordingly, the Tribunal accepts that the Appellant has been compliant with treatment.

[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), the Tribunal is satisfied that the Appellant's disability is severe since he left work in February 2007.

Prolonged

[41] The Tribunal must also determine whether a disability is prolonged as per CPP legislation. To that point, the Tribunal looked to the oral evidence and the documentation on file.

[42] The Appellant detailed a long history starting with knee pain and eventual surgery. For a number of years, he worked with modifications to his job. His knees gradually continued to worsen and his pain spread to other areas of his body. In addition, he developed numbness and a "pins and needles" sensation in his hands and on his face. The Appellant asserts that his condition is largely unchanged since he left work, including at the time of his MQP.

[43] Dr. Leduc is clear that the Appellant suffers from ongoing pain and it is not anticipated that he will recover at any time in the future. In his letter of June 2009 to the Respondent, he stresses the prolonged and indefinite nature of the Appellant's disability when he writes:

> He has had major problems with painful joints for last 9 years. This has gradually evolved from being originally just problems with his knees to now involving joints all over his body. The cause of his pain syndrome is likely multifactorial and has not come under control with standard care. At this point, I do not believe he will ever recover (GT-85).

[44] It is on this basis that the Tribunal finds the Appellant's disability is prolonged as per CPP legislation since he left work in February 2007.

CONCLUSION

[45] The Tribunal finds that the Appellant had a severe and prolonged disability in February 2007, when he left his job at Canada Post. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in October 2008; therefore the Appellant is deemed disabled in July 2007. According to section 69 of the CPP,

payments start four months after the deemed date of disability. Payments will start as of November 2007.

[46] The appeal is allowed.

Kelley Sherwood
Member, General Division

Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

An accessible version of this decision is also available at http://www.canada.ca/en/sst/ad/sst-2016-sstadis-215.html

Citation: *K. S. v. Minister of Employment and Social Development,* 2016 SSTADIS 215

Tribunal File Number: AD-15-267

BETWEEN:

K. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 17, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on February 18, 2015, which dismissed the Appellant's application for a disability pension on the basis that the Appellant did not prove that his disability was severe, for the purposes of the *Canada Pension Plan* (CPP), by his minimum qualifying period (MQP) of December 31, 2010. Leave to appeal was granted on July 10, 2015, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[3] The Appellant submitted an application for CPP disability benefits in November 2010. He indicated that he was a high school graduate and had spent much of his adult life working as a carpenter in the construction industry. In 1999, he suffered multiple fractures after falling from a ladder in a workplace accident. He recovered but was left with chronic pain, leading him to take on lighter work. In November 2008, he was involved in a motor vehicle accident, and has not worked since.

[4] The Appellant was 43 years old at the time of his MQP. In the questionnaire accompanying his CPP application, the Appellant claimed numerous functional limitations, including an inability to sit, stand or walk for extended periods. Lifting and carrying caused him neck pain and tension, and he had lost much of his flexibility. He suffered from headaches and reported difficulties with his memory and powers of concentration. He had been seen and treated by numerous specialists, but there had been no appreciable improvement in his pain or functionality.

[5] At the hearing before the GD in February 2015, the Appellant testified that pain governs his daily life. He is noise and light sensitive and sleeps poorly. He received vocational counselling for a year. He took antidepressants but found they did little to improve his mood. He had received pain management counselling and epidural injections to little effect.

[6] In its decision dated February 18, 2015, the GD found that the Appellant's disability fell short of the requisite severity threshold, in part because he did not mitigate his mental health condition and related chronic pain by following recommended treatment.

[7] On or about May 12, 2015, the Appellant filed an Application for Leave to Appeal with the Appeal Division (AD) of the Social Security Tribunal alleging numerous errors on the part of the GD. On July 10, 2015, the AD granted leave on the grounds that the GD may have:

(a) Made an erroneous finding of fact that "most doctors" who evaluated the Appellant suggested that he consult with a psychologist and take antidepressant and antianxiety medications;

(b) Made an erroneous finding of fact that the Appellant refused treatment when in fact he took counselling whenever this form of therapy was available;

(c) Erred in law and fact by obliging the Appellant to mitigate his impairments even though there were extenuating circumstances that that may have explained his failure to receive treatment, including the fact he was unaware of specific medical recommendations.

[8] On April 7, 2016, the AD decided to proceed on the basis of the documentary record for the following reasons:

(a) The complexity of the issues under appeal;

(b) The fact that the Appellant or other parties were represented;

(c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[9] The Appellant's submissions were set out in his Application for Leave to Appeal and Notice of Appeal of May 12, 2015. Further submissions were made on August 23, 2015. The Respondent's submissions were filed with the AD on August 24, 2015.

THE LAW

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are that:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD 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.

STANDARD OF REVIEW

[11] Until recently, it was accepted that appeals to the AD were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[1]. In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to an administrative tribunal often analogized with a trial court. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[12] The Federal Court of Appeal decision, *Canada (MCI) v. Huruglica*[2], has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

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[1] *Dunsmuir v. New Brunswick,* [2008] SCR 190, 2008 SCC 9

[2] *Canada (Minister of Citizenship and Immigration) v. Huruglica,* 2016 FCA 93

ISSUES

[13] The issues before me are as follows:

(a) What standard of review, if any, applies when reviewing decisions of the GD?

(b) Did the GD make an erroneous finding of fact that "most doctors" who evaluated the Appellant suggested that he consult with a psychologist and take antidepressant and antianxiety medications?

(c) Did the GD make an erroneous finding of fact that the Appellant refused recommended mental health treatments?

(d) Did the GD err in law and fact by failing to consider factors that explained the Appellant's failure to receive recommended mental health treatments?

SUBMISSIONS

(a) What is the appropriate standard of review?

[14] Both the Appellant's and Respondent's submissions on this issue were made prior to *Huruglica*, which was released on March 29, 2016.

[15] The Appellant endorsed the approach set out in *Dunsmuir*, asking that reasonableness be adopted as the standard of review on questions of fact, mixed law and fact and questions of law related to the tribunal's own statute. A range of acceptable outcomes were possible, defensible on the facts and the law.

[16] The Respondent's submissions discussed in comprehensive detail the standards of review and their applicability to this appeal, concluding that a standard correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law.

(b) Did GD Err In Finding "Most Doctors" Recommended Counselling and Medication?

[17] The Appellant submits that the GD erred in finding that "most doctors" recommended counselling, when only two health care providers (one of whom was not a doctor) suggested

consultations with a psychologist and trials of antidepressant and antianxiety medications. Dr. Capstick and Dr. Ogbinosa merely suggested treatments; they did not indicate that the Appellant "should" undergo psychological counselling or "would/could" benefit from it. It was unreasonable for the GD to characterize the comments from these two doctors as recommendations when they were only suggestions. The only clear recommendation was made by Mary Kemp, physiotherapist. She wrote to Dr. Ogbinosa prior to December 2010 and "recommended" psychological assessment. Ms. Kemp is not a medical doctor and mental health issues are not within her area of expertise.

[18] The Respondent submits that the GD conducted a thorough review of the medical, documentary and oral evidence before it. There was no erroneous finding of fact. Its decision reviewed and summarized the medical evidence of six doctors and a physiotherapist in paragraphs 10 through 19. In this summary, the GD noted that four of the seven healthcare professionals involved in treating the Appellant between 2008 and 2010 found that underlying anxiety and depression were a playing a role in the symptoms experienced by the Appellant. Furthermore, the GD Member noted that, according to Dr. Capstick, the Appellant's symptoms in 2009-10 were not related to the symptoms of his injuries he sustained in his motor vehicle accident. Three of the doctors and the physiotherapist recommend the use of antidepressants and anxiety medications, as well as a mental health referral for counselling and assessment of the Appellant's anxiety disorder. The majority of the health care professionals recommended some form of treatment for the Appellant's issues with anxiety and depression.

(c) Did the GD err in finding the Appellant refused treatment?

[19] The Appellant submits that the GD erred in finding that he refused treatment when in fact he accepted therapy whenever it was available. It is clear that Dr. Capstick and Dr. Javidan left it up to Dr. Ogbinosa to consider their suggestions, but the family physician indicated in his November 5, 2010 report that the only further consultations or medical investigations planned (GD1-47) were a pain clinic and botox injections. It is unreasonable to fault the Appellant because his family physician did not refer him to a psychologist. It is patently unreasonable to fault the Appellant for being unaware of suggestions and recommendations that were made to his doctor or his lawyer, particularly as there is no evidence he was aware of them. At the

hearing, the GD did not ask the Appellant whether he knew about the suggestions contained in these reports.

[20] The Respondent submits that the GD was reasonable in arriving at the conclusion that the Appellant failed to mitigate his illness. The GD noted that the physiotherapist, Ms. Kemp, approached the Appellant about seeking help from a psychologist and in response he said that he preferred to attend a pain clinic. In testimony, the Appellant noted that he would rather attend a 12-step program than take any more antidepressants. He also testified that the only reason he did not want to try new antidepressants, as suggested by his doctor, was because the last ones did not work. Furthermore, the GD noted that the Appellant was diagnosed with bipolar disorder in 1996, a diagnosis he did not agree with, but he did not seek a second opinion regarding this diagnosis, nor did he seek treatment or follow up on other mental health issues.

(d) Did the GD err in ignoring extenuating circumstances that accounted for the Appellant's failure to receive treatment?

[21] In his submissions, the Appellant suggests that the GD erred in law and fact by not taking into account circumstances that excused the Appellant's failure to receive mental health treatment recommended by his physicians. In making this argument, the Appellant cited *MHRSD v A.B.R.*,[3] a decision of the now-defunct Pension Appeals Board, for the principle that a claimant cannot be faulted for treatment omissions if there are valid reasons for them.

[22] The Appellant offered several reasons why he did not take additional psychotropic medications or seek psychological counselling, among them:

- He was not aware of some of these recommendations as he relied on his family doctor to make write prescriptions and make referrals;
- Psychological counselling was only available at a significant distance from his home and was not covered by the Medical Services Plan of British Columbia;
- He had tried antidepressants previously but found that they did not work.

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[3] *Minister of Human Resources and Skills Development and A.B. R.* (P.A.B. CP 26100 April 2009)

[23] In its submissions, the Respondent did not specifically address the Appellant's allegation that that the GD gave insufficient consideration to the reasons for which he might not have received psychological treatment. It did, however, emphasize evidence that the Appellant preferred to attend a pain clinic and 12-step program rather than follow recommendations to see a psychologist and take more antidepressants.

ANALYSIS

(a) Standard of Review

[24] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law. "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[25] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> … the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[26] The implication here is that the standards of reasonableness or correctness will not apply unless those words or their variants are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(a) and (b) do not qualify errors of law or breaches of natural justice, suggesting the AD should afford no deference to the GD's interpretations.

[27] The word "unreasonable" is nowhere to be found in paragraph 58(1)(c), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious"

or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the AD should intervene when the GD bases its decision on an error that is clearly egregious or at odds with the record.

(b) "Most Doctors"

[28] At paragraph 31 of its decision, the GD found that "numerous doctors" suggested evaluation and treatment for the Appellant's mental health issues, and at paragraph 33, it suggested that "most doctors" had suggested antidepressant and antianxiety medications and consultations with a psychologist for evaluation and treatment. The GD did not list which doctors it might have been referring to when it used the word "most."

[29] A survey of the treatment providers and assessors who offered mental health recommendations yields the following list:

- A report dated April 6, 2009 by Mary Kemp, a physiotherapist and occupational therapist, addressed to Dr. Igbinosa, in which she recommended "psychological assistance with his frustrations, with his pain and his perceived level of disability." Ms. Kemp noted that the Appellant preferred to attend a chronic pain program instead.
- A consultation report dated October 29, 2009 by Dr. J.R. Capstick, an anaesthesiologist, suggested the Appellant try a tricyclic antidepressant or a SSRI for what appeared to be a combination of anxiety and depression. Dr. Capstick also suggested a mental health referral for counseling and assessment of his anxiety disorder.
- A consultation report dated April 7, 2010 by Dr. M. Javidan, a neurologist, suggested that the Appellant take Clonazepam for anxiety. Dr. Javidan also thought the Appellant would benefit from a psychological referral.
- A consultation report dated August 19, 2010 by Dr. Alan Berkman, an anaesthesiologist, who suggested the Appellant might benefit from a mood-stabilizing drug, such as Cymbalta, although he made it clear that this was something that he would leave to the family physician.

- A medical-legal report dated June 5, 2012 prepared by Dr. Berkman recommended treatment options including cognitive behavioural therapy, ongoing medication, memory training and probably vocational training.
- In another medical-legal report, dated February 3, 2013, Dr. Berkman again recommended psychological counselling, as a means of helping the Applicant cope with his pain; there was no mention that this recommendation was intended to address his depression or anxiety.
- On February 28, 2014, Dr. Berkman noted that he had recommended that the Applicant follow up with the X Regional General Hospital's Interdisciplinary Pain Management Clinic's psychologist, but due to the Applicant's memory problems, he had missed quite a few appointments.
- In November 2014, Jen Mazur, a registered psychologist, strongly suggested that the Applicant receive a neuropsychological assessment to gain a complete picture of his strengths and deficits (p. GT10-6).

[30] First, I do not accept the Appellant's premise that there is a marked distinction between a "suggestion" and "recommendation." In medical reports, these words are frequently used interchangeably, and when a treatment provider "suggests" a particular therapy, it cannot be said that he or she is doing anything less than saying it "should" be carried out.

[31] Second, I agree with the Appellant that Mary Kemp's recommendation for psychological assistance should be discounted, as she was commenting well outside her expertise as a physical therapist. That said, contrary to the Appellant's assertion, there was more than just a single medical practitioner who suggested he would benefit from mental health treatment: Dr. Capstick, Dr. Javidan and Dr. Berkman all recommended either psychological counseling or psychotropic drug prescriptions, and Dr. Igbinosa documented a prior use of an antidepressant, Effexor, since discontinued.

[32] Treatment received after the MQP is relevant in an assessment of the severity of a claimed disability (as is treatment *not* received after the MQP) where there are indications of some disabling condition that went undiagnosed or untreated during the eligibility period. The record shows that at least four medical practitioners made recommendations with respect to the

Appellant's mental health, whether before or after the MQP. Whether this qualifies as "numerous" is a matter of judgment, but I do not think it can be fairly characterized as an error— certainly not one "capricious or perverse" or made without regard for the record. The same can be said for the GD's use of the word "most"—a majority of the Appellant's doctors, and certainly a majority of those qualified to offer psychological assessments, made recommendations regarding his mental health.

(c) Refusal of Treatment

[33] Lack of treatment can be taken as evidence that a claimant's injuries are less than severe, but it can also be seen as a failure to "mitigate" one's impairment. Mitigation is defined as the act of reducing the severity, seriousness or painfulness of a loss. Within the CPP regime, the doctrine of mitigation imposes a positive obligation on a claimant to take active steps to regain functionality—typically by following doctors' recommendations. Refusal to do so entitles a decision-maker to draw an inference that the claimant would have got better had he or she accepted the treatment.

[34] A review of the decision, particularly the three-page section headed "Analysis," makes it clear that the GD based much of its denial of the Appellant's claim on what it found was the Appellant's refusal to follow medical advice:

> [31] The Tribunal must consider whether the Appellant's refusal to undergo treatment is unreasonable and what impact that refusal might have on the Appellant's disability status should the refusal be considered unreasonable.
>
> [31] The Tribunal finds that it was unreasonable for the Appellant not to follow suggestions of antidepressant/antianxiety medications and consultations with a psychologist for his evaluation and treatment.
>
> [32] Had the Appellant followed recommendations for mental health treatments of: psychological referral, CBT and medication, he may have had more capacity, especially since the evaluator listed depression and anxiety as one of the barrier to employment.
>
> [33] The Tribunal finds that the Appellant is not incapable regularly of pursuing any substantially gainful occupation because he did not mitigate his treatment options with regards to his mental health condition and its relationship to his chronic pain after it had been recommended by most doctors who evaluated him.

In asserting that a CPP disability claimant is obliged to pursue all recommended treatment options, the GD correctly cited *Lalonde v. Canada,*[4] although this principle has also been set out more fully in other cases.[5] The question before me now is whether the GD was correct in finding the Appellant "refused" to follow medical advice.

[35] Although the GD found that the Appellant refused treatment, its decision did not specify where he turned down a medical recommendation. When I look for specific instances in the evidentiary record that document the Appellant's refusal to follow medical recommendations, I come away empty-handed.

[36] The GD noted that the Appellant was hospitalized with bipolar disorder in 1996, although he did not agree with the diagnosis. This by itself did not amount to a refusal to accept treatment. The GD found that in 2009 the Appellant was briefly treated with a starting dose of Effexor, which was discontinued due to lack of effectiveness, but there was no evidence that he was offered, or that he refused, alternative doses or subsequent prescriptions of antidepressant or antianxiety medications. During the hearing, the Appellant stated that he preferred to address anxiety and depression with a 12-step program, but there was nothing to suggest that in doing so he had ruled out psychological counselling.

[37] To be clear, I am not questioning the GD's authority to make an assessment of severity based on the number and type of therapies that were recommended by his treatment providers. However, I must agree with the Appellant's submissions that he had never been explicitly criticized anywhere in the medical record for disobeying medical advice. There is no indication in the evidence, oral or written, that the Appellant ever refused treatment. He testified that he had tried everything his doctors recommended. While he indicated that he thought the 12-step program and the chronic pain clinic were the best strategies for him, at no point did he refuse alternatives. The evidence indicates that the Applicant eventually took advantage of counselling when this form of therapy was made available to him.

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[4] *Lalonde v. Canada (MHRD),* 2002 FCA 211

[5] *Giannaros v. Canada (MSD),* 2005 FCA 187; *Kaminski v. Canada (Social Development),* 2008 FCA 225 and *Warren v. Canada (A.G.),* 2008 FCA 377

[38] For these reasons, I conclude that the GD had no basis in finding that the Appellant did not follow mental health treatments recommended by his physicians.

(d) Extenuating Circumstances

[39] Although the Appellant did not refuse recommended mental health treatments, it is nonetheless also true that he did not receive them—and it was on this fact that the GD rested much of its decision. The questions that remain are: (i) whether there is anything in the law that required the GD to consider extenuating circumstances that explained or excused a failure to receive treatment; (ii) whether such circumstances existed in this case and (iii) if so, whether the GD discharged its obligation to consider those circumstances.

[40] In *Lalonde*, the case cited by the GD in support of the mitigation principle, the Federal Court of Appeal stated:

> The "real world" context also means that the Board must consider whether Ms. Lalonde's refusal to undergo physiotherapy treatment is unreasonable and what impact that refusal might have on Ms. Lalonde's disability status should the refusal be considered unreasonable.

[41] The key concept here is reasonableness. Even if it has been established that a claimant did not receive recommended treatment, the decision-maker must still conduct an inquiry into whether there was some good reason for that omission, or at the very least give fair consideration to available evidence on the matter.

[42] In the present case, the Appellant submits that the following factors accounted for his failure to receive treatment for his psychological conditions:

- The reports of Dr. Capstick, Dr. Javidan and Dr. Berkman were all addressed to his family physician, Dr. Igbinosa, and he was not aware of their treatment recommendations.
- He relied on his family physician to implement specialist recommendations, and if Dr. Igbinosa did not do so, he cannot be blamed.

- Psychological counselling was not available in his region, and BC Health Services did not cover this service. Both of these factors may have played a role in Dr. Igbinosa not referring him to psychological counselling.
- When he previously took an antidepressant, he saw no improvement and suffered side effects. Dr. Igbinosa did not see fit to prescribe alternative medications.

[43] In its decision, the GD largely ignores these considerations, addressing only the alleged side effects and lack of efficacy of the Appellant's Effexor trial. At the hearing, the GD questioned the Appellant about that trial and concluded the starting dose was inadequate to treat the Appellant's PTSD, anxiety and depression. Having reviewed the documentary evidence and listened to the relevant extracts from the hearing recording, I see no evidence that the Appellant was prescribed any other antidepressants after the unsuccessful Effexor trial, and find the GD was within its rights to infer from this that the Appellant's psychological impairment was less than severe. However, I remain unsure why Dr. Igbinosa discontinued the Effexor and why he declined to prescribe further antidepressants: Was it because he did not think they were necessary given the Appellant's condition or was it because the Appellant told him he did not want any more? The GD member did not pursue this line of questioning at the hearing, nor did she make inquiries into why the Appellant did not receive timely counselling from a psychologist, as had been recommended by specialists.

[44] If the GD chooses to make its denial contingent on a finding of insufficient psychological treatment, it must recognize the reality that most claimants depend on their family physicians to recommend treatment, as well as implement the recommendations of specialists. Claimants tend to passively accept those recommendations and do what their doctors tell them to do. There was nothing in the evidence to suggest that the Appellant resisted treatment, and if the Appellant's family physician was failing to carry out specialist recommendations or otherwise prescribe what the GD thought was appropriate treatment, it should have raised those questions at the hearing and addressed them in the decision.

[45] As noted in the Appellant's submissions, the reports of Dr. Capstick, Dr. Javidan and Dr. Berkman (as well as the letter from Mary Kemp) were all addressed or copied to Dr. Igbinosa. The GD did not ask the Appellant whether he was aware of their recommendations

that he receive psychological counselling or, if he was, whether he took any steps of his own to get it. There was evidence before the GD that psychological counselling was not readily available prior to the end of the MQP, as indicated by Dr. Capstick's October 2009 comment that a clinical psychologist was no longer associated with his clinic. In his February 2013 report, Dr. Berkman mentioned that in August of the previous year the Appellant saw a psychologist based in X, who referred him to a "recently appointed" psychologist in X, to relieve him of the need to make a longer trip. He subsequently did start seeing a psychologist (as of February 2013), which suggests that he was willing to receive treatment when it was recommended to him, but an obstacle may have been availability. It does not appear, however, that the GD canvassed this issue at the hearing and there is certainly no discussion of it in its decision.

[46] All of the above persuades me that the GD did not give adequate consideration to issues of awareness and accessibility before dismissing the Appellant's claim for failure to receive treatment. This was not a case that involved a claimant flatly refusing to take recommended treatment. The evidence shows the Appellant was willing to do as his doctors advised when he became aware of it. He tried Effexor but found it ineffective. He testified that he found pain management classes helpful. Counselling was not available in any proximity to make it practicable. Once treatment options became available, he accessed them, and it should not matter whether treatment was offered after the minimum qualifying period.

[47] I find that the GD failed to consider extenuating circumstances to assess whether the Appellant's failure to receive psychological treatment was reasonable, as the existing jurisprudence suggests it must do.

CONCLUSION

[48] I would allow the appeal on two grounds: First, the GD made an error of fact without regard for the material before it in finding that the Appellant had "refused" treatment. Second, the GD made an error of mixed law and fact by failing to consider extenuating circumstances for the Appellant's failure to receive psychological treatment.

[49] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. It is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different GD Member.

Member, Appeal Division

Date: 20010803

Docket: A-245-00

Neutral Citation: 2001 FCA 248

CORAM: LINDEN J.A.
ISAAC J.A.
MALONE J.A.

BETWEEN:

GIUSEPPE VILLANI

Applicant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

ISAAC J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (the "Board"), dated 11 February, 2000, which concluded that the applicant was not disabled within the meaning of subsection 42(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "*Plan*") and was therefore not entitled to a disability pension under paragraph 44(1)(b) of the *Plan*.

Background and Medical History

[2] The applicant was born in Italy on 3 June, 1938 and received a grade 5 education before emigrating to Canada in 1955. After finding several odd jobs, the applicant found permanent employment at Rothman's of Pall Mall, the tobacco company, on 4 July, 1963. He worked at Rothman's for the next twenty-three and a half years until the plant closed in December of 1986. During this period at the company, the applicant worked his way from general labourer to machine adjuster.

[3] In 1969 and 1974, the applicant sustained knee injuries which led to three separate operations – the first for a torn meniscus, the second for a left Baker cyst and the third to free the perineal nerve from pressure. In 1976, he sustained a shoulder and neck injury which resulted in stiffness and discomfort extending down his back. In 1979, pain from the neck injury recurred and required the applicant to consult with a number of doctors, including those of the Workers' Compensation Board of Ontario (the "W.C.B."). He then began using a TENS machine for pain relief. In 1985, he was awarded a 10% partial disability pension by the W.C.B. In 1992, the disability was confirmed as being permanent. Since September of 1996, the W.C.B. has granted him a 20% pension for the permanent disability in his shoulder and neck.

[4] Despite his injuries, the applicant was able to continue work at Rothman's until the plant was closed in 1986. After Rothman's closed its plant, the applicant studied for and passed the Ontario Real Estate Board's examination and thereby obtained a real estate agent's licence in 1987.

[5] For one month in 1992, the applicant worked as an inside worker and van delivery man for Golden Loaf Bakery. In 1993, he renewed his real estate agent's licence and became registered with National Group Realty Services Inc. In the same year, he first applied to the W.C.B. for a pension for the injury to his knee. He was granted an 8% pension on 2 March, 1994 which was raised to a 12% pension on 14 January, 1996. Unfortunately, the applicant was unable to generate a customer base for his real estate business. His registration with National Group Realty ceased in December of 1995 at which time he felt he could not continue to work because of his deteriorating physical health. The applicant's real estate licence lapsed in 1997. It has not been renewed.

[6] Throughout the period mentioned in the preceding paragraphs, the applicant also experienced some visual and hearing impairment, the latter a product of environmental noise at the Rothman's plant. For this impairment, he has been receiving from the W.C.B. a 4.5% pension since 1983.

Procedural History

[7] On 11 March, 1994, the applicant – then nearly 56 years old – applied for a disability pension under the *Plan*, citing his main disabling condition to be pain in his right knee, his shoulders and his back. He also complained of numbness in his lower leg and hands as well as hearing loss and difficulty reading, even with glasses. In addition, the applicant reported pain and a burning sensation in his stomach. By letter dated 25 March, 1994, the respondent Minister

denied the application. On reconsideration, the respondent maintained his view and communicated his decision to the applicant by letter dated 6 September, 1995.

[8] The applicant appealed the denial to the Review Tribunal ("the Tribunal"). In its decision of 14 May, 1996 (See Respondent's Application Record, Vol I at 20-21), the Tribunal affirmed the respondent's decision, stating:

> ...This claimant does not present with sufficient objective evidence of medical anatomical or physiological impairments which would be expected to restrict him from performing *all* physical activities and work... [Emphasis added]

[9] The applicant obtained leave to appeal the decision of the Tribunal to the Board. The appeal was heard on 3 December, 1998. On 6 January, 1999, the Board dismissed the appeal on the basis that the applicant had not adduced sufficient evidence to demonstrate his disability prior to 31 December, 1995. The Board noted that neither of the applicant's doctors had described the applicant as "totally disabled" prior to the critical date and that both of them had indicated that he was "capable of performing non-physical work with limitations" (Respondent's Record, Vol II at 426).

[10] The applicant applied to this Court for judicial review of the Board's decision. However, the application never came on for hearing, the parties having agreed to refer the application back for redetermination by another panel of the Board on the basis of the applicant's allegation that he was unable to hear the original appeal proceeding (Consent Order dated 26 October, 1999, Applicant's Record, Tab 11 at 321).

[11] A new hearing before a different panel of the Board was convened on 7 February, 2000.

In a unanimous decision dated 11 February, 2000, the new panel determined that the applicant was not, at the relevant time, disabled within the meaning of subsection 42(2) of the *Plan*. The Board placed considerable emphasis on the repeated statements of the applicant's family doctor, Dr. Soutar, that the applicant (at least prior to October of 1998) was totally disabled only from "all physical work and work involving prolonged standing or repetitive use of his hands" (Reasons of the Board, Respondent's Record, Vol. I at 9). In the opinion of the Board, this diagnosis of partial disability was consistent with the applicant's receipt of only a partial disability pension from the W.C.B. and the applicant's apparent mental and linguistic ability to undertake work in the real estate industry between 1987 and 1991 and between 1993 and 1997.

[12] At page 10 of its reasons, the Board explained the statutory definition of a "severe" disability found in subparagraph 42(2)(a)(i) of the *Plan*:

> It is very important to note that the words "regularly pursuing any substantially gainful occupation..." means just that: any occupation. It is not, as some insurance policies say, "...any occupation for which the applicant is reasonably suited..." It is any occupation, even though the applicant may lack education, special skills, or basic language.
>
> A second factor is availability of work. This is not a matter that is or can be considered by this Board. So the state of the local job market is irrelevant: It is legally assumed that work is available to do. [emphasis in original]

[13] In support of its interpretation of the severity requirement in subparagraph 42(2)(a)(i) of the *Plan*, the Board cited the following passage from the reasons of Teitelbaum J. in *Davies v. Canada (Minister of Human Resources Development)* (1999), 177 F.T.R. 88, [1999] F.C.J. No. 1514 (QL) (F.C.T.D.):

> ¶ 43 The relevant inquiry in determining if an individual has a severe disability

> is whether they have the physical capacity to pursue some type of substantially gainful employment, irrespective of what their previous work experience has been. The legislation specifies that this employment be "substantially gainful" and subsection 42(2) articulates what factors will inform this assessment.
>
> ¶ 44 There is no ambiguity in which factors are relevant in assessing disability. The decisions of the PAB in Bains v. MHRDC, (1997) CP 4153 at pages 2 and 3, Aitkins v. MEI, (1996) CP 3408 at page 5, and Wilson v. MEI, (1996) CP 4109 at page 6 are unambiguous in stating that the applicant's inability to perform their previous job, the availability of work, their skills and education, and other personal barriers do not form part of the consideration into the severity of the disability.
>
> [...]
>
> ¶ 46 However, the legislation does not provide for the consideration of age or education under subsection 42(2). The only issue is whether he is capable of obtaining some type of substantially gainful employment, not necessarily anything related to his previous job.

[14] Applying that definition of "severe", the Board concluded that the applicant's disability was not severe within the meaning of the *Plan*. The Board's opinion was articulated in the following terms (at pages 12-13 of its reasons):

> (d) While one acknowledges immediately that suitable sedentary work with relief times to walk around is not easy to find, the test is not "Is the work available?" but rather, "If it were there, could he do it?" In my opinion the answer is yes. He is a highly intelligent man with excellent language skills who was able to carry out the ordinary skills of living – walking short distances and driving a car.
>
> (e) In the witness stand Mr. Villani complained of the disabling pain. I can only say that up to December, 1995, in my opinion, he may well have been disabled from doing what he wanted to do – a good job earning high wages – but he was not disabled from a job he was capable of doing either mentally or physically. [emphasis in original]

[15] It is from the dismissal of his appeal by the Board that the applicant now seeks judicial review. In his oral and written arguments, the applicant attacked the decision of the Board on several grounds, including a large number of procedural arguments and arguments touching on whether the Board had applied the correct legal test for determining a severe disability under the

Plan. The Court did not require the Crown to answer any of the grounds raised by the applicant except those relating to the issue of whether or not the Board had applied the appropriate legal test. Counsel for the Crown, in her submissions, supported the test which the Board applied in this case by referring the Court to earlier decisions of the Board.

Relevant Provisions of the *Plan*

44. (1) Subject to this Part,	44. (1) Sous réserve des autres dispositions de la présente partie :
[...]	[...]
(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who	b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :
(i) has made contributions for not less than the minimum qualifying period,	(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,
(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or	(ii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;
(iv) [Repealed, 1997, c. 40, s. 69]	(iv) [Abrogé, 1997, ch. 40, art. 69]

42(2) For the purposes of this Act,	42(2) Pour l'application de la présente loi :
(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,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(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	(i) *une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice*,
(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; ... [emphasis added]	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

The Standard of Review

[16] Before considering the merits of this application, it is necessary to determine the appropriate standard of review to be applied to the decision of the Board. This undertaking has as its primary concern the legislative intent of Parliament in creating the tribunal whose decision is being reviewed. That intention must be gleaned from the constating statute of the tribunal in order to appreciate whether the question which the tribunal has answered was intended by legislators to be left to its exclusive jurisdiction (*Pasiechnyk v. Saskatchewan (Worker's Compensation Board)*, [1997] 2 S.C.R. 890 at para. 18).

[17] This task requires a Court to consider and weigh a number of different factors which assist in indicating the degree of deference to be given to the decision under review. That degree of deference is now measured on a spectrum of standards running from the most deferential – patent unreasonableness, to the least deferential – correctness. Since the Supreme Court's

decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, a mid-point on the spectrum of deference has been identified which requires a standard of reasonableness *simpliciter*.

[18] The principal factors to be considered in arriving at the appropriate standard of review are the following: (i) the existence or absence of a privative clause, (ii) the expertise of the tribunal relative to that of the reviewing court, (iii) the purpose of the Act as a whole and of the provision in particular and (iv) the nature of the problem or question decided by the tribunal (See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29ff). No one of these factors alone is dispositive. Rather, they must be analysed together in order to identify the proper standard of review to apply in each case. This is the "pragmatic and functional" approach to determining legislative intent, and it must be applied in this case to determine the amount of curial deference this Court owes to the Board and its decision in respect of the applicant.

[19] In this case, the Court did not have the benefit of full submissions from the parties on the question of the appropriate standard of review, because the appellant was unrepresented by counsel. Though the respondent did make submissions on this point, those submissions were limited to the appropriate deference to be accorded the Board on questions of fact. That issue is quite straightforward and I agree with the respondent that on questions of fact the standard is one of patent unreasonableness. This view has been articulated in previous decisions of this Court involving judicial reviews of decisions of the Board pursuant to section 28 and paragraph

18.1(4)(d) of the *Federal Court Act* (See *Wirachowsky v. Canada (Minister of Human Resources Development)*, [2000] F.C.J. No. 2094; *Powell v. Canada (Minister of Human Resources Development)*, [2000] F.C.J. No. 1008).

[20] However, the appropriate standard of review on questions of law or mixed fact and law decided by the Board has never, to my knowledge, been thoroughly addressed by this Court, except on one other occasion. In *Canada (Minister of Human Resources Development) v. Skoric (C.A.)*, [2000] 3 F.C. 265, [2000] F.C.J. No. 193 (QL), this Court reviewed a decision of the Board respecting the appropriate contributory period applicable for the payment of a benefit to a surviving spouse under paragraph 44(1)(d) of the *Plan*. The primary issue was whether the Board erred in deciding whether the pre- or post-January 1, 1987 version of subparagraph 44(2)(b)(ii) applied to the circumstances of the case.

[21] Evans J.A. applied the pragmatic and functional approach and concluded that the decision of the Board was entitled to little or no deference. He reasoned as follows:

> ¶ 15 It was more or less common ground between the parties that the standard of review applicable in this case is at the correctness end of the spectrum. I agree. A pragmatic or functional analysis clearly indicates that this is not a situation in which curial deference is appropriate.
>
> ¶ 16 First, there is no privative clause restricting the scope of judicial review. Subsection 84(1) of the Plan provides that, "except for judicial review under the *Federal Court Act*", the Board's decisions are "final and binding for all purposes of this Act". Since this provision expressly exempts judicial review from its scope, the effect of the finality clause can only be to restrict the jurisdiction that the Board would otherwise have had to reconsider its decisions pursuant to *Chandler* v. *Alberta Association of Architects*, [1989] 2 S.C.R. 848. However, subsection 84(2) expressly permits the Board to reconsider its decisions "on new facts".
>
> ¶ 17 Second, the Board has no broad regulatory responsibilities, but performs only the adjudicative function of hearing appeals from the Review Tribunal:

> subsection 83(1) [as am. by S.C. 1995, c. 33, s. 36]. Third, the Chair, Vice-Chair and other members of the Board must be judges of the Federal Court or of specified section 96 [*Constitution Act*, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act* 1982, 1982, c. 11 (U.K.), *Schedule to the Constitution Act*, 1982, Item 1) [R.S.C., 1985, Appendix II, No. 5]] courts: subsection 83(5); retired judges of these courts are eligible to be appointed as additional "temporary members": subsection 83(5.1). Fourth, the questions in dispute in this case involve the interpretation of the Board's enabling statute and have an application beyond the facts of this dispute. Fifth, the subject-matter of the dispute is the adjudication of an individual's legal rights.
>
> ¶ 18 On the other hand, a consideration pointing to curial deference is the fact that Parliament probably entrusted appellate functions to an administrative tribunal, the Pension Appeals Board, rather than to the Federal Court, to take advantage of the benefits of economical and expeditious decision-making, and more accessible process, normally offered by tribunals.
>
> ¶ 19 In my view, the balance of the factors in the pragmatic or functional mix favours affording little deference to the Board's interpretation of its constitutive legislation, especially in the absence of any evidence in the record indicating that members of the Board acquire considerable expertise in the Canada Pension Plan as a result of the volume of appeals that they hear and decide.

[22] There is little to distinguish the decision of the Board in *Skoric* from the decision of the Board in the present case. In each case, the decision related to the application of the statutory language of the *Plan*. None of the factors in the pragmatic and functional analysis point to a deferential standard of review in this case. On the contrary, except as relates to questions of fact, I am of the view that the decision in this case is one which involved the interpretation and application of the definition of a "severe" disability within the meaning of subparagraph 42(2)(a)(i) of the *Plan*. As such, it should be reviewed on a standard of correctness, at the least deferential end of the spectrum.

Benefits for Disabled Persons Under the *Plan*

[23] Section 44 of the *Plan* lists the various benefits that are payable under that statute. Specifically, that section provides for the payment of retirement pensions, death benefits,

survivor's pensions, disabled contributor's child's benefits and orphan's benefits. There is also provision for a disability pension. In this connection, it is worth repeating the text of paragraph 44(1)(b) of the *Plan*:

44. (1) Subject to this Part,	44. (1) Sous réserve des autres dispositions de la présente partie :
[...]	[...]
(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom no retirement pension is payable, who is disabled and who	b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite n'est payable, qui est invalide et qui :
(i) has made contributions for not less than the minimum qualifying period,	(i) soit a versé des cotisations pendant au moins la période minimale d'admissibilité,
(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor's application for a disability pension was actually received, or	(ii)soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d'invalidité avait été reçue avant le moment où elle l'a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	(iii) soit est un cotisant à qui une pension d'invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n'avait pas été effectué en application des articles 55 et 55.1;
(iv) [Repealed, 1997, c. 40, s. 69]	(iv) [Abrogé, 1997, ch. 40, art. 69]

[24] Not surprisingly, one of the conditions in paragraph 44(1)(b) for the payment of a disability pension is that the applicant be disabled. The *Plan* contains a comprehensive definition of the term "disabled" for the purposes of determining entitlement to a disability pension. That definition is found in paragraph 42(2)(a) of the *Plan* which reads:

42(2) For the purposes of this Act,	42(2) Pour l'application de la présente loi :
(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,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(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	(i) *une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement incapable de détenir une occupation véritablement rémunératrice*,
(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 [emphasis added]	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;

[25] Subsection 42(2) makes it clear that an applicant's disability must be both severe and prolonged before a pension will be payable under paragraph 44(1)(b). There is no issue here as to whether the applicant's disability is prolonged. The only issue is whether it is severe. Of interest in this application is the statutory definition of a "severe" disability contained in subparagraph 42(2)(a)(i). This Court has not yet had occasion to comment on that definition. However, the circumstances of the present case warrant a close analysis of the legal test for determining whether or not a disability is "severe" within the meaning of the *Plan*.

(a) Applicable Principles of Legislative Interpretation

[26] Section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 reads:

> 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The enactment of this general principle abolished the traditional distinction between penal and

remedial legislation for the purposes of statutory interpretation (See R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 356). Under the traditional distinction, penal legislation was construed strictly while remedial legislation was given a large and liberal construction. The liberal approach to remedial legislation flows from the notion that such legislation has a benevolent purpose which courts should be careful to respect.

[27] In Canada, courts have been especially careful to apply a liberal construction to so-called "social legislation". In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant. This interpretive approach to legislation designed to secure a social benefit has been adopted in a number of Supreme Court decisions dealing with the *Unemployment Insurance Act, 1971* (see *Abrahams v. A.G. Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (A.G.)*, [1988] 1 S.C.R. 513; *Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] 2 S.C.R. 29; and *Caron v. Canada (Canada Employment and Immigration Commission)*, [1991] 1 S.C.R. 48).

[28] It is evident to me that the *Plan* is benefits-conferring legislation analogous to the *Unemployment Insurance Act, 1971*. The *Plan* provides for the payment of disability benefits to claimants who have been contributors under the scheme. When the *Plan* was introduced in the House of Commons as Bill C-136 (26th Parl., 2nd Session, November 9, 1964, *Hansard* at 9899),

the Minister of National Health and Welfare referred to the proposed legislation as a

> ... comprehensive social insurance measure... which provides help as of right rather than on a need or a means test, for those who suffer the loss of a loved breadwinner or those who find themselves disabled and unable to carry on work. I think hon. members will agree this is a giant step forward in Canada's social security program.

The Minister was more specific in her characterization of the supplementary benefits made available under the proposed legislation (*Hansard*, *supra* at 9923):

> In a sense, therefore, supplementary benefit pensions are more generous, especially for those in lower income brackets, than the new retirement pensions. This approach is justified because of the special need of widows, orphans and disabled contributors, and is certainly warranted on both humanitarian and economic grounds.

On second reading, the Minister of National Revenue added his opinion that the Bill was "the most far reaching piece of social legislation ... proposed in many years" (*Hansard* at 10140, November 16, 1964).

[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 the those words should be resolved in favour of a claimant for disability benefits.

(b) Is the Disability "Severe"? – The Board's Approach

[30] The Board has readily acknowledged that, on its reading of the *Plan*, the requirements for

a severity finding with respect to an alleged disability are extremely strict indeed. This was expressed by the Board in the following passage from its reasons in *Marie Atkins v. The Minister of Employment and Immigration*, CP 3408 (February 16, 1996) at 5:

> The intention of the legislation has been found on many occasions to preclude disability pensions being granted except in cases of total disability, incapacity to work, in the sense of Section 42(2). This legislation is not welfare legislation. The fact that many applicants are older, cannot return to their old jobs, cannot find any part-time or sedentary positions (in which they could perform) in today's very difficult work place, is not the question we must answer. Nor are those facts, in the real world, a reason, sympathetic as we might be to applicants, to allow a pension.

[31] The position that subparagraph 42(2)(a)(i) of the *Plan* does not permit consideration of an applicant's age, skills level, education or language proficiency in deciding whether he or she is incapable regularly of pursuing any substantially gainful occupation has been repeated in a number of Board decisions (See *e.g. Antonio Macri v. Minister of Employment and Immigration*, CP 3079 (January 9, 1996); *Alfred Wilson v. Minister of Employment and Immigration*, CP 4109 (May 31, 1996); *Surjit Bains v. Minister of Human Resources Development*, CP 04153 (January 24, 1997); *Minister of Human Resources Development v. Steven W. Stewart*, CP 07942 (September 28, 1999); *Patricia J. May v. Minister of Human Resources Development*, CP 06197 (November 22, 1999)).

[32] However, there is another and earlier line of cases in which the Board has adopted a more liberal interpretation of the severity definition in subparagraph 42(2)(a)(i) of the *Plan*. In these cases, the Board chose to take what it has called a "real world" approach to the application of the severity requirement. This approach requires the Board to determine whether an applicant, in the circumstances of his or her background and medical condition, is capable regularly of pursuing

any substantially gainful occupation.

[33] The "real world" approach was first adopted by the Board in *Edward Leduc v. Minister of National Health and Welfare*, *CCH Canadian Employment Benefits and Pension Guide Reports*, *Transfer Binder 1986-1992* at ¶ 8546, pp. 6021-6022 (January 29, 1988). In that case, the Board found for the applicant on the following basis:

> The Board is advised by medical authority that despite the handicaps under which the Appellant is suffering, there might exist the possibility that he might be able to pursue some unspecified form of substantially gainful employment. In an abstract and theoretical sense, this might well be true. However, the Appellant does not live in an abstract and theoretical world. He lives in a real world, people [sic] by real employers who are required to face up to the realities of commercial enterprise. The question is whether it is realistic to postulate that, given all of the Appellant's well documented difficulties, any employer would even remotely consider engaging the Appellant. This Board cannot envision any circumstances in which such might be the case. In the Board's opinion, the Appellant, Edward Leduc, is for all intents and purposes, unemployable.

[34] The "real world" approach has been applied in a number of Board decisions since *Leduc* (See *e.g. Danells v. Minister of National Health and Welfare*, CP 2657 (June 18, 1993); *Reuben Daly v. Minister of Employment and Immigration*, CP 2919 (August 11, 1994); *Elaine Gaudreau Morley v. Minister of Employment and Immigration, CCH Employment Benefits and Pension Guide Reports*, *Transfer Binder 1993-1997* at ¶ 8592, pp. 6115-6116 (November 23, 1995); *Constance M. Osachoff v. Minister of Human Resources Development*, CP 05635 (July 7, 1997); *Appleton v. Minister of Human Resources Development*, CP 04619 (November 21, 1997); *Paul M. Scott v. Minister of Human Resources Development*, CP 10014 (September 30, 1999).

[35] In fact, the first recorded disability determination under the *Plan* of which I am aware took a generous view of the severity requirement analogous to the Board's approach in *Leduc*.

That view, however, was not couched in the "real world" terminology coined by the Board in *Leduc* and repeated in subsequent cases. In *Minister of National Health and Welfare v. Jaeger CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1968-1985* at ¶ 8546, pp. 6066-6068 (August 25, 1971), the Board applied then subparagraph 43(2)(a)(i) in the following manner:

> On the merits of the case, the medical and other evidence tendered persuades us that the degenerative arthritis of the respondent, in that it prevents him and will prevent him from engaging in his normal work or anything remotely resembling an occupation which is suitable to his peculiar abilities and aptitudes, must be classified as a severe disability... We find that the respondent is, as s. 43(2)(a)(i) of the Act puts it, "incapable of regularly pursuing any substantially gainful occupation". The words "regularly" and "substantially" must be given due emphasis in the light of the evidence as to the respondent's work record, station in life and future economic prospects. In this case, there is undoubted incapacity to carry on any sort of gainful occupation in any line of work for which the respondent is suited.

Similarly, in *Minister of National Health and Welfare v. Raymond G. Russell, CCH Employment Benefits and Pension Guide Reports, Transfer Binder 1968-1985* at ¶ 8684, pp. 66279-6280 (June 26, 1974), the Board restated its jurisprudence to that time in the following words:

> The Board has always interpreted the language of the statute to mean exactly what it says, and in many cases has had to say that the fact that suitable work has not been available to an applicant is irrelevant to the question of whether or not he qualifies. However, various circumstances have been held to bear upon this question, such as age, education and aptitude.

[36] It is evident from a review of the Board's disability decisions, particularly its recent case law, that the Board's position regarding the severity requirement in subparagraph 42(2)(a)(i) of the *Plan* has been applied inconsistently. In the recent cases, there has been no discernible reason for the change in approach to the definition of "severe" in the *Plan*. For this reason, it becomes necessary for this Court to give direction concerning the proper legal test to be applied in determining whether an applicant suffers from a "severe" disability within the meaning of the *Plan*.

(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 therefor. 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.

[40] I find additional support for adopting the ordinary meaning of subparagraph 42(2)(a)(i), as interpreted by the Board in *Barlow*, in the *Canada Pension Plan Regulations*, C.R.C. c. 85. Subsection 68(1) of those *Regulations* requires that anyone applying to the Minister for disability benefits under the *Plan* must supply the Minister with particular information. It reads:

68. (1) Where an applicant claims that he or some other person is disabled within the meaning of the Act, he shall supply the Minister with the following information in respect of the person whose disability is to be determined:

(a) a report of any physical or mental impairment including

(i) the nature, extent and prognosis of the impairment,

(ii) the findings upon which the diagnosis and prognosis were made,

(iii) any limitation resulting from the impairment, and

(iv) any other pertinent information, including recommendations for further diagnostic work or treatment, that may be relevant;

(b) a statement of that person's occupation and earnings for the period commencing on the date upon which the applicant alleges that the disability commenced; and

(c) a statement of that person's education, employment experience and activities of daily life. [emphasis added]

68. (1) Quand un requérant allègue que lui-même ou une autre personne est invalide au sens de la Loi, il doit fournir au ministre les renseignements suivants sur la personne dont l'invalidité est à déterminer :

a) un rapport sur toute détérioration physique ou mentale indiquant

(i) la nature, l'étendue et le pronostic de la détérioration,

(ii) les constatations sur lesquelles se fondent le diagnostic et le pronostic,

(iii) toute incapacité résultant de la détérioration, et

(iv) tout autre renseignement qui pourrait être approprié, y compris les recommandations concernant le traitement ou les examens additionnels;

b) une déclaration indiquant l'emploi et les gains de cette personne pendant la période commençant à la date à partir de laquelle le requérant allègue que l'invalidité a commencé; et

c) une déclaration indiquant la formation scolaire, l'expérience acquise au travail et les activités habituelles de la personne.

On the Board's strict interpretation of the severity requirement, the information relating to an applicant's education, employment experience and activities of everyday life which is required to be supplied to the Minister pursuant to paragraph 68(1)(c) of the *Regulations* would be completely irrelevant to a disability determination. Of course, the mandatory requirement that applicants supply the Minister with information related to their education level, employment background and daily activities can only indicate that such "real world" details are indeed relevant to a severity determination made in accordance with the statutory definition in subparagraph 42(2)(a)(i) of the *Plan*.

[41] It is also clear from the minutes of the special joint committee appointed to consider Bill C-136 that the precise words of subparagraph 42(2)(a)(i) were chosen with particular care by the drafters of the *Plan*. During the clause by clause review of the Bill, the severity requirement was explained in the following way by the Deputy Minister of Welfare at the time, Dr. Joseph Willard (See Special Joint Committee of the Senate and House of Commons Appointed to Consider and Report upon Bill C-136, Minutes of Proceedings and Evidence, No. 2 at 247 (Tuesday, December 1, 1964)):

> Mr. Thorson: ...Subclause (2) defines what is meant in this bill by the expression "disabled"...
>
> Hon. Mr. Croll: How does it vary from the definition in the disability act at the present time?
>
> Dr. Willard: Mr. Chairman, the disabled persons' legislation that we have at the present time has the definition of permanent and total disability, which would be a more severe definition than the one set out here. You will notice in this Bill that the severity is related to a person being capable of regularly pursuing any substantially gainful occupation. It, therefore, brings in an additional concept of employability...

[42] The explanation by the Deputy Minister of Welfare is unambiguous. The test for severity is not that a disability be "total". In order to express the more lenient test for severity under the *Plan*, therefore, the drafters introduced the notion of severity as the inability regularly to pursue any substantially gainful occupation. The clear wording of the legislation, the companion provisions in the *Regulations*, and the clear intent of the drafters all indicate with equal force that the crucial phrase in subparagraph 42(2)(a)(i)'s severity definition cannot be ignored or pared down.

[43] But this is precisely what the Board has done in the present case. The Board has adopted

the strict abstract approach to the severity requirement in subparagraph 42(2)(a)(i) without analysing all of the legislative language. For ease of reference, the Board's analysis of the severity definition in subparagraph 42(2)(a)(i) is repeated below (See page 10 of the decision):

> It is very important to note that the words "regularly pursuing any substantially gainful occupation..." means just that: any occupation. It is not, as some insurance policies say, "...any occupation for which the applicant is reasonably suited..." It is any occupation, even though the applicant may lack education, special skills, or basic language.
>
> A second factor is availability of work. This is not a matter that is or can be considered by this Board. So the state of the local job market is irrelevant: It is legally assumed that work is available to do. [emphasis in original]

It is evident, to my mind, that the Board in this case has effectively read out of the severity definition the words "regularly", "substantially" and "gainful". In this way, the Board has reduced the legal test to the following: is the applicant incapable of pursuing any occupation? This approximates the "total" disability test eschewed by the drafters of the *Plan*. Indeed, the Board's repeated emphasis on the word "any" appears to have been a contributing factor in its misinterpretation of the statutory test for severity.

[44] In my respectful view, the Board has invoked the wrong legal test for disability insofar as it relates to the requirement that such disability must be "severe". The proper test for severity is the one that treats each word in the definition as contributing something to the statutory requirement. Those words, read together, suggest that the severity test involves an aspect of employability.

[45] Unfortunately for decision-makers under the *Plan*, employability is not a concept that easily lends itself to abstraction. Employability occurs in the context of commercial realities and

the particular circumstances of an applicant. That is not to say that the Minister, the Review Tribunal or the Board must make intricate postulations respecting an applicant's employability in order to arrive at a severity determination. Furthermore, I wish to express that I should not be taken as stating that employability is to be determined purely by reference to an applicant's chosen occupation. Unlike section 95, paragraph 3 of the *Quebec Pension Plan*, R.S.Q. c. R-9, which specially provides that an applicant who is sixty years of age or over will have a severe disability where he or she is "incapable regularly of carrying on the usual gainful occupation" that he or she holds at the time of becoming disabled, the federal *Plan* makes no provision for a finding of severity where an applicant is merely disabled from pursuing his or her ordinary occupation as at the onset of the alleged disability. Rather, the test under the *Plan* is in relation to *any substantially gainful occupation.*

[46] What the statutory test for severity does require, however, is an air of reality in assessing whether an applicant is incapable regularly of pursuing any substantially gainful occupation. Naturally, decision-makers already adopt a certain measure of practicality in their severity determinations. As an obvious example, the scope of substantially gainful occupations suitable for a middle-aged applicant with an elementary school education and limited English or French language skills would not normally include work as an engineer or doctor.

[47] In other cases, however, decision-makers ignore the language of the statute by concluding, for example, that since an applicant is capable of doing certain household chores or

is, strictly speaking, capable of sitting for short periods of time, he or she is therefore capable in theory of performing or engaging in some kind of unspecified sedentary occupation which qualifies as "any" occupation within the meaning of subparagraph 42(2)(a)(i) of the *Plan*.

[48] Indeed, the tendency to speak in terms of vague categories of labour was singled out for criticism by this Court in *Wirachowsky, supra*. In that case, the applicant was only able to sit and stand for short intervals but had been found by the Board to be capable of semi-sedentary work. On behalf of the Court, McDonald J.A. noted (at paragraph 7) that the phrase "semi-sedentary work" was, in his opinion, incapable of conveying any meaning for the purposes of assessing disability under the *Plan*. The risk of thinking in terms of such "occupational" categories is that all reference to a regular, tangible, and profitable occupation is likely to be forgotten. As a consequence, an applicant may be deprived of the very protection which the *Plan* was designed to provide and for which an applicant has been contributing during periods of healthy and active employment in the labour force.

[49] Bearing in mind that the hearing before the Board is in the nature of a hearing *de novo*, as long as the decision-maker applies the correct legal test for severity – that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.

[50] This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed as will evidence of employment efforts and possibilities. Cross-examination will, of course, be available to test the veracity and credibility of the evidence of claimants and others.

[51] In summary, I am of the opinion that the Board has failed to attribute meaning to the plain words of subparagraph 42(2)(a)(i) of the *Plan*. It has preferred to articulate an abbreviated and decidedly ungenerous version of the statutory definition of a "severe" disability, thereby subverting the benevolent purposes of the legislation. Having reached this conclusion, I do not find it necessary to canvass the many procedural grounds of review which the applicant advanced in his oral and written argument.

Disposition

[52] Accordingly, for these reasons, I would allow the application for judicial review with costs to the applicant, set aside the decision of the Board dated 11 February, 2000, and remit the matter to the Board for redetermination by a differently constituted panel in accordance with these reasons and on the basis of the record as constituted as well as other relevant evidence that the parties may wish to adduce.

"Julius A. Isaac"

J.A.

"I agree
A.M. Linden J.A."

"I agree
B. Malone J.A."

Materials to be provided
at the
Provincial Training Conference

Materials to be provided
at the
Provincial Training Conference

Other

- Access to Justice BC (Day 1)
- Strategies for Advocacy in the Internet Age (Day 1)
- Planning Tools: Representation Agreements, Powers of Attorney and other Planning Tools (Day 1)
- Accessibility Issues (Day 2)
- Wills off Reserve (Day 2)
- End of Employment (Day 3)
- Ombudsperson Update (Day 3)
- Sharing Victories (Day 3)

ACCESS TO JUSTICE BC

What is it? What could it be?

Jane Morley, QC
Strategic Coordinator, A2JBC

Address to Provincial Training for Advocates
Sponsored by the Law Foundation of BC
October 18, 2016

What is A2JBC?

- BC's response to the national call for action
- Group of justice stakeholders dedicated to A2J
- Forum for open communication and collaboration on A2J issues

ACCESS TO JUSTICE BC

What could A2JBC be?

- A platform
- A catalyzer
- A social impact network
- A movement?

ACCESS TO JUSTICE BC

Who is involved?

- 30 person Leadership Group
- Chief Justice of BC Chair
- Leaders of key stakeholders' members
- Representatives from other sectors
- Leaders of organizations serving users
- Member of the public/self represented litigant

ACCESS TO JUSTICE BC

Who could be involved?

- Judges
- Lawyers
- Academics
- Public policy makers
- Service providers
- Users of the system
- The public
- YOU

ACCESS TO JUSTICE BC

Priorities

- Family
- Aboriginal
- Culture Change

ACCESS TO JUSTICE BC

Framework for Action

1. Common commitment to A2J for all BCers
2. Triple Aim supported system-wide
3. "Improvement approach"
4. Collaborative, innovative initiatives
5. Practical common outcome measures
6. Forum for sharing lessons learned
7. Network

ACCESS to JUSTICE BC

Triple Aim

- One aim/ three interrelating elements
- Elements
  1. Improved user experience
  2. Improved justice outcomes for the population
  3. Sustainable per capita costs

ACCESS to JUSTICE BC

"Improvement approach"

- Engaging user perspective
- Multi-disciplinary
- Experimental

ACCESS to JUSTICE BC

A2JBC initiatives

- Self-organizing
- Implemented by stakeholders
- Supported by A2JBC
- Expected to be:
  1. Collaborative and innovative
  2. Designed to contribute to Triple Aim
  3. Measured in relation to Triple Aim
  4. Use improvement approach

ACCESS TO JUSTICE BC

Dual Track strategy

1. Dig deeply into the Framework for Action
2. Get going on initiatives
3. Two tracks interactive

ACCESS TO JUSTICE BC

Track 1 priority issues

- What are justice outcomes?
- What is included in cost?
- How can experience, outcomes, costs be measured in practical ways?

ACCESS TO JUSTICE BC

What the Triple Aim could be

- A common, measurable aim for all justice organizations across BC
- A catalyst for innovation
- A guide to measuring the right things

Track 2 - Initiatives

1. Unbundled services
2. Presumptive CDR
3. Family justice hubs

ACCESS to JUSTICE BC

Value of initiatives

1. Concretely making a difference
2. Learning what works by doing
3. Starting small to go big
4. Means of growing networks and engagement
5. Practicing
   - User-centred approach
   - Multi-disiciplinary involvement
   - Experimenting

ACCESS to JUSTICE BC

Accomplishments to date

- Creating a space for dialogue
- Grappling with the "how" of change
- Potential breaking through on the elusive outcomes measurement front
- Getting going on collaborative initiatives

ACCESS TO JUSTICE BC

The future

- Do! Do! Do!
- Learn! Learn! Learn!
- Engage! Engage! Engage!

Make a difference!

ACCESS TO JUSTICE BC

ACCESS TO JUSTICE BC

QUESTIONS?

ACCESS TO JUSTICE BC

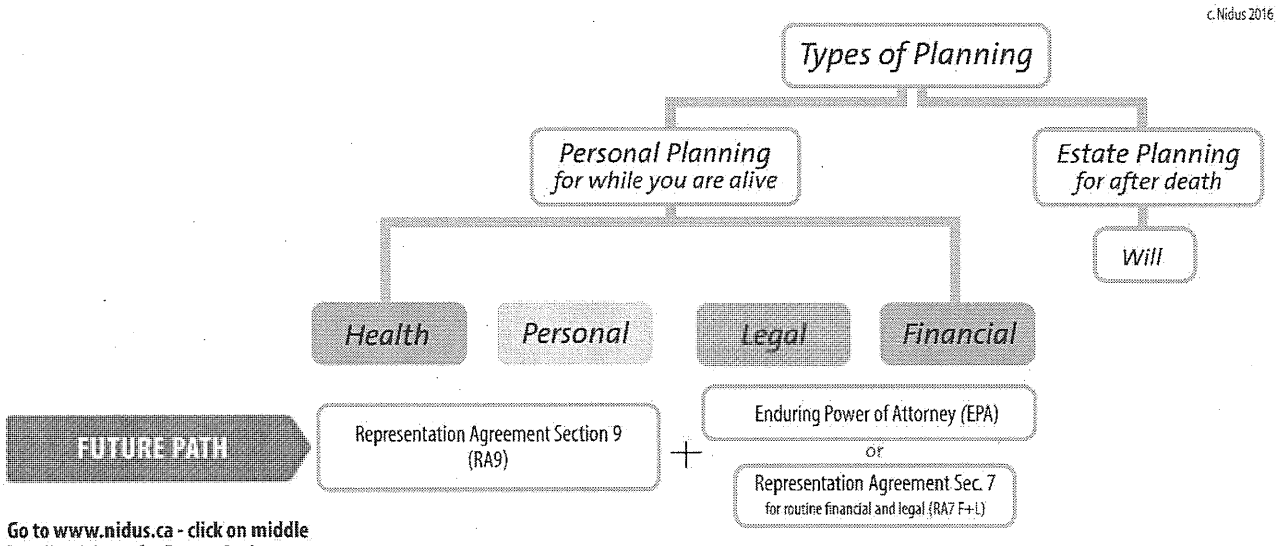
What can advocates do to further the access to justice movement in BC?

Materials to be provided
at the
Provincial Training Conference

Nidus Personal Planning Resource Centre and Registry

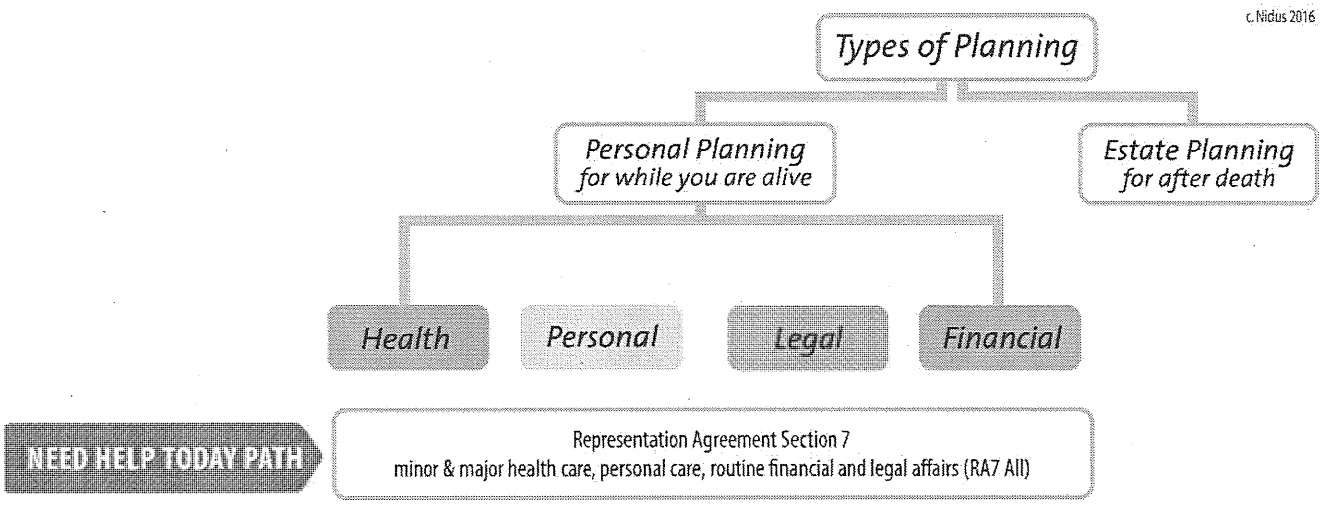
November 2016

Legal Tools for Future Path



Go to www.nidus.ca - click on middle heading/photo for Future Path

Legal Tools for Need Help Today Path



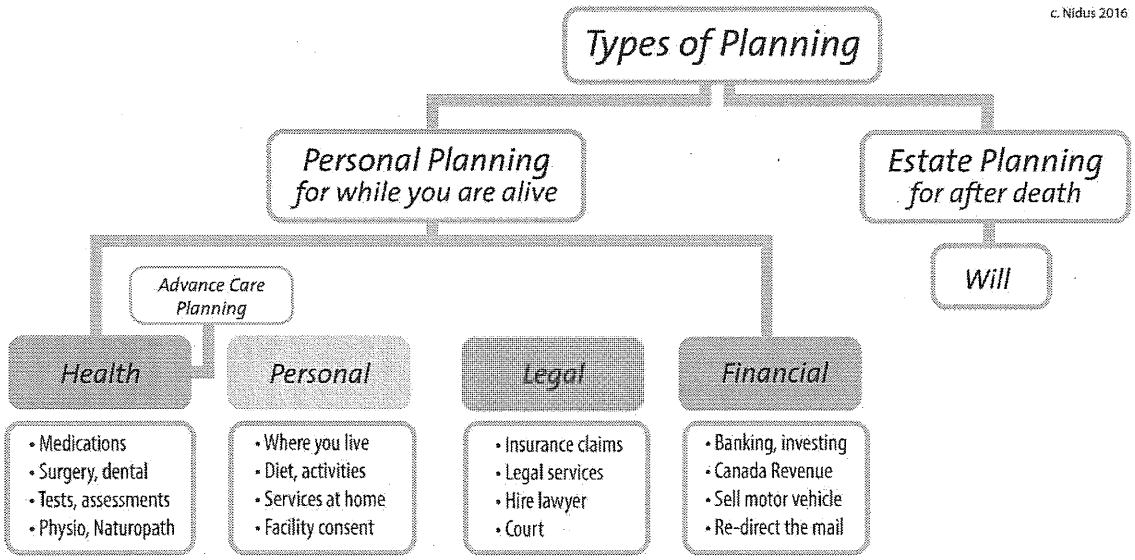
Go to www.nidus.ca -

- For adult who did not plan when considered capable and now needs help - **click on third heading/photo for 'Older Adult'**
- For adult with disability from birth or childhood that affects capability to understand - **click on first heading/photo for 'Helping Relative with Disability'**

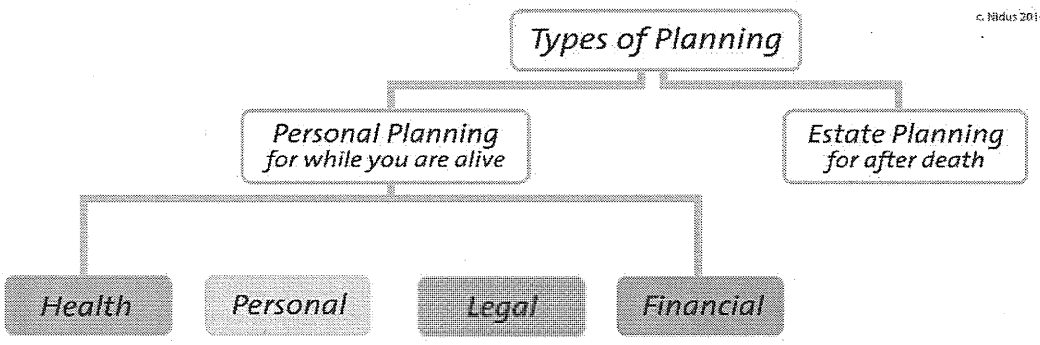
Nidus Personal Planning Resource Centre and Registry

November 2016

Personal Planning and Four Life Areas



Two Paths for Personal Planning in British Columbia



FUTURE PATH — *For adults who **understand** the nature and effect of their planning documents — at the time of making them.*

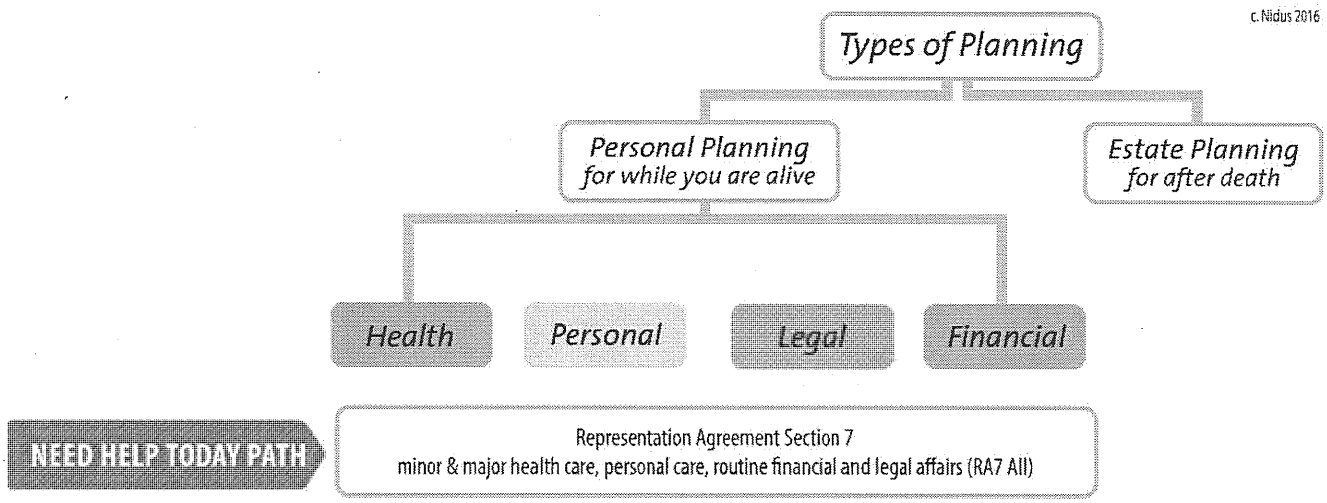
NEED HELP TODAY PATH — *For adults whose capability to **understand** the nature and effect of their planning documents **is in question** — at the time of making them.*

This path may apply, for example, to adults with a developmental disability (special needs), adults who suffered an illness or injury when a child, adults with advanced dementia, adults with a brain injury from a serious stroke or fall or other accident.

Nidus Personal Planning Resource Centre and Registry

November 2016

Legal Tools for Need Help Today Path



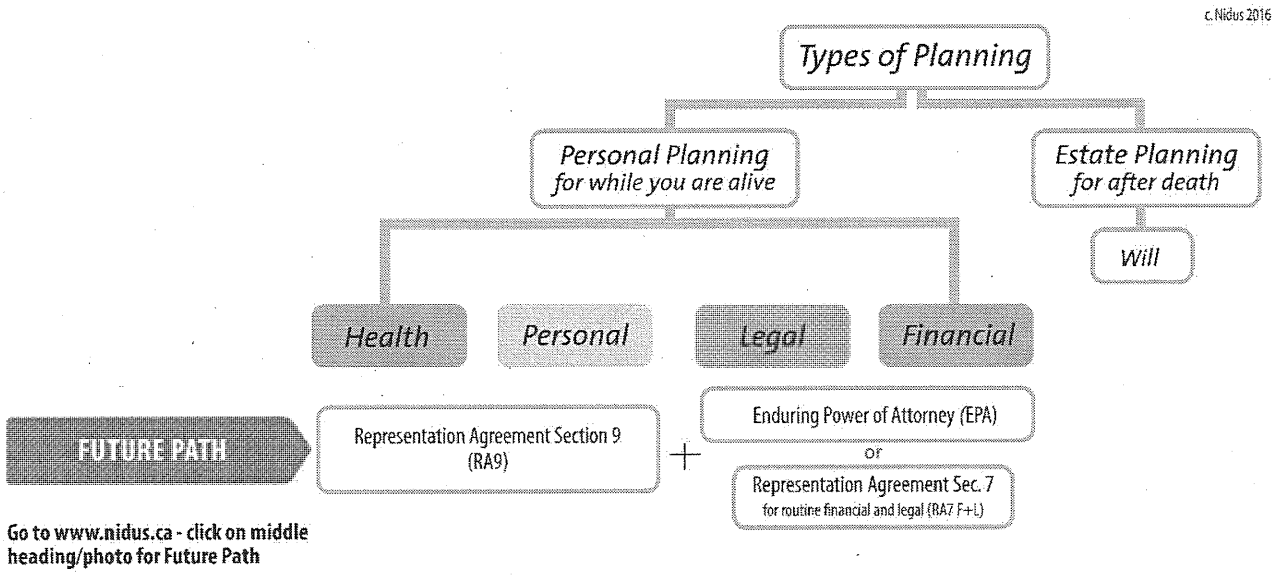
Go to www.nidus.ca -

- For adult who did not plan when considered capable and now needs help - **click on third heading/photo for 'Older Adult'**
- For adult with disability from birth or childhood that affects capability to understand - **click on first heading/photo for 'Helping Relative with Disability'**

Nidus Personal Planning Resource Centre and Registry

November 2016

Legal Tools for Future Path



Comparison Chart for Enduring Power of Attorney and Representation Agreement Section 7 F+L

Some people may NOT meet the capability requirements to make an EPA — the RA7 is designed to be a legal alternative.

FINANCIAL AUTHORITIES	RA7 F+L	EPA
SAME Financial Authorities for RA7 and EPA		
Bank matters - e.g. open/close an account, deposit/withdraw funds.	**Yes**	**Yes**
Renew or make payments on existing loans.		
Obtain financial benefits or entitlements.		
Make and manage your investments according to the Trustee Act.		
Act as the Account Holder for a Registered Disability Savings Plan.		
See the definition of routine management of financial affairs for the complete list. (Link on last page)		
SOME DIFFERENCES between RA7 and EPA Financial Authorities		
Create, cancel or change a beneficiary designation in an instrument, other than a Will.	When converting an instrument, a beneficiary designation must be consistent with the designation of the original instrument. E.g. RRSP to a RIF. Can NOT cancel or change a beneficiary designation.	When renewing, replacing or converting an instrument, the beneficiary must be the same as you named in the original. For a new instrument, your estate must be the beneficiary. Can change a designation you made, only if the court authorizes it.
Delegate authority to someone else. (This is different than appointing an alternate. In this case, the person appointed could delegate their authority to someone else.)	Can delegate authority only with respect to investments and only to a qualified investment specialist.	Delegating is automatically allowed with respect to investments (like RA7) Can allow delegation for decision making in other areas if you specify in your EPA.
Buy, renew, or cancel motor vehicle, household, or other insurance on your behalf.	**Yes**, except can NOT purchase a new life insurance policy.	**Yes,** except EPA must specify purchasing a new life insurance policy.
Make charitable donations.	**Yes**, up to a defined limit, if it is your practice and is within your means.	**Yes**, with more flexibility than allowed in an RA7.

FINANCIAL AUTHORITIES	RA7 F+L	EPA
OTHER Financial Authorities		
Deal with any matters involving the Land Title Office. For example, deal with: • Buying and selling real estate property. • Taking out a new mortgage. • Builders' liens. • Mineral and agricultural rights. • Laneway housing. • Leasing your real estate property for a term of 3 years or more.	**No**	**Yes**, if your EPA is signed by a lawyer or notary public in BC.
Act on your behalf as a director or officer of a company you own or serve on.	**No**	**Yes**
Take a fee when carrying out their duties.	**No**	**Yes**, if you specify the amount or rate in your EPA.
Use your money or property for the benefit of themselves or others—such as minor children. This could involve borrowing/lending your money, transferring ownership of your vehicle or real estate or making gifts.	**No**	**Yes**, with some exceptions or conditions and certain authorities must be specified in your EPA. *(This authority would be important if you have minor children or other dependents.)*
Take more risks with your investments than allowed by the Trustee Act.	**No**	**Yes**, if you specify this in your EPA
Take out a new loan on your behalf, or guarantee one for someone else.	**No**	**Yes**
Apply for and/or manage pension entitlements and benefits held in another jurisdiction (province or country).	The RA7 is a type of agency agreement (like an EPA) but most jurisdictions us the term Power of Attorney so would reject the RA7.	**Probably,** an EPA in BC most likely meets the requirements of another province or country for this purpose.
Deal with real estate property in another province or country.	**No**	It is best to make the EPA equivalent for the province or country where you own the real estate.
Use your credit card.	**No**	**No**

LEGAL AUTHORITIES	RA7 F+L	EPA
Obtain legal services.	**Yes**	**Yes**
Instruct a lawyer to act on your behalf to begin, continue, compromise, defend or settle any legal proceedings.	**Yes**, except cannot *begin* divorce proceedings on your behalf.	**Yes**
Represent you in small claims court.	**Yes**	**Yes**
Settle a claim for compensation on your behalf.	**Yes**	**Yes**
When assisting in the context of a legal proceeding, as above, your representative can act as your litigation guardian. This term is used in law when someone has to act on behalf of another individual in legal matters.		
Make a new Will on your behalf or change your existing Will.	**No**	**No**

This chart provides a general overview only. It is not intended to be a complete inventory or comparison.

MORE INFORMATION

For information on making an EPA, see the Nidus EPA Guide to prepare for meeting with a legal professional.

For other information on the EPA, including the *Role of an Attorney* and details on the *Authorities in an EPA*, go to www.nidus.ca > Information > More EPA Resources.

For more information on making an RA7 to cover financial and legal matters, go to www.nidus.ca > Getting Started (right sidebar). First determine the path or situation - future path OR need help today path.

To read the Definition of Routine Management of Financial Affairs (for the RA7) and find more details on Representation Agreements, go to www.nidus.ca > Information > More RA Resources.

To access the legislation governing the RA7 and EPA, go to www.bclaws.ca . See the Representation Agreement Act and Regulation and the Power of Attorney Act and Regulation.

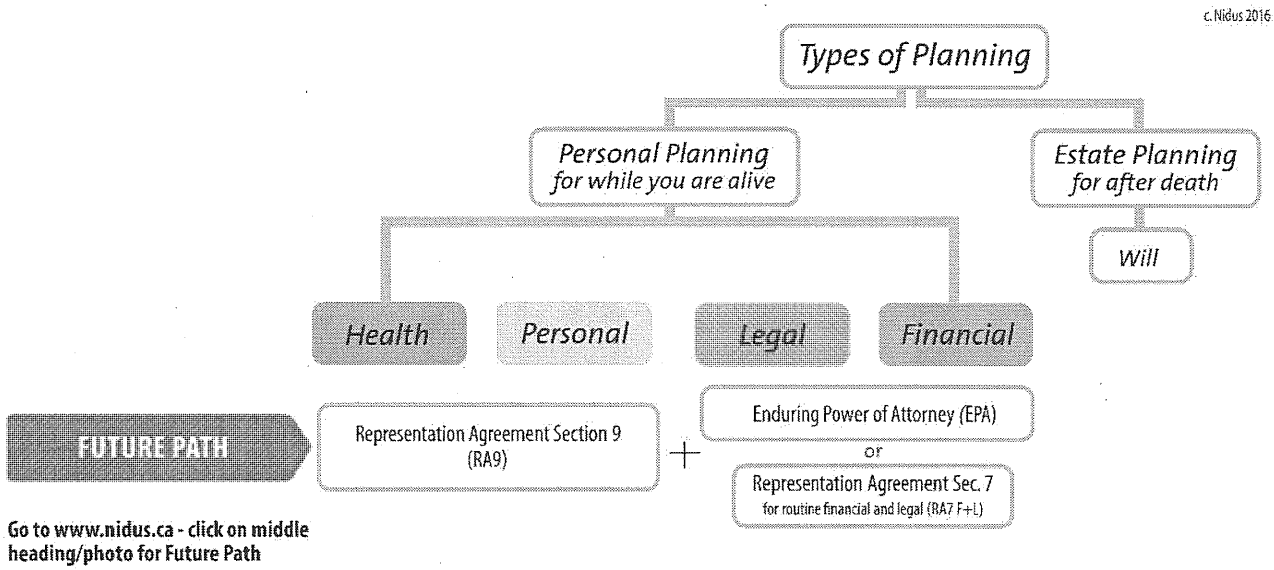
For details on how to register your RA7 or EPA with the Personal Planning Registry go to www.nidus.ca/registry.

1440 West 12 Avenue, Vancouver BC V6H 1M8
info@nidus.ca | www.nidus.ca | voicemail 604.408.7414 or t.free 1.877.267.5552 | fax 604.801.5506

Nidus Personal Planning Resource Centre and Registry

November 2016

Legal Tools for Future Path

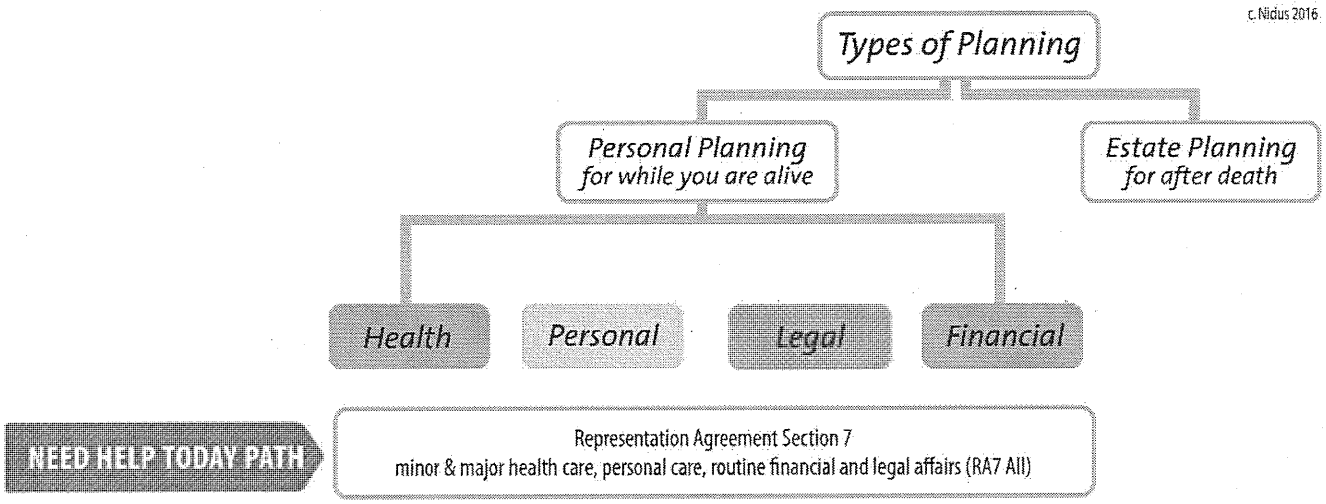


Go to www.nidus.ca - click on middle heading/photo for Future Path

Nidus Personal Planning Resource Centre and Registry

November 2016

Legal Tools for Need Help Today Path



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3RD ANNUAL PERSONAL PLANNING MONTH

Are you Prepared?

For End-of-Life? For Incapacity? For your Future?

COME LEARN THE STEPS YOU CAN TAKE TO PLAN FOR YOUR FUTURE!

PRESENTATION: The Essentials of a Basic Plan for your Future

What are the key legal documents in BC to plan for incapacity, end-of-life and after death? Who gets copies and where do you register your plans so they are available when needed?

This in-person presentation will provide an overview of Representation Agreements, Enduring Powers of Attorney, and Wills. Find out where to get the legal forms and how to register them after they are completed. There is also time for Q&A.

All presentations are free except one as noted

- **Thursday, October 27 – 1:00 to 2:30 pm**
  South Granville Seniors Centre — 3rd floor lounge
  1420 W. 12th Ave (at Hemlock), Vancouver
  Registration not required

- **Tuesday, November 1 – 12:00 to 1:30 pm**
  $4.00 fee, includes lunch
  Kitsilano Neighbourhood House, Seniors Drop In
  2305 W. 7th Ave, Vancouver
  Registration not required

- **Tuesday, November 8 – 9:30 to 11:00 am**
  Collingwood Neighbourhood House
  5288 Joyce St, Vancouver
  Register by calling 604-435-3073

- **Thursday, November 10 – 1:00 to 2:30 pm**
  West End Seniors Network, Barclay Manor
  1447 Barclay St, Vancouver
  Register by calling 604-669-1051

- **Tuesday, November 15 – 9:30 to 11:00 am**
  Mt. Pleasant Neighbourhood House
  3161 E. Broadway (near Fraser), Vancouver
  Register by calling 604-879-8208

- **Thursday, November 17 – 2:00 to 3:30 pm**
  Burnaby Public Library, Bob Prittie Metrotown Branch
  6100 Willingdon Ave, Burnaby
  Register by calling 604-436-5400

- **Thursday, November 24 – 1:00 to 2:30 pm**
  Cedar Cottage Neighbourhood House
  4065 Victoria Dr (at East 24th Ave), Vancouver
  Register by calling 604-874-4231

- **Tuesday, November 29 – 6:00 to 7:30 pm**
  Vancouver Public Library, Fireball Branch
  1455 West 10th Ave. (near Granville St), Vancouver
  Registration not required

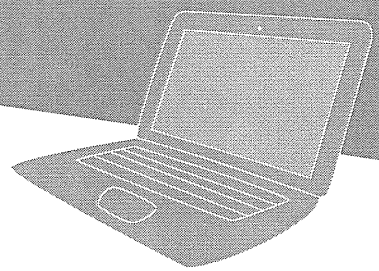
- **Thursday, December 1 – 10:00 to 11:30 am**
  Nidus at Holy Trinity Anglican Church — 2nd floor
  1440 W. 12th Ave (at Hemlock), Vancouver
  Registration not required

For other dates & topics in 2016:
www.nidus.ca > Get Help > Presentations

Nidus Personal Planning Resource Centre and Registry
Nidus is a non-profit, charitable organization

Are you Prepared?

ATTEND THESE FREE WEBINARS AND LEARN THE STEPS YOU CAN TAKE TO PLAN FOR YOUR FUTURE!



The Essentials of a Basic Plan for Your Future

Q&A

What are the key legal documents in BC to plan for incapacity, end-of-life and after death? Who gets copies and where do you register your plans so they are available when needed?

This webinar gives an overview of Representation Agreements, Enduring Powers of Attorney, and Wills. Find out where to get the legal forms and how to register them after they are completed.

Wednesday, November 2, 1:00 to 2:30 pm

- Grand Forks and District Public Library, call to register 250.442.3944
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Thursday, November 3, 7:00 to 8:30 pm

- Kitimat Public Library, call to register 250.632.8985
- Trail and District Public Library, call to register 250.364.1731
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Tuesday, November 29, 10:00 am to 12:00 pm

- Watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

End-of-Life: at home? In hospital? In a care facility?

Q&A

Where you die will depend on a number of factors including your health condition and the services available. What are some practical and medical issues that can influence your dying and death?

When is medical assistance in dying an option? What is palliative care and who is it for?

Wednesday, November 16, 1:00 to 2:30 pm

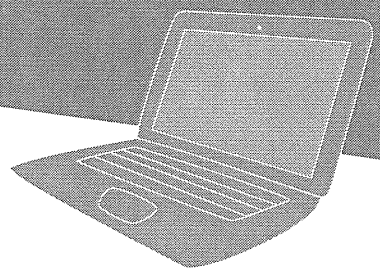
- Hazelton District Public Library, call to register 250.842.5961
- Lillooet Public Library, call to register 250.256.7944
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Thursday, November 17, 7:00 to 8:30 pm

- Kitimat Public Library, call to register 250.632.8985
- Trail and District Public Library, call to register 250.364.1731
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

SEE NEXT PAGE FOR MORE TOPICS

Are you Prepared?



ATTEND THESE FREE WEBINARS AND LEARN THE STEPS YOU CAN TAKE TO PLAN FOR YOUR FUTURE!

Adult Guardianship – What does it mean in 2016?

Q&A

What is adult guardianship (called Committeeship in BC)? How does it happen and who is vulnerable? What are the new ways of ending statutory guardianship according to the Adult Guardianship Act?

This webinar will discuss examples from adults who have been under guardianship. Learn about the Representation Agreement Section 7 (RA7)—the legal alternative to adult guardianship. Find out about our education project funded by the Law Foundation of BC.

Tuesday, November 22, 10:30 am to 12:00 pm

- Lillooet Public Library, call to register 250.256.7944
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Wednesday, November 23, 7:00 to 8:30 pm

- Watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Expressing Wishes — That Don't Backfire!

Q&A

Health authorities have emphasized writing down wishes in their education on advance care planning. But what happens when you are incapacitated or cannot communicate? Are these wishes helpful or harmful? Who is interpreting them?

This webinar will discuss some examples and share resources and tips for discussing wishes, values and beliefs. Why are physicians asking patients to sign the M.O.S.T. form? What is most useful and effective to those who may have to act on your behalf?

Wednesday, November 23, 1:00 to 2:30 pm

- Hazelton District Public Library, call to register 250.842.5961
- Kitimat Public Library, call to register 250.632.8985
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Thursday, November 24, 7:00 to 8:30 pm

- Watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

MORE DETAILS AT WWW.NIDUS.CA > GET HELP > PRESENTATIONS

CAN YOUR GROUP/BUSINESS HOST A WEBINAR? CONTACT INFO@NIDUS.CA

COURTHOUSE LIBRARIES | BC

Nidus Personal Planning Resource Centre and Registry

Nidus is a non-profit, charitable organization

Working with Interpreters

Tess Acton, MKS Immigration Lawyers

I was so afraid of the horrible, awful husband of mine. On so many occasions – they're hard to talk about – he put my life into danger and finally caused me to flee from the country. In Bangladesh, especially in the small towns where I am from originally, but I think even in the big cities like Dhaka, the police do nothing to help women in these situations. Even though I managed to get a divorce I am still afraid.

This excerpt is based on *Jahan v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 987.

OUTLINE

- First –points to get started
- Second – key findings of my research
- Third – strategies for best practices when working with interpreters
- Fourth – resources
- Fifth – discussion and sharing experiences

Question

- What is the interpreter's role?

Communication

- life as **lived**, the flow of events that touch on a person's life; life as **experienced**, how the person perceives and ascribes meaning to what happens, drawing on previous experience and cultural repertoires; and life as **told**, how experience is framed and articulated in a particular context and to a particular audience… [and] life as **text**, the researcher's [advocate's; decision maker's] interpretation and representation of the story.

Lived → experienced → told → understood → text/decision

(Marita Eastmond, "Stories as Lived Experience: Narratives in Forced Migration Research")

Tension in Interpreter's Role

- What is the interpreter's role?
- Negative aspects of interpreter's subjectivity
- Positive aspects of interpreter's subjectivity

Advocate-Client Relationship

- Potential barrier to trust because of reluctance to divulge information in interpreter's presence
- Enabling the relationship and communication
- Building trust by the interpreter endorsing the advocate

Suggestions for Best Practices

AWARENESS

- Interpreters are crucial to effective representation
- Self-reflection
- Acknowledge more nuanced model of interpretation

Suggestions for Best Practices

KNOWLEDGE

- Learn
- Ethical / professional standards
- Resources
- *Evaluate interpreter*

Suggestions for Best Practices

SKILLS

- Explain expectations:

  Do you both understand each other? Everything we are discussing here today is **confidential** – that means nothing that any of us say will be shared with other people unless the client agrees that it can be shared. Your **role** is to interpret between the two languages. Keeping the same meaning is the most important. Please tell me if there are words or concepts that you think need elaboration or explanation. If you want to tell me something other than what the client or I have said, please do so, but let me know you are doing so first. To the interpreter, please also let me know if I am speaking too fast, not taking enough breaks, or if you need a break! Client, please let me know if you have any concerns at any point.

- (Don't forget to have them interpret what you say!)

Suggestions for Best Practices

SKILLS

- Look directly at client (as culturally appropriate)
- Where is everyone sitting?

Evaluating Interpreter

- What do I know about this person's language abilities?
- What do I know about this person's training?
- What do I know about this person's familiarity with the culture of the people to whom they're providing interpreting services (both the client and the advocate!)?
- What do I know about this person's experience with this process they're helping me with?

Evaluating Interpreter

- Are the answers acceptable to me? Are there any alternatives? How can I compensate?
  - Listen & observe
  - Variety of questions (open & closed questions)
  - Double check answers (ask the same question again in a different way)
  - Find a way to speak to client privately to ensure comfort
  - What isn't being said?
  - Mitigate possible bias
  - Explain process, any specific technical terms
  - "Language advocate"
  - Ask others

Resources

- Society of Translators & Interpreters of BC
  Tel: 604 684-2940
  www.stibc.org
- DIVERSEcity (in person and over phone)
- - Phone: 604.597.1358
  - Fax : 604.572.4695
  - Email : interpretation@dcrs.ca
- For Emergency or after hour services contact our representatives at 604-785-0167
- http://www.dcrs.ca/services/interpretation-translation-services/interpretation-services/
- MOSAIC interpretation and translation services: https://www.mosaicbc-lsp.org/contact/
  1522 Commercial Drive, 2nd Floor
  Vancouver, B.C. V5L 3Y2
  Phone: 604 254 8022
  Fax: 604 254 4606
  interpretationservices@mosaicbc.org

Resources

- ICA Victoria

  (in person and telephone)
  http://www.icavictoria.org/welcome-centre/interpretation-translation/

- Healthcare: Provincial Language Service
  Phone: 604-297-8400
  Toll-free: 1-877-BC Talks (228-2557); select option 1
  Email: pls@phsa.ca

Resources

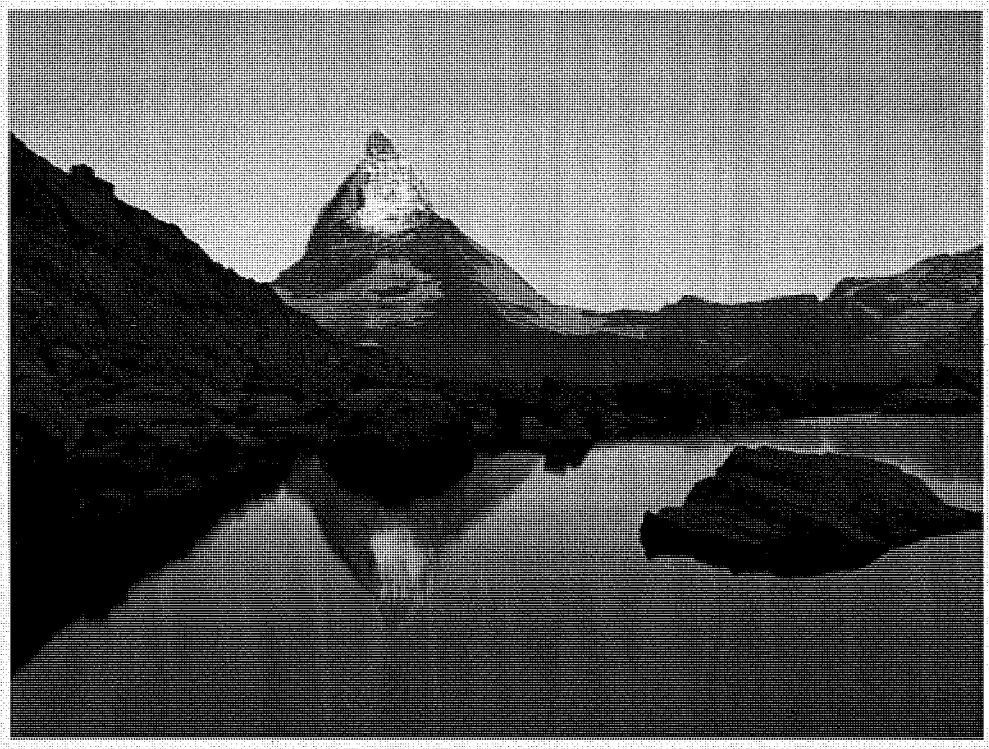
- Cultural Interpretation Services for Our Communities (CISOC) guide: http://www.cisoc.net/_files/Guide_to_Working_with_Interpreters.pdf
- Angela McCaffrey, "Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters" (2000) 6 *Clinical L Rev* 347
- Marita Eastmond, "Stories as Lived Experience: Narratives in Forced Migration Research" (2007) 20(2) *J of Refugee Studies* 248.

Thank you!

- Share experiences

WILLS & ESTATES

Raymond D. Philips, 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. (the Band if reserve land)

DISTRIBUTION ON INTESTATE

- If an intestate dies leaving...
- **A spouse but no surviving descendants:**
  - 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 or 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

FHRMIR ACT

- Section 14.
- When a spouse or common-law partner dies, a survivor who does not hold an interest or right in or to the family home may occupy that home for a period of 180 days after the day on which the death occurs, whether or not the survivor is a First Nation member or an Indian.

FHRMIR ACT

- 21.(1) A court may, on application by a survivor whether or not that person is a First Nation member or an Indian, order that the survivor be granted exclusive occupation of the family home and reasonable access to that home, subject to any conditions and for the period that the court specifies.
- (3) In making an order under this section, the court must consider, among other things (b) terms of Will

FHRMIR ACT

- s. 23. For greater certainty, an order made under any of sections 16 to 18, 20 or 21 does not change who holds an interest or right in or to the family home nor does it prevent an executor of a will or an administrator of an estate from transferring such an interest or right to a named beneficiary under the will or to a beneficiary on intestacy, or a court from ordering the transfer of such an interest or right under section 31 or 36.

FHRMIR ACT

- 38(1) – Distribution of Estate: Subject to subsection (2), an executor of a will or an administrator of an estate must not proceed with the distribution of the estate until one of the following occurs:
- (a) the survivor consents in writing to the proposed distribution;

FHRMIR ACT

- (b) the period of 10 months referred to in subsection 36(1) and any extended period the court may have granted under subsection 36(2) have expired and no application has been made under subsection 36(1) within those periods; or
- (c) an application made under subsection 36(1) is disposed of.

End of Employment and the Employment Standards Act: An Advocacy Guide

Prepared by Stephen Portman, Advocacy Lead, Together Against Poverty Society

Summary: The end of employment can be a challenging time for employees. For low income and marginalized employees it often means the end of income and increased instability for the individual and their families. End of employment can be an emotionally charged time as severing an employment relationship often carries a multitude of challenges that are emotional, economic, and social. During these challenging times it is important that employee are aware of and proactive in pursuing any legal entitlements that may be available to ease the challenges associated with end of employment.

While challenging, end of employment may also be an empowering time, a time when employees may be better positioned to assert legal rights without fear of workplace reprisals. The vast majority of employment standards complaints brought to the attention of the Employment Standards Branch (ESB) occur after the end of an employment relationship. The following paper will provide a brief explanation on employee entitlements after employment ends and how to proceed toward remedies conveyed under the Employment Standards Act (ESA).

It must be stressed that there are several legal paths that may be taken by employee to find remedies following the end of employment. Some of these paths may be pursued at the same time while others must be taken in isolation. Determining what the best path is to resolving a workplace complaint can be a complex process and it is highly recommended that advocates seek assistance from a lawyer in cases where the path is unclear. The most typical legal paths to remedies following end of employment are:

1. BC Employment Standards Complaint
2. BC Provincial Court (Small Claims Court)
3. BC Supreme Court
4. BC Human Rights Code Complaint
5. Canadian Human Rights Act Preceding

*Note: Typically speaking employees are not able to seek the same relief in an employment standards proceeding as in a court preceding (s. 118). There are distinct jurisdictional concerns that must be taken into account before determining which procedural path to pursue.[1] In most cases the ESB will allow a Human Rights proceeding to occur at the same time as an employment standards complaint.

Employment has ended – now what?

Termination of employment may be dictated by either the employee or by the employer. Sometimes the employee quits or retires. Other times the employer fires the employee. Often the way in which an employment relationship is ended can be an area of dispute between employees and employers. Employers may claim that the employee has quit their position as

[1] See Thornicroft, Kenneth W., *Two Roads: The Interface between Common Law and Employment Standards Claims in British Columbia* (May 2013), Employment Law Conference 2013, Continuing Legal Education BC. http://www.lslap.bc.ca/uploads/2/9/3/5/29358111/06_-_employment_law_-_bc_cle_-_common_law_vs_employment_standards.pdf

this characterization of the end of employment enables them to avoid liability in the form of notice or compensation in lieu of notice (severance). In the alternative, employees may claim that they have been terminated from their employment relationship to enable themselves to benefit from employer liability for severance or notice.

Quitting:

Where an employee quits or retires from their position there is no obligation on the employee to provide written notice to the employer and the employer must pay all outstanding wages within 6 days after the end of employment (s. 18(2)). If an employee provides notice of resignation and the employer substantially alters the employment relationship or terminates the employee the employer is obligated to pay severance.

The ESA does not require an employer to pay out severance or provide notice of termination in situations where an employee voluntarily leaves their position. If an employer terminates the employment, all outstanding wages must be paid within 48 hours of the end of employment (s. 18(1)). If the employer refuses to accept a resignation the employee may be entitled to severance.

When there is a dispute over whether or not an employee quit or was fired the obligation for proving that the employer is relived of the liability to give notice or severance rests with the employer.

Constructive Dismissal and Week of Layoff:

An employee may be terminated and not be aware of it in that the employer has substantially altered the employment to a degree where the employee has been terminated in the legal sense but is continuing to work for the employer. This is often referred to as constructive dismissal. The director of the ESB has the authority to determine that employment has been terminated in cases where a condition of employment is "substantially altered." In order for the ESB to find that constructive dismissal has occurred it must be demonstrated that there has been a fundamental change in the employment relationship. The test of what constitutes a substantial change is objective, and includes (see *Re A.J. Leisure Group Inc.* (22 January 1998), BCEST #D036/98 (Petersen). *Re Big River Brewing Company Ltd.* (15 July 2002), BCEST #D324/02 (McCabe):

1. An analysis of the nature of the employment relationship;
2. The conditions of employment;
3. The alterations that have been made;
4. The legitimate expectations of the parties; and
5. Whether there are any express or implied agreements or understandings.

In some instances, an employee may be terminated from employment by a "week of layoff". An employer may only temporarily lay off an employee if the right to do so exists within the employment relationship, eg. A fixed term employment period, well known industry practice, or by employee consent. The legislation holds that a "week of layoff" means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular rate, averaged over the previous 8 weeks (s. 62).

For example, Amanda has been working at Rodney's Café for the past three years. She works a standard work week of 35 hours (7.5 hours/5 days per week) and her schedule has been consistent for the past 8 weeks. The schedule for her next week of work was posted on Friday and her shifts have been cut from 5 shifts to 2. As a result of the reduction in the amount of shifts that Amanda is scheduled to work, the employer has reduced her income by over 50% resulting in a week of layoff.

If nothing in the employment relationship entitles an employer to reduce hours in this manner then the actions of the employer may constitute a termination of employment and that employer may be faced with liabilities resulting from length of service.

Fired:

If an employer terminates an employment relationship, essentially fires an employee, the employer may or may not be obligated to pay severance or provide notice. The most common factor in determining employer liability for severance or notice turns on whether the employee has been terminated with "just cause" or "without just cause" (more on this later). Some of the more typical examples where severance or notice is *not* an employer liability under the ESA include:

1. Employee is terminated by the employer *within* the first 3 consecutive months of employment (s. 63(1))
2. Employee quits or retires (s. 63(3))
3. Employee is terminated "with just cause" (s. 63(3)(c))
4. Employee is employed for a definite term[2] (s. 65(1)(b))
5. Employee is employed at one or more construction sites by an employer whose principal business is construction (s. 65(1)(e))
6. Employee has been offered and refused reasonable alternative employment by the employer (s. 65(1)(f))

In situations where an employee is terminated by the employer *after* 3 consecutive months of employment "without just cause", the employer becomes liable to pay an employee severance in an amount equal to one week's wages as compensation for length of service (s. 63(1)).

The employer's obligation to pay severance is discharged if the employer provides the employee with a "written" notice of termination or a combination of notice and money equal to the period of liability. The period of liability that is placed on an employer increases the longer that an employee continues in the employment relationship.

The period of employer liability for notice or severance increases as follows:

(a) after 3 consecutive months of employment an amount equal to 1 weeks wages or notice;

(b) after 12 consecutive months of employment an amount equal to 2 weeks' wages or notice;

(b) after 3 consecutive years of employment an amount equal to 3 weeks wages or notice plus one additional week for each additional year of employment to a maximum of 8 weeks' notice

[2] A "definite term" or "specific work" employee who works more than three months after completing the specific work or term becomes entitled to notice or a payment calculated from the commencement of employment. *Employment Standards in British Columbia – Annotated Legislation and Commentary,* (current to June 1, 2016).

Calculating Severance:

The amount of severance is calculated by taking the regular wage over the last eight weeks in which the employee worked regular or average hours of work, dividing it by eight, and multiplying that figure by the number of weeks the employer is obligated to pay. The number of weeks that the employer is liable to pay is shown above.

Just Cause

What constitutes just cause is a complicated area of law. When assessing whether or not an employee has been terminated with or without just cause, advocates should seek assistance from a legal supervisor wherever there is uncertainty.

As noted above an employer is not required to pay severance or provide notice to an employee who is terminated with just cause (s. 63(3(c)). The obligation of proving that an employee's actions justify termination for just cause rests with the employer. Some common examples of just cause that are used by the ESB include:

- willful misconduct;
- gross incompetence;
- theft;
- fraud;
- conflict of interest;
- serious undermining of the corporate culture;
- serious breach of employer rules and policies;
- failure to respond appropriately to corrective discipline.

Typically speaking, unless a substantial or fundamental breach of the employment relationship is committed by the employee the employer will have to demonstrate that they have appropriately applied progressive disciplinary standards and that as an employer they have reasonable standards of employment in place. A helpful analysis of just cause termination can be found in, *Re British Columbia (Director of Employment Standards)* (8 April 2003), BCEST #RD122/03 (Stevenson, Lawson, and Thornicroft). *Re Kruger* (30 December 1996), BCEST #D003/97 (Stevenson).

1. *The burden of proving that the conduct of the employee justifies dismissal is on the employer.*

2. *Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:*
   (a) a reasonable standard of performance was established and communicated to the employee;
   (b) the employee was given a sufficient period of time to meet the required standard of performance and had demonstrated that they were unwilling to do so;
   (c) the employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
   (d) the employee continued to be unwilling to meet the standard.

3. *Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the Tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.*

4. *In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.*

Where an employee is terminated without just cause the employer is required to provided notice or severance as explained above.

Path to Remedy:

For many low wage workers the most accessible path to a remedy is through the ESB. There are no direct costs associated with filing an employment standards complaint and the process is designed for non-represented complainants. Unfortunately, there are some significant negatives to pursuing a complaint strictly though the ESB. For example, the maximum period that an employee can claim for unpaid wages is 6 months. This means that if the employee is successful in getting a determination against an employer they are only able to regain wages that became *payable* in the last 6 months of employment even though their employer could have been engaged in wage theft for years.

The first step in most employment standards complaints is a self-help kit. In most cases, the employee is required to complete a self-help kit or write a letter sent to an employer setting out the substance of the complaint. The employer then has 15 days to respond to the notice. If the employer fails to provide the outstanding wages to satisfaction then the employee can complete an online complaint form. After the complaint is submitted the ESB has the discretion to either mediate, investigate, or set a determination hearing. The high majority of complaints are settled through mediation and the ESB appears to be relying more and more on mediation as the first choice of branch staff determining the outcome of complaints.

If the complaint is not settled at mediation the ESB will either move to a formal hearing called a determination hearing or investigate the employee. Investigations, like determination hearings, typically result in a decision or determination. If the employer is found to have contravened the ESA then they are subject to mandatory administrative penalties and will be required to compensate the employee for unpaid wages.

Decisions made by the ESB are subject to appeal by either the employee or the employer to the *BC Employment Standards Tribunal*. Decisions of the Tribunal are subject to appeal through Judicial Review in the Supreme Court of BC.

Decisions issued by the ESB that are unpaid by employers can be filed as a monetary order in the court and these orders are pursued by ESB staff

Helpful Links:

1. Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulations - http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm

2. Employment Standards Act - http://www.bclaws.ca/Recon/document/ID/freeside/00_96113_01#section66

3. Employment Standards Regulation - http://www.bclaws.ca/Recon/document/ID/freeside/396_95

4. BC Employment Standards Tribunal - http://www.bcest.bc.ca/

5. Employment Standards in British Columbia—Annotated Legislation and Commentary - http://pm.cle.bc.ca/clebc-pm-web/manual/index.do

6. UBC Law Students' Legal Advice Manual: Employment Law - http://www.lslap.bc.ca/uploads/2/9/3/5/29358111/9_-_employment_-_updated_2.pdf

END OF EMPLOYMENT:

CLAIMS OUTSIDE THE EMPLOYMENT STANDARDS BRANCH

The Employment Standards Branch (the "ESB") is a relative simple and quick way to recover money owed to a worker. However, there are situations where a worker is better off making their claim in a different venue. Even if advocates do not help clients with disputes outside the ESB, it is important to identify these situations so that an appropriate referral can be considered.

I. COURT CLAIMS

In certain circumstances, it may be advantageous for workers to pursue their claim in court instead of at the ESB. Claims for $25,000 or under go to Small Claims Court, claims over $25,000 go to the BC Supreme Court.

A. Contract Claims

- Workers can sue for breach of contract if their employer owes them money under an employment contract.
- Must have an actual contract. Generally contracts are in writing, but an oral contract is possible.
- Cannot just seek to enforce the *Employment Standards Act* (*ESA*) in court.
- Consider this option for workers who are out of time to claim some or all wages or other money at the ESB.
- Two year limitation period. Runs from when claim discovered, NOT the end of employment.

B. Wrongful Dismissal

- *ESA* sets minimum notice employers must give when terminating a worker without just cause.
- Can contract for more notice, but not less.
- If contract silent, "reasonable notice" is implied into contract.
- Four factors to determine what amount of notice is reasonable:
    - character of employment
    - length of employment
    - the age of the worker
    - availability of other work
- Generally consider this option for:
    - older, longer term workers
    - workers who are out of time to claim at ESB
    - workers who have unique circumstances that may prevent them from easily returning to work, such as temporary foreign workers
    - workers who may have a claim for other damages that the ESB cannot award (see below)

C. Other Damages

- Courts have the power to give workers certain damages that the ESB cannot.
- Aggravated damages (for example, mental distress from the manner of dismissal)
    - Must actually prove your loss, Courts can no longer just extend the notice period.
    - Damage cannot just be from mere fact worker was dismissed. Employers have the right to terminate workers. Generally need to show damage was caused by employer acting unfairly or in bad faith.
- Punitive Damages
    - Punishment for high-handed, malicious, arbitrary or highly reprehensible misconduct

II. HUMAN RIGHTS CLAIM

- File claim with the Human Rights Tribunal (HRT)
- Must be tied to prohibited ground of discrimination.
- Race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
- Not limited to minimum notice in ESA, or even reasonable notice for wrongful dismissal.
- Broader range of remedies than ESB. For example HRT can award money for injury to dignity.
- Deadline is generally 6 months.

III. EMPLOYMENT INSURANCE

- Generally need between 420 and 700 hours to qualify.
- Must apply right away, even if client received or is pursuing pay in lieu of notice, severance etc.
- Should apply within four weeks of dismissal.
- Money payable due to lay-off or separation from employment will delay start of EI benefits, but worker can still collect same total number of weeks of benefits. In other words, the benefits will just start later.

IV. WCB DISCRIMINATORY ACTION

- Compensation for discriminatory action taken against a worker for making a complaint or exercising a right relating to occupational health and safety.
- Discriminatory action in this context means something different than human rights. Discriminatory action includes dismissal, discipline, intimidation, not paying wages etc.
- File complaint with workers compensation board.
- Broad range of remedies available.
- Deadline 1 year unless case concerns unpaid wages, then deadline is 60 days.

The Office of the Ombudsperson

Provincial Advocates Training Conference
October 20, 2016

Dave Murray
Director, Intake and Innovation,
BC Ombudsperson

Rachel Warren
Ombudsperson Officer, Social Programs,
BC Ombudsperson

The Office of the Ombudsperson
B.C.'s Independent Voice For Fairness

Presentation Outline

- Your Questions
- About the Ombudsperson
  - Role, Mandate & Jurisdiction
  - Administrative Fairness
  - General Overview
- Our Complaint Process
  - Intake, Early Resolution, and Investigations
- Our Systemic Role
- Current Issues
- Strategic Direction
- Advice for Advocates

Role of the Ombudsperson

- Long international tradition (Sweden 1809, and earlier)
- BC Ombudsman (renamed Ombudsperson in 2009) opened in 1979
- Mandate set out in *Ombudsperson Act*
- Independent Office of the Legislature
- Provides **impartial** and **independent** oversight of public administration by **provincial** agencies to **remedy** errors and unfair treatment and promote **administrative fairness**

Administrative Fairness is...

The standard of conduct that people can expect from public authorities in a democratic society.

It includes:

- Consistent and transparent decision-making
- Even-handed and reasonable application of rules
- Properly authorised policies and practices, supportive of program goals
- Fair and respectful treatment of all people

Authority and Key Principles

- Complaint-Driven
- Confidential
- Discretion to investigate
- Broad authority to obtain information through investigation
- Mandate to settle complaints through consultation
- Authority to report to legislature and public, make findings and recommendations

The Power of the Ombudsperson

- The BC Ombudsperson has no coercive authority to order resolutions or require changes to administrative practice, policies or legislation. So, how do we make a difference?
  - Evidence-based
  - Fair and Objective
  - Consultative
  - "Moral suasion"
  - Credibility
  - Public scrutiny

Possible Outcomes

- New decision, apology or explanation
- Access to a benefit
- Apology
- Reimbursement of expenses
- Improved policy or procedure
- Better explanation of decision

Who we are

- 38 core operational staff
  - 24 Investigative Staff
    - 4 Teams: Social Programs, Regulatory Programs, Health & Local Services, Systemic/Special
      - 20 Investigators (Ombudsperson Officers)
      - 4 Managers of Investigations
  - 8 Intake & Early Resolution Staff
  - 4 Executives
  - 2 Admin Support
- Shared "corporate services"

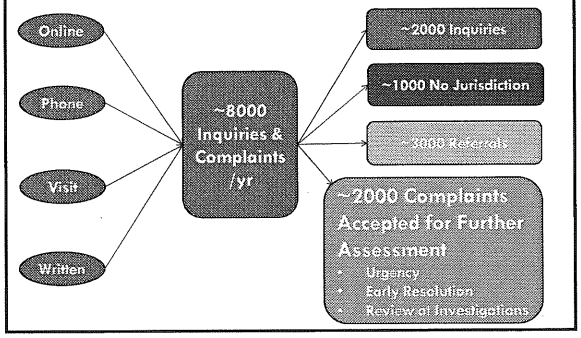
Jurisdiction of the Ombudsperson

- "Authorities" in Schedule to *Ombudsperson Act*
- Over 2,000 provincial government ministries, agencies, funded/regulated bodies, including crown corporations, local governments, health and education sectors, but excepting:
  - Legislature
  - Courts
  - Lawyers
  - Police
  - Information/Privacy
  - BC Ferries

Key Authorities/Programs

- Income & Disability Assistance (20%)
- Child Protection & Family Services (12%)
- Corrections (Youth and Adult)
- ICBC
- BC Hydro
- Health – Health Authorities, MSP, Pharmacare, HIBC
- WorkSafe BC
- BC Housing
- Residential Tenancy Branch
- Family Maintenance Enforcement
- Public Guardian and Trustee
- Revenue Services BC

Our Complaint Process – Intake

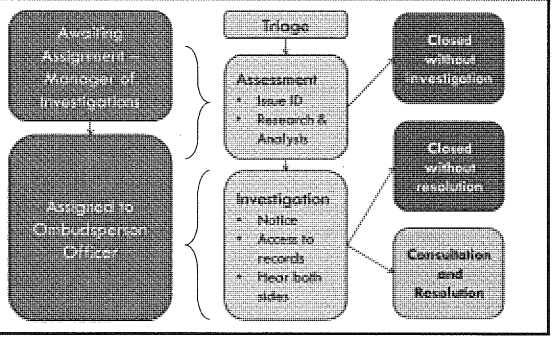


Our Complaint Process – Early Resolution

Early Resolution Officers conclude 300+ ER files each year

- Short term
- Resolution-focused
- Informal
- Less complex
- Resolved through contact or internal review

Our Complaint Process – Investigation



Case Summary

This wasn't expected

- **Gail:** Single mom, five months pregnant, receives shelter allowance which she must supplement with income from a roommate to pay rent.
- Returning from a stay in hospital, Gail discovers an eviction notice due to unpaid rent.
- Gail requests a crisis supplement from MSDSI that is denied.

The ministry determined Gail failed to pay her rent: When Gail previously opted to have her shelter allowance sent to her (rather than to her landlord), the ministry warned that no help would be offered if she failed to pay rent.

The eviction notice stated that there was an outstanding amount of $450 – the amount Gail's roommate was expected to pay.

RESULT: We investigated. Gail had paid her share of the rent. Because Gail did not expect her roommate to leave without paying her portion, Gail's need was an unexpected crisis. After considering the information our investigation provided, the ministry agreed to send Gail a cheque for $450. Gail thanked us for helping her avoid eviction.

Case Summary

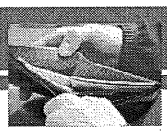
A documentation discrepancy

- **Cory:** Single dad, recently separated, now living with a low income.
- Requests MSP premium assistance and submits his personal records to HIBC.
- HIBC tells Cory his records failed to confirm eligibility and denies premium assistance citing his substantially higher net family income from the previous year.
- HIBC sends Cory's $798 of unpaid MSP premiums to debt collection.

We investigated whether the program used a reasonable procedure to determine Cory's eligibility for premium assistance. We reviewed the legislation pertaining to retroactive premium assistance and contacted the program to discuss how the legislation applied to Cory's situation as we believed he was eligible based on the documentation he provided.

RESULT: HIBC agreed to review Cory's file again and this time determined that Cory's records did in fact make him eligible for premium assistance. In addition, the program eliminated Cory's outstanding balance.

Case Summary



When a house is a home

- **Celeste:** Disability assistance recipient. Moves in the winter from her RV to a nearby rental house. Learns the RV is now an "asset" that could make her ineligible for assistance.
- Attempts to sell the rural RV in the middle of winter are not successful.
- Ministry requests Celeste provide a fair market assessment of her RV from a dealership and begins withholding assistance cheques.
- Without the cheques, Celeste can't afford the four-hour round trip to the dealership to get the assessment.
- RV remains buried in snow.

We began an investigation into the fairness of the ministry's actions and suggested Celeste took reasonable steps to sell the RV.

RESULT: The ministry agreed both to discuss options available to Celeste to preserve her eligibility and in the meantime agreed to release her cheque for the month.

Case Summary

Need rather than geography

- **Annette:** Mom of Peter, a 15-year-old boy with serious mental health needs. They lived north of Vancouver.
- A Vancouver-based program became available that Mom thought might help Peter.
- Peter's application was rejected by the HA: The program had limited resources. Peter lived outside of the region and it wasn't clear if he was a good candidate.

We investigated Peter's assessment. It had not been based on a formal evaluation process that would normally determine a youth's suitability for such a specialized program. We were concerned that Peter's exclusion from the program seemed largely, if not entirely, based on his place of residence rather than his individual need and suitability for the program. We asked the health authority to properly evaluate Peter.

RESULT: After reviewing his medical and treatment records and a recommendation from a psychiatrist, the HA assessed Peter's suitability and he was accepted into the program. The HA also agreed to consider referrals to the specialized program for all candidates living outside Vancouver.

Our Systemic Role

- On individual files
- Ombudsperson-initiated systemic investigations
  - How systemic investigations are selected and resourced
  - Balancing individual complaints with resourcing systemic investigations
  - Systemic Reports: findings, recommendations and monitoring
- Best practices approaches

Complaints lead to action

MSDSI Documentation Requirements

- Ministry may withhold cheques if ministry documentation requests are not complied with.
- Some documentation requests have been unreasonable. E.g.:
  - Unclear communication: *Which documents do you want?*
  - Requests for records that are inaccessible: *I can't access this!*
  - Insufficient time to comply: *I can't get the records in time!*
- The work of our investigators led to an updated ministry policy in 2015:
  - Before withholding a cheque, the ministry is to consider whether the original documentation request was reasonable. This includes asking whether other evidence is available to determine eligibility and if the ministry can find the information directly.
- We still receive complaints, but they are less frequent and can be resolved more quickly due to the updated policy.

Complaints lead to action

MSDSI Third Party Administration

Systemic investigations

Time Matters: An Investigation into the BC Employment and Assistance Reconsideration Process

January 2014

- As a result of this investigation, almost $350,000 in lost benefits has been paid to more than 900 persons financially affected by delayed benefit payments.
- The ministry also agreed to improve the way that it tracks reconsideration requests and compliance with time limits.
- The ministry agreed to review its application process for Persons with Disabilities designation. (still ongoing).

Systemic investigations

No Longer Your Decision: British Columbia's Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapable Adults

February 2013

- Examined the non-court process for issuing certificates of incapability that result in the Public Guardian and Trustee of British Columbia assuming legal control over an adult's financial and legal decision making.
- Latest Update:
  - Significant process from all authorities.
  - December 2014 new legislative amendments and regulations brought into force created new process for statutory adult guardianship, setting out legally required steps to ensure people are treated fairly before, during and after a certificate of incapability is issued.

Systemic investigations

Last Resort: Improving Fairness and Accountability in British Columbia's Income Assistance Program

March 2009

- Our 28 recommendations addressed four areas:
  - applying for income assistance
  - persons with persistent multiple barriers to employment (PPMB)
  - medical and other documentation requirements
  - implementation of previous commitments.
- Some results to date include:
  - A simplified IA application process (R1)
  - Enhanced information resources for clients (R2)
  - Improved policy and procedures to increase accessibility of the application process (R3)
  - Exemption from the three-week work search requirement for applicants who demonstrate that an adequate work search occurred already, prior to the application (R4) and for single parents with children under the age of three (R5).
  - Review documentation to reduce the number of forms that need to be submitted in person (R21).
- Continuing to monitor implementation. Status updates published online.

Other Systemic Reports

- Under Inspection: The Hiatus in BC Correctional Centre Inspections (2016)
- In the Public Interest: Protecting Sutdents Through Effective Oversight of Private Career Training Institutions (2015)
- Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection – BC's Riparian Areas Regulation (2014)
- Best of Care: Getting it Right for Seniors in British Columbia, Part 2 (2012)
- Investigation of PIAC Complaints about Ministry of Employment and Income Assistance (2006)

Current Issues in Complaints

BC Employment and Assistance Programs

- Application delay & immediate needs assessments
- PWD applications
- PPMB assessments
- Accessibility – telephone, online, and office access
- Spousal dependency
- Adding/removing dependents
- Employment obligations
- Third party administration
- Medical supplements & transportation

Current Issues in Complaints

Children and Family Development

- Access and supervised visits
- Safety planning and informal interventions
- Conduct of investigations
- Follow up on child protection reports
- Access to family services, supports and resources
- Foster placement and contracts

Current Issues in Complaints

- BC Housing – wait lists, priority, suitability
- BC Hydro – disconnections, payment and reconnections
- Adult guardianship and incapacity
- CLBC – youth transition to adult services
- MSP enrolment
- Pharmacare – special authority coverage
- Residential care
- Mental health treatment and detention

Strategic Direction

- New Ombudsperson (2015): Jay Chalke
- Ministry of Health Referral Investigation
- Strategic Plan 2016 – 2021
  - Accessibility and awareness
  - Increased systemic focus
  - Preventative ombudship
  - Using data and knowledge effectively

Advice to Advocates

- Credible arguments
  - Know the rules and legislation
  - Focus on facts and evidence
- Advocacy, not adversarial
  - Identify key contacts
  - Build positive relationships
  - Consider interests
- Effective communication
  - Be clear and concise
  - Control rhetoric and style
  - Limit reliance on Charter, international law arguments
- Call the Ombudsperson for help on individual files

30

Questions?

CONTACT US:
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www.bcombudsperson.ca
947 Fort Street Victoria

PO BOX 9039 STN PROV GOVT VICTORIA BC V8W 9A5

Ombudsperson

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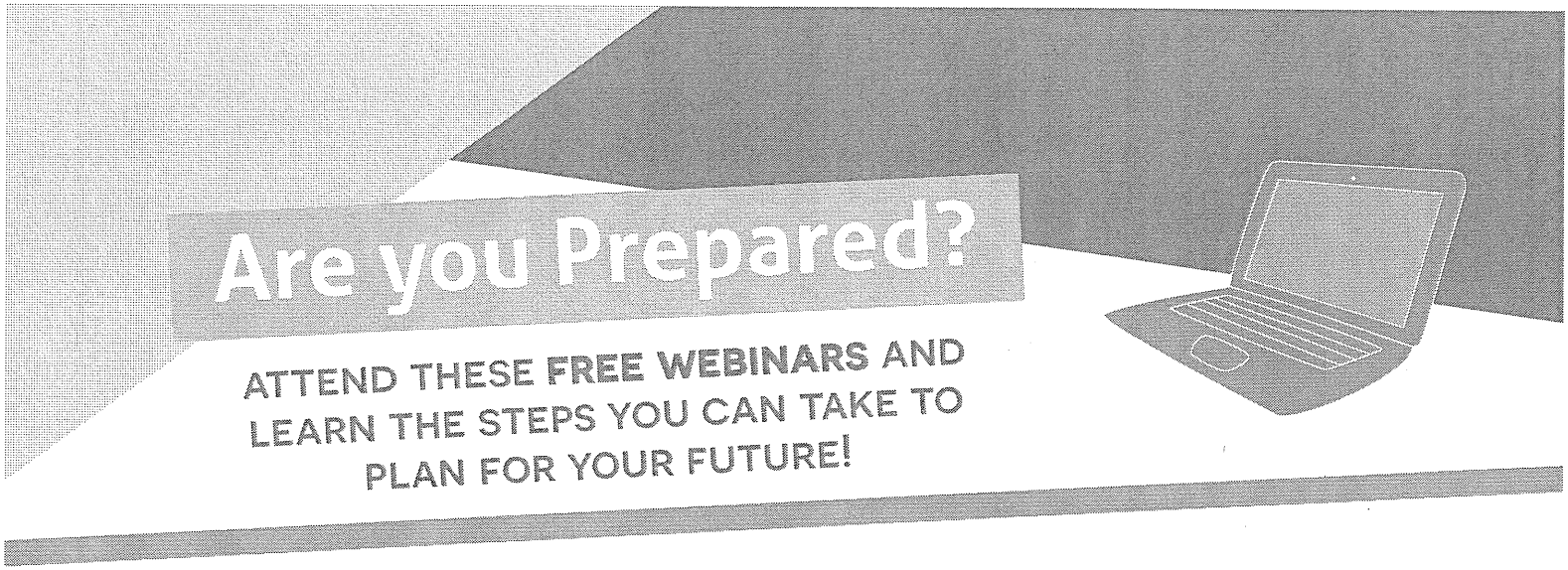

Adult Guardianship – What does it mean in 2016?

Q&A

What is adult guardianship (called Committeeship in BC)? How does it happen and who is vulnerable? What are the new ways of ending statutory guardianship according to the Adult Guardianship Act?

This webinar will discuss examples from adults who have been under guardianship. Learn about the Representation Agreement Section 7 (RA7)—the legal alternative to adult guardianship. Find out about our education project funded by the Law Foundation of BC.

Tuesday, November 22, 10:30 am to 12:00 pm

- Lillooet Public Library, call to register 250.256.7944
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Wednesday, November 23, 7:00 to 8:30 pm

- Watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Expressing Wishes — That Don't Backfire!

Q&A

Health authorities have emphasized writing down wishes in their education on advance care planning. But what happens when you are incapacitated or cannot communicate? Are these wishes helpful or harmful? Who is interpreting them?

This webinar will discuss some examples and share resources and tips for discussing wishes, values and beliefs. Why are physicians asking patients to sign the M.O.S.T. form? What is most useful and effective to those who may have to act on your behalf?

Wednesday, November 23, 1:00 to 2:30 pm

- Hazelton District Public Library, call to register 250.842.5961
- Kitimat Public Library, call to register 250.632.8985
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Thursday, November 24, 7:00 to 8:30 pm

- Watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

MORE DETAILS AT WWW.NIDUS.CA > GET HELP > PRESENTATIONS

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Nidus is a non-profit, charitable organization

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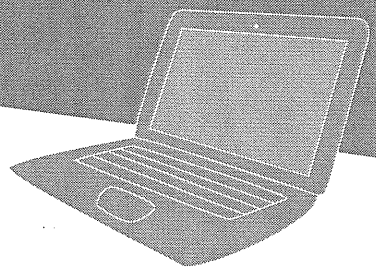

The Essentials of a Basic Plan for Your Future Q&A

What are the key legal documents in BC to plan for incapacity, end-of-life and after death? Who gets copies and where do you register your plans so they are available when needed?

This webinar gives an overview of Representation Agreements, Enduring Powers of Attorney, and Wills. Find out where to get the legal forms and how to register them after they are completed.

Wednesday, November 2, 1:00 to 2:30 pm

- Grand Forks and District Public Library, call to register 250.442.3944
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Thursday, November 3, 7:00 to 8:30 pm

- Kitimat Public Library, call to register 250.632.8985
- Trail and District Public Library, call to register 250.364.1731
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Tuesday, November 29, 10:00 am to 12:00 pm

- Watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

End-of-Life: at home? In hospital? In a care facility? Q&A

Where you die will depend on a number of factors including your health condition and the services available. What are some practical and medical issues that can influence your dying and death?

When is medical assistance in dying an option? What is palliative care and who is it for?

Wednesday, November 16, 1:00 to 2:30 pm

- Hazelton District Public Library, call to register 250.842.5961
- Lillooet Public Library, call to register 250.256.7944
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

Thursday, November 17, 7:00 to 8:30 pm

- Kitimat Public Library, call to register 250.632.8985
- Trail and District Public Library, call to register 250.364.1731
- Or watch on your own device — sign-up at www.nidus.ca > Get Help > Presentations > PPM Listings

SEE NEXT PAGE FOR MORE TOPICS