



**Legal  
Services  
Society**

British Columbia  
[www.legalaid.bc.ca](http://www.legalaid.bc.ca)



**TERRACE REGIONAL CONFERENCE**  
**Family & Child Protection Law, Aboriginal Services & Civil Law Issues**

**Waap Galts'ap Community House**  
**Northwest Community College**  
**5331 McConnell Ave., Terrace BC V8G 4X2**

**AGENDA – Thursday September 14**

Time	Session	Speaker	Facilitator
<b>8:00 – 9:00</b>	<i>Registration &amp; Breakfast</i>		
<b>8:30 – 9:00</b>	<b>Opening Ceremony &amp; Welcome</b>	➤ Sharon Bryant	Baljinder Gill
<b>9:00 – 11:00</b>	<ul style="list-style-type: none"> <li>• Update on Nisga's Child and Family programs</li> <li>• Overview of LSS intake</li> <li>• Legal Resources</li> <li>• MyLawBC</li> </ul>	➤ Agnes Taylor <i>Director of Practice Nisga'a Child and Family Services</i> ➤ Carol Schaeffer - LSS ➤ Michelle Angus - LSS ➤ Patricia Lim - LSS	Baljinder Gill
<b>11:00 – 11:15</b>	<i>Coffee Break</i>		
<b>11:15 – 12:45</b>	<b>Overview of Family Law</b>	➤ Rosanna Slipperjack-Farrell <i>Staff Lawyer</i>	Baljinder Gill
<b>12:45 – 1:30</b>	<i>Lunch</i>		
<b>1:30 – 3:00</b>	<b>Overview of Child Protection</b>	➤ Judith Kenacan <i>Managing Lawyer - Terrace office</i> ➤ Jonathan Yuen <i>Lawyer</i>	Baljinder Gill
<b>3:00 – 3:15</b>	<i>Coffee Break</i>		
<b>3:15 – 4:30</b>	<b>Domestic violence and Protection orders</b>	➤ Rosanna Slipperjack-Farrell <i>Staff Lawyer</i>	Baljinder Gill



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**AGENDA – Friday September 15**

Time	Session	Speaker	Facilitator
<b>8:00 – 9:00</b>	<i>Registration &amp; Breakfast</i>		
<b>9:00 – 10:00</b>	<b>Overview of Aboriginal Services and Gladue</b>	<ul style="list-style-type: none"><li>➤ Judith Kenacan <i>Managing Lawyer - Terrace office</i></li><li>➤ Thomas Barnett <i>Lawyer</i></li></ul>	Baljinder Gill
<b>10:00 – 11:00</b>	<b>Dealing with historical, current abuse and Trauma (IRSSS)</b>	<ul style="list-style-type: none"><li>➤ Arlene Roberts <i>Resolution Health Support Worker</i></li></ul>	Baljinder Gill
<b>11:00 – 11:15</b>	<i>Coffee Break</i>		
<b>11:15 – 12:45</b>	<b>Overview of Criminal Law</b>	<ul style="list-style-type: none"><li>➤ Raymond Phillips <i>Lawyer</i></li></ul>	Baljinder Gill
<b>12:45 – 1:30</b>	<i>Lunch</i>		
<b>1:30 – 3:00</b>	<b>Wills and Estates off and on Reserve</b>	<ul style="list-style-type: none"><li>➤ Raymond Phillips <i>Lawyer</i></li></ul>	Baljinder Gill

# Working with LSS Intake



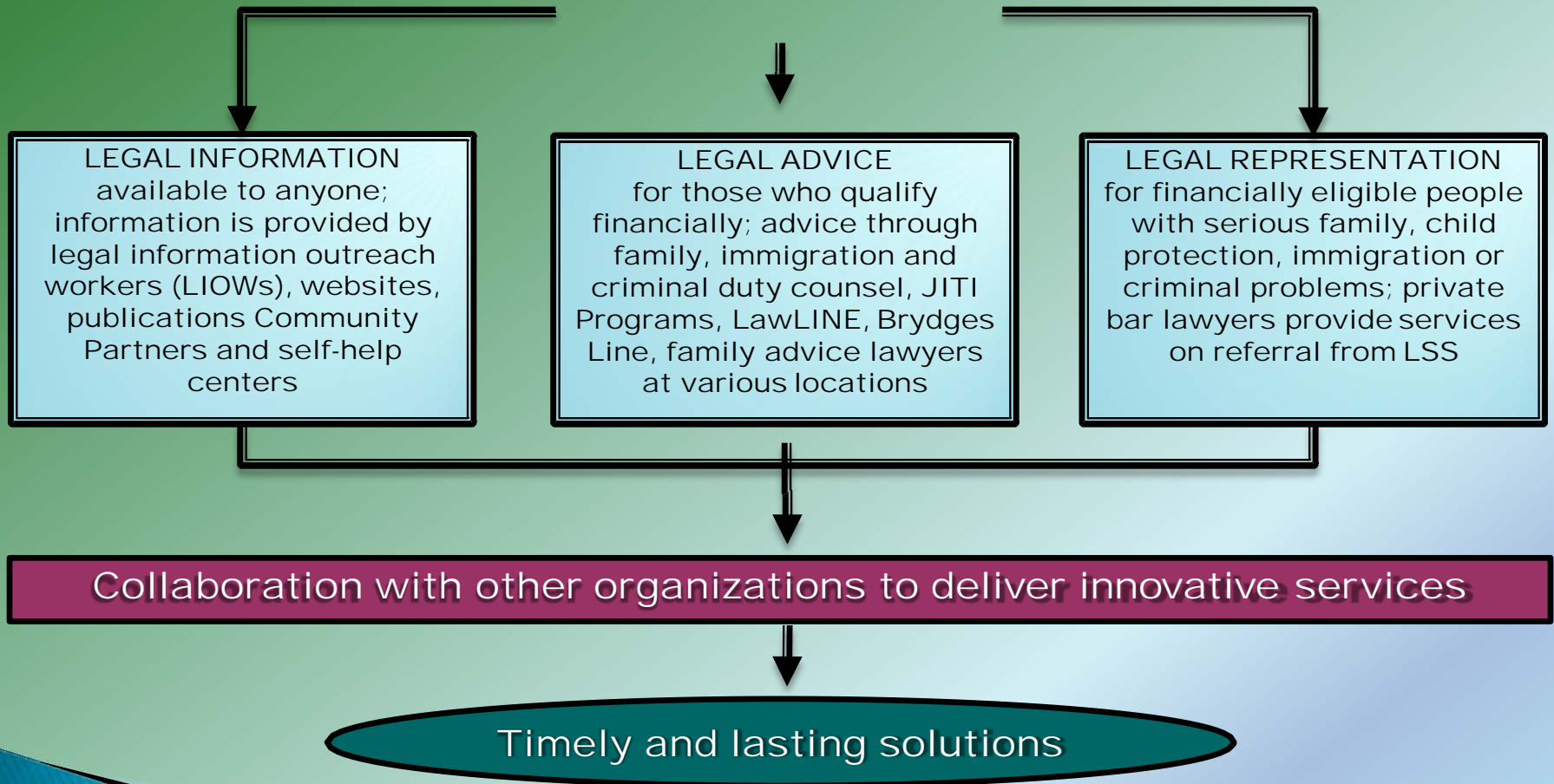
September 2017

# Our Clients



# Services Overview

## Legal Aid





# Legal Information

## Legal Information Outreach Worker



# Community Partners

Community partners are available in 26 communities around the province.

Clients can:

- get free legal information;
- call Legal Aid;
- find nearest Legal Aid office;
- get legal help online; and
- connect with people who can help.



# Upper Skeena Counselling and Legal Assistance Society

4305 Field Street  
Hazelton, BC  
VOJ 1Y0

**Phone:** 250-842-5218

**Fax:** 250-842-5987

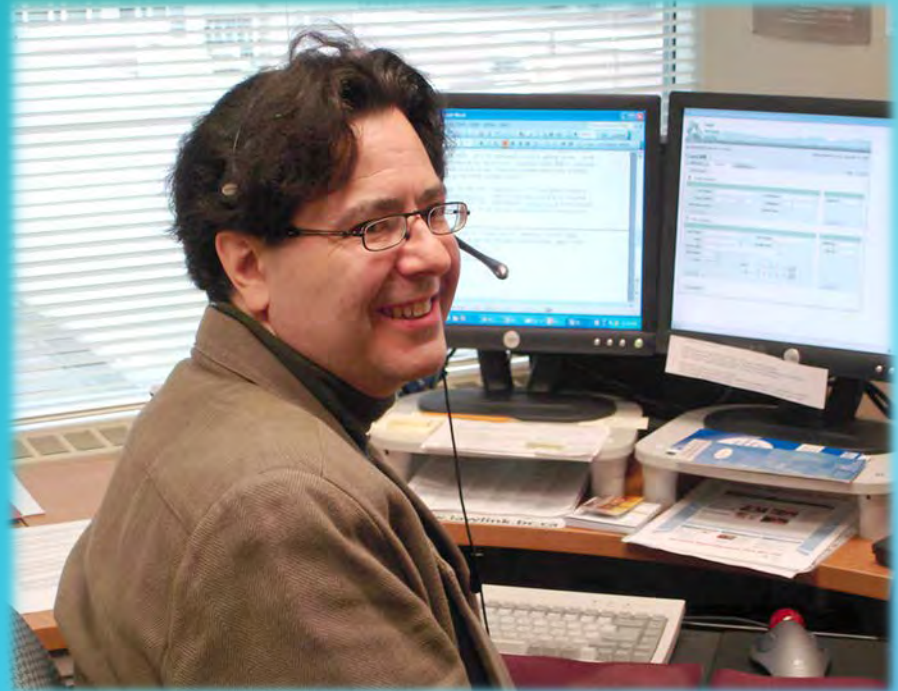




# Legal Advice



Duty Counsel



Family LawLINE

# Duty Counsel

Duty Counsel provides legal advice in the following areas of law:

- Immigration Law (if in detention)
- Family law
- Criminal



# Family LawLINE (Enhancement)

- Brief next-step telephone advice for people representing themselves
- Can set up phone appointments
- Help with preparation and review of legal documents, and coaching
- Up to 6 hours of help from the same lawyer for each current legal matter





# Applying For Legal Aid

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

Come into one of our Legal Aid offices, their contact information is available on our website

**[www.legalaid.bc.ca](http://www.legalaid.bc.ca)**



Clients applying for immigration matters can call the LSS Immigration Line at 604-601-6076 or 1-888-601-6076 (no charge)



# Legal Aid Offices

There are 35 communities in BC where someone can apply for legal aid and get legal information.



# TERRACE REGIONAL CENTRE

Monday to Friday  
8:30 to noon and  
1:00 pm to 4:30

207 – 3228 Kalum Street  
Terrace, BC  
V8G 2N1

**Phone:** 250-635-2133  
Toll free: 1-800-787-2511

**Fax:** 250-635-9085



# Prince Rupert Satellite Office

## Terrace Regional Centre

c/o Government Agent Office  
201- 3<sup>rd</sup> Avenue West  
Prince Rupert, BC  
V8G 1L2

**Phone:** 250-624-7701

**Fax:** 250-624-7421



# Who Qualifies for Legal Aid?

A client qualifies for legal aid when:

- The legal problem is covered by LSS; and
- The client meets LSS financial guidelines





# What Legal Problems Are Eligible For Coverage?

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



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



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





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





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



# **Financial Eligibility**

## ***Representation Income chart***

Household Size

Monthly Net Income

1	\$1,550
2	\$2,160
3	\$2,780
4	\$3,400
5	\$4,020
6	\$4,640
7 or more	\$5,250

Am I  
eligible?



# **Financial Eligibility**

## ***LEGAL ADVICE GUIDELINES***

Household Size

Monthly Net Income

1 - 4

\$3,400

5

\$4,030

6

\$4,670

7 or more

\$5,280



# Financial Eligibility

## *Personal Property (All case types)*

Household Size

Exemption

1

\$2,000

2

\$4,000

3

\$4,500

4

\$5,000

5

\$5,500

6 or more

\$6,000





# FINANCIAL DISCRETIONARY COVERAGE

Legal Representation – Criminal,  
Family, CFCSA, Immigration, and  
Appeal Cases

- If an applicant is over the financial eligibility guidelines, by approximately \$100 – \$200 on income or \$500 on assets, and the matter is a serious and complex case, and there is available budget, it can be sent for discretionary coverage review



# Requesting A Review of A Denial

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

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

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

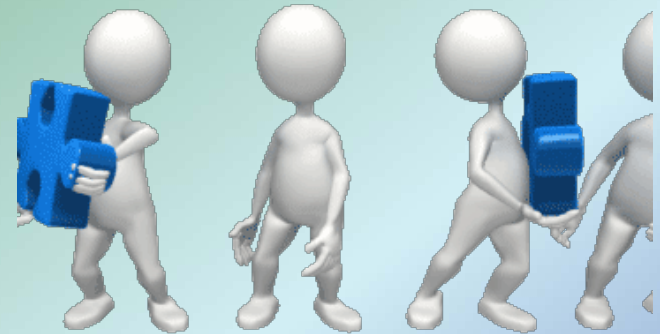
Provincial Supervisor  
Vancouver Regional Centre  
400 – 510 Burrard Street  
Vancouver, BC V6C 3A8  
Fax: 604-682-0787



# Working Together

You can help your clients:

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



**Presenter: Michelle**

**Intake Legal Assistant/Legal Information  
Outreach Worker**

Phone: 250-635-2133

Fax: 250-635-9085

E-Mail: [Michelle.Terrace@lss.bc.ca](mailto:Michelle.Terrace@lss.bc.ca)





# Indian Residential School Survivors Society IRSSS

Terrace North West Regional office

Arlene Roberts NW Resolution Health Support Worker

## France -vs- Britain

From Time Immemorial	1497 Explorer John Cabot to East Coast “New Found Land”	1534 Explorer Jacque Cartier to St. Lawrence Quebec's Gaspé Peninsula - Claims for France	1583 Explorer Humphrey Gilbert Claims Newfoundland for Britain	1608 Explorer Samuel deChamplain founds Quebec for France	1610 Explorer Henry Hudson discovers Hudson Bay for Britain	1642 Montreal founded by French missionaries
90- Ireland, and 1000 Vikings to Newfound Land	Anglican	Catholic	Anglican	Catholic	Anglican	Catholic

**Treaties Made - Treaties Broken**

*Anglican*

*Catholic*

Mid West Canada mainly Aboriginal Laws & Trading

1670 Hudson Bay Formed by a group of wealthy English merchants formed the Hudson's Bay Company and Given Title to Northern & Central Canada	1713 Treaty: France surrenders to Britain, Britain Claims Hudson Bay, Newfoundland and most of Eastern Canada	1755 British forcibly expels Acadians (French settlers) from Nova Scotia and New Brunswick	1759 British defeat French outside of Quebec City
<i>Fur Trade: Demand for fur  for Europeans</i>	French develop reserves as lodges for Military protection		

Acquire the Land - Govern the Nation! -

1763 Royal Proclamation: □ jurisdiction □ issue between French law & British administration and the Hudson Bay Company in Indian Territory:  - recognizes Aboriginal Title & authority - but continues to develop separate lands □ reserves Crown □ is British Sovereignty	1774 Quebec Act gives French Canadians Political rights and religious freedom under British rule	1778 Captain Cook explores West Coast and BC claimed for British Sovereignty	1807 Thompson and Simon Fraser travel to BC	1812 United States -vs- Britain: British & French Canadians and Aboriginals all become allies to fight against U.S.
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Shared Lands: Acquire Aboriginal Land - ONLY thru Treaty (1850's Treaties were established east of the Rocky Mountains)

## Stages of Displacement (for French & Aboriginals): Policy goals:

1. Protection
2. Civilization
3. Assimilation

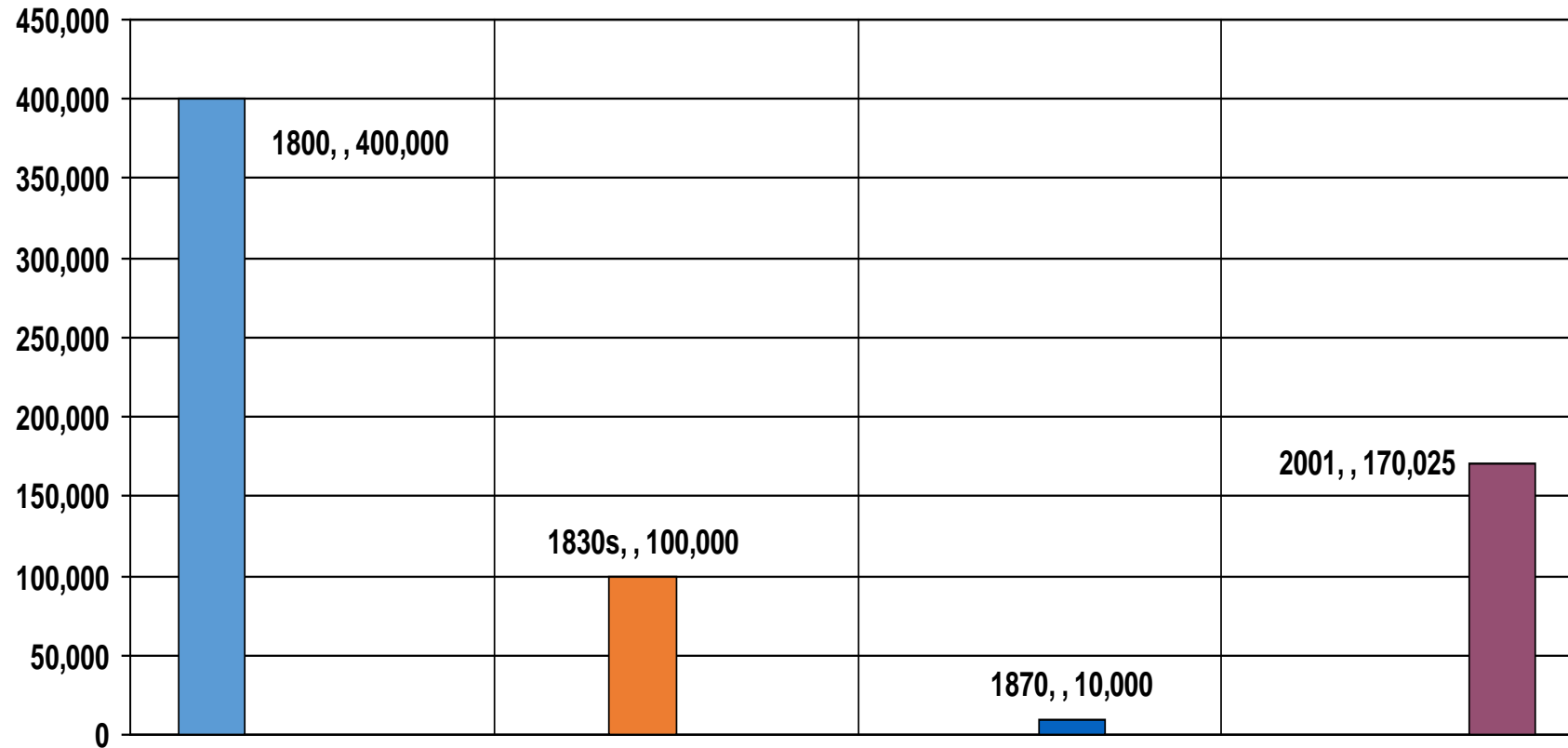


<p>1840</p> <p>Act of Union unites (west) Ontario and Quebec (east) into the Province of Canada with a New Parliament</p>	<p>1844</p> <p>Governor General Bagot Commission Report:</p> <ul style="list-style-type: none"> <li>-Squatter</li> <li>-Poor records of sales &amp; leases</li> <li>-inept official administration of Band funds</li> <li>-subsistence food depleting</li> <li>- Indians suffering from alcohol abuse.</li> </ul>	<p>1849</p> <p>British Colony established on Vancouver Island. Hudson Bay Company given (crown) rights to Trade</p>	<p>1850-1854</p> <p>Chief Factor Douglas purchases Aboriginal land:</p> <p>14 treaties near Victoria, Colony ran out of money,</p> <p>Small reserves created for protection for Aboriginals ----</p> <ul style="list-style-type: none"> <li>- acquire the land</li> </ul> <p>Douglas retires:</p> <p>Douglas information / original agreements reversed stating:</p> <p>title never been acknowledged, no - compensation allowed.</p>	<p>1857</p> <p>Gradual Civilization Act: funds to:</p> <ul style="list-style-type: none"> <li>*Civilize Aboriginals</li> <li>*teach english</li> <li>*hopefully eliminate native culture</li> <li>*Government funding for Residential Schools established.</li> </ul>
	<p>Gold found (Yale)</p> <p>Hudson Bay Co., established</p>			<p>*50 acres &amp; no status, have a home but no land.,</p> <p>*DIA Guardians</p> <p>*Band: census refused to fund schools</p> <p>*White Women status, non-white no status</p>

1858 Fraser River Gold Rush - Land for the Taking	1861 1863	1862	<b>1867 Constitution Act Indian Act passed</b>
	Mission Residential School 1 <sup>st</sup> to open 1861 - the last to close: 1984 Catholic  Coqualeetza (Sardis) 1861-1866 Methodist (reopens)	Small Pox epidemics kill 1/3 Aboriginal population in BC	*Status Indians legal wards  *Treaties - Indian rights surrendered.,  *Discriminated: status  *Education  *Reserves could not federally vote  *Money / Land supervised by federally appointed Indian Agent  *1869: Band Council Election first introduced.,

**Churches Humanitarian Societies: racist / superior**  
**130 residential schools**  
**over 160,000 attend**  
**5 generations**

## 1862 (145 years ago) – Small Pox: 2 epidemics



- Haida's 80% Wet'suwet'en & Gitksan 30% die.
- Spreads from Bella Coola to Nagwuntl'oo (just west of Williams Lake).
- 1/3 of the Aboriginal Population dies

- **1863: “The Mission” School opens**
- It’s the first to open
- And the last to close
- It steadily remained open for 123 years
- Catholic missionaries
- Believe that it was their
- Duty to save the natives
- From bad influences of
- “Gold Rush”



Residence at St. Mary's



# 1868: Gradual Civilization Act final *1857*

- 3 major function:
- Reduced “Reserve” land which do not *reflect* traditional tribal territories
- Creation of “Band Councils” which replace & undermine traditional tribal government authority & tribal system.
- Defining who is an “Indian” under the Indian Act (*status / non-status*)
- “Civilize – teach English; eliminate native culture; funds for residential schools; 50 acres; DIA Guardians; Women status / non

# BC Residential Schools: BC had the most residential schools because it had the most resources that government wanted

- Mission: Catholic: **123 years** (gold rush)
- Coqualeetza / Sardis: Methodist
- Metlakatla (Crosby School): **35 years**
- Alert Bay: **17 years**
- Alert Bay / St. Michaels: **84 years**
- Kamloops / Kuper Island: **85 years**
- Williams Lake: **91 years**
- Port Simpson: **30+ years**
- Cranbrook: **72 years** (mining)
- Squamish: **61 years**
- Yale: **29+ years**
- Tefino: **83 years**
- Lytton: **80 years**
- Ahousaht: 1903
- Alberni: 1909
- Lejac: **66+ years**
- Ft. St. James: 15+
- Fraser Lake 15+
- Sechelt: **63 years**
- Port Alberni: **63 years**
- Kitimat: 1920 +
- Alert Bay **46+ years** (closed 1975)
- Lower Post: **25+ years** (closed 1975)
- 1984: Mission School closes







**1755 – Indian Department** created as branch of British military to establish and maintain relations with Indians.

1820 – This decade sees Anglican and Methodist missionary schools established in Upper Canada and Red River settlement.

**1842 – Governor General** Sir Charles Bagot appoints Commission to report on “the Affairs of the Indians in Canada.”

**1844 – Bagot Commission finds reserve communities in a “half-civilized state”; recommends assimilationist policy,** including establishment of boarding schools distant from child’s community, to provide training in manual labour and agriculture; portends major shift away from Royal Proclamation of 1763 policy that Indians were autonomous entities under Crown protection.

1847 – Dr. Adolphus Egerton Ryerson, Methodist minister and educational reformer, commissioned by Assistant Superintendent General of Indian Affairs to study Native education, supports Bagot approach (as does Governor General Lord Elgin); proposes model on which Indian Residential School system was built.

1856 – “Any hope of raising the Indians ... to the ... level of their white neighbours, is yet a ... distant spark”: Governor General Sir Edmund Head’s Commission “to Investigate Indian Affairs in Canada.”

**1857 – Gradual Civilization Act passed;** males “sufficiently advanced in the elementary branches of education” could be enfranchised (they would no longer be “Indians,” and could vote).

1861 – St. Mary’s Mission Indian Residential School, Mission, and Presbyterian Coqualeetza Indian Residential School, Chilliwack, first residential schools in B.C., established.

<http://www.thecanadianencyclopedia.ca/en/article/residential-schools/>

**Residential schools were government-sponsored religious schools established to assimilate Indigenous children into Euro-Canadian culture.**

Although the first residential facilities were established in New France, the term usually refers to the custodial schools established after 1880.

**Originally conceived by Christian churches and the Canadian government** as an attempt to both educate and convert Indigenous youth and to integrate them into Canadian society, residential schools disrupted lives and communities, causing long-term problems among Indigenous peoples.

Since the last residential school closed in 1996, former students have pressed for recognition and restitution, resulting in the Indian Residential Schools Settlement Agreement in 2007 and

a formal public apology by Prime Minister Stephen Harper in 2008.

In total, an estimated 160,000+ First Nation, Inuit, and Métis children attended residential schools.

***(not in the statistics: industrial schools, boarding schools, days schools, TB institutions)***

# TRC: Calls to Action

- **1996: Royal Commission on Aboriginal Peoples** final report: 4,000 page document makes 440 recommendations calling for changes in the relationship between aboriginals, non-aboriginals and the government.
- **2005: Supreme Court of Canada rules** that the Federal government cannot be held fully liable: 70% / 30% (churches: United, Anglican, Presbyterian, Methodist, Catholic)
- **2007: Indian Residential Schools Settlement Agreement** between: Legal counsel for: former students, Churches, Assembly of First Nations, Aboriginal organizations, and the Government of Canada
  - *(prior to this it was COURT BASED)*
  - Common Experience Payment
  - Independent Assessment Process
- **2008: TRC Commissioners/Adjudicators** panel: examine “Claims”



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## How well do you know Legal Services/Legal Aid

Q1: How many times are pages viewed in the Legal Services family law website in the past year?

- a. 5,378,480
- b. 3,921,257
- c. 925,045

Q2: How many copies of Legal Services publications were ordered last year?

- a. 119,020
- b. 142,532
- c. 259,999

Q3: How many clients are represented by a lawyer through legal aid in a year?

- a. 5,000
- b. 10,000
- c. 26,000

Q4: How many people are helped each year through duty counsel services?

- a. 2400
- b. 14,000
- c. 140,000

Q5: True or False: There is only one Legal Aid Office in BC.

☐ True ☐ False

Q6: True or False: Legal Services provides interpreters to all clients.

☐ True ☐ False

Q7: True or False: All Legal Services publications can be ordered free of charge.

☐ True ☐ False

Q8: True or False: I can only get a legal aid lawyer if I have committed a crime.

☐ True ☐ False

Q9: True or False: Legal Services provides legal aid representation, legal advice and legal information.

☐ True ☐ False



**Answers:**

**Q1: a 131,305**

**Q2: b 142,532**

**Q3: c 26,000**

**Q4: c 140,000**

**Q5: False. There are 35 locations throughout BC**

**Q6: True. Interpreters are available whether you walk in or call legal aid.**

**Q7: True. All LSS publications are free**

**Q8: False. Legal Aid will cover certain criminal charges, difficult Family Law cases, Child Protection cases, Immigration law (refugees and deportation)**

**Q9: True.**



# *Family Law Act, S.B.C. 2011 – Overview (2017)*



Presented By: Rosanna Slipperjack-Farrell  
Original Presentation by Todd R. Bell  
Partner: Schuman Daltrop Basran & Robin  
Adjunct Prof.: Allard School of Law, UBC

# Still Early Days....

- The *Family Law Act*, S.B.C. 2011 (the “FLA”) came into force on March 18, 2013 and replacing the *Family Relations Act*, R.S.B.C. 1996 (the “FRA”) and which had been in force for approximately 30 years.
- The FLA was proposed to answer shortcomings under the FRA, across almost all areas not under federal jurisdiction (child support, for example).

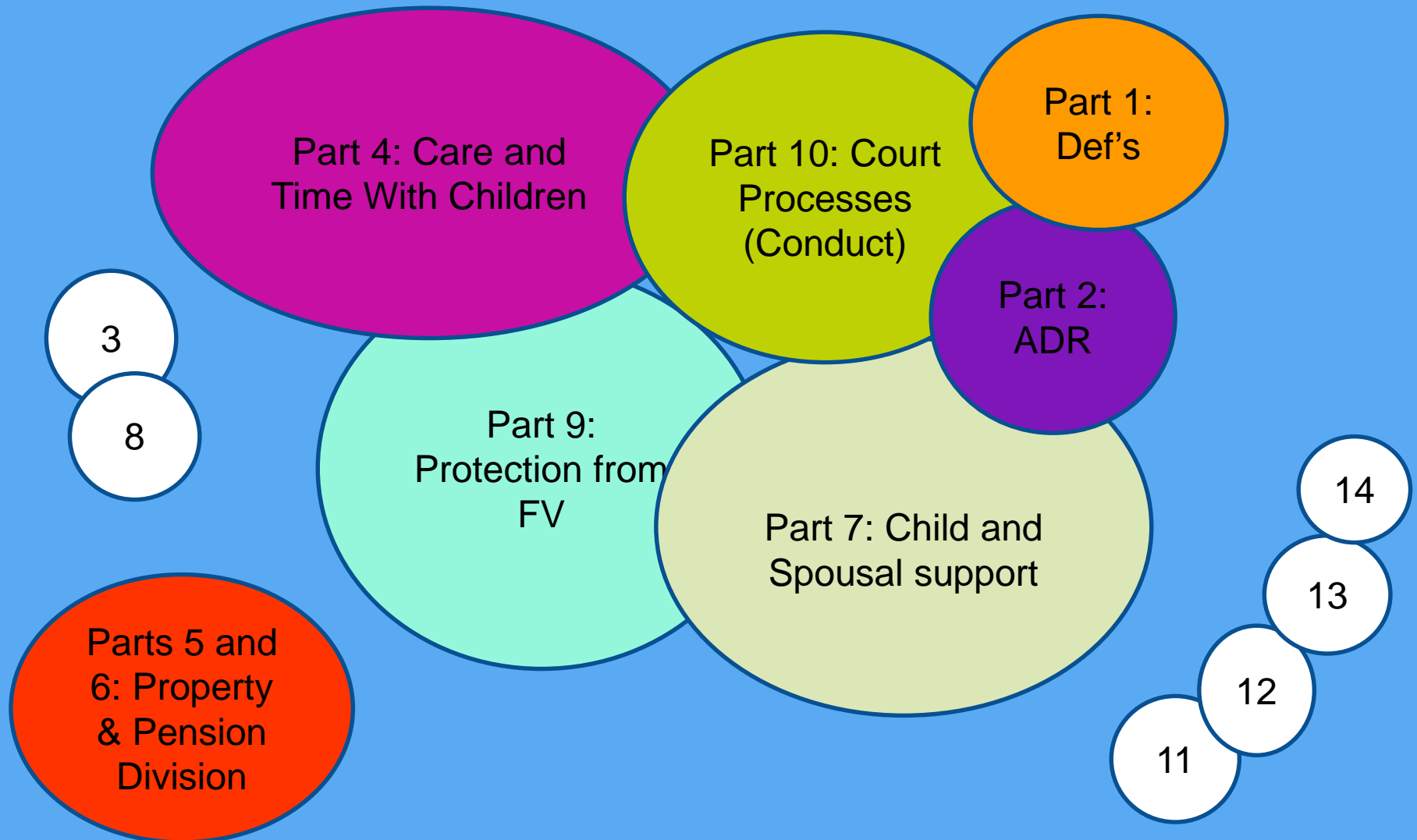
# The Major Changes:

- Focus on Family Violence (“FV”)
- Laser-Focus on the Best Interests Test
- Alternate Dispute Resolution (“ADR”)
- Guardianship by Default
- Determination of Parentage
- Precision Tools for Conduct Management
- Property Division;

# The Written Structure

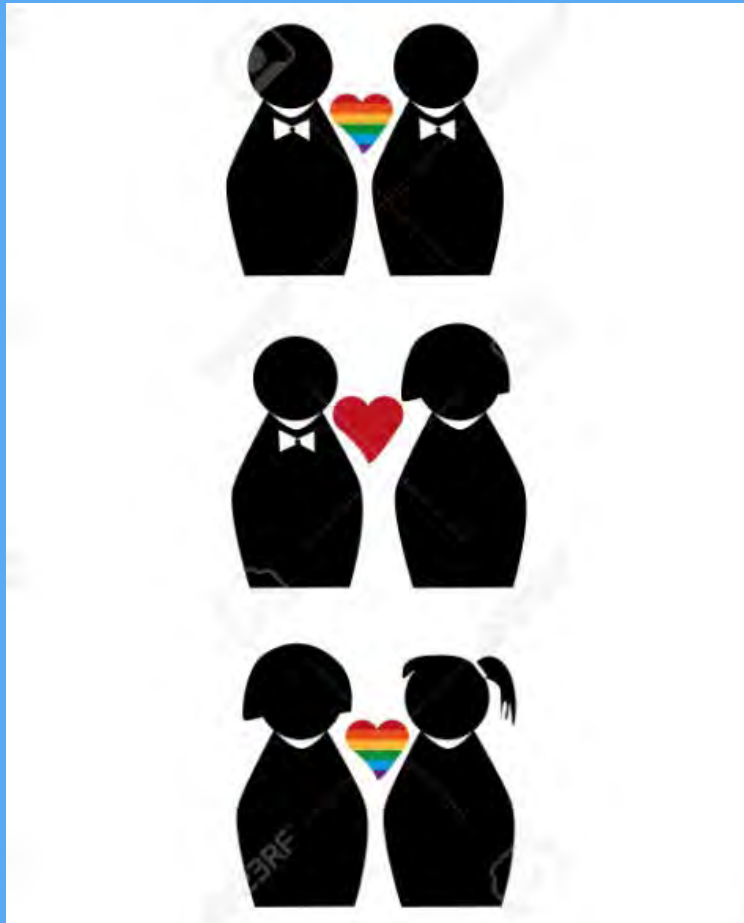
Part 1: Interpretation	Part 8: Children's Property
Part 2: Resolution of Family Disputes	Part 9: Protection from FV
Part 3: Parentage	Part 10: Court Processes
Part 4: Care/Time with Children	Part 11: Search Officers
Part 5: Property Division	Part 12: Regulations
Part 6: Pension Division	Part 13: Transitional Provisions
Part 7: Child/Spousal Support	Part 14: Repeals / Boring Tech. Sections

# The Real-Life Structure





# Part 1: Def's. of Spouse and FV



# Part 1: Interpretation (Spouse)

- Under the FRA, non-married spouses had no recourse to the property division regime under Part 5 of that statute.
- Common-law parties were relegated to using trust principles and the law of equity to resolve property disputes.
- Now, all persons who are married, or have lived in a marriage-like relationship for more than two years qualify (s. 3) under the FLA including for property division purposes (½ cheered in 2013; ½ wept).

# Part 1: Family Violence

- Arguably, the biggest change under the FLA. Family Violence was defined in s. 1 of the FLA and the focus on FV is then woven throughout the statute, including property division.

**"family violence"** includes

- (a) **physical abuse** of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) **sexual abuse** of a family member,

# FV, con'd

- (c) **attempts** to physically or sexually abuse a family member,
- (d) **psychological or emotional abuse** of a family member, including
  - (i) **intimidation, harassment, coercion or threats**, including threats respecting other persons, pets or property,
  - (ii) unreasonable restrictions on, or prevention of, a family member's **financial or personal autonomy**,
  - (iii) **stalking or following** of the family member, and
  - (iv) intentional **damage to property**, and
- (e) in the case of a child, direct or indirect exposure to family violence;

# Mandatory Consideration (s. 38)

**38** For the purposes of section 37 (2) (g) and (h) [best interests of child], a court **must** consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.



# The Case Law: Broadly Defining FV:

- The Court should take a “broad view of what constitutes family violence”: B.(M.W.) v. B.(A.R.), 2013 BCSC 885
- Demeaning remarks, blaming parent to a child qualify as family violence: L.(D.N.) v. S.(C.N.), 2014 BCSC 1417
- Derogatory outbursts, demeaning comments qualify: L.(D.N.) v. S.(C.N.), 2013 BCSC 809

# The Case Law: Broadly Defining FV:

- Litigation abuse, failure to cooperate qualify, *B.(M.W.) v. B.(A.R.)*, 2013 BCSC 885
- Behaviour causing financial hardship and stress, threats to cause financial hardship qualify, *Hokhold v. Gerbrandt*, 2014 BCSC 1875
- Deliberate failure to pay child support intended to inflict emotional harm or control behaviour qualifies *P.(J.C.) v. B.(J.)*, 2013 BCPC 297

## Part 2: Resolution of Family Disputes



# Part 2: Resolution of Family Disputes

- Division 1: Resolution Out of Court Preferred:
  - S. 4 operates as a general nod of approval for out of court resolutions, S. 5 shifts the onus on disclosure (see: *Healey*, 2015 BCSC 2196) and Ss. 8 and 9 put positive obligations on counsel to promote out of court resolutions and processes.
- Division 2: Family Justice Counselors(“FJC”):
  - Codifies the role of FJC’s as a key resource in family law.

# Part 2: Resolution of Family Disputes

- Division 3: Parenting Coordinators (“PC’s”)
  - Codifies the practice of using PC’s
  - Essentially a parenting referee with arbitration powers;
  - Section 17 sets out what the PC can do (building consensus and making determinations);
  - Section 18 sets out the jurisdiction of PC’s;
  - Section 19 leaves review powers to the Court.
  - Despite some reservations from the BCCA (*Fleetwood*), the Courts have been overwhelmingly positive about this development and cases where an appointment was not made (if contested) are rare and generally turn on cost.

# Part 3 – Parentage





# Part 3 – Parentage

- Essentially, Part 3 provides governance for determining parentage in IVF and surrogacy arrangements.
- Codified what had been an area of case law which developed out of necessity using the *parens patriae* and inherent jurisdictions of the Court.
- For a review of operation of the Part, see twin cases (no pun intended) rendered by Fitzpatrick, J: *Family Law Act (Re)*, 2016 BCSC 598 and *Family Law Act (Re)*, 2016 BCSC 22.

# Part 4- Care and Time With Children

Between the *Divorce Act* (“DA”), the FRA and the FLA, the language has become somewhat tangled:

## The DA

- Custody (guar. built in)
- Access
- Primary Residence.

## The FLA:

- Guardianship
- Parenting Time
  - Parenting Responsibilities
- Contact (non-G’s)

## The FRA:

- Guardianship
- Custody

# Part 4: Available Remedies

- Guardianship orders if not already guardians by operation of the FLA;
- Orders for “Parenting Arrangements” (s. 40):
  - Parenting Time (s. 42);
  - Parenting Responsibilities (s. 41);
- Orders for “Contact” (s. 59)
- Governance of Relocation (ss. 65 – 71)

# Governing All of It:

## The Test of All Tests: Best Interests

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;

# Best Interests, con'd

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

# Auto-Guardianship Under the FLA

**39** (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.

\* \* \*

(3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:

\* \* \*

(c) the parent regularly cares for the child.

(4) If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.

- Note: Under s. 51, a person can apply for guardianship.



# Parenting Arrangements (s. 40)

- Sets out that parenting time and parenting responsibilities may be shared by guardians : 40(1);
- Each parent may exercise parenting responsibilities but must consult: 40(2)
- There is no presumption in favour of equal parenting time, equal parenting responsibilities, or that decisions must be made separately or together: 40(4)

# Parenting Responsibilities: S. 41

- Refers to the suite of day-to-day jobs that parents take on in raising a child, including decisions about academics, medical, the child's associations, residence, extra-curricular activities, passports, giving/refusing/withdrawing consent, starting court actions on behalf of a child, etc.

# Parenting Time (s. 42)

- Parenting time refers to, well, parenting time. The section is literally three lines long.



+



= Section 42 (*super complex section*)

# Contact (s. 59)

- Reserved for non-guardians only;
- Generally, would be the section under which a grandparent, aunt or other family member would seek an order for time with a child;
- Does not confer any right to make decisions about the child or exercise any parenting responsibilities;
- In theory, available to a parent who does not have guardianship, but begs the question as to why that person isn't applying for guardianship / PR / PT

# Compliance (New Under the FLA)

- Under s. 61, if a parent denies the other parenting time, the Court can do multiple things including ordering ADR, make-up time, order a person to attend counselling, etc.
- Under s. 62, the denial is not found to be blameworthy if, for example, there was a reasonable basis to expect FV or the other parent was impaired.
- Under s. 63, if a person fails to take the parenting time to which they are entitled, the other parent can be awarded compensation for child care costs.

# Summary

## Parents

Guardianship  
(s. 39)  
Automatic



Parenting  
Arrangements  
s. 40



Parenting  
Responsibilities  
s. 41



Parenting  
Time  
s. 42

Aunt Jean  
The Ex-Boyfriend  
Gramma Bev



Contact  
s. 59 (no  
legal rights)



# Property



# Property Division: Part 5

- **Major** departure from the test under the FRA.
- Under the FRA, we had what was called a “community property regime”. The basic idea was that everything in sight, provided that it was “ordinarily used for a family purpose” (which included passive uses such as retirement planning) and that the claiming spouse had “contributed to” (including the provision of child care, thus enabling the breadwinner to earn income and acquire property), was open season.
- After that, the party that didn’t want to share was responsible for arguing why they ought to get a large percentage of the asset (reapportionment). The test was whether it would be “unfair” to not divide unequally.

# The New Model: Exclusions

- Under the FLA, there are classes of excluded property, and which include the property brought into the relationship by one party, inheritances received during the marriage or marriage-like relationship, and gifts received from third parties.
- All else, including the increase in value of otherwise excluded property, is divisible.
- Contribution and use are largely irrelevant.
- Now, the person seeking an unequal division of family property (reapportionment) must demonstrate that it would be “significantly unfair” not to do so.

# The Sections:

- S. 81: Parties have equal entitlement to “family property” on separation.
- S. 84: Defines family property (houses, shares, pensions, increase in value of excluded property, RRSP’s etc.).
- S. 85: Defines excluded property (pre-relationship property, inheritances, gifts from third parties).
- S. 95: Unequal division allowed in certain enumerated circumstances, but only if “significantly unfair” to divide equally.

# Operation in the Real World

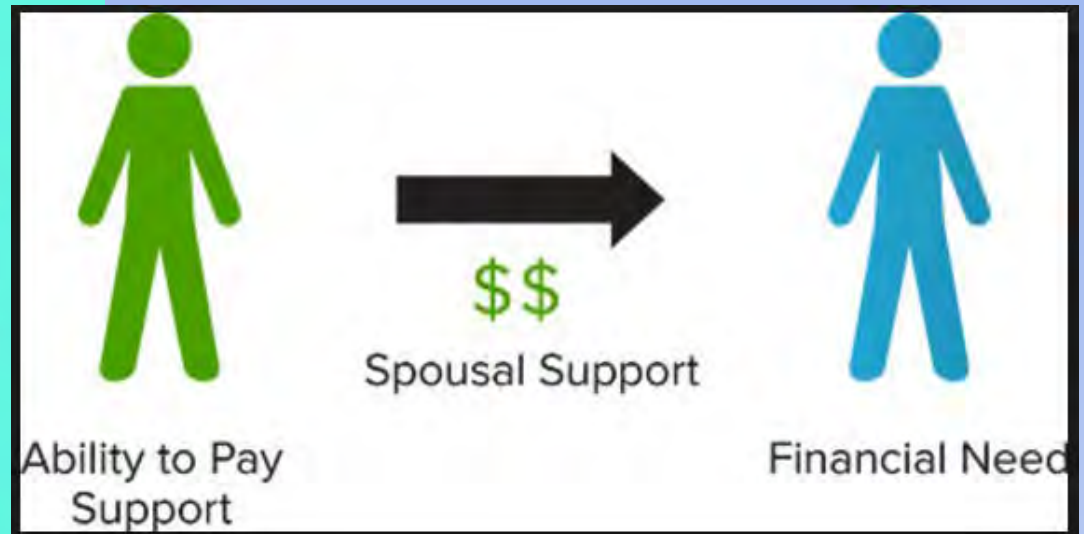
	Jane	Jill
DOM	\$100K Equity in Her House	
	10 Years Paying Into Her Pension	\$65K RRSP's
	Scooter (worth \$5K)	\$2,500 in Savings
DOS (10 years later)	\$175K in Equity in House	
	Now, 20 Years Paying into Her Pension	\$125K RRSP's
	Scooter (Now Vintage worth \$10K)	\$15,000 in Savings
They Share:	\$75K Increase in the House	\$60K Increase in the RRSP's
	The 10 Years of the Pension	\$12,500 Increase in Savings
	The 5K Increase in the Scooter	

# Property Protections

- S. 90: **Exclusive Occupancy** (tied into FV): gives the right of one person to stay in the family home to the exclusion of the other where it would be “impossible” for them to remain under the same roof. Often cited when the separation tension is affecting the children or FV is in play.
- S. 91: **Financial Restraining Order** against disposal or transfer of property. Preserves the property, especially in cases where there is an information imbalance between the parties.



# Child and Spousal Support



# Child Support

- Child support is comprised of two components: table support and the sharing of special/extraordinary expenses.
- Special expenses (s. 7 expenses) are generally academic, medical/dental or childcare costs (if needed to facilitate employment).
- Child support is available in British Columbia through the combined application the *Child Support Guidelines* (Federal) and either the FLA or the *Divorce Act*.
- The *Child Support Guidelines* are used to determine the appropriate incomes to be used to calculate support
- The FLA and DA are then used, once the amount of support is determined, to obtain agreements or orders for payment.

# The Real World:

Step 1:

Determine Income Under CSG,  
ss. 15 – 20



Step 2:

Determine Monthly Amount Using  
the Tables



Step 3:

Determine Special Expenses to  
be Shared

Seek Order Under  
FLA or DA

FLA

OR

DA

---

**= Child Support**

# Step 1: Determining Income

- **Section 16:** Start with Line 150 (total income) from T1 general (personal tax return).
- **Section 17:** If the person's income fluctuates wildly, consider using a three-year average.
- **Section 18:** If the person keeps money in their personal corporation for no reason other than tax planning, pull that money out for support purposes.
- **Section 19:** Impute additional income if the person is aggressive with writing off expenses, is unemployed or underemployed (with no good reason), the payor is exempt from paying federal or prov. tax, etc.
- **NOTE:** Section 150 the FLA says you must use the CSG.

# Step 2: The Tables

British Columbia / Colombie-Britannique

Federal Child Support Amounts: Simplified Tables

Montants fédéraux de pensions alimentaires pour enfants: Tables simplifiées

Income/ Revenu (\$)	Monthly Award/ Païement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Païement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Païement mensuel (\$)				Income/ Revenu (\$)	Monthly Award/ Païement mensuel (\$)			
	No. of Children/ N <sup>bre</sup> d'enfants					No. of Children/ N <sup>bre</sup> d'enfants					No. of Children/ N <sup>bre</sup> d'enfants					No. of Children/ N <sup>bre</sup> d'enfants			
	1	2	3	4		1	2	3	4		1	2	3	4		1	2	3	4
10820	5	16	17	19	16200	119	263	283	304	21600	187	345	472	533	27000	239	420	571	694
10900	6	20	22	24	16300	120	266	287	308	21700	188	346	474	537	27100	240	421	573	696
11000	24	71	76	82	16400	122	269	291	312	21800	189	348	476	541	27200	241	422	574	698
11100	26	76	81	88	16500	124	272	294	315	21900	189	349	477	546	27300	242	424	576	700
11200	28	80	86	93	16600	126	275	298	319	22000	190	350	479	550	27400	243	425	577	702
11300	29	85	91	99	16700	128	278	302	323	22100	191	351	481	554	27500	244	426	579	704
11400	31	90	96	104	16800	129	280	305	327	22200	192	353	483	559	27600	245	427	580	706
11500	33	95	101	110	16900	131	283	309	331	22300	193	354	484	563	27700	246	428	582	708
11600	35	99	107	115	17000	133	286	313	335	22400	193	355	486	567	27800	247	430	583	710
11700	37	104	112	121	17100	135	287	317	339	22500	194	357	488	572	27900	248	431	585	712
11800	39	109	117	126	17200	137	288	320	343	22600	195	358	490	576	28000	249	432	586	714
11900	40	114	122	132	17300	139	289	324	347	22700	196	360	492	581	28100	250	434	588	716
12000	42	118	127	137	17400	140	290	327	351	22800	197	361	494	585	28200	251	435	589	718
12100	44	122	131	141	17500	142	290	331	354	22900	198	362	495	589	28300	252	437	591	720
12200	46	125	135	145	17600	144	291	335	358	23000	198	364	497	594	28400	253	438	592	722
12300	47	129	139	149	17700	146	292	338	362	23100	199	365	499	597	28500	254	440	594	724
12400	49	132	142	153	17800	148	293	342	366	23200	200	367	501	601	28600	255	441	595	726
12500	51	136	146	157	17900	150	294	346	370	23300	201	368	502	604	28700	256	443	597	728
12600	53	139	150	161	18000	152	295	349	374	23400	201	369	504	607	28800	257	445	598	730
12700	55	143	154	165	18100	153	296	353	378	23500	202	371	506	611	28900	258	446	600	732
12800	56	147	158	169	18200	155	298	357	383	23600	203	372	508	614	29000	259	448	602	734
12900	58	150	162	173	18300	156	299	362	387	23700	204	373	510	617	29100	260	450	604	736
13000	60	154	166	177	18400	158	300	366	392	23800	205	375	512	621	29200	261	451	605	738
13100	62	158	170	181	18500	159	302	370	396	23900	206	376	513	624	29300	262	453	607	740
13200	64	161	173	185	18600	161	303	374	401	24000	206	377	515	627	29400	263	454	609	742



# Step 3: Determine Special Expenses

- Classics:
  - Daycare, preschool or after-school care which is needed to facilitate employment (not going out for lunch with your friends);
  - Medical, dental, ortho, optical, drugs, net of coverage;
  - Academic costs.
- These can be shared between the parties (are not covered by child support) either in proportion to the parties' incomes or some other fashion.
- Based on family resources.

# Who Pays Who?

- If one parent has the children in their care **>60%** of the time, the other parent pays straight table support on their income regardless of the recipient's income and then they share special expenses in some fashion.
- If the parties share the children between **40/60 and 50/50** there is a set-off (CSG S. 9). Thus if parent A would pay \$1,000 to the other, and parent B would in turn pay \$500, the net payment from A to B is \$500.
- There are several nuanced issues buried in this analysis, including tax ramifications. The client needs to dig deeper than this presentation can provide.



# Make It Happen: S. 149 FLA

**149** (1) Subject to subsection (3), on application by a person referred to in subsection (2), a court may make an order requiring a child's parent or guardian to pay child support to a designated person.

(2) An application may be made by

(a) a child's parent or guardian,

(b) the child or a person acting on behalf of the child, or

\* \* \*

(3) An order under subsection (1) may only be made against a stepparent if

(a) the stepparent has a duty to provide for the child under section 147 (4) [duty to provide support for child], and

(b) the stepparent and the child's parent are separated.

(4) The making of an order against one person for the support of a child does not affect the liability of, or prevent the making of an order against, any other person responsible for the support of the child.

# Spousal Support

- Spousal support is awarded to a spouse on the basis of one or more of three principled legal bases (per *Bracklow*, SCC)
  - Contractual (i.e. a marriage agreement or cohabitation agreement);
  - Non-compensatory (sheer need of the recipient with a payor with a corresponding ability to pay); and
  - Compensatory (*Bracklow*, *Moge*): to compensate a spouse for the roles played during the marriage and which has resulted in economic disadvantage on the breakdown of the relationship.

# The FLA: ss. 160 - 165

- **S. 160:** There is a duty to provide support to an entitled spouse.
- **S. 161:** The objectives of spousal support (next slide).
- **S. 162:** Determining quantum of spousal support (mostly impacted by length of relationship) .
- **S. 163 – 164:** Deals with agreements.
- **S. 165:** The section conferring the Court with authority to make spousal support orders.

# Objectives

**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.

# SSAG's / DivorceMate



**DIVORCEMATE SOFTWARE**

Flintstone: Calculation 1  
type calculation here

Calculation Input		Annual \$			
Fred Male, 32, Resident of AB					
+	Income				
	Employment income	85,600			
Wilma Female, 30, Resident of AB					
+	Income				
	Employment income	38,080			
Children	Age	Lives with	Table Amt	Claimed by	
+	Pebbles	16	Wilma	Yes	Wilma

Child Support Guidelines (CSG)		
	Fred	Wilma
Annual Guidelines Income	85,600	38,080
CSG Table Amount	739	0
Child Support (Table)	739	0

Spousal Support Advisory Guidelines		Monthly
Length of marriage/cohabitation: 0 years		
Recipient's age at separation: 0 years		
'With Child Support' Formula		
Low	Mid	High

# Part 9: Protection from FV

- Section 183 provides for “protection orders” and which can be sought either with or without notice.
- They are serious orders that are made where the Court concludes that family violence is likely to occur to an at-risk family member (including a child).
- Linked to the *Criminal Code of Canada* such that a breach of a family law protection order gives rise to the possibility of criminal prosecution. This is a significant, major step-up from the restraining tools available under the FRA and *Rules of Court*.



## Part 10: Court Processes





# Procedural – Important

**198** (1) Subject to this Act, a proceeding under this Act may be started at any time.

(2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, **no later than 2 years after**,

(a) in the case of spouses who were married, the date

(i) a judgment granting a divorce of the spouses is made, or

(ii) an order is made declaring the marriage of the spouses to be a nullity, or

(b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

\* \* \*

(5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in family dispute resolution with a family dispute resolution professional.

# Procedural: Children's Rights

- **S. 201:** children over the age of 16 can start or defend their own court proceedings without the need for a litigation guardian.
- **S. 202:** the Court has wide discretion over the manner in which a child's evidence will be heard or received.
- **S. 203:** a child can be appointed their own lawyer by the Court, including where the conflict is so severe that no one has objectivity.

See: *K. (N.) v. H. (A.)*, 2016 BCSC 744

# Reports / Views of the Child

- Under Section 211, the Court can order an enquiry into any aspect of a child's best interests, including their needs and the ability of their caregivers to meet those needs.
- This section can also be used for views of the child reports, allowing for the evidence of a child to be acquired without the need for the child's direct participation.

# Disclosure

- Disclosure is the cancer of matrimonial litigation: Justice Fraser in *Cunha*.
- In reply to this, sections 212 and 213 provide the Court with the ability to award heavy costs and fines (up to \$5,000) for parties who fail to meet their disclosure obligations.
- See: *G. (J.D.) v. V. (J.J.)*, 2013 BCSC 1274

# Conduct Orders

- **S. 221:** Court can find abuse of process, lower standard than under the *Supreme Court Act*.
- **S. 222:** Court make a person do, or not do, pretty much anything. Surgical management of bad behaviors.
- **S. 223:** Court can manage court proceeding however necessary.
- **S. 224:** Court can order parties into ADR
- **S. 225:** Court can order restrictions on communications between parties.

# Conduct Orders, Con'd

- **S. 226:** Court can order that a person maintain mortgage, rent or utilities payments.
- **S. 227:** Court can make a person do, or not do, just about anything (one more time, but this time with feeling).
- **S. 228:** If you breach a conduct order, the Court can award costs or fine you up to \$5,000.
- **S. 230:** If you breach, the Court can do more things against you (again, feeling).
- **S. 231:** Jail.

# Conduct Order Cases:

- Orders that parties do not drink or do drugs when parenting children:

*Stevenson v. Nivala*, 2015 BCSC 892

- Orders that a party not harass the new romantic interest of the other:

*B. (J.R.) v. F. (J.H.)*, 2015 BCPC 70

- Addressing alienation behavior:

*G. (N.R.) v. G. (G.R.)*, 2015 BCSC 1062 (para. 288)



The background of the slide is a solid light blue color. At the top, there are several overlapping, wavy lines in various shades of blue, creating a decorative header effect.

Thanks.

# **CHILD PROTECTION LAW**

WHAT PARENTS SHOULD KNOW

**PRESENTER: KAREN TSE**

**ROCKIES LAW CORPORATION**

Original presentation by: Karen Tse

Presented at the Terrace workshop by: Judit Kenacan

Presentation materials are sourced from Legal Services Society publications on Child Protection

# CHILD PROTECTION

- Why does Child Protection laws exist?
  - Children have a right to be protected from abuse, neglect, and harm or threat of harm.
- If a child's safety is at risk, the Ministry of Children and Family Development (or an Aboriginal delegated agency) must look into it.
  - If necessary, the Ministry must take the child from the home.
- Child protection legislation in British Columbia
  - *Child, Family and Community Service Act (CFCSA).*

# CHILD PROTECTION

## This presentation

- Provides an overview of child protection law
  - This presentation is geared towards parents, families and those helping parents and families
- Information from this presentation is based on and include many excerpts from the very helpful online guides from the Legal Services Society.
  - You will be able to find this information by visiting the LSS website

# HOW PARENTS ARE DEFINED IN THIS PRESENTATION

## Who is a parent?

- A parent is a person who is responsible for a child's care.
- This person could be the child's mother or father, a person given custody or guardianship of a child by a court order or agreement, a relative or a friend the child lives with, or an appointed guardian.
- A guardian is a person who has the legal authority to act as a parent.



# A REPORT IS MADE

The law in BC provides that

- Anyone who believes a child has been (or is likely to be) abused or neglected, must report it
  - Includes teachers, religious leaders, friends, family, childcare workers, neighbours
  - The director cannot release the names of a person who reports child abuse. This is so people won't be afraid to tell the director when they think a child is being harmed
- Who investigates
  - Child protection workers (also called social workers) investigates
  - Sometimes people make false reports – the director looks at all available information
  - Some Aboriginal communities have Aboriginal delegated agencies

# INVESTIGATION

## Child protection worker

- Makes assessment by asking questions and gathering information
- Some cases close after short assessment if child does not need protection
- Referral to services
  - Home support, counselling, parenting classes
- May speak with the child alone and with people who knows the child
- Parents should explain their views and work with Ministry from early stage to protect the child and make the situation better
- Child protection worker will decide:
  - If the child needs or does not need protection
    - If protection required, child may or may not be removed



# VOLUNTARY CARE AGREEMENT

## Ministry might offer

- to place the child in foster care on a voluntary and temporary basis.
- In this case, parents sign a Voluntary Care Agreement with the Ministry.
  - A written agreement proposed when parents face a crisis that leaves parents temporarily unable to care for child at home.
- For example, sole parent who needs to enter the hospital or a treatment program.
- Worker makes sure situation meets the conditions for agreement and explores all other options first

# VOLUNTARY CARE AGREEMENT

## Contents of the Agreement

- Prepare plan for the earliest possible return and for any support the parents might need
- The initial term for least amount of time needed to recover from crisis.
  - Three months or less for children under five years old, and six months or less for older children.
- Agreement can be renewed for a limited number of months based on the age of the child involved.
- The ministry's goal is to reunite children and families as soon as possible.
- If possible, parents contribute to the care of the child based on income

# EXTENDED FAMILY PROGRAM

If a social worker takes the child from your home because you're temporarily unable to take care of them, you can ask the social worker to place them in the care of:

- a family member,
- a friend who has an important relationship with them, or
- someone who has a cultural or traditional connection to them.

**Instead of going into foster care**

- the children will stay with someone they know.
- The program's goal is to return the children to the parents when possible.



# EXTENDED FAMILY PROGRAM AGREEMENTS

## **An Extended Family Program Agreement:**

- sets out the best way to meet the child's needs, and
- how long the child will stay with the caregiver.

## **Requires:**

- social worker, caregiver and parent work as a team to come up with a plan for child's care. The plan will include the services and supports the child needs.

**Parent must deal with the issues that led to them being unable to take care of the child. This is so that the ministry can return the child when the agreement ends.**



# EXTENDED FAMILY PROGRAM AGREEMENTS

The social worker must screen the caregiver you suggest.

The social worker will:

- review the caregiver's Child, Family and Community Service Act records;
- do a criminal record check;
- check personal references; and
- check their home.

If a social worker contacts you or visits your home, you have the right to get legal advice.

- Call Legal Aid immediately to find out if you qualify for a free lawyer.



# HOW LONG DOES AGREEMENT LAST?

The length of the agreement depends on:

- your circumstances, and how old the children are:
  - |                        |                          |
|------------------------|--------------------------|
| <u>Age of children</u> | <u>Agreement length</u>  |
| Under five             | No longer than 3 months  |
| Between five and 12    | No longer than 6 months  |
| Over 12                | No longer than 12 months |

## Renewing an agreement

- If a longer placement would be better for the children, you may be able to renew the agreement. The total length of the agreement, including all renewals depends on:
  - your circumstances, and how old the children are:
    - |                        |                          |
|------------------------|--------------------------|
| <u>Age of children</u> | <u>Agreement length</u>  |
| Under five             | No longer than 12 months |
| Between five and 12    | No longer than 18 months |
| Over 12                | No longer than 24 months |

# COLLABORATIVE PLANNING AND DECISION MAKING IN CHILD PROTECTION CASES

## What is collaborative decision making?

- The family has the right to be involved in decisions about the child's care.

## Collaborative (shared) decision making:

- Parents and a child protection worker will negotiate (talk and work together) to reach an agreement about what's best for the child, and
- A neutral person (someone who is not involved in making decisions about the child's protection) guides participants through a process that lets each person share their story and be a part of the decision making.






# WHEN CAN FAMILIES USE COLLABORATIVE DECISION MAKING?

**At almost any time in the child protection process**

- Parents can negotiate with ministry to make a plan or agreement about the child's care.
- As soon as the ministry raises concerns about the child's safety, parents can talk with the child protection worker to figure out what is best for the child.
- Even if the case is already in court, parents can try to resolve the issues out of court.

## **Voluntary**

- Parents can choose whether or not the family participates. If the child protection worker doesn't suggest using collaborative decision making, parents can ask to use it.
  - Free
- 

# WHEN CAN FAMILIES USE COLLABORATIVE DECISION MAKING?

**By working with the child protection worker**

- Parents may be able to resolve issues faster than going to court and in ways that best suit the family. Issues that can be dealt with using shared decision making might include:
  - Where the child will live
  - How to keep the child safe
  - What services the family needs
  - Plans for the child to return home
  - How the family and community will support parents and the child

# **FAMILY GROUP CONFERENCES**


## **Collaborative (Family Group) Decision Making**

- Child's parents, relatives, close friends, or other community members meet about how to keep the child safe.

## **When can a family group conference help?**

- Family and the Ministry must agree to use this option
- Works well if there are supportive extended family or community.

**Parents can use a family group conference to help everyone agree on issues such as:**


- How to keep the child safe
  - What services the family needs
  - Where the child will live
  - How the family and community will support the parents and the child
- 

# FAMILY GROUP CONFERENCES

## How to get started


- Once the ministry decides that the child needs protection, the child protection worker can offer to refer the family to a family group conference coordinator (section 20 of the CFCSA.)
- Parents can also ask the child protection worker for a referral to a family group conference coordinator.
- The coordinator is trained and works for the ministry.
- Can use a family group conference at any time while family is involved with the Ministry — even if case is already in court.

## How does a family group conference work?

- Parents work with the family group conference coordinator to decide who will participate.
  - The coordinator meets with the participants before the conference to prepare them for the meeting.
- 

# FAMILY GROUP CONFERENCES

## At a family group conference

- Everyone will gather to talk about the reason for the meeting — the need for a family plan that deals with specific concerns about the child's safety.
  - A coordinator organizes the meeting and helps everyone stay focused.
  - Get help to work through issues and learn about how your family can get support services.
  - Next, the invited community members and professionals will leave the room. Family will have private time to discuss a plan for the child's protection.
  - Family will develop a plan for child's safety and well-being.
  - A child protection worker has to look it over to make sure the plan addresses child's safety concerns and speak with the family.
- 

# TRADITIONAL DECISION MAKING

## Traditional decision making

- Like a family group conference .
- Includes the community.
- Can invite Elders and other community members.
- Lets the family make decisions based on cultural traditions and values if the child is Aboriginal.



# MEDIATION IN CHILD PROTECTION CASES

## What is mediation?

- Mediation is an option of collaborative (shared) decision making where someone with special training (a mediator) helps people solve problems.
- The mediator works to help both sides listen to and understand each other and then together come up with a solution that feels fair. Mediators aren't judges and they aren't supposed to take sides. They won't tell you what to do.
- Under Section 22 of *CFCSA*, parents, children and child protection workers or anyone directly involved in a child protection case can ask for or suggest mediation to help solve various problems. Both sides have to agree to try mediation for it to go ahead.
- Mediators
  - Neutral & cannot provide legal advice




# MEDIATION

- Mediation can help you deal with issues such as:
  - What do you want to have happen
  - What does the child protection worker want to have happen
  - What are you expected to do (or not do) to get your child back
  - What services can be provided for you and your child
  - How long will your child stay in care
  - Where will your child live temporarily
  - How and when can you or others have access to a child
  - What terms and conditions should be put in a supervision order
- What does mediation cost?
  - Free. The Ministry of Children and Family Development may also pay for some of your costs so you can be at the mediation sessions, such as day care, meals, and transportation. Make sure you ask for that help.

# HOW DOES MEDIATION WORK?

**The mediator's job is to help balance the power between the sides.**

- That is hard when one side is a large government ministry, and the other is a single parent or child. You may have to remind the mediator about that and how it feels for you.
  - Speak up clearly if you think the mediator is taking sides or acting unfairly in any way.
  - State your needs, opinions, and suggestions clearly and honestly. It's the mediator's job to help you do that.
  - You can ask to have a private session with the mediator at any time during the mediation process if you have concerns.
  - Only agree to what is fair and fits for you and your family.
- 

# HOW DOES MEDIATION WORK?


## Things to Keep in Mind

- Be willing to hear and understand the child protection worker's concerns.
- At any point, you have the right to talk to a lawyer before making a final decision.
  - You may be able to have your lawyer come with you to the mediation.
- You have the right to stop mediation if you find it's not working for you.
  - If you can, let the mediator know your reasons.



# CASE CONFERENCE

**If you can't reach an agreement with the director by the protection hearing, the judge will order you to go to a case conference.**

- A case conference is a lot like mediation, except the judge is in charge instead of a mediator.
  - It's a meeting between you, your lawyer or advocate, the child protection worker, the director's lawyer, and the judge.
  - The judge may ask your child to be there if your child is more than 12 years old, other family members, or people involved with taking care of your child.
  - If your child is Aboriginal, a representative of the Aboriginal community may also be there.
- 

# CASE CONFERENCE

## Things to Keep in Mind

- Be prepared to speak for yourself at a case conference. Judges usually want to hear directly from the parents.
  - You may want to discuss what to say with your lawyer beforehand.
  - The director can't use what you say at the case conference against you in court.
- However, the director can try to use what you say to find out more information to use at a hearing.
- Supervision orders or custody orders can't be made at the case conference unless everyone agrees.
  - If you work out an agreement with the director in the case conference, then the judge can make a consent order and that ends the protection hearing.

# CASE CONFERENCE

## Things to Keep in Mind

- If you and the director can't agree in the case conference, you will then set a date to complete the protection hearing and have a judge decide what will happen.
- How long it takes to finish the protection hearing will depend on the length of the trial and available court dates.



# WHAT A CONSENT ORDER MEANS

If you and the Ministry agree on a plan of care but disagree whether your child needs protection, you can make a written agreement

- The judge may then make what's called a Consent Order and doesn't have to decide that your child needs protection.
- The court won't have in its records that you couldn't care for your child or that your child needed protection.
- If your child is 12 years or older, he or she has the right to be part of the discussion about a consent order. If possible, get legal advice for your child.
- In most cases, both parents have to agree before the judge can make a consent order. You can make a consent order with the director after a case conference or at any time during the protection hearing process.

# WHAT AGREEMENTS CAN I MAKE USING COLLABORATIVE DECISION MAKING?

## Support Service Agreement

- Support services to help parents take care of the child (whether or not the child needs protection).

## Safety Plan

- Plan about how the child will be cared for during a child protection investigation.

## Extended Family Program Agreement

- Agreement for the child to be in the care of a friend or family member for a limited time.

## Voluntary Care Agreement

- Agreement for the child to be in foster care for a limited time.





# WHAT AGREEMENTS CAN I MAKE USING COLLABORATIVE DECISION MAKING?

## Plan of Care

- Plan for how to meet the child's needs while the ministry is involved with the family; for example, where the child will live while the case is in court.

## Access Agreement

- Agreement about when and where parents can visit with the child if the ministry has removed the child from the home.

**Any other arrangement parents and child protection worker want to make during the investigation or court process, or even after parents have been to court.**



# TIPS ABOUT MAKING AGREEMENTS FOR CHILD'S CARE


## Independent Legal Advice

- Speak with lawyer.
- Lawyer can attend meetings with parents, explain their rights, or help parents negotiate with the ministry.
- Before parents sign a written agreement, have a lawyer look over it.




# TIPS ABOUT MAKING AGREEMENTS FOR CHILD'S CARE

## Be part of making decisions

- Make the plan fit the needs of you and your child. For example, if you have a drug or alcohol problem, the ministry might ask you to go to drug counselling. Make sure that the agreement lets you choose a counselling program that you can work with.
  - If you agree to place your child in the ministry's care, make sure your child sees you and other important people while in care. Make the agreement for the shortest possible time.
  - Ask the director to be clear about what services or programs will be provided to you and your family.
- 

# TIPS ABOUT MAKING AGREEMENTS FOR CHILD'S CARE FOR PARENTS

## Be realistic


- Understand what is agreed to
  - Agree only to what you know is helpful. Always put your child's best interests first.
  - Be clear about when the ministry will think you have completed the terms of the agreement.
  - If you don't do what you agree to or can't follow through with parts of the agreement, there could be serious consequences. Ask the ministry what will happen if you don't complete everything required, and include this in the written agreement.
- 

# TIPS ABOUT MAKING AGREEMENTS FOR CHILD'S CARE FOR PARENTS

## Check time limits

- Be sure the agreement gives you enough time to make the changes you have to make.
- Check that programs and the people you'll be working with (for example, counsellors) can meet the timelines in your agreement.
- Think about how your family situation might change and ask for flexible time limits.

## Keep notes

- Keep notes of your meetings with the social worker, advocate, and lawyer. Write down what people say they will do and what you agree to do.
  - Keep track of all important dates — such as meetings, court dates, and deadlines.
  - Keep notes and papers sorted so that everything is in one place.
- 


# IF THE DIRECTOR REMOVES YOUR CHILD

**Go to court hearings**

**Ask for access visits**

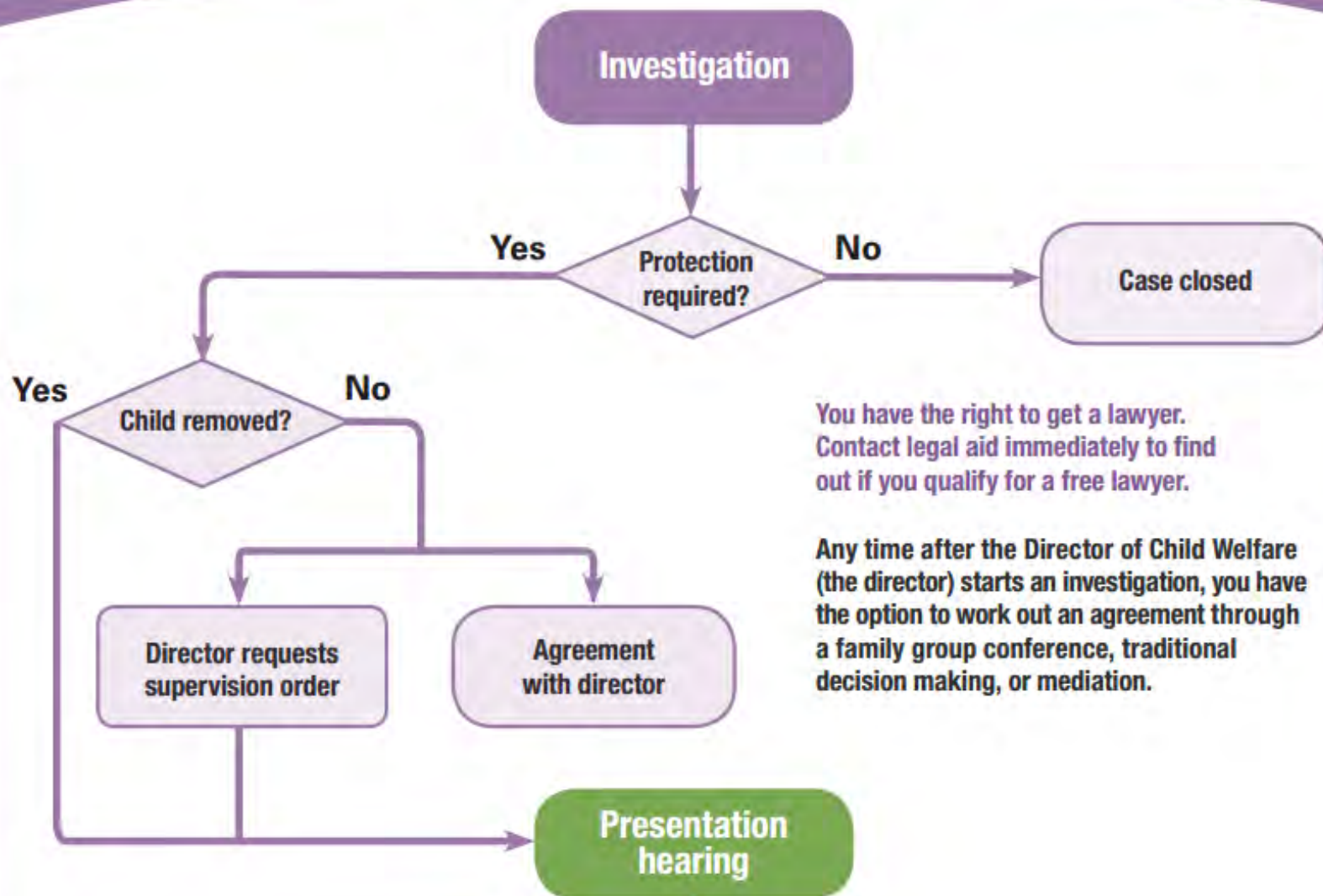
- Visits can also be by phone or video conference
- Ask the child protection worker to plan visits – if refused, ask for visits when you attend court
- Try to see child as often as you can – show that you care
- Be on time. Give notice for cancellations.
- Director may request supervised access – plan which adult will supervise. If no agreement, may go to mediation.

**Ask for case information**

- Can ask to see child protection worker's notes
  - Can ask to see reports (e.g. Suspected child abuse and neglect (SCAN) report)
- 

# The Child Protection Process in British Columbia

Family Law in BC



# WHAT HAPPENS IN COURT

When your child is removed from your home, or the child protection worker applies for a supervision order without removal, the next step is to go to court.

The court process usually has two stages:

- Stage 1) Presentation stage
- Stage 2) Protection stage





# THE PRESENTATION STAGE

## If removal

- Director presents a report to the court within seven days. This starts the court process for the presentation hearing.

## Without removal

- If the child protection worker applies for a supervision order without removal, the presentation hearing will be held within 10 days after the application date and you receive a copy of the application.




# WHAT'S IN THE REPORT TO COURT?

**The Report to Court should include this information:**

- Why the director decided to remove your child or ask for a supervision order
- What other steps the director tried before taking that action
- The date, time, and place of the action
- Who was there at the time
- What terms the director wants in a supervision order without removal
- How the director plans to care for your child — called an interim plan of care
  - Children who are 12 years and older have the right to have this plan explained to them, and to tell the judge what they want. Also, the judge can also say that your child may have his or her own free lawyer.

# PLAN TO GO TO THE PRESENTATION HEARING

- Attend and be on time
  - Can have lawyer present.
  - If child 12 years or older, the director will tell child about the date of the presentation hearing too.
  - If you cannot be present, ask if you can participate by phone.
  - If child is Aboriginal, the director must tell your child's community (such as the band) if the director removes your child from your home, even if you don't live on reserve. Someone from the community can then come to the presentation hearing.
- 

# AT THE PRESENTATION HEARING

- Before or at the presentation hearing, you will receive a copy of the child protection worker's document called the Report to Court.
- Judge will ask whether you agree with what the director wants to do in the Report to Court.
  - If you agree, the judge will make an order right away. That will be the end of the presentation hearing.
  - If you don't agree, the judge will schedule another day for the presentation hearing to learn more about your case. It's usually two to six weeks later. In some cases, it could be more than six weeks later, depending on how busy the court is in your area. These hearings usually take half a day, but they could take longer.
- If you don't go to the presentation hearing, the judge will probably make the order the director asks for, without hearing from you.

# JUDGE MAKES AN INTERIM ORDER

At the presentation hearing, judge may

- Make an Interim Order which says how child will be cared for
  - Order stays in place until protection hearing is complete, or another order is made
    - Each order will also have the date and time of the start of the protection hearing.
    - The protection hearing must be scheduled within 45 days of when the presentation hearing ends

# FOUR TYPES OF INTERIM ORDERS

## **No supervision order (child with parent)**

- If you can show that you are able to care for your child, and a protection hearing isn't needed, the judge will return your child to live with you without supervision. This will end the court process for you and your child.
- This could happen if you have worked out an agreement with the director, and/or if you have made changes that the child protection worker suggested.

## **Interim supervision order (child with parent)**

- Your child will live with you, and the director will supervise the care you give your child. This order will include conditions you must follow.
- An interim supervision order will have terms and conditions of supervision.

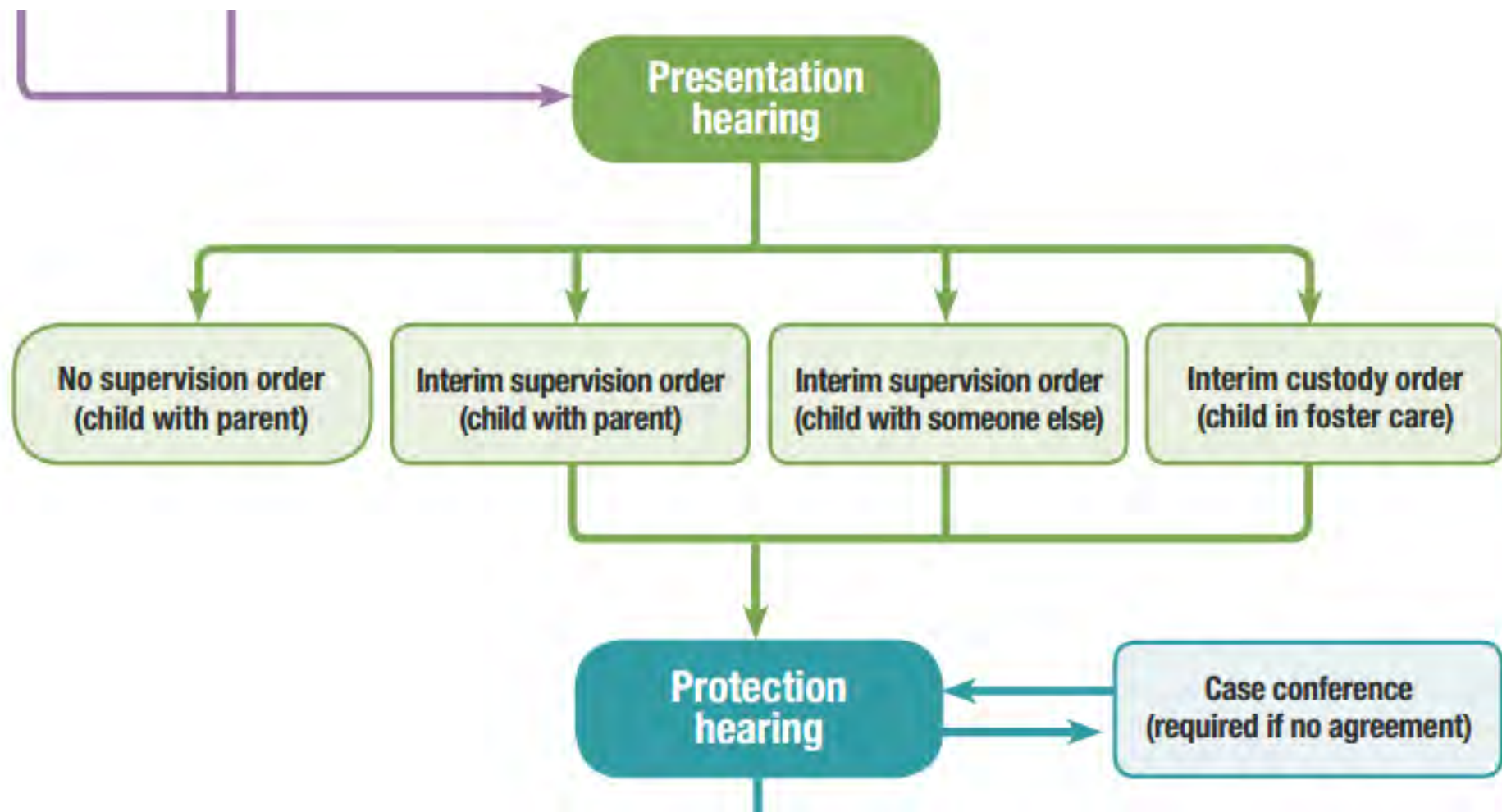
## **Interim supervision order (child with someone else)**

- Your child will live with another person who is able to care for your child under the director's supervision. This order will set out how your child will be cared for and may set out when and how you can visit your child.

## **Interim custody order (child in foster care)**

- Your child will stay in the care of the director (foster care). This order may set out when and how visits will occur.





# THE PROTECTION STAGE

The judge will decide whether your child needs protection and who will care for your child in the future. The judge makes this decision at the protection hearing.

- The protection hearing must start no more than 45 days after the presentation hearing ends.
  - The whole process can last up to several months. Or it can end on the same day that it starts, depending on the details of your case and when the courtroom is free.
- At least 10 days before the protection hearing, the director must give you an application that says what kind of order he or she will ask the judge for and a plan of care that says how the director wants your child to be looked after.





# AT THE PROTECTION HEARING

Before the judge can decide whether to make the order the child protection worker applied for, the judge must first decide whether your child needs protection.

- If you agree that your child needs protection, the judge can make that decision at the start of the protection hearing.
- If you don't agree that your child needs protection, then a hearing, with evidence and witnesses, must be held before the judge can make (or refuse to make) that decision.
- Before that hearing can be held, a case conference must be completed.



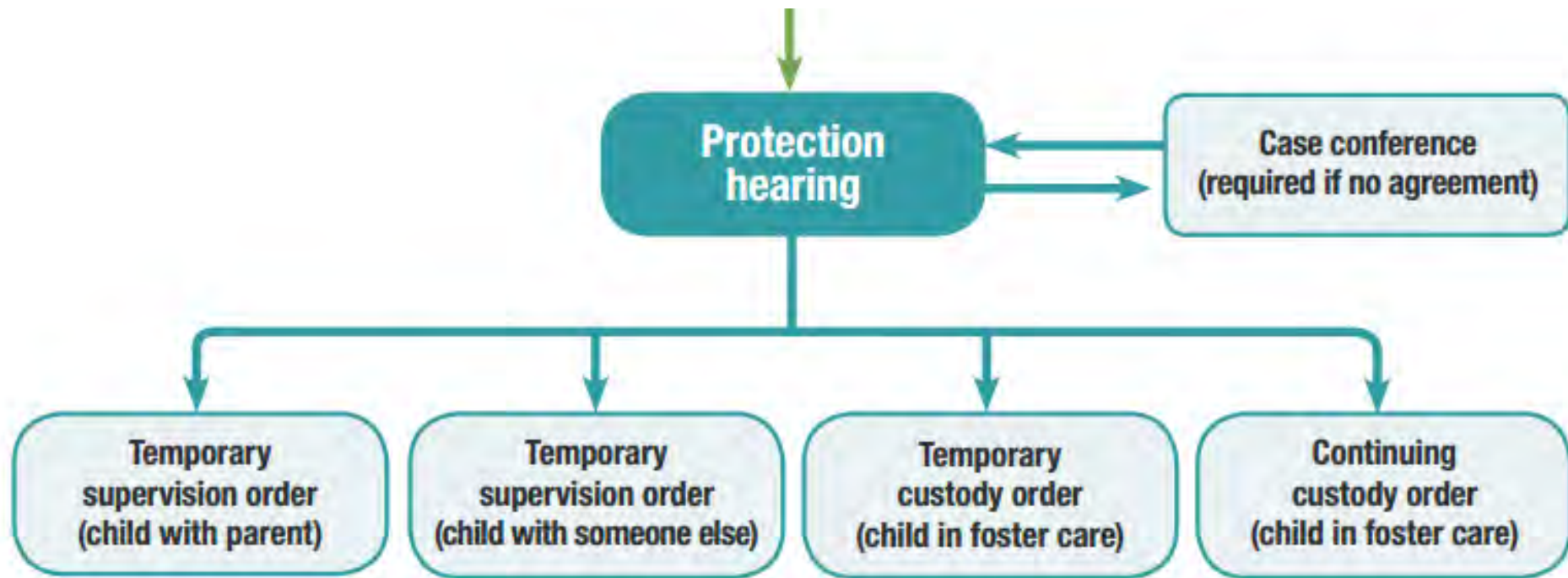
# JUDGE MAKES A TEMPORARY ORDER

If the judge decides your child needs protection, the judge will make one of the following orders at a protection hearing and will decide how long the order will last:

- **Temporary supervision order (child with parent):** Your child will live with you, and the director will supervise the care you give your child.
- **Temporary supervision order (child with someone else):** Your child will live with another person who can care for your child under the director's supervision.
- **Temporary custody order (child in foster care):** Your child will stay in the care of the director (foster care).
- **Continuing custody order (child in foster care):** If there's a serious problem that can't be fixed within the time the court allows, the judge might make this order. It means your child will stay in the care of the director (foster care) without limits on how long this will last. The judge makes this order in very rare cases.

The judge will include terms and conditions in the supervision order and an order of access if your child will stay with another person.






# LENGTH OF TIME FOR TEMPORARY ORDERS

- Supervision orders and custody orders are made for a specific period of time, called a fixed term. The length of the fixed term is based on the age of your child at the time of the removal, or the age of the youngest child if there is more than one child. If your child is:
  - Under five years old, the order can last for up to three months;
  - Five years to under 12 years old, the order can last for up to six months;  
or
  - Twelve years or older, the order can last for up to 12 months.

# HOW TO APPEAL OR CHANGE AN ORDER

- You may be able to appeal a custody order — that is, you can ask another judge to decide if the order is fair. If you want to appeal a decision, get legal advice immediately because you have only 30 days after a protection hearing to appeal an order. These time limits are very strict.
  - You can also apply to change an order if you make big changes in your life. (This is different from appealing an order.) For example, you may have had counselling that's helped you with an anger problem or an addiction, or you may be changing your housing or leaving an abusive relationship. If you have done something like that, you can ask to change an order any time after the judge makes it. You will need a lawyer's help.
  - A judge will consider your application and decide whether to make a new order or leave it the way it is.
- 

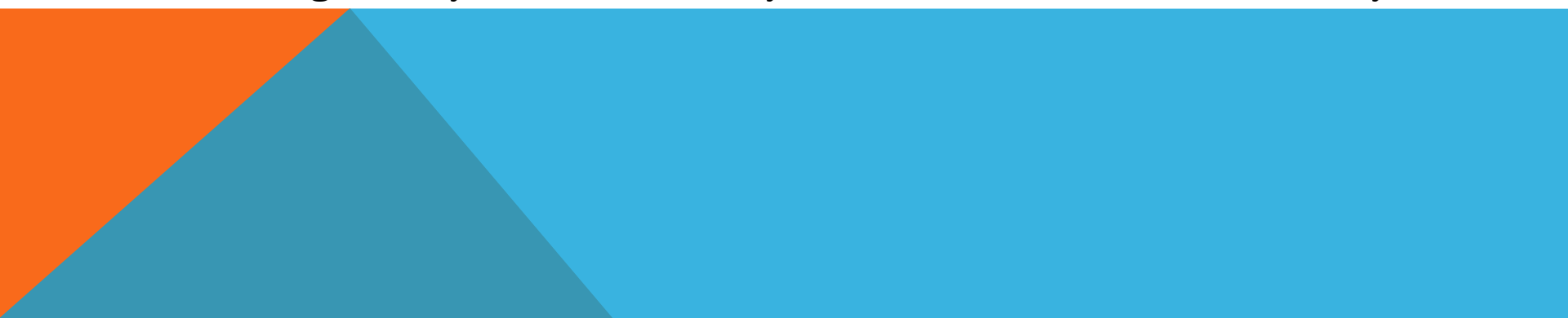
# CONTINUING CUSTODY ORDER

In the rare case when there's a serious problem that can't be fixed within the time the court allows

- The judge might make a continuing custody order.
- This means your child will stay in the director's care (foster care) for an unknown length of time.
  - The ministry becomes the permanent guardian of your child. You lose all your guardianship rights.
  - Sometimes you can get an access order
- After there is a Continuing Custody Order in place, there may be a permanent transfer of custody of your child to another person.
  - This also means your child may be adopted.
  - You may want to request an open adoption where you can remain in contact with your child.

# WHO CAN HELP?

**You can get a free lawyer if your income is below a certain level, and:**

- You believe the ministry is about to take your child away.
  - You're trying to work out an agreement with the ministry and you need advice from a lawyer about what to do.
  - You have worked out an agreement with the ministry and they want you to sign it.
  - The ministry plans to apply for a supervision order for your child.
  - The ministry has removed your child from your home.
  - You want to see your child, who is in foster care, more often.
  - Your circumstances have changed and you want to bring your child back home from permanent foster care.
  - The ministry has applied to give permanent custody of your child, who is in continuing custody, to someone who you don't believe should have custody.
- 

# WHO CAN HELP?

**If you are denied legal aid...**

- and then are refused again after a review,
- and you want a lawyer but cannot afford one,
- and you have an upcoming court hearing and face complicated child protection issues (educational, knowledge and language barriers),
  - you can ask the judge to appoint a lawyer for you





# WHO CAN HELP?

## “Making a JG application”

- “JG” is the name of an important Canadian court case
- You can make the JG application no matter where you are in the court process
- Speak with family duty counsel
- Online guide by LSS
  - “How to Get a Court-Appointed Lawyer for Your Child Protection Case”
- Application for an Order plus Affidavit required.

# OTHER RESOURCES

- Visit your local Legal Aid office
- Speak with duty counsel
- Read the *Parent's Guide to Child Protection Law in BC*
  - Available online on the LSS Website
- Get an advocate
  - Check advocacy centres, community centres, churches, or women's centres. Look for one who's knowledgeable about, and trained in, child protection.
  - Advocates can help parents understand information, look at options, develop plans, prepare documents, negotiate agreement
  - Advocates aren't lawyers. They can't give you legal advice. Even though an advocate can go to court with you to offer support, they can't be your legal representative.

# **CHILD PROTECTION LAW**

WHAT PARENTS SHOULD KNOW

**PRESENTER: KAREN TSE**

**ROCKIES LAW CORPORATION**

Presentation materials are sourced from  
Legal Services Society publications on Child Protection

# *Gladue After Twenty Years*

Halie (Kwanxwa'logwa)  
Bruce



## Background: Aboriginal People and the Criminal Justice System

- 1989: "Locking Up Natives In Canada," UBC Professor Michael Jackson
- 1991: Manitoba Justice Inquiry
- 1996: Royal Commission on Aboriginal Peoples  
(*Bridging The Cultural Divide: A Report on Aboriginal People and Criminal Justice In Canada, RCAP 1995*)



# Other Inquiries | Commissions | Reports:

- Alberta Task Force Report (1991);
- Saskatchewan Indian Justice Review Committee and Metis Justice Review Committee (1991);
- The Law Commission of Canada (1991);
- Ontario Commission on Systemic Racism in the Criminal Justice System (1995).

## Canada's response: 1996 Amendments to the 1996 *Criminal Code of Canada*

- S. 718: Sentencing considerations apply to **ALL** offenders -- Calls for the **courts** to limit the reliance on imprisonment for all offenders;
- S.718.2(e) specifically mentions Aboriginal offenders:

A court that imposes a sentence shall also take into consideration the following principles:

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

- **S. 718.2(e): A Call to Action?**
  - Included to address the over incarceration of Aboriginal offenders
  - Specifically directs the courts to bear in mind the **unique** circumstances of Aboriginal offenders.



## SCC: *R. v. Gladue*, [1999] 1 S.C.R. 688

- Called the overrepresentation of Aboriginal peoples in prison “a crisis”;
- Recognized discrimination faced by Aboriginal people in the justice system (and other systemic factors) contribute to over-representation;
- Said s. 718.2(e) means that:
  - Sentencing judges can look at **restorative justice** options; and
  - It applies to **all** Aboriginal people (at very least, Indian, Inuit and Metis);



# WHY?:

SCC, *R. v. Gladue* (1999)

- The different treatment of Aboriginal people historically has manifested in a broad range of adverse circumstances affecting Aboriginal people generally and contribute to the incidence of Aboriginal offending.
- Recognized that, Aboriginal offenders are:
  - More likely to be negatively impacted by detention, and
  - Less likely to be rehabilitated because incarceration is frequently culturally inappropriate and can lead to even further discrimination towards Aboriginal people.

# How?

- HOW should Courts take into account the unique circumstances of the Aboriginal offender before the court?

# WHAT is unique about Aboriginal Offenders (or Aboriginal Accused)?

The SCC said:

- Judges have **a statutory duty** to consider the unique systemic and background factors in sentencing an Aboriginal offender, including systemic bias and discrimination against Aboriginal people;
- **Factors** to be considered include (but not limited to):
  - Low income
  - Unemployment
  - Lack or irrelevance of education
  - Lack of opportunities and options
  - Substance use
  - Loneliness
  - Community Fragmentation
  - Systemic/direct discrimination

# How?

SCC :

- S 718.2(e) requires the judge to use a “different methodology” in deciding a fit sentence for an Aboriginal offender before the court, including that a judge must:
  - Consider the role of systemic factors in bringing a particular Aboriginal accused before the court. (para. 69);
  - Get information about systemic factors with the help of counsel, or probation officers (in PSRs), **or other means**. (para. 83); and
  - Get information on restorative options (**community resources and treatment**) that may be alternatives to incarceration (para. 84)

*R v Kakekagamick*, (2006), 81 OR (3d) 664

Ontario Court of Appeal said:

- “Counsel” in *Gladue* means that both **Crown and defence counsel have a positive duty** to provide information about Gladue factors where appropriate (para 53.)

## *R. v. Ipeelee*, 2012 SCC 13

- Reaffirmed s. 718.2(e) and *Gladue*;
- Recognized the Aboriginal incarceration rate has gone up, not down, since 1996 and *Gladue*.
- There was a “fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in *Gladue*.”
- Explained further how s. 718.2(e) operates:
  - There **is no discretion** about whether or when s. 718.2(e) applies;
  - A **causal link does not need to be made** between the background factors and the offence;

## *R. v. Ipeelee*, [2012] cont'd

- Failure to consider Gladue principles is a breach of the sentencing judge's duty and the principle of proportionality in sentencing (fundamental justice).
- Strongly supported the use of "*Gladue* reports" to assist the court in fulfilling its statutory duty.
- Affirmed that *Gladue* applies to **all** sentencing decisions involving Aboriginal people unless there is an explicit waiver.

S. 718.2(e) applies:

- **To all Aboriginal people** (First Nation, Status/Non-Status, on/off reserve, rural/urban)
- **Every time an Aboriginal persons liberty is at stake**, including at, for example:
  - Bail, and
  - Sentencing
- The sentencing judge **must weigh the *Gladue* factors presented** (whether submitted orally or in a written report) **along with the other fundamental principles of sentencing** (denunciation, deterrence) while keeping in mind the concept of proportionality of the sentence to the gravity of the offence and the degree of responsibility of the offender.

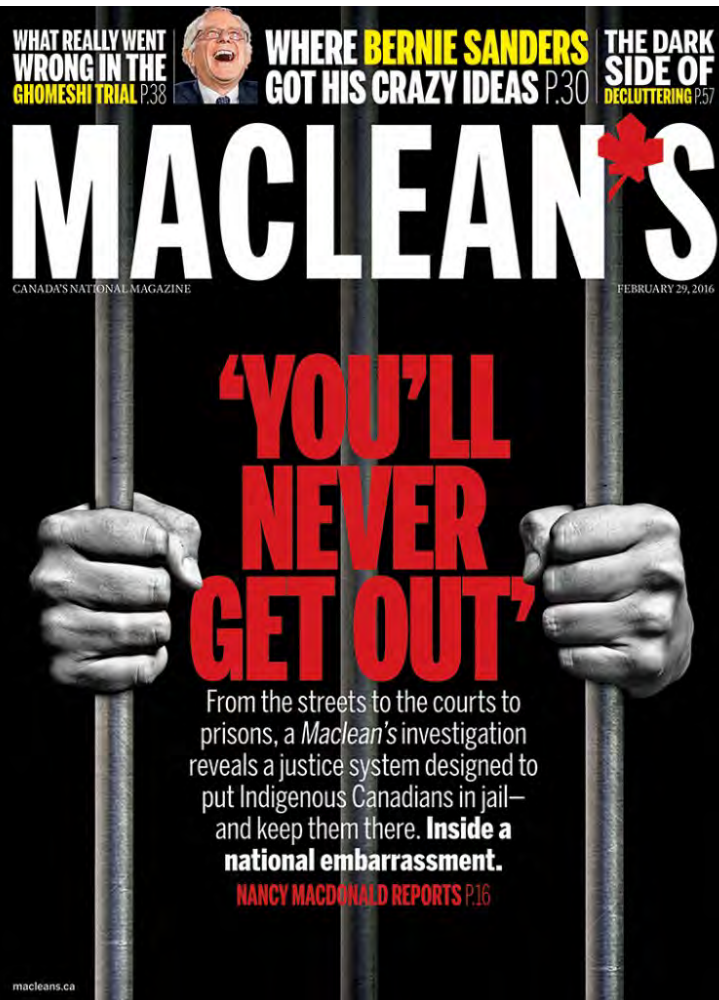


- **Only the Aboriginal offender can waive** their right to have 718.2(e) considered (i.e. it is not up to the judge, Crown or defense counsel);
- Even if an offender waives the right to having their background considered, a **judge must still take judicial notice** of the history of colonization;
- The outcome of s. 718.2(e) **adjusts the method of analysis** sentencing judges must use to decide an appropriate sentence for an Aboriginal offender;
- The lack of alternative sentencing programs particular to an Aboriginal community **does not eliminate the obligation of a sentencing judge to impose a sanction that takes into account principles of restorative justice.**

## Summary/Key features of SCC's interpretation of s. 718.2(e):

- Purpose: To address the problem of overrepresentation of Aboriginal people in prisons by encouraging judges to consider a **restorative justice approach** to sentencing;
- In some cases, the goals of deterrence, denunciation, and separation may be less relevant, and the **goal of restorative justice** may be more appropriate and given greater weight;
- There is **a judicial duty** to give the provision's remedial purpose real force;





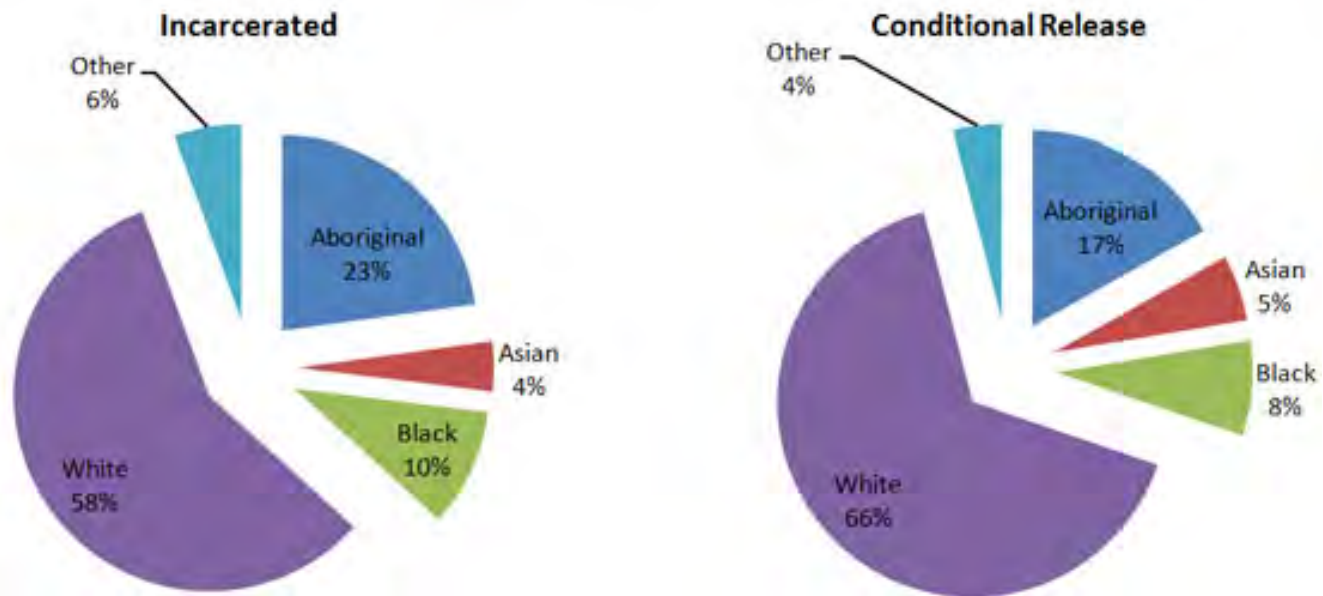
## Impact of s.718.2(e) in last 20 years?

### 2013: “High and Growing Incarceration Rates for Aboriginal Peoples”

- Aboriginal people = about **4%** of the Canadian population, but make up about **23.2%** of the federal inmate population
- 2011: The federal incarceration rate of Aboriginal adults is about **10 times higher** than that of non-Aboriginal adults.
- From 2001 to 2013, the over-representation of Aboriginal people continued to grow, from **17.0% to 23.2%**. = a **56.2% increase**

# 2014...

**Figure 5. Federal Incarcerated and Conditional Release Populations by Aboriginal and Race (as of April 13, 2014)**



# Aboriginal Women

## POPULATION VS. INCARCERATION



PERCENTAGE OF CANADIAN POPULATION IDENTIFIED AS ABORIGINAL (2013)



PERCENTAGE OF THE FEDERALLY INCARCERATED INMATES WHO ARE ABORIGINAL (2013)



PERCENTAGE OF WOMEN IN FEDERAL PRISON WHO ARE OF ABORIGINAL DESCENT (2011)

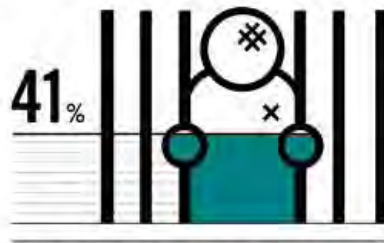


PERCENT OF WOMEN IN PROVINCIAL CUSTODY WHO ARE OF ABORIGINAL DESCENT (2011)

Source: Geraldine Malone, Vice.com: *Why Indigenous Women Are Canada's Fastest Growing Prison Population* (Feb. 2016)

# Aboriginal Youth

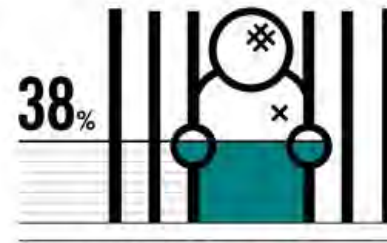
## YOUTH BETWEEN THE AGES OF 12 AND 17 ADMITTED TO CANADA CORRECTIONS SYSTEM (2013-14)



PERCENTAGE OF TOTAL WHO WERE  
ABORIGINAL YOUTH



PERCENTAGE WHO WERE  
ABORIGINAL GIRLS



PERCENTAGE WHO WERE  
ABORIGINAL MALES

Source: Geraldine Malone, Vice.com: *Why Indigenous Women Are Canada's Fastest Growing Prison Population* (Feb. 2016)



# "Myth-Conceptions"

- *Gladue* and *Ipeelee* **do not call for shorter jail terms** for Aboriginal offenders, but requires judges to explore restorative justice as an option to incarceration;
- If there is no alternative to incarceration available, the length of the jail term imposed on the offender must be carefully considered.
- The "Aboriginal Community?" is not just on-reserve. In *Gladue*, the SCC said it is the Aboriginal offenders **community of support**



# Some Challenges Applying Gladue

- Judges are required to take judicial notice of the history of colonization, dislocation, and systemic discrimination, but **few have received this as part of their education**;
- Courts continue to struggle to understand how s. 718.2(e) applies to the day-to-day operation of the courts = **inconsistency**;
- Lack of meaningful alternatives. Not enough programs and services to address the various needs of Aboriginal offenders, despite importance of restorative justice options;
- “Tough on crime” legislation
- Lack of education about Aboriginal historical and current circumstances (TRC)
- **Time** constraints: A typical Gladue report takes about 8 weeks to prepare.
- **Little to no funding available** to produce such reports. In BC, LSS has taken on part of this task since 2011, but there is no provincial or federal program to pick up this task;



# Indigenous Restorative Justice



- In *Justice as Healing: Indigenous Ways*, McCaslin (2005) states that restorative principles refer to the mending process needed to renew damaged personal and communal relationships.

## Restorative Justice, Specialized Courts

- Restorative Justice approach – look at the Aboriginal offenders community for the **source**;
- Based on **restoring** balance to the community, victim, and holds the Aboriginal offender accountable and responsible;
- Often more **onerous** than “just doing time”;
- BC: First Nations Courts (New Westminster, North Vancouver, Kamloops, and Duncan).

## Restorative Justice, Specialized Courts

### Ontario: “Gladue Courts”.

- Judges, caseworkers, support and resource people, Gladue writers, work together;
- Some programs developing “expedited” reports, focusing on “key historical and background factors and future goals and commitment to wellness” (London, Ont), so less emphasis on biographical.
- Yet to be seen if change in Government will result in change in laws, policies, funding for Gladue and restorative justice.

# First Nations Courts, BC



## "Garry"

- 35 year old Non-status Indian (Culturally Cree, but not legally recognized)
- Aboriginal (maternal) Great Grandparents were hunters/trappers who were on the trapline when treaty and reserve created, so were not recognized as Status/treaty Indians under the *Indian Act*
- Family not allowed to live on reserve and did not receive any treaty or other benefits
- Family lived on outskirts of reserve in non-Aboriginal town
- Impacted by alcoholism and family violence
- His maternal grandfather marries Cree Status woman who loses her Status. Family is poor, suffers from alcoholism. No longer hunts or traps, lacks education. Move to the city.
- His mother taken into foster care at 2 and has no contact with family. Becomes addicted to heroin at 14, involved in the sex trade. Meets his father, (non-Aboriginal), and has Garry at age 19. Family impacted by alcoholism, violence, periods of neglect.

## Garry cont'd

- Garry and 3 siblings taken into care when he was 4. Has little contact with mother, and no contact with father.
- He and one sister adopted to non-Aboriginal family, after living in several foster homes.
- He's exposed to alcohol and marijuana at 12, cocaine and first contact with CJS at 13.
- He has lengthy adult record of property crimes to support his drug addiction.
- He has never been to treatment and knows little about his Aboriginal family or Cree culture.



## "Patricia"

- 22 Year old Status Indian
- Raised on remote reserve with maternal grandparents
- Parents and all grandparents attended Indian Residential School
- Family impacted by lack of education, lack of opportunity, poverty, alcohol and sexual abuse.
- Patricia begins drinking at 9. Introduced to cocaine at 12 by older cousin who sexually abuses her.
- She moves into town at 15 with 30 year old boyfriend. Has child at 16 who she tries to keep but is eventually taken into care.
- She is homeless, suffers from substance abuse, untreated trauma, etc.



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# Legal Information Resources and MyLawBC

Patricia Lim, Publications Development Coordinator

604-601-6054

[Patricia.Lim@lss.bc.ca](mailto:Patricia.Lim@lss.bc.ca)

# What I'll talk about today

- Overview of publications
- Publication updates
- Websites and social media
- MyLawBC



# FREE

## Publications

# Audience & accessibility

## LSS Publication Readability

### **How much legal understanding is needed?**

#### **Level 1 — None needed.**

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

#### **Level 2 — Some helpful.**

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

#### **Level 3 — Some needed.**

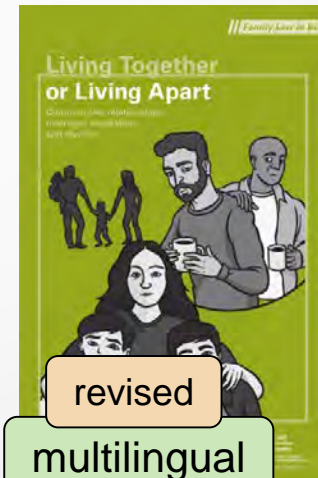
Basic familiarity assumed. Detailed material, written primarily as a reference for the advocate/intermediary audience, although accessible to members of the public with adequate literacy skills.

[www.mylawbc.com/pubs](http://www.mylawbc.com/pubs)

# Family law

## Level 2

### Level 1



# Abuse & family violence

## Level 1



revised

## Level 2



multilingual



revised



new

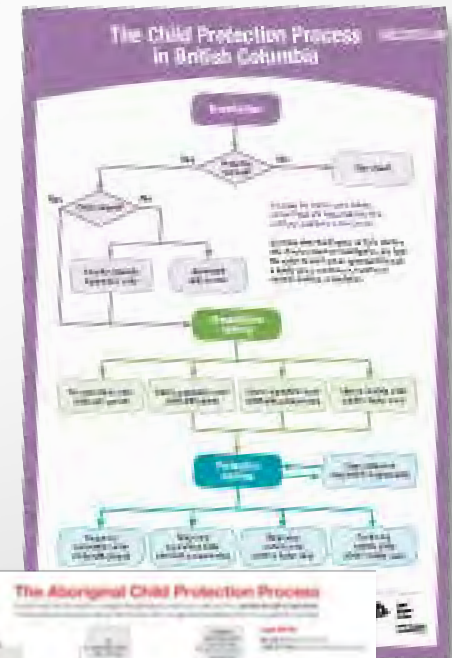
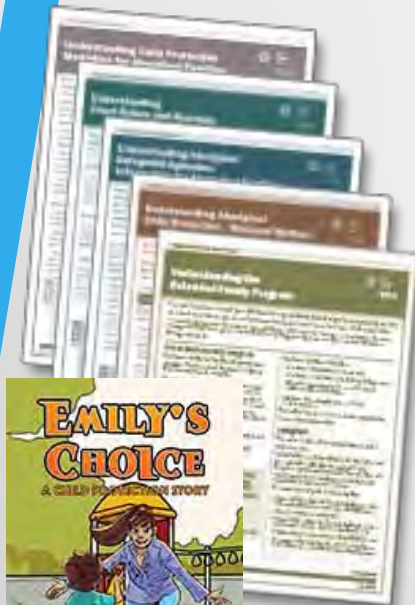


# Child protection

## Level 1

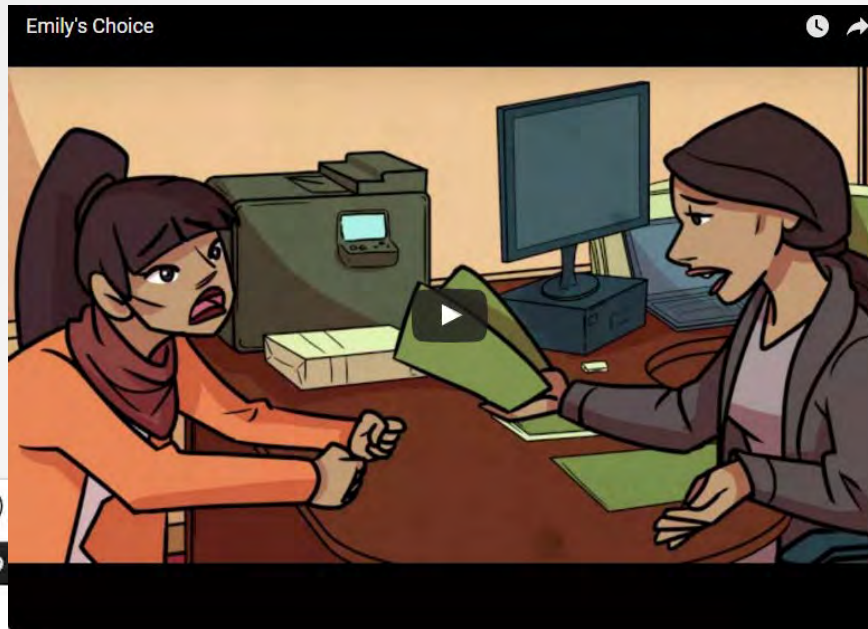
## Level 2

## Level 3



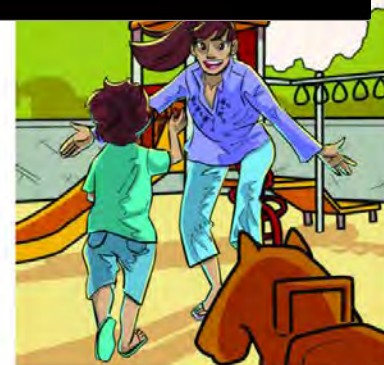


# Emily's Choice graphic novel



## Emily's Choice A child protection story

Emily is struggling with addiction and an unhealthy relationship. She loves her son, Greg, but can't always take care of him. When Greg goes into foster care, Emily is heartbroken. But by getting legal help and with the support of her family, she gets Greg back. *Emily's Choice* is Emily's story.



[aboriginal.legalaid.bc.ca](http://aboriginal.legalaid.bc.ca)

# Criminal

## Level 1



## Level 2



# Immigration & refugees

Level 1



multilingual

Level 2

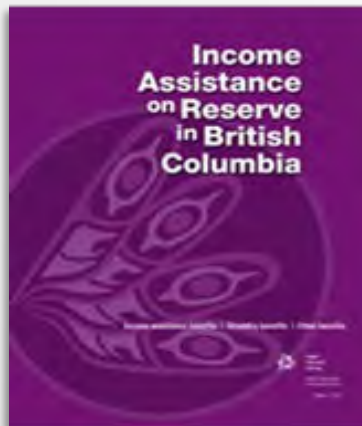


To be revised

multilingual

# Welfare/income assistance

## Level 2



revised



revised



# Publication updates



# New and upcoming publications about Gladue and First Nations Court



# Other upcoming publications



## **New publications**

- Your Welfare Rights: Available Benefits (second in the series)
- Applying for Welfare Online (supplementary fact sheet)

## **Revised according to new legislation**

- Sponsorship Breakdown booklet

## **More languages**

- Legal Aid poster
- Mothers Leaving Abusive Partners booklet
- Is that Legal booklet
- Live Safe End Abuse fact sheet folder



# How to order **FREE** Publications



# Ordering process

mylawbc.com/pubs

Dialogue Tool



My problem. My solution.

## Order in bulk

Get information to help your clients

Find by subject, title, or language below.

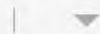
By subject



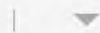
Readability list

[Back to Our publications home](#)

By title



By language



## How to order

Pick up copies at your local legal aid office. Or order online with Crown Publications.


How to order free publications from Crown Publications


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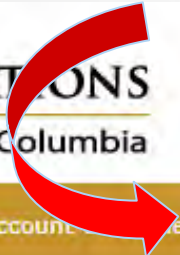



Questions about your customer ID or how to update your contact information


# Crown Publications

**CROWN PUBLICATIONS**  
Queen's Printer for British Columbia

 Items: 0  
Total: \$0

Account  Customer #  Postal Code  

 Other Organizations Legal Services Society / Your Gladue Rights (English)



### Your Gladue Rights (English)

Plain language booklet about Aboriginal peoples' rights under the Criminal Code of Canada called Gladue rights. It explains:



- restorative justice,
- how Gladue is applied in court,
- the history of Gladue, and
- Gladue reports and oral Gladue submissions.

See also: [Gladue Rights at Bail and Sentencing](#) (infographic poster) and [What's First Nations Court?](#)

To view this publication online: [Click Here](#)

**Stock:** 3587  
**Price:** Free Each

**Publish Date:** March 1, 2017  
**ISBN:** 2560-6247  
**Product No.:** 7550005106  
**Format:** Booklet  
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# Any questions about ordering?

[distribution@lss.bc.ca](mailto:distribution@lss.bc.ca)  
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	<b>Customer Account Application Form</b> <small>To order:</small> <ul style="list-style-type: none"><li>• Fill in the form online, then e-mail it to Legal Services Society; or</li><li>• Print out and fill in the form, then fax it to Legal Services Society</li></ul>
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If you plan to order multiple copies of a publication or place regular orders, then you can apply for a customer account. Please fill in the information below and return this form to Legal Services Society by email at [distribution@lss.bc.ca](mailto:distribution@lss.bc.ca) or by fax at 604-682-0965. We will contact you after we have reviewed your application. You will receive your customer number and your pre-approved order quantity if your application is accepted.

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Preferred languages:	<input type="text"/>		
Area of law:	<input type="checkbox"/> Aboriginal <input type="checkbox"/> Civil <input type="checkbox"/> Criminal <input type="checkbox"/> Family <input type="checkbox"/> Immigration <input type="checkbox"/> Legal aid		
Type of organization:	<input type="checkbox"/> Aboriginal <input type="checkbox"/> Community group <input type="checkbox"/> Government <input type="checkbox"/> Library <input type="checkbox"/> Legal organization <input type="checkbox"/> Medical <input type="checkbox"/> Police/RCMP <input type="checkbox"/> School/College <input type="checkbox"/> Victim services <input type="checkbox"/> Other		
Demographics: (Groups/individuals you serve)	<input type="checkbox"/> Aboriginal <input type="checkbox"/> Children and youth <input type="checkbox"/> Community workers/Advocates <input type="checkbox"/> Gay/Lesbian/Bisexual/Transgender <input type="checkbox"/> Immigrants/Refugees <input type="checkbox"/> Police/RCMP <input type="checkbox"/> Seniors/Elders <input type="checkbox"/> Victims <input type="checkbox"/> Women <input type="checkbox"/> Other		
Services: (Type of service offered)	<input type="checkbox"/> Advocacy services <input type="checkbox"/> Counselling/Support Group <input type="checkbox"/> Crisis line <input type="checkbox"/> ESL/Literacy training <input type="checkbox"/> Legal advice <input type="checkbox"/> Legal representation <input type="checkbox"/> Mediation and conflict resolution <input type="checkbox"/> Pro bono legal services <input type="checkbox"/> Restorative justice <input type="checkbox"/> Other		

#### Disclaimer

LSS collects and uses personal information solely to operate its business and provide legal aid in BC. LSS does not sell the personal information it collects and will not disclose an individual's personal information to a third party unless the disclosure is authorized under FOIPPA and/or in writing by the individual.

# The LSS Game Show



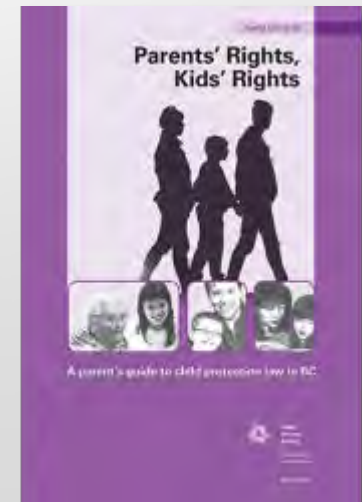
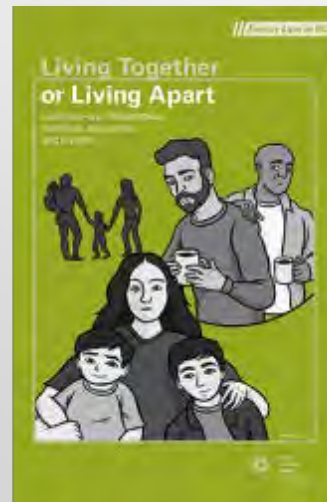
**Q1:** Which publication has had the most orders in Terrace in the last 12 months?

A. Emily's Choice

B. Living Together or Living Apart

C. Defending Yourself: Assault

D. Parents' Rights, Kids' Rights



**Q2:** How much does it cost to order publications from LSS?

A. Just the shipping cost!

B. Completely free!

C. Free shipping within British Columbia!

D. Buy one get one free!



**Q3:** Which publication introduces and explains Gladue rights?



A. Clear Skies

B. Gladue Rights at Bail and Sentencing

C. Is That Legal?

D. Your Gladue Rights





Providing legal information  
for British Columbians

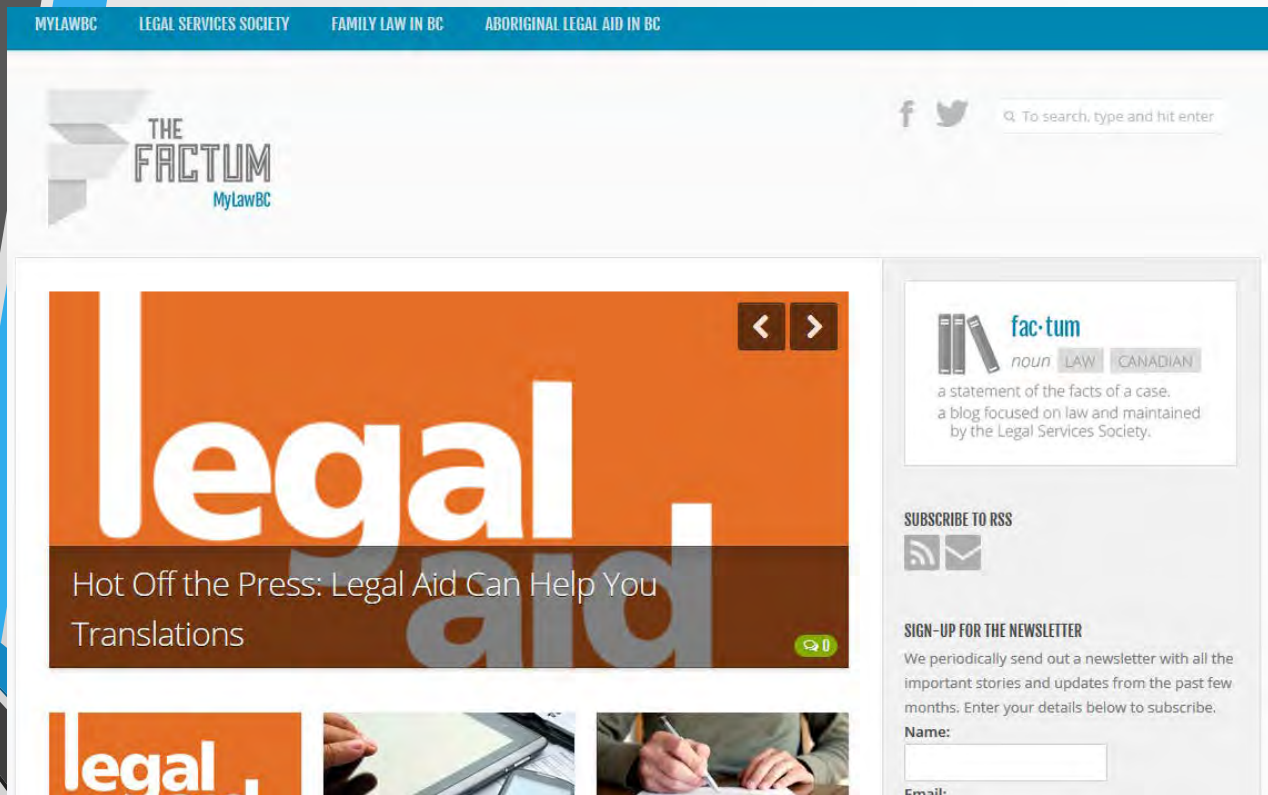


# Social media & websites



# LSS on social media

[factum.mylawbc.com](http://factum.mylawbc.com)



@legalaidBC



# Legal information websites

## 1. Family Law Website

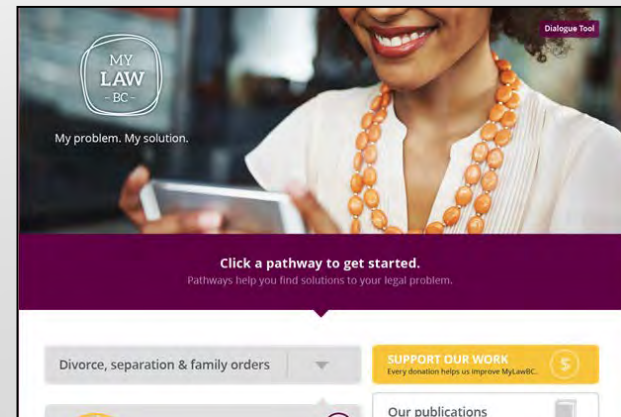
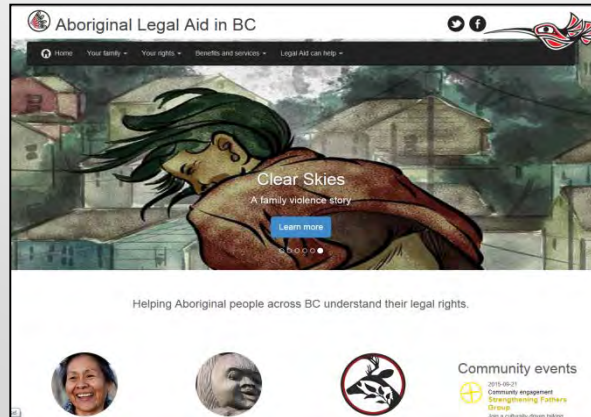
[familylaw.lss.bc.ca](http://familylaw.lss.bc.ca)

## 2. Aboriginal Legal Aid in BC

[aboriginal.legalaid.bc.ca](http://aboriginal.legalaid.bc.ca)

## 3. MyLawBC

[mylawbc.com](http://mylawbc.com)





# Family Law

in British Columbia



Search for



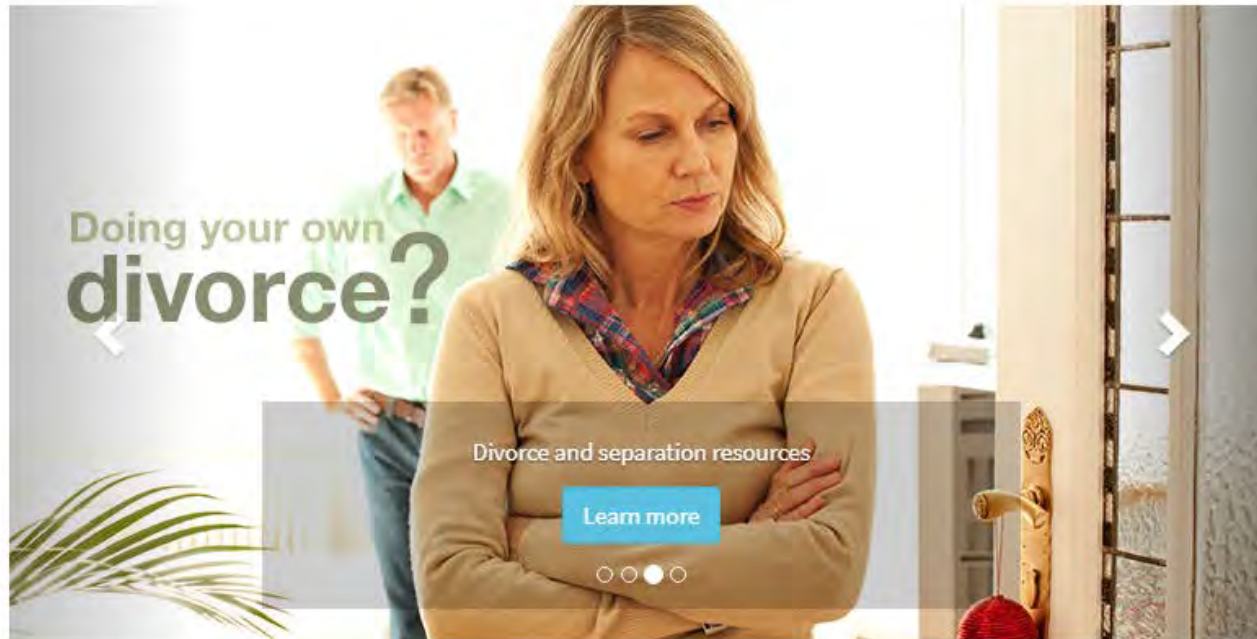
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Your community ▾

Legal system ▾

Staying out of court ▾

Shortcuts ▾



## What's new

Find out about the [latest changes](#) to family law

Find out [what's new](#) on this website

Feedback

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**Live Help**  
Available



Live Chat by [LivePerson](#)



British Columbia's [Legal Services Society](#) maintains this site. If you're having a family problem, you may qualify for a lawyer to advise you or take your case. Contact [Legal Aid](#) to find out.

[www.familylaw.lss.bc.ca](http://www.familylaw.lss.bc.ca)





## Your home on reserve

The laws have changed. If you break up with your partner or your partner dies, you may be able to stay in your home.

[Learn more](#)



Helping Aboriginal people across BC understand their legal rights.



### Is this site for you?

This website is for anyone who identifies themselves as **Aboriginal**.

[Learn more »](#)



### Do you know about First Nations Court?

There are now four First Nations Courts in BC. You may be able to have your sentencing hearing in one.

[Learn more »](#)



### Find out more in a publication

We have free publications. See if we have one that's right for you.

[Learn more »](#)

### Community events



2016-04-14  
Deadline

#### New Relationship Trust — Youth Grants

The New Relationship Trust has announced Youth Grants for BC First Nation youth groups and organizations.

[Read more »](#)

All of BC



2016-04-28

#### Community engagement Residential Historical Abuse Program: Free Counselling Support

Free counselling support for people abused in foster care and for residential schools.



My problem. My solution.

Dialogue Tool

**Click a pathway to get started.**

Pathways help you find solutions to your legal problem.

Separation, divorce & family orders



Our publications



Abuse & family violence



Our other sites



Missed mortgage payments



Wills & personal planning



WWW.MYLAWBC.COM







My problem. My solution.

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# Separation, divorce & family matters

Get solutions for your family law matters

**Click a pathway to get started.**

Find a solution to your family law matters in 10 – 20 minutes.

## Get help with the issues families face when they separate

No matter where you are in your separation process, MyLawBC can help. First, make a separation plan to find out what your options are for working through your family law matters.

Get family orders if you've tried to resolve your issues out of court and can't, or if you need to get **interim** or **consent orders**. (An interim order is a temporary order. A consent order is an order you ask the court to make based on the terms you and your spouse agree to.)

Or find out what to do if you've been served with court documents.

### Before you begin

In some unhealthy relationships, one person has more power than the other. This can affect how well you and your partner communicate and cooperate as you separate. And it can show up as abusive behaviours. **Your and your family's safety may be at risk.**

If you're worried about a power imbalance, it's a good idea to go through our [Abuse and family violence pathway](#) first.



### Make a separation plan

Figure out the best way for you and your partner to work through your family law matters.



### Get family orders

Figure out which court to use. Get help with court orders.



### I've been served with a court document

Find out what to do next.

[WWW.MYLAWBC.COM](http://WWW.MYLAWBC.COM)





My problem. My solution.

Dialogue Tool

# Missed mortgage payments

Find out if you can keep your home

**Click a pathway to get started.**

Find out what your options are in 10 – 20 minutes.

## Get help with foreclosure

Whether you've missed making a mortgage payment or you're worried about missing a payment, MyLawBC can help you. Find out about your options and where to go for financial and legal advice. Use our checklist and tips to get help with your particular situation.

If you decide to go to court, get an overview of foreclosure proceedings and follow the steps to prepare your case.

### Some terms to know

In most situations, your **lender** doesn't want to **repossess** (take back) your home. (A lender can be a bank, credit union, insurance company, private



## Find out if you can keep your home

See what your options are if you think you might miss a mortgage payment or you've already missed a payment.

[WWW.MYLAWBC.COM](http://WWW.MYLAWBC.COM)







My problem. My solution.

Dialogue Tool

# Wills & personal planning

Plan for the future

**Click a pathway to get started.**

Get solutions for the future in 10 – 20 minutes.

## Get help with making a will and planning for the future

If you want legal documents to say what you want to happen after you die or for when you can't act independently, MyLawBC can help you.

Make a simple will that reflects your wishes and fits your situation. You can fill it out and print it. If your situation is complicated, you'll still get basic information about what you need in your will and where to get help.

Learn about the documents that arrange for future decision making about financial, legal, and health and personal care matters. Find out which documents are best for you and how to get them.



### Make a will

Create a simple will to fit your needs.



### Plan for the future

Identify the documents you need for future decision making.

MyLawBC can't provide a will in some situations. You may need help from a

[WWW.MYLAWBC.COM](http://WWW.MYLAWBC.COM)







Dialogue Tool

My problem. My solution.

# Abuse & family violence

Make a plan to stay safer

**Click a pathway to get started.**

Find help to address your issues in 25 minutes.

## Get help with issues that may affect your safety

MyLawBC helps you think about your relationship with your intimate partner and consider your safety risks. It gives you an action plan to get the help you need to address your safety concerns, legal needs, and other issues specific to your situation.



### Make a safety plan

Get the help and support you need to stay safer.

[WWW.MYLAWBC.COM](http://WWW.MYLAWBC.COM)





## Answer questions about your situation.

Learn about the law as you go.

### What is your current living situation?

- ☐ My partner and I live in the same household with children
- ☐ My partner and I live in the same household without any children
- ☒ My partner and I live in separate households and have children
- ☐ My partner and I live in separate households without any children

◀ Previous question


Continue ▶

### Talk with someone right now

VictimLINK

BC211

Your answers are anonymous

 QUICK EXIT



# Action plan

MYLAWBC Abuse & family violence

Summary > Read first > Do now > Do next > Get more help >

## Your first steps

WHAT TO DO NOW

[Download your plan \(PDF\)](#)

[Get checklist](#)

### Learn about staying safe

#### Get safe housing

If you're afraid of your partner, there are safe places you can go. Shelters and transition houses are temporary places to live that provide support services to women and their children. Contact [VictimLINK](#) or [BC Society of Transition Houses](#) (604-669-6943 or 1-800-661-1040) to find housing in your community.

#### Make a safety plan

When you're afraid, it's very difficult to think clearly. Getting information and making some planning decisions before a crisis can keep you safe.

It's important to have a plan whether you decide to leave or stay in the relationship.

If you're thinking about leaving your partner, it's important to plan what to do both *before* and *after* you leave. Be aware that your safety may be at a higher risk immediately after separation from your partner.

A safety plan can help you protect yourself and your children, both at home and outside your home.

Children who have witnessed or experienced abuse can be greatly affected by what they've seen. Safety planning is very important for any children who have been traumatized by abuse against themselves or someone they love.





# What's Next?

[WWW.MYLAWBC.COM](http://WWW.MYLAWBC.COM)

MY  
LAW  
- BC -

# More Useful Resources!



[www.publiclegaled.bc.ca](http://www.publiclegaled.bc.ca)



[www.clicklaw.bc.ca](http://www.clicklaw.bc.ca)



[www.povnet.org](http://www.povnet.org)

# Thank you!

Patricia Lim  
Publications Development Coordinator  
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# ◆ Criminal Procedure Rights Upon Arrest

Presentation by: Raymond D. Phillips, QC



# **What if I am stopped by the police?**

Police officers can stop you under three general circumstances:

- If they suspect that you have committed a crime
- If they see you committing a crime
- If you are driving

If the police do not arrest you or if they do not have grounds to detain you, they must let you be on your way



# Police Stop While Driving

The police can stop cars at any time to determine if a driver has consumed alcohol or drugs, to see whether a car is mechanically fit, to check whether a driver has a valid licence, or to make sure a driver has insurance.

- ♦ The police may also stop your car if they suspect that you have committed a driving offence.
- ♦ The police are only allowed to search your car if they have reasonable and probable grounds to believe that there are illegal drugs or alcohol or evidence relating to the commission of a crime in the car.



# When can the police search me?

In most cases, the police can only search you only if you have been placed under arrest or if you have consented to the search. However, there are exceptions. These include:

- If the police find you in a place where they are searching for drugs, and they have reason to believe that you have drugs.
- The police find you in a vehicle where people are transporting or drinking alcohol illegally, and they believe that you have alcohol.
- The police believe that you have an illegal weapon or one that was used to commit a crime, and suspect that it might be removed or destroyed in the time it would take to get a search warrant.



# Police Entering Your Home

There are a number of circumstances in which the police are allowed to enter your home. These include:

- The police have a warrant to enter your home to arrest someone
- The police have a search warrant
- The police have permission from you or someone else in authority in your home
- There are urgent circumstances that require the police to enter your home

The police may also enter your home if they suspect that a crime has been committed in relation to property in your home



# Police can enter your home in urgent circumstances

- ♦ The police can enter your home without your permission in the following urgent circumstances:
- A 911 call has been made from your home, and the police believe that entry is necessary to prevent death or serious injury.
- Where the police believe that someone in the home is in need of emergency services.
- To help someone who has reported a domestic assault to safely remove their belongings.
- To protect people from injury if the police suspect that there is a drug laboratory in the home.



# Rights on Arrest

- ◆ At the time of arrest, an officer must typically inform the accused of the following and confirm that they understand:
  1. inform of reason for arrest
  2. Charter of Rights caution / Right to Silence
  3. right to speak to a lawyer
  4. access to legal aid
  5. secondary police cautions





# Informed of Arrest

- ♦ Section 10(a) of the Charter entitles all people "the right on arrest or detention ... to be informed promptly of the reasons therefore". It is generally expected that the arresting officer, upon making the arrest, will inform the person of the reason for the arrest. However, where the reason is obvious and the person is well aware of the reason, it is not necessary.
- ♦ It is not necessary to always inform the accused of the circumstances of the offence. In a murder case it is not necessary to reveal the victim's identity.



# The Script

- ♦ I am arresting you for [name of offence(s)]. You have the right to retain and instruct counsel without delay. You also have the right to free and immediate legal advice from duty counsel by making free telephone calls to [toll-free phone number(s)] during business hours and [toll-free phone number(s)] during non-business hours.
- ♦ Do you understand?
- ♦ Do you wish to call a lawyer?
- ♦ You also have the right to apply for legal assistance through the provincial legal aid program.

Do you understand?



# Right to Silence

Upon arrest the peace officer should inform the accused of their right to silence and right against self-crimination protected under section 7 and section 11(c) of the Charter.

- ♦ **POLICE WARNING:**

I wish to give you the following warning: You need not say anything. You have nothing to hope from any promise or favor and nothing to fear from any threat whether or not you say anything. Anything you do or say may be used as evidence.

- ♦ **Do you understand?**



# FIREARMS

- ♦ On April 5, 2012, Bill C-19, the *Ending the Long-gun Registry Act*, came into effect. The key changes:
- Removal of the requirement to register non-restricted firearms
- Destruction of the existing non-restricted firearms registration records
- Allowing the transferor of a non-restricted firearm to obtain confirmation of a transferee's firearms acquisition licence prior to the transfer being finalized

It is important to note that the new law **does not change the requirement for all individuals to hold a licence in order to possess a firearm.**





# Fire Arms Prohibition

- ♦ A sentencing judge, before making a probation order must consider whether to impose a weapons prohibition order under s. 109 or 110.
- ♦ Section 109 is a mandatory prohibition applied where an offense is indictable, violence was used, threatened or attempted or where violence was against an intimate partner, a child or is someone who resides with the person or intimate partner



# Firearms Prohibitions

- ♦ **s.109 Mandatory Prohibition 10 years**
- ♦ Sexual Assault, aggravated sexual assault, sexual assault causing bodily harm
- ♦ criminal harassment
- ♦ using firearms in offense
- ♦ drug trafficking
- ♦ using an imitation weapon in offense
- ♦ Prohibited for life on subsequent offense



# Firearms Prohibitions

- ◆ Section 110 Discretionary Prohibition
- ◆ Summary offenses involving violence or threats and where weapon used.
- ◆ prohibited for up to 10 yrs.



# Firearms Prohibitions

- ◆ Discretionary Prohibitions - Exemption
- ◆ **Lifting of prohibition order for sustenance or employment**
- ◆ the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or
- ◆ a prohibition order against the person would constitute a virtual prohibition against employment



# Firearms Prohibitions

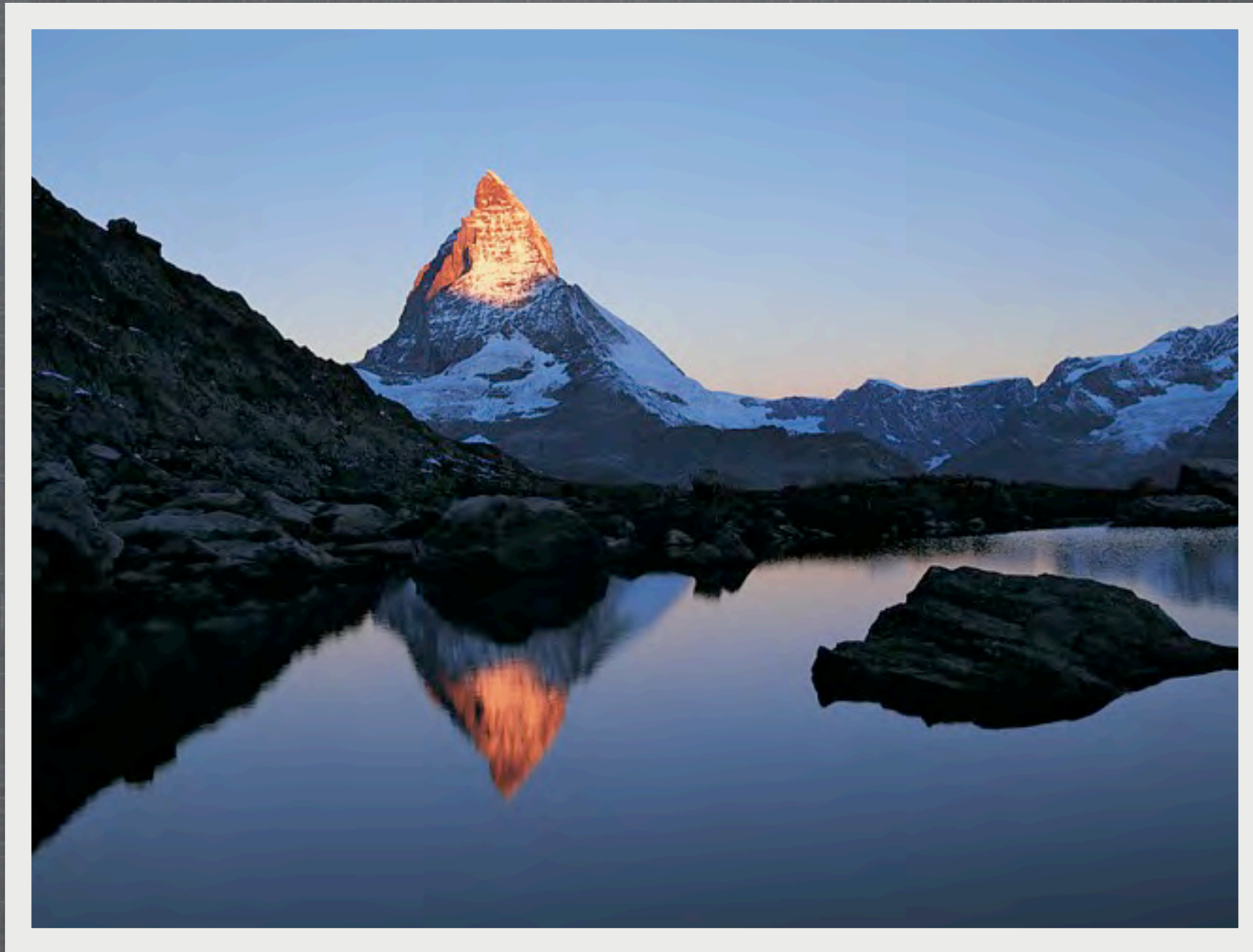
- ◆ **Factors:**
- ◆ A competent authority may make an order under subsection (1) only after taking the following factors into account:
  - a) criminal record, if any, of the person;
  - b) the nature and circumstances of the offence,
  - c) the safety of the person and of other persons.





# WILLS & ESTATES

Raymond D. Phillips, QC





# FORMALITIES

## ■ **IS THE WILL VALID? (Section 4 WESA)**

- The primary requirements relate to the “ability of a person” to make a will; a persons competency (testamentary); and the person’s age.
- Other requirements relate to the formalities for the preparation and execution of the Will.

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

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

# Age Requirement

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

# Testamentary Capacity

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



# Undue Influence (s.52 WESA)

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

# Statutory Requirements

1. Must be in writing (s.37(1)(a) WESA). A voice recording or a movie is not valid.
2. Will must be signed. To be valid, a Will must be signed “at its end” by the Will-maker – “attestation”.
3. Dated. Although not required by WESA, a Will is always dated in order to ensure that the one being executed is the last Will chronologically.
4. Will-maker’s signature must be witnessed.



# SIGNING THE WILL

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

# Holograph Will (no witnesses)

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

# Legal Effect of a Will

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



# Gifts to Witnesses (s.43 WESA)

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

# Changes or Alterations to Wills (s.45 WESA)

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



# Contesting a Will (s.60)

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

# Wills Notice

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

# Benefit Plans

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



# INTESTATE - NO WILL

- **INTESTATE (Part 3 of WESA)**

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

# WESA Benefits

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



# Per Stirpes v. Per Capita

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

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

# Escheat

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

# DISTRIBUTION ON INTESTATE

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



# INTESTATE

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

# INTESTATE

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



# INTESTATE

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

# INTESTATE

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

# INTESTATE

- No surviving spouse, descendants, parents or descendants of a parent but intestate survived by one or more grandparents or descendants of grandparents (uncles aunts)
- Estate divided equally for each surviving grandparent (or to descendants in equal shares per stirpes).



# INTESTATE

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



# SURVIVORSHIP RULES

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

# REPRESENTATION / ESTATE GRANTS

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

# REPRESENTATION/ ESTATE GRANTS

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



# REPRESENTATION /ESTATE GRANTS

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



# INDIAN ACT

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

# INDIAN ACT

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

# INDIAN ACT

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



# INDIAN ACT

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