Community Workshop: Legal Aid Services & Family Law

Victoria, BC
September 25 & 26, 2012

Legal Services Society

British Columbia
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Legal Services Society

Providing legal aid in British Columbia since 1979

COMMUNITY WORKSHOP: Legal Aid Services & Family Law

Harbour Tower Hotel & Suites
345 Quebec Street | Victoria, BC | V8V 1W4

Tuesday | September 25 | 2012

AGENDA

Time	Session	Speaker	Facilitator
7:30 – 8:30	**Breakfast & Registration**		Lynn McBride, Faye Yee
8:30 – 8:45	**Opening Prayer & Welcome**	• Elder Butch Dick	Linda Thiessen
8:45 – 9:00	**INTRODUCTION of Angelina**	• Baljinder Gill	N/A
9:00 – 10:45	**Update on Recent Developments in Family Law & Child Protection Law**	• Trudi Brown – Family Relations Act • Colleen Spier – Child Protection • Christine Stretton – Family Duty Counsel • Linda Thiessen – Family Services Update	Lynn McBride
10:45 –11:00	**Break**		
11:00 –12:30	**Panel on Housing**	• Kim Shelley (Ready to Rent) • Russ Godfrey (TRAC) • Roger Butcher (BC Housing) • Janetta Hurst (RTB policy)	Baljinder Gill
12:30 – 1:15	**Lunch**		
1:15 – 2:30	**Overview of LSS Services and Resources**	• Roland Kuczma – Local Agent • Lynn McBride – Overview of LSS Services • Branka Matijasic – Intake Services • Pamela Shields – Aboriginal Services	Baljinder Gill
2:30 – 2:45	**Break**		
2:45 – 3:15	**Other Legal Resources**	• Clicklaw • Access Pro Bono – Priyan Samarakoone • UVIC Law Centre – Susan Noakes	Lynn McBride, Baljinder Gill
3:15 – 4:30	**Small Group Discussion: Case Studies based on Angelina's Story**	• Linda Thiessen • Pamela Shields	Baljinder Gill

Community and Publishing Services
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Wednesday | September 26 | 2012

AGENDA

Time	Session	Speaker	Facilitator
8:00 – 9:00	**Breakfast**		
9:00 – 10:00	**Gladue Reports & Restorative Justice**	• Laura Matthews • Pamela Shields	Lynn McBride
10:00 – 10:30	**Child Protection Mediation**	• Laura Matthews	Lynn McBride
10:30 –10:45	**Break**		
10:45 – 11:45	**Changes to Welfare Law**	• Kelly Newhook • Stephen Portman	Baljinder Gill
11:45 – 12:45	**FASD Session**	• Kee Warner • Ken Kissinger	Lynn McBride
12:45 – 12:50	**Closing**		Pamela Shields
12:50 –2:00	**Lunch**		

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1. Family

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FAMILY LAW ACT RSBC 2011

In November 2011, the Provincial Legislature of British Columbia passed the Family Law Act. The current legislation, the Family Relations Act, has been in place since April 1, 1978 and the new Act reflects many of the changes in society that have occurred since 1978

The new Act has not yet been proclaimed and will not be proclaimed until some time in 2013 but this article will give you a basic overview of the changes that are coming. While it is impossible to go through all of the details of the Act in this article, I will focus on the major changes. Much more emphasis is placed on mediation, collaborative law, and other forms of dispute resolution in the New Act in an effort to keep people out of the court system.

The Family Law Act has been drafted in a way that makes resolutions out of court the preferred method of resolving family disputes and makes court the last option.

PARENTAGE

The Act attempts for the first time to set out the details of "parentage" and includes definitions of who are the parents in cases of assisted reproduction and surrogacy. It also provides that in certain cases, there may be more than two parents.

PARENTING

The Act does away with the words custody and access, and attempts to define who are the guardians of the child. Only a guardian has parental responsibilities and parenting time and those responsibilities and time can be allocated between guardians if there is more than one. There is no presumption that if two parents separate they shall have equal parenting time.

The only test in determining parenting arrangements (the term for parental responsibilities and parenting time) between guardians is the best interests of the child, and for the first time the Act attempts to set out the circumstances which must be

considered in determining that interest. The Court must look at all of the children's needs and circumstances including health and emotional well-being; the child's views; the nature and strength of relationships between the child and significant others; history; the need for stability; the ability of guardians to exercise parental responsibilities, the impact of family violence, and whether or not the guardians can co-operate on issues respecting the child.

People who are not guardians will not have parental responsibilities or parenting time but may apply for contact orders. This would include grandparents who seek court ordered time with the child or other parties who have been involved in the child's life.

The legislation deals specifically with the issue of what happens when one guardian wishes to move from the area where they have been living. The legislation sets out that the reasons for the move must be considered along with the best interests of the child.

For the first time the legislation includes a provision that a person who is entitled under an agreement or an order for parenting time or contact with the child may apply to enforce that order or agreement. The Act provides penalties for those who wrongfully deny contact or parenting time and further provides that if the denial of contact or parenting time was not wrongful, then the person who did so with good reason will not be punished. The example that comes to mind is the situation where a child is too sick to move to another house in which case the denial of contact may be deemed reasonable.

In dealing with children, the legislation makes it clear that the views of the child can be made available and allows a court to appoint a person to assess the needs of the child or the views of the child. The Act also provides that a Parent Coordinator may be appointed to deal with high conflict custody cases and make some of the decisions around parenting time and contact that may be impossible for the guardians to determine for themselves.

PROPERTY

One of the major changes in the new legislation has to do with the division of property. The Act includes as spouses anyone who has lived in a marriage-like relationship for two years or is legally married. This is a major change and puts BC in the forefront of granting property rights to “common law spouses”. Currently, common law spouses must demonstrate that they assisted in some way with the acquisition or maintenance of an asset in order to qualify for an interest in the property if their name is not on title.

The division of property under the new Act is a different regime than currently in place in British Columbia and envisions dividing all property equally between the spouses except for excluded property. Excluded property includes property acquired before the relationship began, gifts or inheritances, damages for personal injury, and discretionary trusts to which the spouse did not contribute.

What this effectively means is that the spouses will equally divide the property that is acquired during their relationship, including the increase in value on property owned before the relationship. For example, if the wife owned a house at the time of the marriage which was worth $400,000 and at the end of the relationship that house is worth $500,000 (assuming no increase in the debt against it) the spouses would share equally $100,000 – the increase in the value of the property.

For the first time the legislation also defines family debt and provides that unless the Court order says otherwise, any debt incurred during the relationship or afterward for the purpose of maintaining family property, should be shared equally between the spouses. The legislation also provides that the court may make an order for an interim distribution of family property if required to provide money to fund family dispute resolution or a court application.

The court may still order that property be divided unequally if it would be “significantly unfair” to divide property and family debt, equally. In determining whether the equal division is substantially unfair, the court can also determine whether or not there is

sufficient income to properly provide for spousal support and if there is not, can change the percentage of the division. At present, the test is only if the equal division would be "unfair", so we could assume that the addition of the word "significantly" will make this more difficult to challenge an equal division.

AGREEMENTS

In keeping with the desire to have people resolve their disputes out of Court, the legislation encourages people to make agreements with respect to their property, money and debt. The court can only change the terms of a written agreement if:

a. one of the parties failed to disclose significant property or debts;
b. one person took advantage of the other person's vulnerability;
c. one spouse did not understand the nature and consequences of the agreement, or
d. any other circumstance that would cause that part of the contract to be voidable at common law.

The legislation also changes the test to determine whether an agreement is valid from "unfair" to "significantly unfair" and the court will only be able to vary agreements if the agreement is significantly unfair. We will have to wait until this provision is first interpreted by the Courts to see how different "significantly unfair" is to "unfair".

OTHER COURT ORDERS

For the first time the legislation has provided that the court can say who has to pay for various reports to assist the court – for example, reports about the best interests of the child or the views of the child. The court has the power to order disclosure of assets and to fine people for failing to properly disclose all of their assets and debts.

If someone has become a regular litigant in the court, and makes applications without merit, the court may make an order prohibiting them from bringing further applications and may make orders fining a person for their behaviour. The court can also order that one of the parties must participate in dispute resolution or for the first time, order that

someone must attend counseling or other specified services or programs. The court can also allocate the costs for those. The court can set restrictions on communications between spouses and can make all forms of interim orders to stabilize the situation while waiting for a trial.

CHILD SUPPORT

Child support will still be payable by guardians and parents. The Child Support Guidelines (the Federal tables which have been in place for a number of years) will continue to apply. The one change that the new legislation brings is with respect to step-parents. A step-parent will not have a duty to provide support for a child unless he or she has contributed to the support of the child for at least one year and his or her duty will be secondary to that of the child's parents' and guardians and the amount ordered will only be dependent on the standard of living being experienced by the child during the time they lived with the step-parent.

SPOUSAL SUPPORT

With respect to spousal support, the Act has not changed substantially except in two respects: there is a provision that the court must not consider the conduct of the spouse except if that conduct prolongs or aggravates the need for spousal support or effects the ability to provide spousal support.

More importantly, a provision has been added that the court may order that spousal support and child support may continue after the payor's death. That provision has not existed previously. This means that the payor's estate may have to pay child or spousal support long after the payor's death.

CHILDRENS PROPERTY

For the first time the legislation provides that a court may order that a child's property may be delivered to that child if the guardians and parents cannot agree as to who keeps the childrens' belongings and property.

PROTECTION FROM FAMILY VIOLENCE

The legislation also has specific provisions that provide protection from family violence and provide for various protection orders and enforcement that can be made.

TRANSITION TO THE NEW ACT

The legislation has transition provisions which provide that if someone has custody and guardianship under the current legislation or agreement, under the new Act they become a guardian and have parenting responsibilities and parenting time. If someone only has access under the current legislation they will not be a guardian but will have contact to the child.

If a property action has been started under the current Family Relations Act, it will continue under the Family Relations Act unless the parties agree otherwise, and then the Family Law Act can apply.

Many of the changes in the Family Law Act, mirror those in other jurisdictions. In particular, Alberta has introduced parenting time and parenting responsibilities in a similar fashion to what is proposed in British Columbia. It is hoped that the exclusion of the terms “custody” and “access” will deter people from fighting about those possessory terms respecting children. We will be looking to the law as it has emerged in Alberta for direction on how those terms will be used here.

With respect to property, the Province is well ahead of most other jurisdictions by recognizing the *needs* of unmarried people who live together for more than two years. These parties will now have recourse to the legislation to resolve their issues, where as before they had to meet a complicated legal test to establish an interest in property.

However, the Act also recognizes that many people, married or ‘common law’, will want to determine their own division of assets and the Act encourages them to enter into agreements which if not “substantially unfair” will allow the spouses control over their

futures. These agreements are what we commonly refer to as marriage contracts, prenuptial contracts or cohabitation contracts.

This article is only a very brief overview of the proposed changes to the Act and I caution that no one should rely on it without receiving specific legal advice based on their own circumstances. Many of the new issues will not be clear until the courts have had the opportunity to review them.

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Understanding the Extended Family Program

If a social worker removes your children from your home because you're temporarily unable to take care of them, you can ask to have family or friends care for them. This means that instead of going into foster care, your children will stay with someone they know. You can arrange for this through an Extended Family Program agreement (sometimes called an EFP agreement).

The Extended Family Program

The Extended Family Program is a government program. The Ministry of Children and Family Development runs the program.

The program allows your children to be placed with someone they know if you're temporarily unable to take care of them. This means that if a social worker removes your children from your home (or is going to remove 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.

NOTE

If a social worker tells you that you're being investigated for a child protection matter, you have the right to get a lawyer. *Contact legal aid immediately to find out if you qualify for a free lawyer.*

Legal aid:

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

The Extended Family Program:

- provides an alternative to foster care.
- provides your children with a living arrangement that is less upsetting for them while you're unable to take care of them.
- builds on the strengths of your family and community.

The goal of the program is to return your children to you whenever possible.

Caregivers

The person looking after your children is called their **caregiver**.

Your children would be placed with their caregiver through what's called an **Extended Family Program agreement** (see over). The program will provide your children's caregiver with financial support and other support services.

Not everyone is eligible for the program:

- If your children are already with a caregiver who has court-ordered custody or guardianship of them, he or she is **not** eligible.
- If your children are already with a caregiver who is still enrolled in the Child in the Home of a Relative program (sometimes called **CIHR**), he or she **may not** be eligible. The Child in the Home of a Relative program has different requirements.

Continued over

Extended Family Program agreements

An Extended Family Program agreement sets out the best way to meet your children's needs. It also sets out how long your children will stay with their caregiver.

An Extended Family Program agreement requires the following:

- The social worker, your children's caregiver, and you will work as a team to come up with a plan for your children's care. The plan will include the services and supports your children need.
- You must deal with the issues that led to your being unable to take care of your children. This is so that your children can be returned to you by the time the Extended Family Program agreement ends.
- The social worker must look into the background of the caregiver you suggest. The social worker will:
  - » review the caregiver's Child, Family and Community Service Act records (sometimes called **CFCSA** records);
  - » do a criminal record check;
  - » check personal references; and
  - » check his or her home.

The length of the agreement will depend on how old your children are:

Age of children	Agreement length
Under 5	No longer than 3 months
Between 5 and 12	No longer than 6 months
12 or older	No longer than 12 months

If a longer placement would be better for your children, you may be able to renew the agreement. The total length of the agreement, including all renewals, will depend on how old your children are:

Age of children	Total agreement length
Under 5	No longer than 12 months
Between 5 and 12	No longer than 18 months
Over 12	No longer than 24 months

Note: Extended Family Program agreements replaced kith and kin agreements and the Child in the Home of a Relative program in April 2010.

Get more information

BC Ministry of Children and Family Development

The ministry's website has information on the Extended Family Program. The website includes information about the steps involved in becoming a caregiver. Go to **www.gov.bc.ca/mcf** (on the left-hand navigation bar, click Alternatives to Foster Care — Extended Family Program).

The Parent Support Services Society of BC

The Parent Support Services Society of BC provides information and support to parents and caregivers. For information about the Extended Family Program or help with your application, call the society's **Grandparents Raising Grandchildren Support Line** at **1-855-474-9777** (no charge from anywhere in BC).

You can also visit the society's website at **www.parentsupportbc.ca.**

Your important details

Date the ministry started investigating: _____

Date you called legal aid for lawyer: _____

Name of lawyer: _____

First Nation/Band or friendship centre contact: _____

2. Housing

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Important Information about Bed Bugs

Provided by TRAC Tenant Resource & Advisory Centre

1. Tenant must tell their landlord about a bed bug problem as soon as possible, as landlords are generally responsible for the removal of pests. If the tenant delays, the landlord may try to charge some or all of the cost of treatment to the tenant.

2. Tenant should ask the landlord to arrange treatment from a qualified company.

3. It is always a good idea to inform the landlord and request treatment in writing (See TRAC's website www.tenants.bc.ca for template demand letters). The tenant should keep copies of letters for their records.

4. If the landlord is bringing a professional to look at the tenant's home for treatment, the tenant has to let them in. If they don't, the tenant could be evicted.

5. Tenant must comply with the treatment instructions. If they don't cooperate, the tenant could be evicted.

6. If the landlord is refusing to fix the bed bug problem, the tenant can apply for dispute resolution through the Residential Tenancy Branch and show evidence that the landlord is not following their legal obligations. Using this process, the tenant can apply for an order for rent reductions, repairs and proper treatment. The tenant can also ask their City Hall and/or health authority for assistance.

7. If the tenant has a fixed term lease, finding bed bugs does not mean that the tenant can automatically end their tenancy early. The tenant must first let the landlord know about the bed bugs and give him/her a reasonable chance to fix the problem.

8. See TRAC's website www.tenants.bc.ca for more information and links to bed bug tips and advice.

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510 Burrard Street
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Tel: (604) 601-6000
Fax: (604) 682-0965
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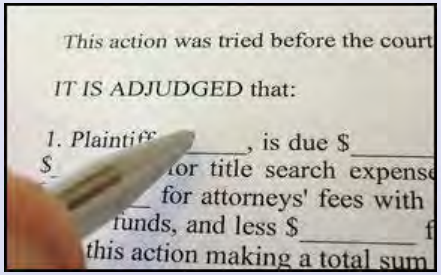
Residential Tenancy Branch

BRITISH COLUMBIA

BRITISH COLUMBIA

Preparing for Dispute Resolution



BRITISH COLUMBIA

Formal dispute resolution should be the “last resort” in a landlord / tenant dispute

BRITISH COLUMBIA

Preparation for a dispute resolution hearing is essential.

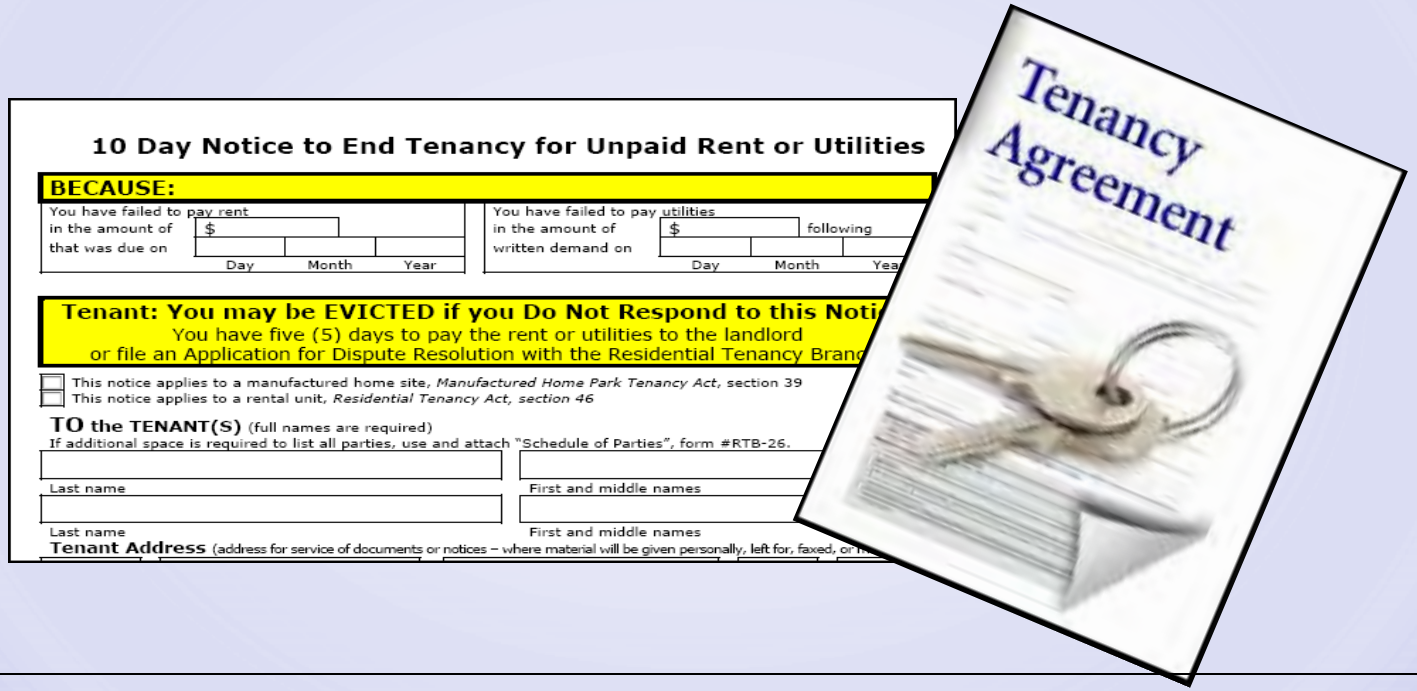
All parties need to be prepared for the hearing by having evidence to prove their side of the dispute.

Evidence must be:

- Organized
- Relevant
- Convincing

BRITISH COLUMBIA

Important Documents:



File copies of the following documents with your evidence and have the documents in front of you for the hearing:

- **Tenancy Agreement**
- **Move-in Inspection Report**
- **Receipt given for deposits or rent**

- **Notice to End Tenancy (if one was served)**
- **Proof of Service (how and when)**
- **Invoices or written estimates for repairs to unit (if applicable)**


WORK ESTIMATE

Important Information:

In most hearings the RTB will require the following information:

- What is the nature of this dispute – in as brief and succinct a way as possible (stick to the facts).
- When and how did you serve the Application for Dispute Resolution on the other party?
- How did you provide a copy of your evidence to the other party?

Decisions

- Decisions are based on the evidence, the merits of the case, and the law
- Decisions are issued within 30 days from hearing
- Jurisdiction is up to $25,000 - the same as Small Claims Court

RTB Orders

- Decisions and Orders are final and binding
- The RTB does not enforce Orders; participants must use the courts for enforcement of an Order.

RTB Contact Information

www.rto.gov.bc.ca

Public Information Lines:

1-800-665-8779 **(Toll free)**

Vancouver: 604-660-1020

Victoria: 250-387-1602

Email: HSRTO@gov.bc.ca

Thank you...any questions?

3. Overview of LSS Services & Resources

Legal
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www.legalaid.bc.ca

Family coverage

General policy

To qualify for legal aid representation, an applicant must:

- Be financially eligible, and
- have a family law problem covered by the family coverage guidelines:
  - need an initial, or a change to the current, custody or access order where there is a risk of harm or violence to the client or to his or her child or children;
  - have custody of a child or children who have been unlawfully held by the access parent/party;
  - have been permanently or repeatedly denied access to a child or children;
  - need a physical restraining order or other legal assistance to protect themselves or their child or children from harm or violence;
  - need a non-removal order to prevent the other parent from permanently moving their child or children out of the province. The threat must be real and imminent, and involve a permanent change of residence;
- be eligible for coverage provided through the exception review process.

Who is covered?

When the legal issue involves children, an applicant must be a:

- parent (including a same-sex parent), or
- party to the proceeding who is a:
  - member of the children's immediate or extended family,
  - relative or individual who has lived with the children in a parental or custodial relationship, or
  - member of the community who has a cultural or traditional responsibility towards the children (this applies to emergency referrals only).
- An applicant does not have to permanently reside in BC or hold Canadian citizenship to qualify for legal aid representation.

Exception

Youth under the age of 18 who are wards of the Ministry of Children and Family Development (MCFD) are not eligible for legal aid representation. In such cases, MCFD will arrange for counsel through the Ministry of Attorney General.

Exception reviews

An application dealing with a Family Relations Act matter can be sent for an exception review if:

- the applicant has a mental or physical disability and is unable to represent him or herself. There must be a significant barrier that will create an injustice if the applicant is not represented;
  OR
- a significant injustice can only be avoided by the appointment of counsel;
  OR
- the applicant is traumatized by past abuse such that he/she is unable to represent him or herself.

Exception Review Considerations:

- the applicant's issue is significant;
- the outcome will benefit the applicant and/or his/her children if the case is successful;
- the applicant has a reasonable likelihood of success;
- a reasonable person of modest means would themselves pay to pursue the case;
- the applicant does not have other viable options, other than legal representation, to deal with the issue; and
- there is remaining LSS budget available to fund the case.

CFCSA Coverage Guidelines

General policy

To qualify for legal representation, an applicant must:

- be financially eligible; and
- have a CFCSA problem covered by the CFCSA coverage guidelines.

An applicant must be:

- a parent (including parents in a same-sex relationships), or
- a party to the proceeding who is a:
  - member of the children's immediate family,
  - relative or individual who has lived with the children in a parent or custodial relationship, or
  - member of the community who has a cultural or traditional responsibility towards the children.

An applicant does not have to permanently reside in BC or hold Canadian citizenship to qualify for legal representation.

Where an applicant is financially eligible and his or her children have been removed or are at risk of being removed, coverage is provided.

If legal representation is denied, an applicant may request a coverage review or a financial eligibility review.

An applicant is not eligible for legal aid if he or she is in the care of the Ministry of Children and Family Development (MCFD). In such cases, MCFD will arrange for counsel through the Ministry of Attorney General.

Immigration Coverage Guidelines

General policy

To qualify for legal aid representation, an applicant must:

- be financially eligible, and
- have an immigration law problem covered by the LSS immigration coverage guidelines.

Immigration coverage guidelines

An applicant is covered if he or she:

- is making a refugee claim in Canada, or
- faces an immigration proceeding that could result in deportation from Canada to a country where his or her life is in danger or if he or she has other compelling reasons for not returning to his or her country.

Note: LSS screens immigration cases for merit to determine whether the applicant has a reasonable chance of being successful in his or her case.

If legal aid representation is denied, an applicant may request a coverage review or financial eligibility review.

Refugee claims

Referrals for refugee and protected persons claims made in Canada are issued for (in two stages):

- Personal Information Form (PIF) preparation, and
- representation at refugee hearings.

Other immigration cases

The following types of cases will be referred to the LSS Judicial Appeals Section at the Vancouver Regional Centre. The Judicial Appeals Section screens these cases for merit and issues referrals if they determine that the applicant has a reasonable chance of being successful in his or her case.

- admissibility hearings before the Immigration and Refugee Board Adjudication Division
- judicial Review applications to the Federal Court of Canada, and appeals to the Federal Court of Appeal or the Supreme Court of Canada to review an order of the Immigration and Refugee Board or an immigration officer
- applications to stay a removal from Canada made to the Federal Court of Canada
- applications to reopen or reinstate proceedings before the Immigration and Refugee Board
- permanent resident (landed immigrant) deportation appeals to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board
- Pre-Removal Risk Assessment (PPRA) submissions to Citizenship and Immigration Canada
- Humanitarian and Compassionate (H&C) submissions to Citizenship and Immigration Canada

Criminal Coverage Guidelines

General policy

To qualify for legal representation, an applicant must:

- be financially eligible, except for specified exceptions, and
- have a criminal law problem covered by the criminal coverage guidelines.

Criminal coverage guidelines

An applicant is covered if he or she:

- faces a criminal proceeding,
- is charged with a criminal offence, and
- if convicted, faces a risk of jail (includes house arrest).

An applicant does not have to permanently reside in BC or hold Canadian citizenship to qualify for legal representation.

Less serious summary offences may be covered for adult applicants in very limited circumstances.

Additional grounds for coverage

An applicant who does not necessarily face a risk of jail may be covered if he or she:

- faces a loss of livelihood upon conviction,
- has a mental or physical disability, or
- faces immigration complications that may result in deportation.

If legal representation is denied, an applicant may request a coverage review or financial eligibility review.

Exception

Youth under the age of 18 who are not wards of the Ministry of Children and Family Development are covered for all federal charges regardless of financial eligibility or risk of jail.

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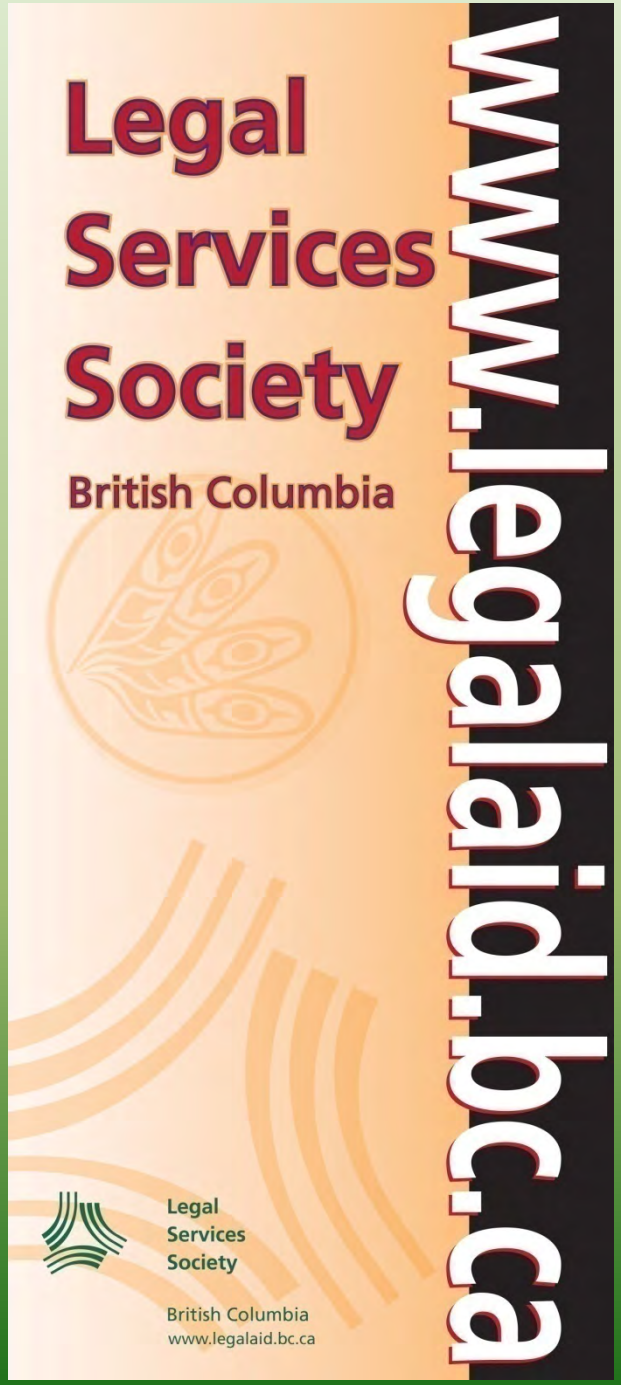
Community …Education …Information …Engagement


HELP
SUPPORT
ADVICE
ASSISTANCE
GUIDANCE

32 Legal Aid Offices

Abbotsford
Campbell River
Chilliwack
Courtenay
Cranbrook
Dawson Creek
Duncan
Fort St. James
Fort St. John
Hazelton
Kamloops
Kelowna
Langley
Nanaimo
Nelson
New Westminster
North Vancouver
Penticton
Port Alberni
Port Coquitlam
Prince Rupert
Quesnel
Richmond
Salmon Arm
Smithers
Surrey
Terrace
Vancouver
Vanderhoof
Vernon
Victoria
Williams Lake



Community Engagement & Outreach Team

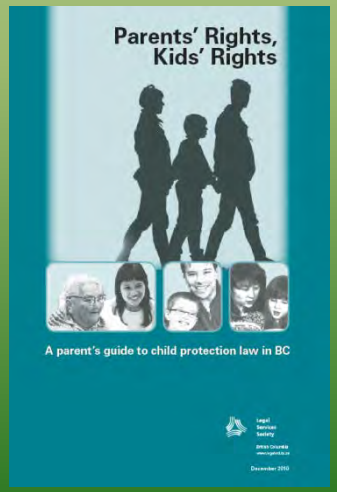
LSS Publications & the new FLA

All current LSS family law PRINTED materials will be revised and updated to conform to the new FLA by March 18, 2013 (the FLW "in force" date) in three key areas:

- General family law
  (e.g. *Living Together or Living Apart*)
- Abuse & family law violence
  (e.g. *Surviving Relationship Violence and Abuse, For Your Protection* and the *Live Safe End Abuse* series)
- Child protection (*Parents' Rights, Kids' Rights)*

A number of NEW publications will be added to the family law print collection:

- *A Guide to the New BC FLA* (gives an overview to introduce the FLA changes in plain language)
- *Understanding Mediation in Child Protection Cases* (a fact sheet for the Aboriginal community).



LSS Publications & the new FLA

All current material on the FLWS will be revised and updated to conform to the new FLA (self-help guides, fact sheets, FAQs and videos alike).

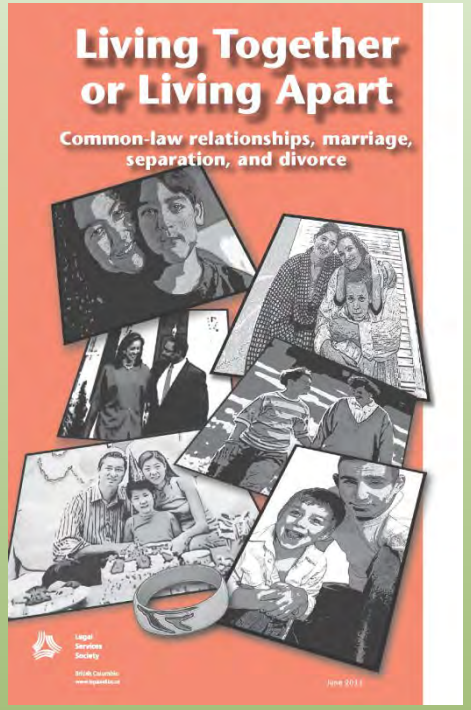
A number of NEW fact sheets and self-help guides will be added to the website.

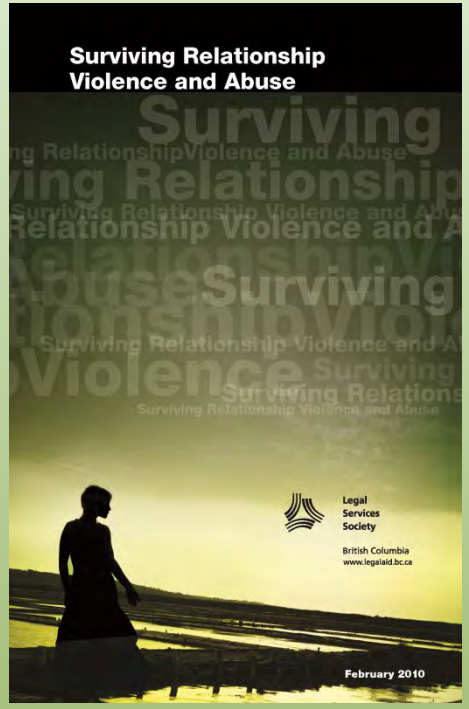
Fact sheets (20 more)

- General family law (e.g. Best Interests of the Child, Guardianship and Parenting Arrangements, Parentage etc.)
- Abuse & Family Violence (e.g. Family Court protection orders)
- Child protection with a focus on dispute resolution options (e.g. Collaborative planning and decision making in child protection cases)

Self-help guides (6 more)

- General family law
  (e.g. how to set aside an agreement in Provincial Court)
- Guides will focus on dispute resolution options
  (e.g. how to start or respond to a family case in Supreme Court)





For any queries or suggestions about FLA-impacted publications, please contact:

Candice Lee
Supervisor, Print, Web & Multimedia
Email: candice.lee@lss.bc.ca

Family Law in British Columbia

Helping families use the law

Legal Services Society

Text Size: A A A

Welcome

The Legal Services Society maintains this legal information website and provides legal aid in British Columbia, Canada. If you're having a family problem, you may also qualify for a lawyer to advise you or take your case. Contact legal aid to find out if you qualify.

Shortcuts

- Self-help guides
- Fact sheets
- Who can help
- Publications
- Legislation / court rules
- Court forms
- Definitions
- Videos
- Audio clips

Changes coming

About the new Family Law Act

What's new in family law

Find out about the latest changes to family law

feedback

Home | Legal aid | Lawyers | Cor | Aboriginal | Media | About us

Search our site

Google™ Custom Search

I'm looking for...

- Legal help
- A lawyer to take my case
- A legal aid office
- Publications
- News releases
- Career opportunities
- Lawyer e-services

Our locations

Our services

Our publications

We're here to help

français · español · 中文 · العربية

Multilingual publications

Welcome to the Legal Services Society (LSS), the organization that provides legal aid in BC.

If you have a legal problem and can't afford a lawyer, we can help. Join the thousands who use the self-help information on our Family Law in BC website or who read our free legal information publications. You may also qualify for some legal advice from a lawyer or even for a lawyer to take your case.

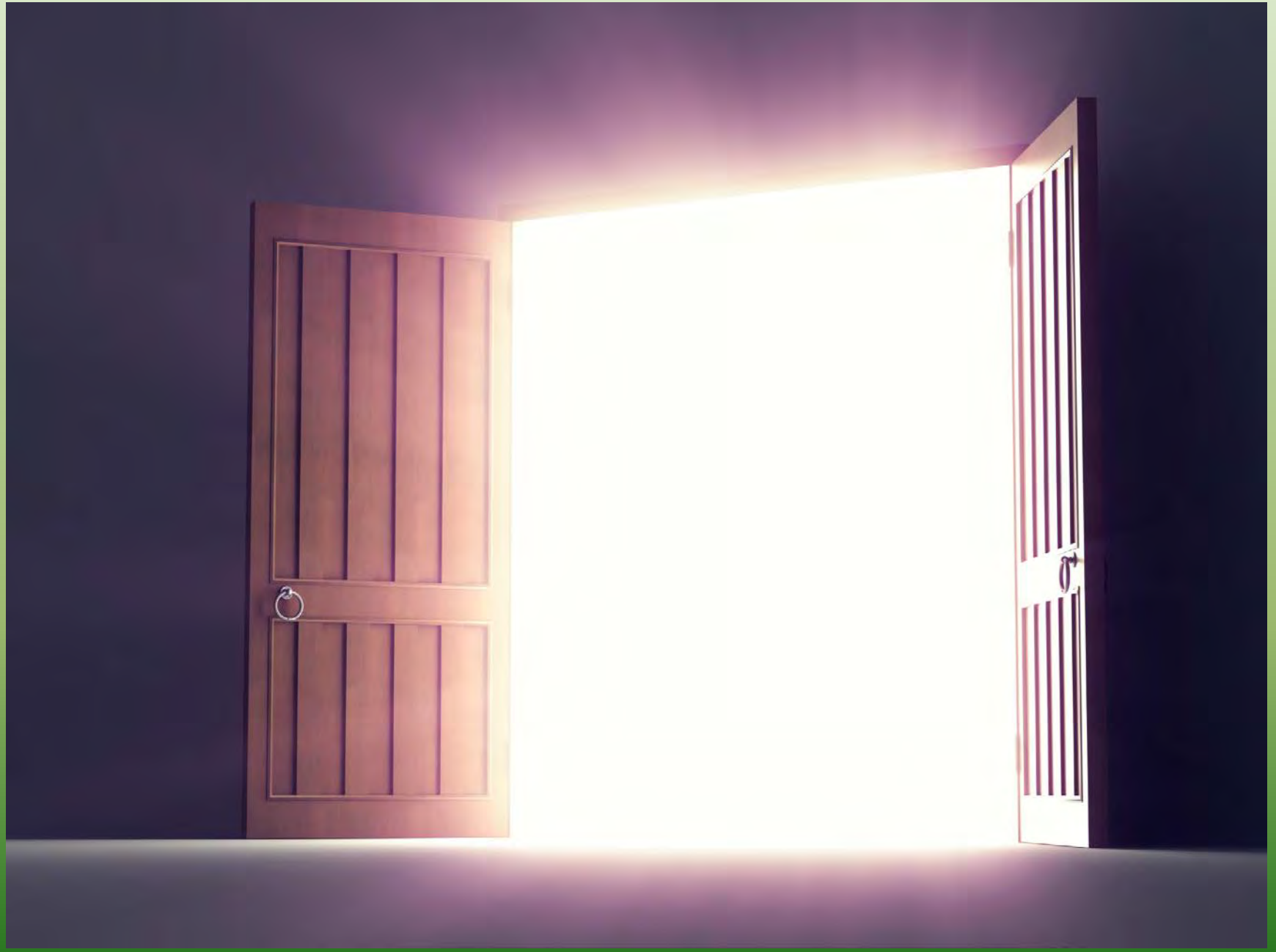
Find out more about legal aid and LSS.

I am a...

- Person who needs legal help
- Lawyer
- Community worker
- Reporter

I want to...

- Apply for legal aid
- Contact LSS
- Get help with my family law problem
- Find family law court forms



TRAC

TRAC Tenant Resource & Advisory Centre

www.tenants.bc.ca

www.povnet.org

Clicklaw

SOLVE PROBLEMS. FIND HELP.

www.clicklaw.bc.ca

Other agencies that provide PLEI services

access | probono

QUALITY LEGAL SERVICES FOR ALL

www.accessprobono.ca

Thank You!

Legal
Services
Society

British Columbia
www.legalaid.bc.ca

Working with LSS Intake

September 25, 2012

How to apply for legal representation?

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

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

Our clients

Who qualifies?

A client qualifies for legal aid when:

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

Approved

What legal problems are eligible for coverage?

- **Criminal** – where charges are serious and jail is likely

Family Law

Child removal

Immigration

Financial Eligibility

Income chart(All case types)

Household Size	Monthly Net Income
1	$1,470
2	$2,050
3	$2,640
4	$3,230
5	$3,810
6	$4,400
7 or more	$4,990

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

Appealing a refusal

- Client has right to appeal a refusal

- Coverage and financial eligibility reviews must be submitted within 30 days of being refused legal aid to:

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

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 info

More information

- Legal Services Society www.legalaid.bc.ca.
- Family Law in BC www.familylaw.lss.bc.ca

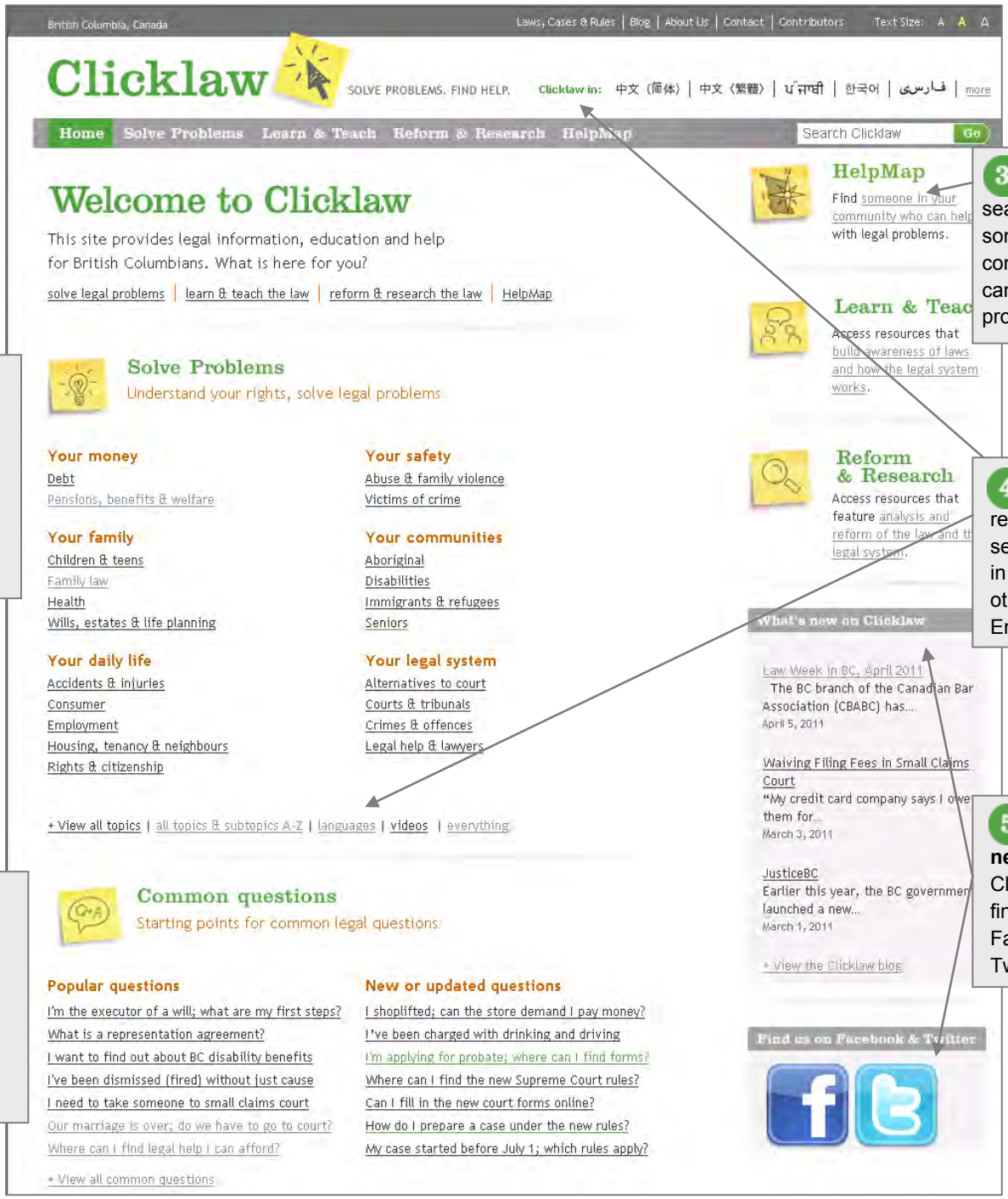
Clicklaw

SOLVE PROBLEMS. FIND HELP.

www.clicklaw.bc.ca

Are you a member of the public or helping someone with a legal problem?

The Clicklaw website offers a single place to start on the Internet for quality legal information, education and help for British Columbians. Here are **five key ways you can use Clicklaw**:



1 In **Solve Problems**, find understandable information on your legal rights and options to solve legal problems

2 Choose from over 100 **common questions**, which offer starting points for common legal problems

3 On **HelpMap** search for someone in your community who can help with legal problems

4 Find resources and services that are in **languages** other than English

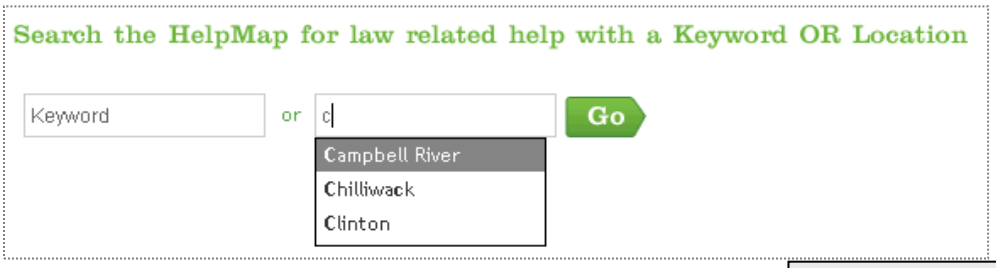
5 See **what's new** on the Clicklaw blog or find Clicklaw on Facebook or Twitter

The Clicklaw HelpMap

Integrated with Google Maps, the HelpMap assists the public in British Columbia in finding those who can provide assistance with legal problems in their community. It also assists service providers and helpers who are making referrals for clients who have legal issues.

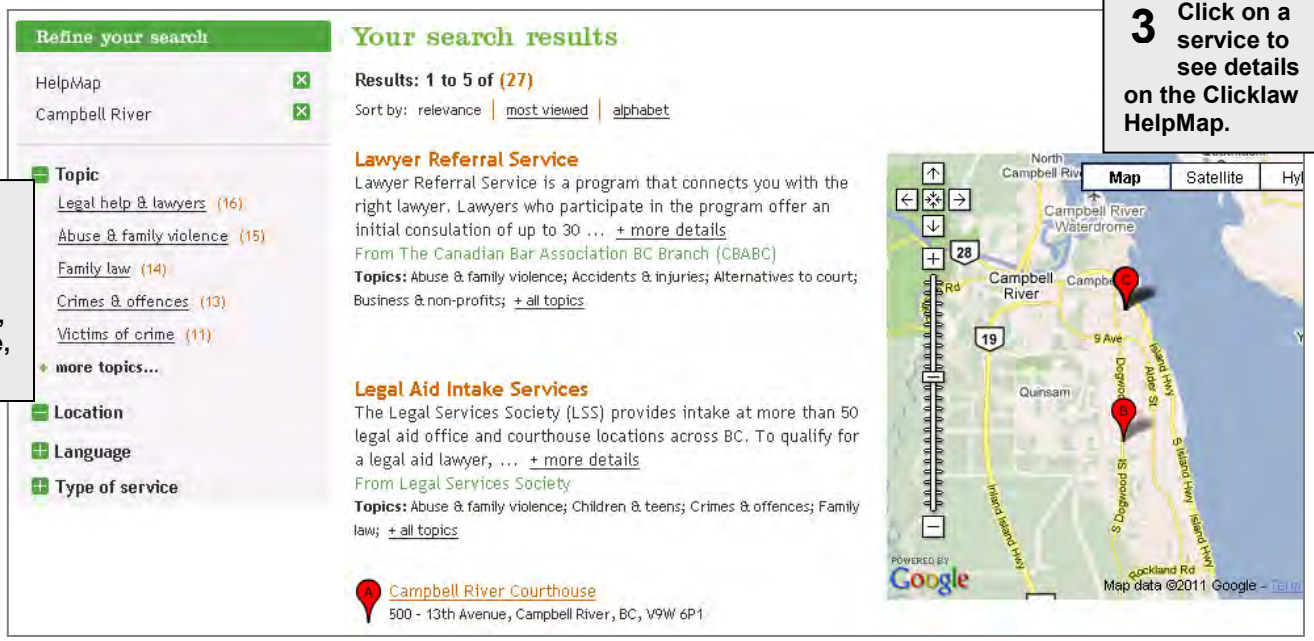
Three steps to finding law-related assistance on the HelpMap

1 Search by keyword or city/town at www.clicklaw.bc.ca. Or you can browse by topic.



2 *[optional]* Refine your search by topic, location, type of service, or language.

3 Click on a service to see details on the Clicklaw HelpMap.



What can you find on the HelpMap

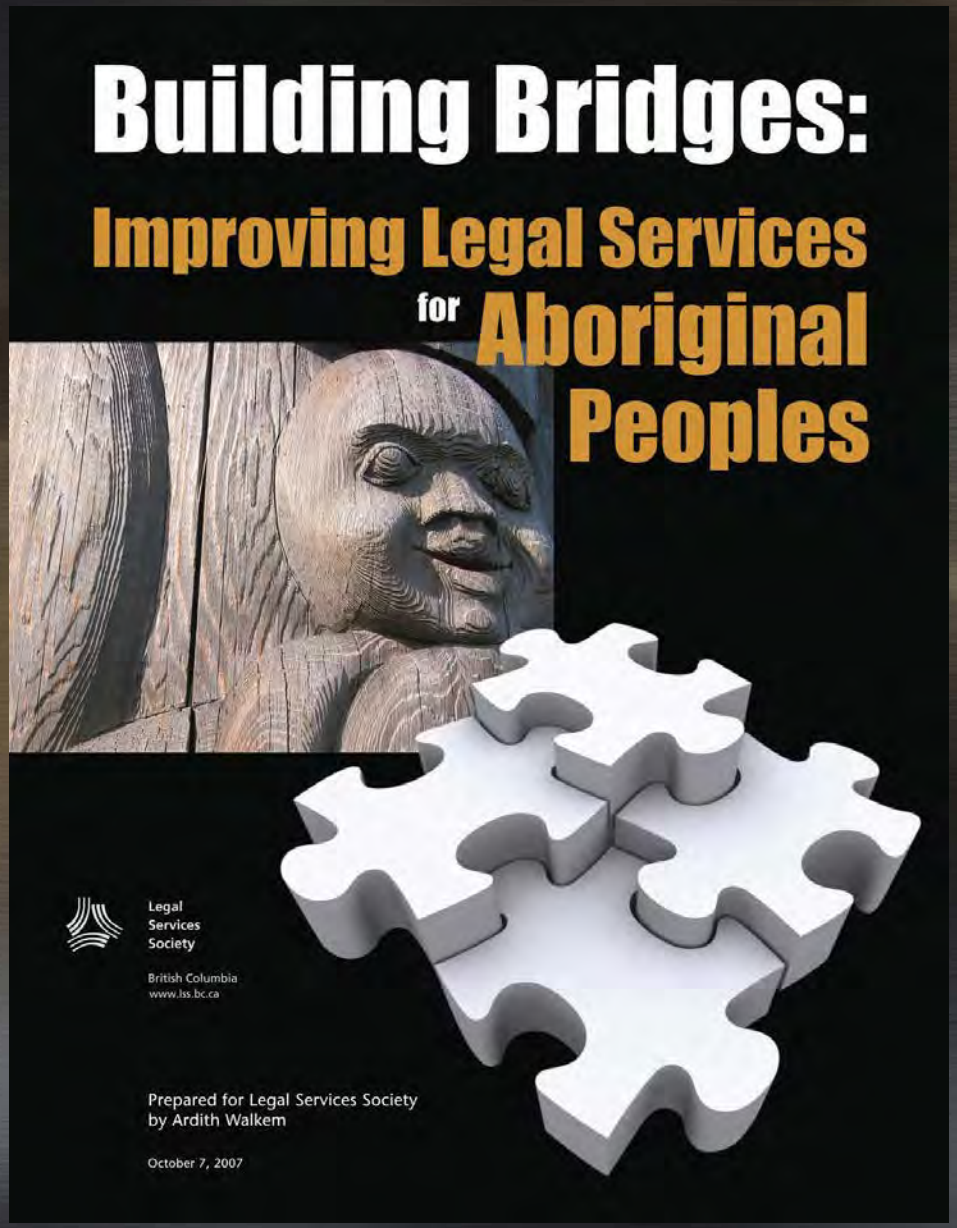
- pro bono clinics, community legal clinics, and legal aid offices
- organizations with community legal advocates
- court registries
- courthouse libraries
- Native Courtworkers
- victim support programs
- key government agencies
- dozens of other law-related helping services

4. Aboriginal Services

IMPROVING LEGAL SERVICES

FOR ABORIGINAL PEOPLES

Pamela Shields
Manager, Aboriginal Services
Legal Services Society



A roadmap for improving legal services for Aboriginal peoples

October 2007
By Ardith Walkem

LEGACY OF COLONIALIST HISTORY

- INDIAN RESIDENTIAL SCHOOL GENERATIONAL IMPACT
- ILLITERACY
- CHILD APPREHENSION
- POVERTY
- FASD
- SEXUAL ABUSE

GOAL #1:

Reducing the number of

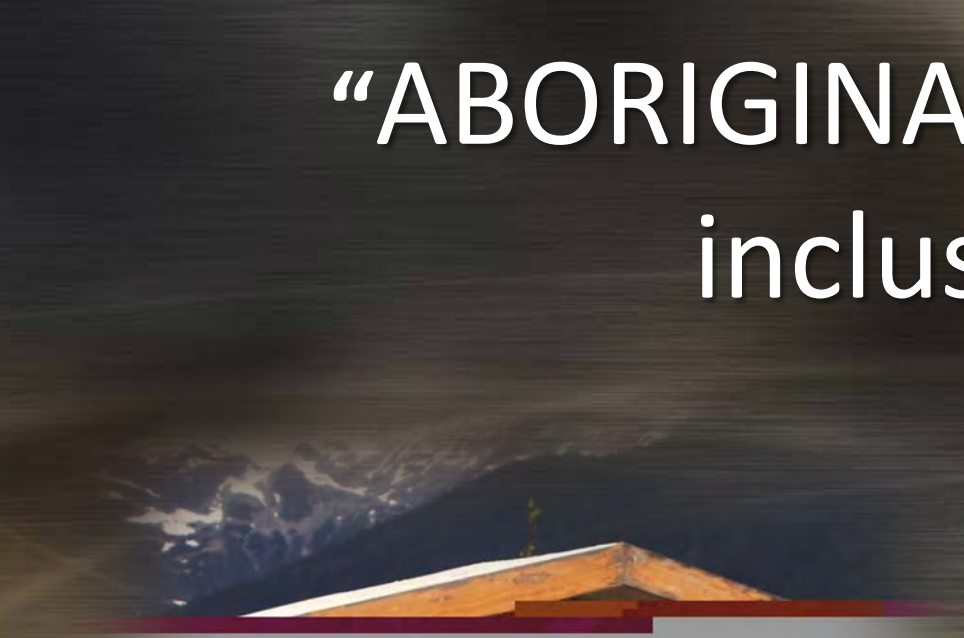
Aboriginal people in prison

GOAL #2:

Reducing the number of

Aboriginal children in care

“ABORIGINAL” – defined inclusively



- FIRST NATIONS (INDIAN)
  - STATUS
  - NON-STATUS
  - ON & OFF RESERVE
- MÉTIS
- INUIT

ABORIGINAL PEOPLES

4.5% OF BC'S POPULATION

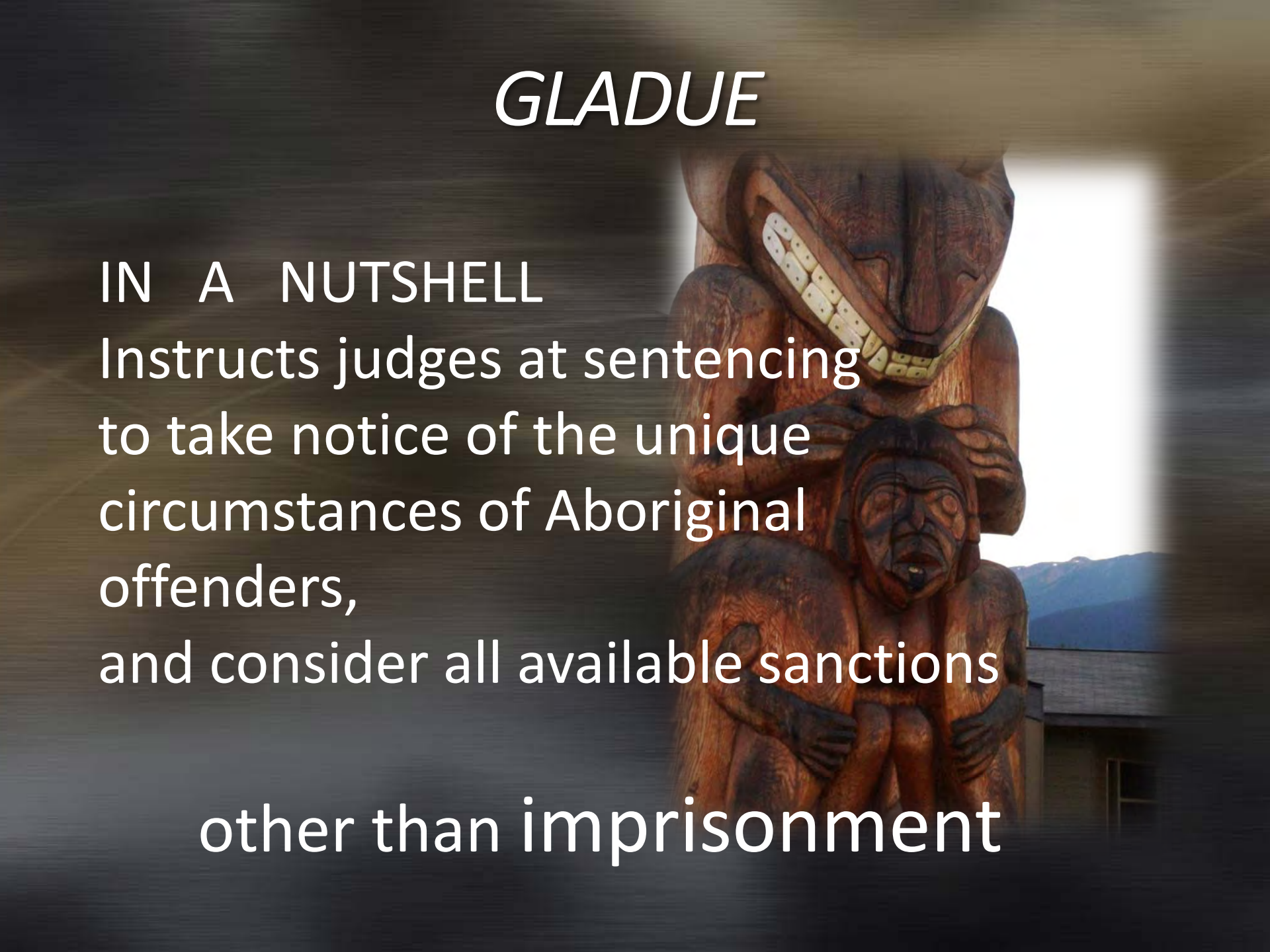
ABORIGINAL PEOPLES

- 56% Aboriginal kids in care
- 20% Aboriginal adults in jail

Aboriginal Child Protection

The Industry of Aboriginal Child Apprehension

GLADUE



IN A NUTSHELL

Instructs judges at sentencing
to take notice of the unique
circumstances of Aboriginal
offenders,
and consider all available sanctions

other than imprisonment

Gladue reports

Paint a picture of the defendant

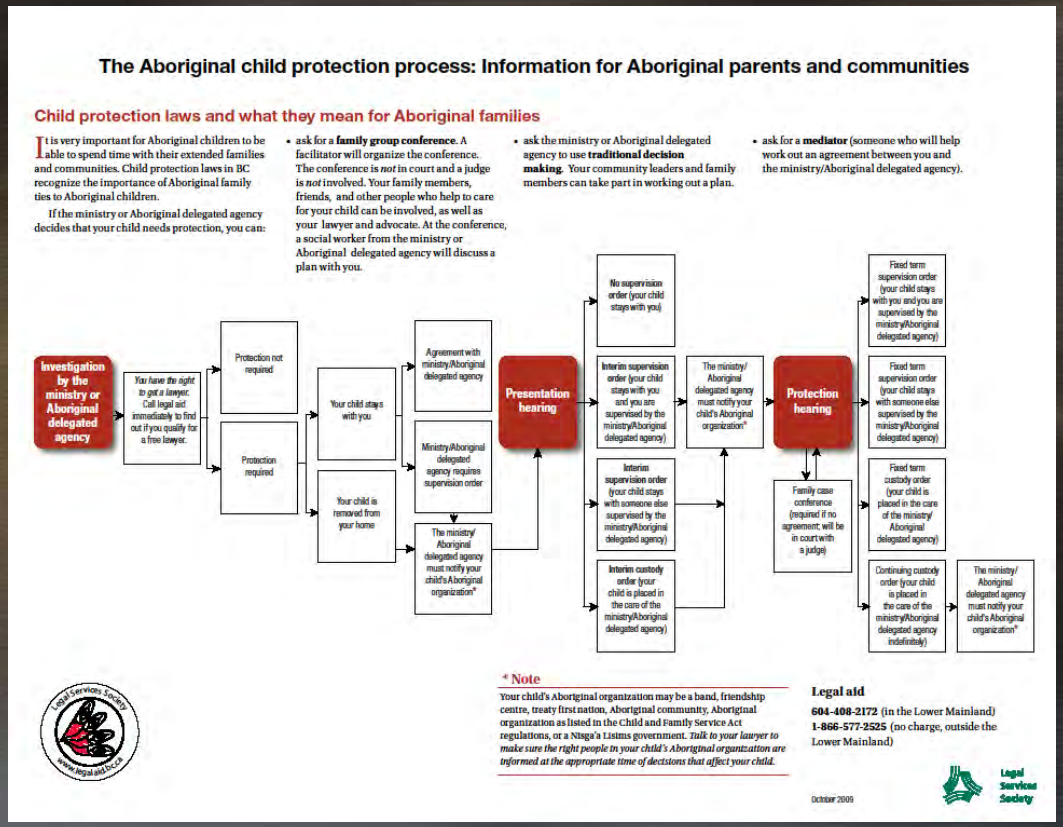
For the court

What are Gladue reports?

- Sentencing
- Bail

Restorative Justice

ABORIGINAL CHILD PROTECTION PUBLICATIONS



The Aboriginal child protection process: Information for Aboriginal parents and communities

Child protection laws and what they mean for Aboriginal families

It is very important for Aboriginal children to be able to spend time with their extended families and communities. Child protection laws in BC recognize the importance of Aboriginal family ties to Aboriginal children.

If the ministry or Aboriginal delegated agency decides that your child needs protection, you can:

- ask for a **family group conference**. A facilitator will organize the conference. The conference is *not* in court and a judge is *not* involved. Your family members, friends, and other people who help to care for your child can be involved, as well as your lawyer and advocate. At the conference, a social worker from the ministry or Aboriginal delegated agency will discuss a plan with you.
- ask the ministry or Aboriginal delegated agency to use **traditional decision making**. Your community leaders and family members can take part in working out a plan.
- ask for a **mediator** (someone who will help work out an agreement between you and the ministry/Aboriginal delegated agency).

*** Note**

Your child's Aboriginal organization may be a band, friendship centre, treaty first nation, Aboriginal community, Aboriginal organization as listed in the Child and Family Service Act regulations, or a Nisga'a Lisims government. *Talk to your lawyer to make sure the right people in your child's Aboriginal organization are informed at the appropriate time of decisions that affect your child.*

Legal aid

604-408-2172 (in the Lower Mainland)
1-866-577-2525 (no charge, outside the Lower Mainland)

Legal Services Society

October 2009

- Aboriginal Child Protection poster
- 1-Page Fact Sheets
- Right to Counsel Cards
- Mediation

Tk̓emlúps Legal Aid

208 – 300 Columbia Street
Tk̓emlúps, BC V2C 6L1
Xwqweltálkwetn: 250-314-1900
Me7 éyct.s te7 scálkwem
Fax: 250-314-1605
Tskelltsín: Nek̓wésqt – Mesésqt
8:30 a.m. – 12:00 p.m., 1:00 p.m. – 4:30 p.m.

Me7 tsnes-k

E qwenén-ucw es knucwt.s te7 k̓wséltkten, MCFD k cikt tek sw7ec

Tk̓emlúps Xwqwelélllcw

2nd Floor, 455 Columbia te Cucwéll
Nek̓wésqt, Kellésqt, Mesésqt
9:00 a.m. – 11:30 a.m.

Legal Aid e Tsnes-ucw

208 – 300 Columbia te Cucwéll
Nek̓wésqt – Mesésqt
1:00 p.m. – 3:30 p.m

E qiyém̓-ucw me7 tsqwlentéc re Call Centre

1-866-577-2525
Nek̓wésqt, Selésqt, Mesésqt, Tselkstésqt
8:30 a.m. – 4:30 p.m.
Kellésqt
8:30 a.m. – 12:30 p.m.

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

April 2012

Qwenénen-k e sknúct.s te sw7ecs re7 k̓wséltktn?

Re kenknúcwmens k nek̓úsem te k̓wseltktnéws tsknúcwst.s re qelmúcw e tá7us put wes k k̓úlscenmes ell e pll-sw7éces tek ts'ucwlém.

Tk̓emlúps Xwqwelélllcw

2nd Floor, 455 Columbia te Cucwéll

Xwent k sknúcwt.s te7 k̓wséltktn Supreme Court

Tk̓wenem7íplem̓ e kellé̓ws-ucw ell e sq̓wté̓wsencwes k stemstítem̓t, k tmicw.

Tqeltkéllcws
re Tk̓wenem7íplem̓
kenknúcwmens k k̓wseltktnéws
e tsnes-ucw
Nek̓wésqt, Selésqt
9:00 a.m. – 12:00 p.m., 1:00 p.m. – 4:00 p.m.

Xwent k sknúcwt.s te7 k̓wséltktn Provincial Court

Tk̓wenem7íplem̓ e kellé̓ws-ucw ell e sknúcwenc re7 stsmémelt.

Provincial Xwqwelélllcw
re Tk̓wenem7íplem̓
kenknúcwmens k k̓wseltktnéws
e tsnes-ucw
Selésqt, Kellésqt
9:00 a.m. – 12:00 p.m., 1:00 p.m. – 4:00 p.m.

www.familylaw.lss.bc.ca
Re kenknúcwmens k nek̓úsem te k̓wseltktnéws website
Xpqenwé̓nte t̓hé7en e xílm-ucw e sknúcwenc re7 k̓wséltktn.

E sxpqenwé̓nc cú7tsem k s7i7llcw tek sw7ec, csp̓élkwecte e tsut-ucw e swiktc k swet:
Access Pro Bono
1-877-762-6664
Salvation Army Pro Bono
604-694-6647

Tk̓emlúps ell District Elizabeth Fry Society
"Kenknúcwmen nts'ecwlém te sw7ec"
www.kamloopsefry.com

ABORIGINAL WEB PAGES

- Indian Residential School Settlement
- Harvesting Rights
- Community Board
- Publications
- Links

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

Early Intervention At Investigation

Asserting legal rights

ABORIGINAL CHILD PROTECTION

Ardith Walkem
Halie Bruce
Hannah
Vancouver, 2012

Aboriginal Mediators Roster

Aboriginal Community Legal Workers

Working in their Communities:

Donna Moon
Nanaimo/Duncan

Maggie Matilpi
Port Hardy

Expanded Duty Counsel First Nations Court

New Westminster

- No triable issue
- Sentencing
- Restorative justice
- Waiving in

Legal Advice Before Court Date

Expanded Duty Counsel

Legal Advice Before Court Date

1-877-601-6066

Expanded Duty Counsel

- First Nations Court
- Port Hardy
- Williams Lake
- Sheway/Fir Square

Legal Advice Clinics

Legal Advice Clinics

- Tsay Keh Dene
- Kwadacha

Aboriginal Courts

- New Westminster
- Kamloops
- Tsay Keh Dene?

Profile of an Aboriginal Woman Prisoner*

- 27 years old
- grade nine
- single mother of 3
- violence
- sex trade

And the cycle continues

Correctional Service of Canada http://www.csc-scc.gc.ca/text/prgrm/abinit/know/5-eng.shtml

Gladue Primer

Legal Services Society
British Columbia
www.legalaid.bc.ca
February 2011

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This booklet explains the law in general. It isn't intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. The *Gladue Primer* is up to date as of **February 2011**.

Special thanks to Jonathan Rudin of Aboriginal Legal Services of Toronto and Linda Rainaldi for their contributions to this booklet. We gratefully acknowledge Community Legal Education Ontario (CLEO) for the use of the information in their booklet *Are you Aboriginal? Do you have a bail hearing? Or are you going to be sentenced for a crime?* (2009).

How to get the *Gladue Primer*
Get free copies of this booklet from your local legal aid office.

Read online (in PDF) at **www.legalaid.bc.ca/publications**

Order online: www.crownpub.bc.ca
(click the Legal Services Society image)

Phone: 1-800-663-6105 (call no charge)
250-387-6409 (Victoria)

Fax: 250-387-1120

Mail: Crown Publications
PO Box 9452 Stn Prov Govt
Victoria, BC V8W 9V7

Contents

Section 1 — Gladue primer

Introduction **1**

Are you Aboriginal? 1

About Gladue **2**

History of Gladue 2

Why did the Supreme Court make this decision? 3

How can Gladue help you? 3

How does Gladue work? 4

Gladue applies to all Aboriginal people 4

Gladue applies to all crimes 4

Exercising your Gladue rights is your choice 4

When does the judge apply Gladue? 5

What does the judge need in order to apply Gladue? 5

Gladue reports 6

What kind of information is included in a Gladue report? 6

Are Gladue reports different from pre-sentencing reports? 7

Who can help me with my Gladue report? 8

Bail and sentencing **9**

Bail 9

Release without a bail hearing 9

Bail hearings 9

Bail options — If you're released 10

If you're not released 11

What is a bail plan? 11

Gladue considerations for bail 11

Sentencing 12

Sentencing hearings 12

Types of sentences 13

Gladue considerations for sentencing 15

First Nations Court **17**
What is First Nations Court? 17
How do I apply to have my matter heard in First Nations Court? 17
Section 2 — Gladue report workbook
Review of Gladue materials **21**
Are you Aboriginal? 21
About Gladue 21
History of Gladue 22
How can Gladue help you? 24
How does Gladue work? 25
Gladue reports 26
Who can help me with my Gladue report? 28
What is First Nations Court? 28
Preparing a Gladue report **30**
What does the judge need to know? 30
What is your background? 30
What types of community sentences are available? 35
Notes 37
Appendices 39
Appendix 1 — *Are you Aboriginal?* fact sheet 41
Appendix 2 — Case law: *Regina v. Gladue* 45
Appendix 3 — Resources for preparing Gladue reports 105

Section 1 — Gladue primer

Introduction

This booklet is for Aboriginal **defendants** who want to know more about their Gladue rights and are working with their lawyer on preparing a Gladue report. (A defendant is someone who has been accused of a crime.) This booklet can also be used by Aboriginal advocates, Aboriginal justice workers, Aboriginal community members, the legal community, and anyone else who needs information about Gladue rights.

This booklet contains information about Gladue rights, the history of Gladue, and what Gladue means for you. This booklet also has a workbook that will help you review the information about Gladue (see page 21). The workbook will also walk you and your lawyer (or advocate) through the process of preparing a Gladue report (see page 30). At the end of this booklet, you'll find appendices (see page 39, after the third tab) that can help you learn more about Gladue and preparing Gladue reports.

In this booklet, words that you might not know appear bold. These words are defined or explained, usually within the same sentence or paragraph. Sometimes you will be referred to a different page, where the word is explained in detail.

Are you Aboriginal?

If you **self-identify** as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code (section 718.2 (*e*)) often called **Gladue rights**. Gladue rights refer to the special consideration that judges must give an Aboriginal person when setting bail or during sentencing. When you or your lawyer let the court know that you're Aboriginal and that you have Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is setting your bail or sentencing you, he or she must consider all options other than jail. How Gladue works and how it can help you is explained in the sections that follow.

Gladue rights apply to *all* Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It doesn't matter if you live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community — Gladue still applies to you.

About Gladue

History of Gladue

In 1995, a young Cree woman named Jamie Tanis Gladue was celebrating her 19th birthday with some friends and her fiancé, Reuben Beaver. Jamie and Reuben had one child together and Jamie was pregnant with their second child. They were living together in Nanaimo, BC. Jamie suspected that Reuben was sleeping with her sister. When Reuben left the party with Jamie's sister, Jamie said that "Next time he fools around on me, I'm going to kill him." Jamie confronted Reuben at home, where Reuben insulted her many times. Jamie stabbed Reuben inside their townhouse and when he ran out of the townhouse, she ran after him and stabbed him again. Reuben died from his injuries and Jamie was charged with second degree murder.

Jamie and Reuben had a history of **domestic violence** (abuse) in their relationship — Reuben had assaulted Jamie in the past. When Jamie stabbed Reuben, she was extremely drunk and didn't appear to know what she was doing. Jamie pled guilty to manslaughter and her case didn't go to trial. At the time, she was 20 and didn't have a criminal record. While she was on bail, Jamie attended drug and alcohol counselling and finished Grade 10 and was about to start Grade 11. As well, after the stabbing, she was diagnosed with a medical condition (hyperthyroid) that caused her to overreact to emotional situations.

At the sentencing hearing, Jamie said that she was sorry about what had happened, that she didn't intend to do it, and said that she was sorry to Reuben's family. The judge kept these things in mind when he was sentencing her. The judge also kept in mind that because of the comments that Jamie had made at the party, it was clear that she had intended to hurt Reuben. It was also clear that because Jamie had been the one to attack Reuben, she was not afraid of him. The judge didn't think that Jamie's or Reuben's Aboriginal status was important to the case because they lived in a city off reserve and weren't in an Aboriginal community. He therefore didn't give Jamie any special consideration as an Aboriginal person when he was sentencing her. The judge sentenced Jamie to three years in prison.

Jamie decided to **appeal** her sentence (ask the court to reconsider her sentence), partly because the judge didn't take into account her Aboriginal status. However, the BC Court of Appeal dismissed her appeal. After her appeal was dismissed, Jamie and her lawyer took her case to the Supreme Court of Canada in 1999. The Supreme Court said that the judge who sentenced Jamie might have made a mistake when he said that Jamie's Aboriginal status wasn't important because she didn't live in an Aboriginal community and that he didn't need to give her special consideration under section 718.2 (*e*) of the Criminal Code. However, the Supreme Court still felt that Jamie's sentence of three years was fair, especially since she'd been granted parole after she'd served six months.

Even though the Supreme Court didn't think it was necessary to change Jamie Gladue's sentence, it did feel that Jamie's case was important. As a result of her case, the court said that there are too many Aboriginal people being sent to jail.

The court also said that Aboriginal people face racism — in Canada and in the justice system. The special rights that Aboriginal people have under section 718.2 (*e*) of the Criminal Code are a way the justice system can try to make sure that Aboriginal people are treated fairly when their bail is being set or when they're being sentenced.

Now the word **Gladue** refers to the special consideration that judges must give an Aboriginal person when setting bail or during sentencing.

For more information on Jamie Gladue's case in the Supreme Court, see Appendix 2. To see some examples of case law involving the principles of Gladue, you can refer to *Regina v. R.R.B.*, *Regina v. Wesley*, and *Regina v. Sunshine* at www.canlii.org.

Why did the Supreme Court make this decision?

The Supreme Court recognized that the number of Aboriginal people being sent to jail is a problem in Canada. The Supreme Court also recognized that the number of Aboriginal people being sent to jail has been increasing over the last several decades. According to Statistics Canada, between 1965 and 1985, Aboriginal people represented only two percent of the Canadian population, but they formed 10 percent of the federal inmate population for men, and 13 percent of the federal inmate population for women. By 2008, Aboriginal people made up three percent of the Canadian population, but they formed 18 percent of the federal inmate population for men, and 24 percent of the federal inmate population for women[1]. What this means is that the number of Aboriginal people in prison is too high when compared to the number of Aboriginal people in the general population.

The Supreme Court said that this is because Aboriginal people in Canada face racism in their everyday lives, and in the justice system. Gladue rights are a way to address the high numbers of Aboriginal people in jail: now judges will have to look at all options other than jail when they're sentencing an Aboriginal person.

How can Gladue help you?

When you or your lawyer inform the court of your Gladue rights, the judge must keep in mind that Aboriginal people face unique circumstances, and he or she must give you special consideration when setting your bail or sentencing you. Gladue encourages judges to use **restorative justice** when they're sentencing Aboriginal people. Restorative justice is a form of justice that focuses on repairing the harm done by your crime and giving you and any victims of your crime opportunities to heal. The goal of restorative justice is to give you, the victims of your crime, and your community a chance to move forward, and to help you so that you won't feel the need to turn to crime in the future. This can mean that your sentence will help you to address the issues that got you into trouble with the law in the first place. It may also mean that your sentence is one that's more appropriate and meaningful to your culture.

[1] www.statcan.gc.ca

The judge also has to consider all options other than jail for your sentence. For example, as mentioned above, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place. This is called a **community sentence**. A community sentence might involve something like participating in drug or alcohol rehabilitation, anger management, or counselling. If you do a community sentence, you may get less or no time in jail.

However, Gladue doesn't automatically mean you won't get jail time. If you committed a serious crime, the judge may have no choice but to send you to jail. If this is the case, the judge must still apply Gladue when he or she decides how long your jail sentence will be.

It's also important to remember that participating in restorative justice or serving a community sentence isn't an easy way out. The main idea behind restorative justice is that the offender has to take responsibility for his or her actions. And, as mentioned above, serving a community sentence often means that you will have to work on addressing the issues that got you into trouble with the law. This can be difficult and a lot of hard work.

For more information on how Gladue can help you, see the fact sheet in Appendix 1.

How does Gladue work?

Gladue applies to all Aboriginal people

Gladue rights apply to *all* Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It applies to you if you live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community. Gladue also applies to you even if you were adopted by parents who aren't Aboriginal, or if you were raised in a foster home.

If you don't have a lawyer, you can tell the court that you're Aboriginal and the judge must still apply Gladue.

Gladue applies to all crimes

Gladue applies to all crimes under the Criminal Code of Canada, even very serious ones. The judge will make his or her decision based on the specific details of your case, and will try to come up with a sentence that's appropriate for you, your community, and the victim. If you committed a serious crime, you may have to go to jail, but the judge will still apply Gladue when he or she is deciding how long your jail sentence should be.

Exercising your Gladue rights is your choice

It's *your choice* whether you exercise your Gladue rights; once you tell the court that you're Aboriginal, the judge must apply Gladue to your case unless you tell him or her not to.

If you're Aboriginal but don't want to have Gladue applied to your case, you can **waive** your Gladue rights. This means that you can give up your Gladue rights and the judge won't apply Gladue when he or she is setting your bail or sentencing you. However, only you can decide that you don't want Gladue applied to your case — no one else can make that decision for you. In other words, the judge, **Crown counsel** (government lawyer), or your lawyer don't have the right to say that Gladue doesn't apply to you or your case. For example, if your lawyer isn't familiar with Gladue, he or she must still do everything possible to make sure your Gladue rights are respected (to start, he or she can get more information on Gladue from this booklet and the booklet *Are You Aboriginal? Do you have a bail hearing? Or are you being sentenced for a crime?* available at www.cleonet.ca). As long as you're Aboriginal, Gladue applies to you and you have the right to have Gladue applied to your case.

Before you decide to waive your Gladue rights, it's very important to talk to your lawyer first. It's usually not a good idea to waive your Gladue rights.

When does the judge apply Gladue?

The judge applies Gladue when he or she is setting your bail or sentencing you. Your bail hearing will happen before your trial. Your sentencing hearing happens after you plead guilty (in which case your case won't go to trial), or if the judge finds you guilty at your trial. Gladue doesn't apply to the trial itself. If you're sent to jail, Gladue applies if you have a parole hearing in jail.

In BC, if you self-identify as Aboriginal, you can apply to have your bail and sentencing hearings in First Nations Court. See page 17 for more information.

For more information on bail, see page 9. For more information on sentencing and the types of sentences a judge might give you, see page 12.

What does the judge need in order to apply Gladue?

In order to apply Gladue, the judge needs to know that you self-identify as Aboriginal and to understand your circumstances. At your bail hearing, the judge also needs to know what options there are for you instead of jail while you wait for your next court date. This is called a **bail plan** (see page 11). At your sentencing hearing, the judge also needs to know what kinds of community sentences are available.

To help the judge, your lawyer needs to give the court a **Gladue report**. A Gladue report gives the judge, Crown counsel, and your lawyer as much information as possible about you and your background so that they can understand why you committed the crime that you did, what kinds of community sentences are available, and how those community sentences might help you to address the issues that got you into trouble with the law in the first place. If the judge has all the information he or she needs to apply Gladue, he or she will be able to make the best decision possible for you and your community.

Gladue reports

What kind of information is included in a Gladue report?

A Gladue report gives the judge the information he or she needs to make the best decision possible when setting your bail or sentencing you. The judge needs to be able to answer two important questions:

- Why is this particular Aboriginal person before the court? (In other words, how or why did you end up getting into trouble with the law?)
- What sentencing options other than jail are available that might help to address the reasons why this Aboriginal person is before the court? (In other words, what kinds of community sentences are available and how will they help you to address the issues that got you into trouble with the law?)

To answer these questions, the judge will need to know more about you, and he or she will need as much information as possible about you and your background in order to get a full picture of your life. The judge will also need to know some information about your family and your community. A few examples of the types of information the judge will need to know about you include:

- Where are you from? Do you live in the city or in a **rural** area (the country)? Do you live on reserve? Did you grow up on reserve?
- Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
- Did you or a family member attend an Indian residential school?
- Have you ever struggled with **substance abuse** (drug or alcohol abuse)? Have you been affected by someone else's substance abuse? For example, did you grow up in a home where there was substance abuse or addictions?
- Did you grow up in a home where there was domestic violence or abuse?
- Is there a program in your community that would help you to address the issues that got you into trouble with the law? For example, is there a counselling program or alcohol or drug rehabilitation program that you feel would be helpful to you?
- Have you participated in community activities such as family gatherings, fishing, longhouse ceremonies, or sweat lodge ceremonies?

The more the information in your Gladue report can be supported by other people or documentation, the better it will be for your case. However, even if you can't support the information in some way or if there's no one who can back up the information (this can often be the case for information about abuse), you should still include it. The judge still needs as much information about you as possible.

Some of the information in your Gladue report may be private or sensitive for you, and you may not like to talk about it. If you don't want this information discussed out loud in court, you can ask your lawyer to give this information in writing to the judge and Crown counsel.

The judge doesn't need the same amount of personal information to apply Gladue at your bail hearing as at your sentencing hearing. See page 11 for more information on Gladue considerations at bail.

The workbook in Section 2 on page 30 will walk you and your lawyer (or advocate) through preparing a Gladue report. Appendix 3 includes a checklist of all the information you should include in your report, blank templates of a Gladue report (one is a sample with instructions, and one is blank that you can photocopy and fill in), and a Gladue report writer's style guide. For information on who can help you prepare a Gladue report, see below.

Are Gladue reports different from pre-sentencing reports?

Yes. Gladue reports and pre-sentencing reports are addressed in different sections of the Criminal Code. Gladue reports are addressed in section 718.2 (*e*) and pre-sentencing reports are addressed in section 721.

Ideally, Gladue reports are prepared with the help of someone who has a connection to and understands the Aboriginal community. The purpose of a Gladue report is to give the court a complete picture of you and your life, including information about your background, your Aboriginal community, and the specific circumstances that brought you before the court. A Gladue report will put your particular situation into an Aboriginal context so that the judge can come up with a sentence that's unique to you and your culture, and has an emphasis on **rehabilitation** (healing). A Gladue report is usually 12 – 18 pages long.

Pre-sentencing reports are prepared by a probation officer. The purpose of a pre-sentencing report is to give the court a picture of you as an offender and is based on your criminal record. A pre-sentencing report focuses on your criminal behaviour and on **risk analysis** (how likely you are to re-offend).

Aboriginal community advocates who understand your culture are in the best position to help you prepare your Gladue report or provide information that can be used in your Gladue report. See page 8 for more information on who can help you prepare your Gladue report.

Who can help me with my Gladue report?

You and your lawyer (or advocate) can use the workbook on page 30 and the resources in Appendix 3 to prepare your Gladue report.

If you don't have a lawyer or your lawyer isn't familiar with Gladue, a **Native courtworker** may be able to help you. Native courtworkers give information and guidance to Aboriginal people who are before the courts, and make sure they have access to the help they need to deal with the legal system. Native courtworkers can also connect you to Aboriginal community groups that can help you with other issues, such as substance abuse or family problems. The Native Courtworker and Counselling Association of British Columbia's website at www.nccabc.ca has more information about who they are and the services they provide. You can call the Native Courtworker and Counselling Association of British Columbia at **604-985-5355** (in Greater Vancouver) or **1-877-811-1190** (elsewhere in BC, call no charge).

The expanded duty counsel at First Nations Court in New Westminster can answer some questions as you prepare your Gladue report. (See page 17 for more information about First Nations Court.) The expanded duty counsel can give you legal advice on or *before* the day of court. For more information, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).

Bail and sentencing

Bail

Bail is an assurance or guarantee to the court that you will appear in court when you're required to do so, and that you will obey any conditions the court sets. Bail is sometimes called **judicial interim release** or **show cause**. In Canada, anyone who is charged with a crime has the right to be considered for bail. In other words, no one is automatically held **in custody** (jail) until their trial. Whether you're held in custody until your trial will depend on the type of crime you've been charged with and other factors such as whether you have a criminal record.

After you've been arrested, depending on the crime you've been charged with and the circumstances of your arrest, the police will either release you without a bail hearing, or they will keep you in custody until you can attend a bail hearing.

Release without a bail hearing

A bail hearing isn't always necessary. If the crime you've been charged with isn't a serious one and the police are confident you will go to court on the specified date, they will release you. You may have to sign a document agreeing to follow certain conditions until your court date, and promising to appear in court on the specified date. If you live more than 200 kilometres from the court, you may have to pay a cash deposit. If you're released without a bail hearing, it won't be necessary to apply Gladue to your case at this time. If you plead guilty to the charges or are found guilty at your trial, you or your lawyer can submit a Gladue report at your sentencing hearing and ask the judge to apply Gladue then.

Bail hearings

The purpose of a bail hearing is to determine whether you should be released or held in custody until your trial. A bail hearing must be held within 24 hours of your arrest, except in special circumstances. You don't have to plead guilty or not guilty at the bail hearing; you will do this when your case goes to trial. A judge or a justice of the peace will set your bail based on the offence you've been charged with, and other factors such as your criminal record (if you have one) and your previous history for appearing in court.

In certain serious circumstances, *you* may be responsible for proving that you're eligible for release. This is called **reverse onus**.

It's a good idea to get a lawyer to represent you at your bail hearing, especially if you've been charged with a serious offence. Contact legal aid immediately to find out if you qualify for a free lawyer. If you don't qualify for a free lawyer, most courts in BC have duty counsel. Duty counsel are lawyers who can give you free legal advice on or before the day of court. Legal aid can give you more information on when and where you can meet with a duty counsel in your area.

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

Bail options — If you're released

The court may release you on an **undertaking**. An undertaking is a written promise that you will show up at court at the specified times. The undertaking may have conditions that you need to follow, such as:

- reporting to a bail supervisor at specified times,
- remaining within the court's **territorial jurisdiction** (area of authority),
- reporting to the court any change of address or employment,
- not communicating with witnesses or victims,
- staying away from certain areas,
- **abstaining from** (not using) alcohol or drugs,
- depositing your passport, and
- not possessing any **firearms** (guns) or weapons.

If you're afraid you might not be able to abstain from alcohol, you can ask for a clause that allows you to drink alcohol inside your home only.

If the Crown counsel can give the court reasons why you shouldn't be released on an undertaking with conditions, the court may still release you on a **recognizance**. A recognizance is a written promise that you will show up at court at the specified times, in addition to a fine you may have to pay if you fail to attend court, or an amount you and/or your **surety** (see below) may have to pay. If you live more than 200 kilometres from the court, you or your surety may have to pay a cash deposit. A recognizance may also have conditions that you have to follow.

A surety is a person who agrees in writing to be responsible for you until your case is concluded. The judge or justice of the peace will interview your surety to make sure he or she is reliable and to find out what kinds of assets he or she has available. For example, the judge or justice of the peace will want to know what type of job your surety has, how long he or she has lived in the province, and whether he or she has bank accounts, property, and/or stocks and bonds.

Your Aboriginal community can act as a surety for you.

For more information on bail and bail options, see the Ministry of Attorney General website at www.ag.gov.bc.ca. On the left-hand navigation bar, click Courts — Court Services Branch — Criminal Court — Bail in B.C.

If you're not released

If the judge or justice of the peace isn't confident that you will show up in court at the specified times or is concerned that you might commit further crimes if you're released, he or she may decide that you should stay in custody until your trial. In general, you have a much better chance of being released on bail if you don't have a criminal record, you're gainfully employed or going to school, or you have another program or plan in place (a **bail plan**). It can take a long time for the courts to schedule a criminal trial. If you're not released on bail, you may be in custody for months.

What is a bail plan?

A bail plan is a comprehensive plan for being in the community while the charges against you are pending. Your bail plan may include conditions similar to an undertaking or recognizance and should include a Gladue report (see below). Working with your lawyer to come up with a comprehensive bail plan that has several conditions, including a surety, is your best option for release.

Working with your lawyer to fully prepare for your bail hearing and to develop a bail plan is important because you could be in custody for a long time before your trial if you're not released.

Taking the time for you and your lawyer to develop a bail plan and Gladue report might delay your bail hearing for a few weeks, which means you would have to remain in custody for those weeks. However, this approach is often much better than rushing into a bail hearing without a bail plan, as you're more likely to be released and won't have to remain in custody for the months leading up to your trial.

Gladue considerations for bail

Your Gladue report doesn't have to be as detailed or contain as much personal information for your bail hearing as it does for the sentencing hearing. The judge or justice of the peace will need to know that you're Aboriginal and the details of your life that would be relevant to bail — employment, education, whether you have a surety, etc. For example:

- Where are you from? Do you live on reserve or off reserve?
- Are you employed? What level of education do you have?
- Do you have a hard time finding work because you lack education or because there are limited opportunities in your community?
- Do you struggle with any addictions?
- Have you been affected by racism?

- Has your life been impacted by colonization in any other significant ways? For example, did you attend an Indian residential school?
- Is there someone who can act as a surety for you? (Remember that your Aboriginal community can act as a surety.)
- Have you taken part in community traditions, celebrations, or family gatherings as a child or as an adult? For example, have you participated in fishing, longhouse ceremonies, or sweat lodge ceremonies?

If you haven't had time to prepare a Gladue report, you or your lawyer can tell the judge or justice of the peace these things out loud.

You can also include positive aspects of your Aboriginal culture in your bail plan. For example, your bail plan could include a commitment to attend sweat lodge ceremonies once per week; do volunteer work for an Aboriginal elder, your Aboriginal community, or friendship centre; or to participate in the potlatch or any other activities that keep you connected to your Aboriginal culture (big house ceremonies, longhouse ceremonies, winter dance, sundance, berry picking, fishing, hunting, beading, drumming, etc.).

Sentencing

If you plead guilty to the charges against you or are found guilty at your trial, the judge will **sentence** you. A sentence is the punishment that the judge feels is appropriate for you given your circumstances and the crime you committed. There are three types of punishments (sentencing options): a fine, probation, or **imprisonment** (jail). A sentence may be served in jail or in the community (for more information, see the table on page 13).

Sentencing hearings

Sentencing takes place in a hearing after you plead guilty to the charges against you, or after your trial if you're found guilty. If you plead guilty to the charges against you, your case won't go to trial and will go straight to sentencing. At the sentencing hearing, the Crown counsel will have a chance to speak and let the judge know what he or she thinks the judge should keep in mind when sentencing you. After the Crown counsel has spoken, your lawyer will have a chance to speak on your behalf and let the court know what he or she thinks the judge should keep in mind when sentencing you (sometimes called a **sentencing plan**; see Appendix 3B for more information). If you want Gladue applied to your case, this will include your Gladue report. Once the judge has heard from both lawyers, he or she will make a decision. The judge will let you and your lawyer know his or her reasons for the decision.

Types of sentences

The type of sentence the judge gives you will depend on the seriousness of your crime and your circumstances. Sentences range from an absolute discharge (which means you will have no conditions, no jail, and no criminal record) to federal imprisonment. The table below lists the different types of sentences from least restrictive to most restrictive; the more restrictive your sentence is, the less freedom you will have.

Types of sentences — Least restrictive to most restrictive	
Community sentences — A community sentence is any sentence that allows you to remain in the community without going to jail.	
Orders	An order is a document that records the judge's decision and is entered at the court registry.
Diversion or alternative measures	Diversion is an out-of-court solution. Typically you must plead guilty for the offence that you've been charged with. The judge will give you a sentence that has conditions. For example, you might be required to perform a certain number of hours of community service, or to abstain from alcohol. If you meet all of the conditions, you won't have a criminal record and your guilty plea won't be entered in court. If you don't meet all of the conditions, your case will go back before the court.
Peace bond	A peace bond is a court order not to harass or bother another person. You may not be allowed to communicate with the person and you may have to stay away from their home or work. A peace bond can last up to a year.
Absolute discharge	An absolute discharge means that even though the judge finds you guilty, he or she doesn't convict you. An absolute discharge has no conditions, probation, fines, or **restitution** (see page 14). After one year, you'll have no criminal record. An absolute discharge is usually only available for minor offences and if you have no previous history of similar offences.
Conditional discharge	A conditional discharge is similar to an absolute discharge, except the judge will place you on probation for a set period of time. Your probation will have conditions that you have to follow. If you follow the conditions, your discharge will become absolute once it expires. After three years, you'll have no criminal record.

Types of sentences — Least restrictive to most restrictive	
Fines	If you committed a **summary offence** (minor offence), the maximum fine is $2000. If you committed an **indictable offence** (serious offence), there is no maximum fine. The court must consider your ability to pay the fine, and may set up a program that allows you to pay the fine in set amounts over a specified period of time. A **Victims Fine Surcharge** applies to all offences. This is a fund that helps victims of crime. If you're unable to pay this, let the judge know and he or she may waive it.
Restitution	Restitution is a way of making amends with the victim of your crime. Restitution usually involves a payment to help cover the costs of the physical or emotional harm that you caused, or to help pay for damaged or lost property.
Probation	Probation is a court order that allows you to remain in the community while following certain conditions, such as undergoing counselling, participating in addictions treatment, and performing community service. Probation may last up to three years. You may also have to pay a fine or go to jail for a certain amount of time.
Suspended sentence	A suspended sentence usually means that the judge will sentence you to prison, but will delay your prison sentence and release you on probation instead. If you follow the conditions of your probation, you won't have to go to jail. If you don't follow the conditions of your probation, you will spend the remainder of your sentence in jail.

Types of sentences — Least restrictive to most restrictive	
Imprisonment within the community — Certain prison sentences can be served within the community, as long as you follow conditions set by the court.	
Conditional sentence order	A conditional sentence order is a prison sentence that's served in the community. This is also known as **house arrest**. A conditional sentence has conditions that restrict your freedom. For example, you may have to stay in your home except to go to work or medical appointments. You may also have to follow conditions set out in a probation order. If you don't follow the conditions, you will have to spend the remainder of your sentence in jail.
Intermittent sentence	If the judge sentences you to less than 90 days in jail, you may be able to serve the sentence on weekends only. This will allow you to continue working. You will also have to follow the conditions of a probation order.
Imprisonment	
Provincial jail	If the judge sentences you to prison for two years less a day or less, you'll be sent to a provincial jail.
Federal jail	If the judge sentences you to prison for two years or more, you'll be sent to a federal jail.

Gladue considerations for sentencing

You and your lawyer (or advocate) should prepare a detailed Gladue report to submit at your sentencing hearing. See page 6 for more information on Gladue reports, and see the workbook on page 30 and the resources in Appendix 3 for help with preparing your Gladue report.

If you haven't had a chance to prepare a Gladue report, you or your lawyer can tell the judge that you're Aboriginal, and tell him or her about the details of your life that he or she will need to know in order to give you an appropriate sentence. However, taking the time to prepare a Gladue report is a better approach and should be done whenever possible, as you will have a chance to think about what information might be important for the judge to know, and it will help you to keep sensitive details about your life private.

You or your lawyer can also ask witnesses such as an Aboriginal elder, band chief, hereditary chief, or other representatives from your Aboriginal community to speak on your behalf at the sentencing hearing. You can also give the judge any letters of support, certificates (such as a certificate that shows you participated in drug or alcohol counselling), and a letter of apology to the victim(s) of your crime.

You or your lawyer can ask the judge to consider sentencing options that are appropriate to your culture. For example, you can ask to participate in an Aboriginal restorative justice program; attend Aboriginal treatment or counselling programs; perform volunteer work for elders, your Aboriginal community, or friendship centre; fish or hunt for your Aboriginal community; or take part in any other relevant Aboriginal traditions, such as holding a shame feast, or participating in the winter dance or longhouse ceremony.

A list of Aboriginal restorative justice programs in BC is available on the Department of Justice website at www.justice.gc.ca/eng. You can navigate to the page as follows:

1. On the left-hand navigation bar, click Programs and Initiatives. The Programs and Initiatives page appears.
2. Scroll down and, under Aboriginal Justice, click Aboriginal Justice Strategy. The Aboriginal Justice Strategy page appears.
3. On the left-hand navigation bar, click Programs. The Community-Based Justice Programs page appears.
4. Click British Columbia. The Community-Based Justice Programs page for British Columbia appears.

If the judge has all of the information he or she needs to apply Gladue but doesn't follow Gladue when sentencing you, the judge may have made a mistake and you may be able to appeal your sentence. Talk to your lawyer about your options.

First Nations Court

What is First Nations Court?

If you live in BC and you self-identify as Aboriginal, you may be able to have your bail or sentencing hearing at First Nations Court in New Westminster. First Nations Court takes a holistic, restorative, and healing approach to sentencing, with a focus on rehabilitation whenever possible. The First Nations Court sits once a month and hears criminal and related child protection matters. You must apply to have your matter heard in First Nations Court.

First Nations Court is different from other provincial courts. First Nations Court focuses on community and makes sure everyone involved in the case has a chance to be heard. During sentencing, the judge, Crown counsel, Aboriginal community members, the victim and the victim's family, you and your family, as well as probation officers, social workers, and drug and alcohol counsellors are invited to sit around a table where everyone gets a chance to speak. After each person has spoken, the judge will work with everyone at the table to come up with a healing plan. The healing plan might involve referrals to counsellors; programs that are appropriate to your culture, job training, and education; and programs offered by Health Canada. You're expected to stick to your healing plan and you must go to future court dates to report on your progress.

How do I apply to have my matter heard in First Nations Court?

The First Nations Court expanded duty counsel can help you apply for First Nations Court, give you free legal advice on or *before* the day of court, and help you prepare a Gladue report. If you're interested in applying to have your bail or sentencing hearing in First Nations Court, you or your lawyer can contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC) for more information.

It's your choice whether you apply to have your matter heard in First Nations Court. Talk to your lawyer about what's best for you. If you don't have a lawyer, contact the First Nations Court expanded duty counsel.

If your matter is heard in First Nations Court, you will have to appear in person. This means you will have to be able to travel to New Westminster. If you can't travel to New Westminster, you may be able to get special permission to participate in your hearings by telephone or videoconference.

Section 2 — Gladue report workbook

Review of Gladue materials

This section of the workbook briefly reviews the information on Gladue. You can enter any notes or questions you want to bring up with your lawyer or Native courtworker in the space provided.

Are you Aboriginal?

If you self-identify as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code often called Gladue rights.

Gladue rights apply to *all* Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It doesn't matter if you live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community — Gladue still applies to you.

About Gladue

Gladue rights refer to the special consideration that judges must give an Aboriginal person when setting bail or during sentencing.

When you or your lawyer let the court know that you're Aboriginal and that you have Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is setting your bail or sentencing you, he or she must consider all options other than jail.

History of Gladue

In 1995, a young Cree woman named Jamie Tanis Gladue was celebrating her 19th birthday with some friends and her fiancé, Reuben Beaver. Jamie and Reuben were living together in Nanaimo, BC. Jamie suspected that Reuben was sleeping with her sister.

Do you see similarities in your circumstances?

When Reuben left the party with Jamie's sister, Jamie confronted Reuben at home. Jamie stabbed Reuben inside their townhouse and again outside of their townhouse.

Do you see similarities in your circumstances?

Reuben died from his injuries. Jamie was charged with second degree murder.

Do you see similarities in your circumstances?

Jamie pleaded guilty to manslaughter and her case didn't go to trial.
Do you see similarities in your circumstances?

At the sentencing hearing, the judge said that he didn't think Jamie's or Reuben's Aboriginal status was important to the case because they lived in a city off reserve, and weren't in an Aboriginal community. The judge didn't give any special consideration to Jamie as an Aboriginal person when he was sentencing her. The judge sentenced Jamie to three years in prison.
Do you see similarities in your circumstances?

Jamie decided to appeal her case. It went to the Supreme Court in 1999. Even though the Supreme Court didn't think it was necessary to change Jamie's sentence, it did feel that Jamie's case was important.
Do you see similarities in your circumstances?

As a result of Jamie's case, the Supreme Court said that too many Aboriginal people are being sent to jail. The Supreme Court also said that Aboriginal people face racism — in Canada and in the justice system.
Do you see similarities in your circumstances?

The special rights that Aboriginal people have under section 718.2 (*e*) of the Criminal Code are a way the justice system can try to make sure that Aboriginal people are treated fairly when their bail is being set, or when they're being sentenced.

Do you see similarities in your circumstances?

How can Gladue help you?

When you or your lawyer inform the court of your Gladue rights, the judge must keep in mind that Aboriginal people face unique circumstances, and he or she must give you special consideration when setting your bail or sentencing you.

Gladue encourages judges to use restorative justice when they're sentencing Aboriginal people.

The judge also has to consider all options other than jail for your sentence. For example, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place (a community sentence).

How does Gladue work?

Gladue rights apply to all Aboriginal people: status or non-status Indians, First Nations, Métis, or Inuit. It applies to you if live on reserve or off reserve, or if you live in an Aboriginal community or a non-Aboriginal community.

Gladue also applies to you even if you were adopted by parents who aren't Aboriginal, or if you were raised in a foster home.

If you don't have a lawyer, you can tell the court that you're Aboriginal and the judge must still apply Gladue.

Gladue applies to all crimes, even very serious ones.

Exercising your Gladue rights is your choice. Only you can choose to waive (give up) your Gladue rights.

The judge applies Gladue when he or she is setting your bail or sentencing you. Gladue doesn't apply to the trial process. Gladue also applies if you have a parole hearing in jail.

In order to apply Gladue, the judge needs to understand your circumstances and to know what kinds of community sentences are available.

To help the judge, your lawyer needs to give the court a Gladue report.

Gladue reports

A Gladue report gives the judge the information he or she needs to make the best decision possible when setting your bail or sentencing you.

A Gladue report gives the judge as much information as possible about you, your background, your family, and your community.

A Gladue report also gives the judge information on the types of community sentences available and how they will help you.

Gladue reports are different from pre-sentencing reports. A Gladue report gives the judge a more complete picture of you and your life, while a pre-sentencing report focuses on your criminal behaviour.

Ideally, a Gladue report should be prepared by someone who has ties to the Aboriginal community.

Who can help me with my Gladue report?

A Native courtworker may be able to help you. Native courtworkers give information and guidance to Aboriginal people who are before the courts, and make sure they have access to the help they need to deal with the legal system.

The expanded duty counsel at First Nations Court in New Westminster may also be able to answer some questions as you prepare your Gladue report.

What is First Nations Court?

If you live in BC and you self-identify as Aboriginal, you may be able to have your bail or sentencing hearing at First Nations Court in New Westminster.

First Nations Court takes a holistic and restorative approach to sentencing. First Nations court focuses on rehabilitation whenever possible.

The judge at First Nations Court works with everyone involved with the case, including Crown counsel, probations staff, and cultural resources such as friendship centres and Native courtworkers, to come up with a healing plan.

You're expected to stick to your healing plan and to show up at future court dates to report on your progress.

It's your choice whether you apply to have your matter heard in First Nations Court.

If your matter is heard in First Nations Court, you will have to appear in person. This means you will have to be able to travel to New Westminster. If you can't travel to New Westminster, you may be able to get special permission to participate in your hearings by telephone or videoconference.

Preparing a Gladue report

What does the judge need to know?

Use this section of the workbook to begin preparing your Gladue report. The judge needs to know about you, your life, and your background — who you are and how you got here. Try to give the judge as complete a picture as possible. The judge also needs to know what kinds of community sentences are available, which ones you're interested in, how they will help you and why. Appendix 3 has a Gladue report writer's checklist, templates you or your Gladue report writer can use (a sample that includes instructions and a blank template that you can fill in), and a Gladue report writer's style guide you can refer to.

Remember to support your information with other documentation or people who can back up your story whenever possible. The more you can support your information, the better it will be for your case. However, don't worry if you can't back something up in this way — what's more important is to give the judge as much information about yourself as you can.

Once you've collected all the information you need, your lawyer (or advocate) should use it to write up a report. Your lawyer should then give the report to the judge. If you don't have a lawyer or your lawyer can't write up a report for you for any reason (for example, if there isn't enough time), it's still important to give this information to the judge in whatever way you can so that the judge can apply Gladue.

Remember that this information doesn't have to be discussed out loud in court. You can ask your lawyer to give this information in writing to the judge or Crown counsel.

What is your background?

Do you self-identify as Aboriginal? Aboriginal can be status or non-status Indian, First Nations, Métis, or Inuit.

Where are you from? What community or band are you from? Do you live in the city or in a rural area (the country)?

What kind of living arrangements do you have right now? For example, how many people live in your house? Are these people your brothers and sisters or other relatives?

What is your home community like? Are there any issues with **substandard** (second rate) housing, lack of clean water, chronic unemployment, or seasonal employment? Is your community "dry"? Are there any issues with substance abuse?

What kind of living arrangements did you have when you were growing up?

Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?

Do you feel **dislocated** from your community? (Have you been taken away from your community in some way?) Has your community been **fragmented** (broken apart)? Do you feel isolated or lonely because of this?

Did you or a family member go to an Indian residential school?

Have you made an application to the *Indian Residential School Settlement*? If so, has this process been painful for you or caused other problems? If you received a settlement payment, has this caused problems for you or your family?

Have you spoken with an Indian residential school counsellor or therapist?

Have you ever struggled with substance abuse (drug or alcohol abuse)? Have you ever struggled with addictions to drugs or alcohol?

Did you grow up in a home where there were issues with substance abuse or addictions?

Did you grow up in a home where there was abuse?

Do you have any mental health issues?

What level of education do you have? For example, did you finish high school? If not, what's the last grade you finished?

Did you or a family member have any issues that may have affected your opportunities to learn? For example, do you have any issues with trauma, Fetal Alcohol Spectrum Disorder (FASD), or learning disabilities?

Have you taken part in community traditions, celebrations, or family gatherings as a child or as an adult? For example, have you participated in fishing, berry picking, longhouse or sweat lodge ceremonies, Hobiyee, sundances or winter dances, Métis dancing, potlatches, shame feasts, friendship centre events, or volunteering for elders or other community members?

Have you ever been affected by racism? Please describe what happened and how this affected you.

Have you ever been affected by poverty? For example, did you or your family struggle to pay bills or rent, buy food, or pay for healthcare?

What are your interests and goals? For example, is there any education or training you'd like to complete? Is there a job or volunteer opportunity that you're interested in? Do you have goals for your family or community?

Have you ever been involved with any Aboriginal restorative justice programs, or with community elders or teachings? If so, give examples.

Is there someone in your community whom you or your lawyer, Native courtworker, or other advocate can contact if you need help? For example, is there a family member, elder, social worker, chief, or band councillor who can help you?

What types of community sentences are available?

You and your lawyer (or advocate) can also ask a Native courtworker to help find you community sentences that will work for you. The judge should still consider a community sentence for you even if it isn't an Aboriginal program.
Is there a program in your community that you think can help you address the issues that got you into trouble with the law in the first place? For example, is there a drug or alcohol rehabilitation program that you think might be helpful to you? What about personal counselling or anger management counselling?

If you've identified a program, explain why you think this program will be helpful to you. For example, have you had experiences or participated in programs that have been helpful to you in the past? Think about what does and doesn't work for you.

Are there sentencing options in your community that are appropriate to your culture? For example, is there an Aboriginal restorative justice program you could participate in? Could you perform volunteer work for elders, your Aboriginal community, or friendship centre? Could you take part in any other relevant Aboriginal traditions, such as holding a shame feast, or participating in the winter dance or longhouse ceremony?

Is there someone in your community who can provide you with a letter of support? For example, can you get a letter of support from an elder, hereditary chief, elected chief, support worker, or your employer, friends, family, or members of your church? You can attach letters of support to your Gladue report.

If you've attended courses to upgrade your skills or schooling, are you able to get a certificate of completion? Can you get proof of attendance for counselling or addictions meetings? You can attach these certificates to your Gladue report.

Notes

Notes

Appendices

Appendix 1:

Are you Aboriginal? fact sheet

Are you Aboriginal?

Do you have a bail hearing?

Are you being sentenced for a crime?

Do you know about First Nations Court?

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

If you self-identify as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code, often called Gladue rights. These rights apply to all Aboriginal people, whether you're status or non-status Indian, First Nations, Métis, or Inuit, and whether you live on or off reserve. In addition to your Gladue rights, you may be able to have your bail or sentencing hearing in the First Nations Court of BC in New Westminster.

What is Gladue?

In 1999, an Aboriginal woman named Jamie Gladue had her case heard by the Supreme Court of Canada. As a result of this case, the court said that there are too many Aboriginal people being sent to jail. The court also said that Aboriginal people face racism in Canada and in the justice system.

Now the word Gladue refers to the special consideration that judges must give an Aboriginal person when sentencing or setting bail. When your lawyer informs the court of your Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is sentencing you, he or she must consider *all options other than jail*.

Note: It's *your right* to have Gladue applied to your case. Your lawyer should do everything possible to make sure your Gladue rights are respected. More information on Gladue is available in the *Gladue Primer* (see www.legalaid.bc.ca/publications), or from the booklet *Are You Aboriginal?* (see www.cleonet.ca). If you don't have a lawyer, the judge must still apply Gladue.

NOTE

Contact legal aid immediately to find out if you qualify for a free lawyer.

Legal aid:

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

Will Gladue keep me out of jail?

Gladue does not automatically mean you won't get jail time. However, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place. This is called a **community sentence**. A community sentence might involve participating in drug rehabilitation or counselling. If you do a community sentence, you may get less or no time in jail.

However, the judge may have no choice but to send you to jail. If this is the case, the judge must still apply Gladue when deciding how long your jail sentence will be.

What is a Gladue report?

In order to apply Gladue, the judge needs to understand your circumstances and to know what kinds of community sentences are available. To help the judge, your lawyer needs to provide the court with a **Gladue report**. A Gladue report gives the judge, the **Crown counsel** (the government lawyer), and your lawyer as much information as possible about you. The other side of this fact sheet has some questions that can help you and your lawyer get started on preparing your Gladue report.

Continued over

Do you know about First Nations Court?

You may be able to have your bail or sentencing hearing at First Nations Court. First Nations Court takes a **restorative** approach to sentencing. This means that the judge, Crown counsel, Aboriginal community members, and your family will work with you and your lawyer to come up with a healing plan.
First Nations Court sits once a month and hears criminal and related child protection matters. For more information, contact the First Nations Court expanded **duty counsel** at **1-877-601-6066** (call no charge from anywhere in BC).

Duty counsel are lawyers who give free legal advice. If you don't have a lawyer, the expanded duty counsel can give you legal advice on or *before* the day of court. He or she can also help you prepare your Gladue report.

Note: It's *your choice* whether you exercise your Gladue rights or apply to have your matter heard in First Nations Court. Talk to your lawyer about what's best for you. If you don't have a lawyer, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).

Some questions for preparing your Gladue report

Note: Some of this information may be private or sensitive for you and you may not like to talk about it. If you don't want this information discussed out loud in court, you can ask your lawyer to give this information in writing to the judge and the government lawyer.

- Where are you from? Do you live in a city or in a rural area? Do you live on reserve?
- Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
- Did you or a family member attend an Indian residential school?
- Have you ever struggled with **substance abuse** (drug or alcohol abuse)? Have you been affected by someone else's substance abuse?
- What level of education do you have? What is your reading level?
- Did you or a family member have any issues that may have affected your opportunities to learn, such as trauma, Fetal Alcohol Spectrum Disorder (FASD), or learning disabilities?

Your important details

Name of lawyer: _____

Bail hearing: _____

Trial hearing: _____

Sentencing hearing: _____

Special thanks to Community Legal Education Ontario for use of the information in their booklet *Are you Aboriginal?* (2009).

Legal Services Society
www.legalaid.bc.ca

Appendix 2:

Case law: *Regina v. Gladue*

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

Jamie Tanis Gladue *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General for Alberta and Aboriginal Legal Services of Toronto Inc. *Interveners*

Indexed as: R. *v*. Gladue

File No.: 26300.

1998: December 10; 1999: April 23.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache and Binnie JJ.

on appeal from the court of appeal for british columbia

Criminal law -- Sentencing -- Aboriginal offenders -- Accused sentenced to three years' imprisonment after pleading guilty to manslaughter -- No special consideration given by sentencing judge to accused's aboriginal background -- Principles governing application of s. 718.2(e) of Criminal Code -- Class of aboriginal

people coming within scope of provision -- Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(e).

The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years' imprisonment. On the night of the incident, the accused was celebrating her 19th birthday and drank beer with some friends and family members, including the victim. She suspected the victim was having an affair with her older sister and, when her sister left the party, followed by the victim, the accused told her friend, "He's going to get it. He's really going to get it this time". She later found the victim and her sister coming down the stairs together in her sister's home. She believed that they had been engaged in sexual activity. When the accused and the victim returned to their townhouse, they started to quarrel. During the argument, the accused confronted the victim with his infidelity and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled their home. The accused ran toward him with a large knife and stabbed him in the chest. When returning to her home, she was heard saying "I got you, you fucking bastard". There was also evidence indicating that she had stabbed the victim on the arm before he left the townhouse. At the time of the stabbing, the accused had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

At the sentencing hearing, the judge took into account several mitigating factors. The accused was a young mother and, apart from an impaired driving conviction, she had no criminal record. Her family was supportive and, while on bail, she had attended alcohol abuse counselling and upgraded her education. The accused was provoked by the victim's insulting behaviour and remarks. At the time of the offence, the accused had a hyperthyroid condition which caused her to overreact to emotional situations. She showed some signs of remorse and entered a plea of guilty.

The sentencing judge also identified several aggravating circumstances. The accused stabbed the deceased twice, the second time after he had fled in an attempt to escape. From the remarks she made before and after the stabbing it was clear that the accused intended to harm the victim. Further, she was not afraid of the victim; she was the aggressor. The judge considered that the principles of denunciation and general deterrence must play a role in the present circumstances even though specific deterrence was not required. He also indicated that the sentence should take into account the need to rehabilitate the accused. The judge decided that a suspended sentence or a conditional sentence of imprisonment was not appropriate in this case. He noted that there were no special circumstances arising from the aboriginal status of the accused and the victim that he should take into consideration. Both were living in an urban area off-reserve and not "within the aboriginal community as such". The sentencing judge concluded that the offence was a very serious one, for which the appropriate sentence was three years' imprisonment. The majority of the Court of Appeal dismissed the accused's appeal of her sentence.

Held: The appeal should be dismissed.

The considerations which should be taken into account by a judge sentencing an aboriginal offender have been summarized at para. 93 of the reasons for judgment. The following is a reflection of that summary.

Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence. In that Part, s. 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of

aboriginal offenders. The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force. Section 718.2(*e*) must be read in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. In determining a fit sentence, all principles and factors set out in that Part must be taken into consideration. Attention should be paid to the fact that Part XXIII, through certain provisions, has placed a new emphasis upon decreasing the use of incarceration.

Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. The effect of s. 718.2(*e*), however, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection. In order to undertake these considerations the sentencing judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the systemic or background factors and the appropriate sentencing procedures and sanctions, which in

turn may come from representations of the relevant aboriginal community. The offender may waive the gathering of that information. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

If there is no alternative to incarceration the length of the term must be carefully considered. The jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence. However, s. 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

Section 718.2(*e*) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including one in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

In this case, the sentencing judge may have erred in limiting the application of s. 718.2(*e*) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, he does not appear to have considered the systemic or background factors which may have influenced the accused to engage in criminal conduct, or the possibly distinct conception of sentencing held by the accused, by the victim's family, and by their community. The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. Although in most cases such errors would be sufficient to justify sending the matter back for a new sentencing hearing, in these circumstances it would not be in the interests of justice to order a new hearing in order to canvass the accused's circumstances as an aboriginal offender. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offence was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable. More importantly, the accused was granted, subject to certain conditions, day parole after she had served six months in a correctional centre and, about a year ago, was granted full parole with the same conditions. The results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the accused and society.

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APPEAL from a judgment of the British Columbia Court of Appeal (1997),

98 B.C.A.C. 120, 161 W.A.C. 120, 119 C.C.C. (3d) 481, 11 C.R. (5th) 108, [1997]

B.C.J. No. 2333 (QL), affirming a judgment of Hutchinson J. sentencing the accused to three years' imprisonment. Appeal dismissed.

Gil D. McKinnon, Q.C., and *Michael D. Smith*, for the appellant.

Wendy L. Rubin, for the respondent.

Kimberly Prost and *Nancy L. Irving*, for the intervener the Attorney General of Canada.

Goran Tomljanovic, for the intervener the Attorney General for Alberta.

Kent Roach and *Kimberly R. Murray*, for the intervener Aboriginal Legal Services of Toronto Inc.

The judgment of the Court was delivered by

//*Cory and Iacobucci JJ.*//

1 CORY AND IACOBUCCI JJ.-- On September 3, 1996, the new Part XXIII of the *Criminal Code*, R.S.C., 1985, c. C-46, pertaining to sentencing came into force. These provisions codify for the first time the fundamental purpose and principles of sentencing. This appeal is particularly concerned with the new s. 718.2(*e*). It provides that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. This appeal must consider how this provision should be interpreted and applied.

I. Factual Background

2 The appellant, one of nine children, was born in McLennan, Alberta in 1976. Her mother, Marie Gladue, who was a Cree, left the family home in 1987 and died in a car accident in 1990. After 1987, the appellant and her siblings were raised by their father, Lloyd Chalifoux, a Metis. The appellant and the victim Reuben Beaver started to live together in 1993, when the appellant was 17 years old. Thereafter they had a daughter, Tanita. In August 1995, they moved to Nanaimo. Together with the appellant's father and two of her siblings, Tara and Bianca Chalifoux, they lived in a townhouse complex. By September 1995, the appellant and Beaver were engaged to be married, and the appellant was five months pregnant with their second child, a boy, whom the appellant subsequently named Reuben Ambrose Beaver in honour of his father.

3 In the early evening of September 16, 1995, the appellant was celebrating her 19th birthday. She and Reuben Beaver, who was then 20, were drinking beer with some friends and family members in the townhouse complex. The appellant suspected that Beaver was having an affair with her older sister, Tara. During the course of the evening she voiced those suspicions to her friends. The appellant was obviously angry with Beaver. She said, "the next time he fools around on me, I'll kill him". The appellant told one of her friends that she wanted to test Beaver, and asked her friend to "hit on Reuben to see if he would go with her", but the friend refused.

4 The appellant's sister Tara left the party, followed by Beaver. After he had left, the appellant told her friend, "He's going to get it. He's really going to get it this time." The appellant, on several occasions, tried to find Beaver and her sister. She

eventually located them coming down the stairs together in her sister's suite. The appellant suspected that they had been engaged in sexual activity and confronted her sister, saying, "You're going to get it. How could you do this to me?"

5 The appellant and Beaver returned separately to their townhouse and they started to quarrel. During the argument, the appellant confronted him with his infidelity and he told her that she was fat and ugly and not as good as the others. A neighbour, Mr. Gretchin, who lived next door was awakened by some banging and shouting and a female voice saying "I'm sick and tired of you fooling around with other women." The disturbance was becoming very loud and he decided to ask his neighbours to calm down. He heard the front door of the appellant's residence slam. As he opened his own front door, he saw the appellant come running out of her suite. He also saw Reuben Beaver banging with both hands at Tara Chalifoux's door down the hall saying, "Let me in. Let me in."

6 Mr. Gretchin saw the appellant run toward Beaver with a large knife in her hand and, as she approached him, she told him that he had better run. Mr. Gretchin heard Beaver shriek in pain and saw him collapse in a pool of blood. The appellant had stabbed Beaver once in the left chest, and the knife had penetrated his heart. As the appellant went by on her return to her apartment, Mr. Gretchin heard her say, "I got you, you fucking bastard." The appellant was described as jumping up and down as if she had tagged someone. Mr. Gretchin said she did not appear to realize what she had done. At the time of the stabbing, the appellant had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood.

7 On June 3, 1996, the appellant was charged with second degree murder. On February 11, 1997, following a preliminary hearing and after a jury had been selected, the appellant entered a plea of guilty to manslaughter.

8 There was evidence which indicated that the appellant had stabbed Beaver before he fled from the apartment. A paring knife found on the living room floor of their apartment had a small amount of Beaver's blood on it, and a small stab wound was located on Beaver's right upper arm.

9 There was also evidence that Beaver had subjected the appellant to some physical abuse in June 1994, while the appellant was pregnant with their daughter Tanita. Beaver was convicted of assault, and was given a 15-day intermittent sentence with one year's probation. The neighbour, Mr. Gretchin, told police that the noises emanating from the appellant's and Beaver's apartment suggested a fight, stating: "It sounded like someone got hit and furniture was sliding, like someone pushed around" and "The fight lasted five to ten minutes, it was like a wrestling match." Bruises later observed on the appellant's arm and in the collarbone area were consistent with her having been in a physical altercation on the night of the stabbing. However, the trial judge found that the facts as presented before him did not warrant a finding that the appellant was a "battered or fearful wife".

10 The appellant's sentencing took place 17 months after the stabbing. Pending her trial, she was released on bail and lived with her father. She took counselling for alcohol and drug abuse at Tillicum Haus Native Friendship Centre in Nanaimo, and completed Grade 10 and was about to start Grade 11. After the stabbing, the appellant was diagnosed as suffering from a hyperthyroid condition, which was said to produce an exaggerated reaction to any emotional situation. The appellant underwent radiation

therapy to destroy some of her thyroid glands, and at the time of sentencing she was taking thyroid supplements which regulated her condition. During the time she was on bail, the appellant pled guilty to having breached her bail on one occasion by consuming alcohol.

11 At the sentencing hearing, when asked if she had anything to say, the appellant stated that she was sorry about what happened, that she did not intend to do it, and that she was sorry to Beaver's family.

12 In his submissions on sentence at trial, the appellant's counsel did not raise the fact that the appellant was an aboriginal offender but, when asked by the trial judge whether in fact the appellant was an aboriginal person, replied that she was Cree. When asked by the trial judge whether the town of McLennan, Alberta, where the appellant grew up, was an aboriginal community, defence counsel responded: "it's just a regular community". No other submissions were made at the sentencing hearing on the issue of the appellant's aboriginal heritage. Defence counsel requested a suspended sentence or a conditional sentence of imprisonment. Crown counsel argued in favour of a sentence of between three and five years' imprisonment.

13 The appellant was sentenced to three years' imprisonment and to a ten-year weapons prohibition. Her appeal of the sentence to the British Columbia Court of Appeal was dismissed.

II. Relevant Statutory Provisions

14 It may be helpful at this stage to set out ss. 718, 718.1 and 718.2 of the *Criminal Code* as well as s. 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21.

Criminal Code

Purpose and Principles of Sentencing

718. [Purpose] The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 [Fundamental principle] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or

> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization
>
> shall be deemed to be aggravating circumstances;
>
> (*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Interpretation Act

> **12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

III. Judicial History

A. *Supreme Court of British Columbia*

15 In his reasons, the trial judge took into account several mitigating factors. The appellant was only 20 years old at the time of sentence, and apart from an impaired driving conviction, she had no criminal record. She had two children and was expecting a third although he considered her pregnancy a neutral factor. Her family was supportive and she was attending alcohol abuse counselling and upgrading her education. The appellant was provoked by the deceased's insulting behaviour and remarks. At the time of the offence, the appellant had a hyperthyroid condition which caused her to overreact

to emotional situations. The appellant showed some signs of remorse and entered a plea of guilty.

16 On the other hand, the trial judge identified several aggravating circumstances. The appellant stabbed the deceased twice, the second time after he had fled in an attempt to escape. Also, the offence was of particular gravity. From the remarks she made before and after the stabbing it was very clear that the appellant intended to harm the deceased. Further, the appellant was not afraid of the deceased; indeed, she was the aggressor.

17 The trial judge considered that specific deterrence was not required in the circumstances of this case. However, in his opinion the principles of denunciation and general deterrence must play a role. He was of the view that the sentence should also take into account the need to rehabilitate the appellant and give her some insight both into her conduct and the effect of her propensity to drink. The trial judge decided that in this case it was not appropriate to suspend the passing of sentence or to impose a conditional sentence.

18 The trial judge noted that both the appellant and the deceased were aboriginal, but stated that they were living in an urban area off-reserve and not "within the aboriginal community as such". He found that there were not any special circumstances arising from their aboriginal status that he should take into consideration. He stated that the offence was a very serious one, for which the appropriate sentence was three years' imprisonment with a ten-year weapons prohibition.

B. *Court of Appeal for British Columbia* (1997), 98 B.C.A.C. 120

19 The appellant appealed her sentence of three years' imprisonment, but not the ten-year weapons prohibition. She appealed on four grounds, only one of which is directly relevant, namely whether the trial judge failed to give appropriate consideration to the appellant's circumstances as an aboriginal offender. The appellant also sought to adduce fresh evidence at her appeal regarding her efforts since the killing to maintain links with her aboriginal heritage. The fresh evidence showed that the appellant had applied to become a full status Cree, and that she had obtained that status for her daughter Tanita. She had also maintained contact with Beaver's mother, who is a status Cree, and who was in turn assisting the appellant with the status applications.

20 The Court of Appeal unanimously concluded that the trial judge had erred in concluding that s. 718.2(*e*) did not apply because the appellant was not living on a reserve. However, Esson J.A. (Prowse J.A. concurring) found no error in the trial judge's conclusion that, in this case, there was no basis for giving special consideration to the appellant's aboriginal background. Esson J.A. noted that the appellant's actions involved deliberation, motivation, and "an element of viciousness and persistence in the attack", and that the killing constituted a "near murder" (p. 138). He found that, on the facts presented in this case, it could not be said that the sentence, if a fit one for a non-aboriginal person, would not also be fit for an aboriginal person. Esson J.A. concluded therefore that the trial judge did not err in not giving effect to the principle set out in s. 718.2(*e*) of the *Criminal Code* and dismissed the appeal. Although it is not entirely clear from the reasons of Esson J.A., he appears also to have dismissed the appellant's application to adduce fresh evidence regarding her efforts to maintain links with her aboriginal heritage.

21 Rowles J.A. (dissenting) reviewed many reports and parliamentary debates and determined that the mischief that s. 718.2(*e*) was designed to remedy was the excessive use of incarceration generally, and the disproportionately high number of aboriginal people who are imprisoned, in particular. She stated that s. 718.2(*e*) invites recognition and amelioration of the impact which systemic discrimination in the criminal justice system has upon aboriginal people. She referred to the importance of acknowledging and implementing the different conceptions of criminal justice and of appropriate criminal sanctions held by many aboriginal peoples, including, in particular, the conception of criminal justice as involving a strong restorative element.

22 In this case, Rowles J.A. agreed that the crime committed by the appellant was serious. The circumstances surrounding the offence were tragic for everyone, including the appellant's children. Yet, the circumstances of the offence included provocation, superimposed on an undiagnosed medical problem affecting the appellant's emotional stability. The offender was young and emotionally immature. She had an alcohol problem but no history of other criminal conduct or acts of violence. The success the appellant enjoyed while on bail awaiting trial showed that she was likely to be a good candidate for further rehabilitation. Rowles J.A. also referred favourably to the fresh evidence which showed that the appellant was taking steps to maintain links with her aboriginal heritage.

23 Rowles J.A. concluded that a sentence of three years' imprisonment was excessive. The principles of general deterrence and denunciation had to be reflected in the sentence, but the sentence could have been designed to advance the appellant's rehabilitation through a period of supervised probation. Rowles J.A. would have allowed the appeal and reduced the sentence to two years less a day to be followed by a three-year period of probation.

IV. Issue

24 The issue in this appeal is the proper interpretation and application to be given to s. 718.2(*e*) of the *Criminal Code*. The provision reads as follows:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .
>
> (*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The question to be resolved is whether the majority of the British Columbia Court of Appeal erred in finding that, in the circumstances of this case, the trial judge correctly applied s. 718.2(*e*) in imposing a sentence of three years' imprisonment. To answer this question, it will be necessary to determine the legislative purpose of s. 718.2(*e*), and, in particular, the words "with particular attention to the circumstances of aboriginal offenders". The appeal requires this Court to begin the process of articulating the rules and principles that should govern the practical application of s. 718.2(*e*) of the *Criminal Code* by a trial judge.

V. Analysis

A. *Introduction*

25 As this Court has frequently stated, the proper construction of a statutory provision flows from reading the words of the provision in their grammatical and

ordinary sense and in their entire context, harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of Parliament. The purpose of the statute and the intention of Parliament, in particular, are to be determined on the basis of intrinsic and admissible extrinsic sources regarding the Act's legislative history and the context of its enactment: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at p. 875; E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131.

26 Also of importance in interpreting federal legislation is s. 12 of the federal *Interpretation Act*, which provides:

> **12.** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

27 Section 718.2(*e*) has already received judicial consideration in several provincial appellate court decisions: see, e.g., *R. v. McDonald* (1997), 113 C.C.C. (3d) 418 (Sask. C.A.); *R. v. J. (C.)* (1997), 119 C.C.C. (3d) 444 (Nfld. C.A.); *R. v. Wells* (1998), 125 C.C.C. (3d) 129 (Alta. C.A.); *R. v. Hunter* (1998), 125 C.C.C. (3d) 121 (Alta. C.A.); *R. v. Young* (1998), 131 Man. R. (2d) 61 (C.A.). This is the first occasion on which this Court has had the opportunity to construe and apply the provision.

28 With this introduction, we now wish to discuss the wording of s. 718.2(*e*) and the scheme of Part XXIII of the *Criminal Code*, as well as the legislative history and the context behind s. 718.2(*e*), with the aim of determining and describing the circumstances of aboriginal offenders. This discussion is followed by a framework for

the sentencing judge to use in sentencing an aboriginal offender. The reasons then deal with the specific facts and sentence in this case.

B. *The Wording of Section 718.2(e) and the Scheme of Part XXIII*

29 The interpretation of s. 718.2(*e*) must begin by considering its words in context. Although this appeal is ultimately concerned only with the meaning of the phrase "with particular attention to the circumstances of aboriginal offenders", that phrase takes on meaning from the other words of s. 718.2(*e*), from the purpose and principles of sentencing set out in ss. 718-718.2, and from the overall scheme of Part XXIII.

30 The respondent observed that some caution is in order in construing s. 718.2(*e*), insofar as it would be inappropriate to prejudge the many other important issues which may be raised by the reforms but which are not specifically at issue here. However, it would be equally inappropriate to construe s. 718.2(*e*) in a vacuum, without considering the surrounding text which gives the provision its depth of meaning. To the extent that the broader scheme of Part XXIII informs the proper construction to be given to s. 718.2(*e*), it will be necessary to draw at least some general conclusions about the new sentencing regime.

31 A core issue in this appeal is whether s. 718.2(*e*) should be understood as being remedial in nature, or whether s. 718.2(*e*), along with the other provisions of ss. 718 through 718.2, are simply a codification of existing sentencing principles. The respondent, although acknowledging that s. 718.2(*e*) was likely designed to encourage sentencing judges to experiment to some degree with alternatives to incarceration and to be sensitive to principles of restorative justice, at the same time favours the view that

ss. 718-718.2 are largely a restatement of existing law. Alternatively, the appellant argues strongly that s. 718.2(*e*)'s specific reference to aboriginal offenders can have no purpose unless it effects a change in the law. The appellant advances the view that s. 718.2(*e*) is in fact an "affirmative action" provision justified under s. 15(2) of the *Canadian Charter of Rights and Freedoms*.

32 Section 12 of the *Interpretation Act* deems the purpose of the enactment of the new Part XXIII of the *Criminal Code* to be remedial in nature, and requires that all of the provisions of Part XXIII, including s. 718.2(*e*), be given a fair, large and liberal construction and interpretation in order to attain that remedial objective. However, the existence of s. 12 does not answer the essential question of what the remedial purpose of s. 718.2(*e*) is. One view is that the remedial purpose of ss. 718, 718.1 and 718.2 taken together was precisely to codify the purpose and existing principles of sentencing to provide more systematic guidance to sentencing judges in individual cases. Codification, under this view, is remedial in and of itself because it simplifies and adds structure to trial level sentencing decisions: see, e.g., *McDonald*, *supra*, at pp. 460-64, *per* Sherstobitoff J.A.

33 In our view, s. 718.2(*e*) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case. It should be said that the words of s. 718.2(*e*) do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. For example, as we will discuss below, it will generally be the case as a practical matter that particularly violent and serious offences will result in

imprisonment for aboriginal offenders as often as for non-aboriginal offenders. What s. 718.2(*e*) does alter is the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender. In our view, the scheme of Part XXIII of the *Criminal Code*, the context underlying the enactment of s. 718.2(*e*), and the legislative history of the provision all support an interpretation of s. 718.2(*e*) as having this important remedial purpose.

34 In his submissions before this Court, counsel for the appellant expressed the fear that s. 718.2(*e*) might come to be interpreted and applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada. In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system, we do not consider this fear to be unreasonable. In our view, s. 718.2(*e*) creates a judicial duty to give its remedial purpose real force.

35 Let us consider now the wording of s. 718.2(*e*) and its place within the overall scheme of Part XXIII of the *Criminal Code*.

36 Section 718.2(*e*) directs a court, in imposing a sentence, to consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, "with particular attention to the circumstances of aboriginal offenders". The broad role of the provision is clear. As a general principle, s. 718.2(*e*) applies to all offenders, and states that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.

37 The next question is the meaning to be attributed to the words "with particular attention to the circumstances of aboriginal offenders". The phrase cannot be

an instruction for judges to pay "more" attention when sentencing aboriginal offenders. It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be no point in adding a special reference to aboriginal offenders if this was the case. Rather, the logical meaning to be derived from the special reference to the circumstances of aboriginal offenders, juxtaposed as it is against a general direction to consider "the circumstances" for all offenders, is that sentencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(*e*), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.

38 The wording of s. 718.2(*e*) on its face, then, requires both consideration of alternatives to the use of imprisonment as a penal sanction generally, which amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders. The respondent argued before this Court that this statutory wording does not truly effect a change in the law, as some courts have in the past taken the unique circumstances of an aboriginal offender into account in determining sentence. The respondent cited some of the recent jurisprudence dealing with sentencing circles, as well as the decision of the Court of Appeal for Ontario in *R. v. Fireman* (1971), 4 C.C.C. (2d) 82, in support of the view that s. 718.2(*e*) should be seen simply as a codification of the state of the case law regarding the sentencing of aboriginal offenders before Part XXIII came into force in 1996. In a

similar vein, it was observed by Sherstobitoff J.A. in *McDonald*, *supra*, at pp. 463-64, that it has always been a principle of sentencing that courts should consider all available sanctions other than imprisonment that are reasonable in the circumstances. Thus the general principle of restraint expressed in s. 718.2(*e*) with respect to all offenders might equally be seen as a codification of existing law.

39 With respect for the contrary view, we do not interpret s. 718.2(*e*) as expressing only a restatement of existing law, either with respect to the general principle of restraint in the use of prison or with respect to the specific direction regarding aboriginal offenders. One cannot interpret the words of s. 718.2(*e*) simply by looking to past cases to see if they contain similar statements of principle. The enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law. Each of the provisions of Part XXIII, including s. 718.2(*e*), must be interpreted in its total context, taking into account its surrounding provisions.

40 It is true that there is ample jurisprudence supporting the principle that prison should be used as a sanction of last resort. It is equally true, though, that the sentencing amendments which came into force in 1996 as the new Part XXIII have changed the range of available penal sanctions in a significant way. The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration. The general principle expressed in s. 718.2(*e*) must be construed and applied in this light.

41 Further support for the view that s. 718.2(*e*)'s expression of the principle of restraint in sentencing is remedial, rather than simply a codification, is provided by the articulation of the purpose of sentencing in s. 718.

42 Traditionally, Canadian sentencing jurisprudence has focussed primarily upon achieving the aims of separation, specific and general deterrence, denunciation, and rehabilitation. Sentencing, like the criminal trial process itself, has often been understood as a conflict between the interests of the state (as expressed through the aims of separation, deterrence, and denunciation) and the interests of the individual offender (as expressed through the aim of rehabilitation). Indeed, rehabilitation itself is a relative late-comer to the sentencing analysis, which formerly favoured the interests of the state almost entirely.

43 Section 718 now sets out the purpose of sentencing in the following terms:

> **718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (*a*) to denounce unlawful conduct;
>
> (*b*) to deter the offender and other persons from committing offences;
>
> (*c*) to separate offenders from society, where necessary;
>
> (*d*) to assist in rehabilitating offenders;
>
> (*e*) to provide reparations for harm done to victims or to the community; and
>
> (*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community. [Emphasis added.]

Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (*a*) through (*d*). What are new, though, are paras. (*e*) and (*f*), which along with para. (*d*) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (*d*), (*e*), and (*f*) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process: D. Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996), 60 *Sask. L. Rev.* 153, at p. 165. Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament's choice to include (*e*) and (*f*) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. The principle of restraint expressed in s. 718.2(*e*) will necessarily be informed by this re-orientation.

44 Just as the context of Part XXIII supports the view that s. 718.2(*e*) has a remedial purpose for all offenders, the scheme of Part XXIII also supports the view that s. 718.2(*e*) has a particular remedial role for aboriginal peoples. The respondent is correct to point out that there is jurisprudence which pre-dates the enactment of s. 718.2(*e*) in which aboriginal offenders have been sentenced differently in light of their unique circumstances. However, the existence of such jurisprudence is not, on its own, especially probative of the issue of whether s. 718.2(*e*) has a remedial role. There is also sentencing jurisprudence which holds, for example, that a court must consider the unique circumstances of offenders who are battered spouses, or who are mentally disabled. Although the validity of the principles expressed in this latter jurisprudence is

unchallenged by the 1996 sentencing reforms, one does not find reference to these principles in Part XXIII. If Part XXIII were indeed a codification of principles regarding the appropriate method of sentencing different categories of offenders, one would expect to find such references. The wording of s. 718.2(*e*), viewed in light of the absence of similar stipulations in the remainder of Part XXIII, reveals that Parliament has chosen to single out aboriginal offenders for particular attention.

C. *Legislative History*

45 Support for the foregoing understanding of s. 718.2(*e*) as having the remedial purpose of restricting the use of prison for all offenders, and as having a particular remedial role with respect to aboriginal peoples, is provided by statements made by the Minister of Justice and others at the time that what was then Bill C-41 was before Parliament. Although these statements are clearly not decisive as to the meaning and purpose of s. 718.2(*e*), they are nonetheless helpful, particularly insofar as they corroborate and do not contradict the meaning and purpose to be derived upon a reading of the words of the provision in the context of Part XXIII as a whole: *Rizzo & Rizzo Shoes*, *supra*, at paras. 31 and 35.

46 For instance, in introducing second reading of Bill C-41 on September 20, 1994 (*House of Commons Debates*, vol. IV, 1st Sess., 35th Parl., at pp. 5871 and 5873), Minister of Justice Allan Rock made the following statements regarding the remedial purpose of the bill:

> Through this bill, Parliament provides the courts with clear guidelines
>
> . . . .
>
> . . .

> The bill also defines various sentencing principles, for instance that the sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. When appropriate, alternatives must be contemplated, especially in the case of Native offenders.
>
> . . .
>
> A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.
>
> ...
>
> Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. . . . [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.
>
> It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely. [Emphasis added.]

The Minister's statements were echoed by other Members of Parliament and by Senators during the debate over the bill: see, e.g., *House of Commons Debates*, vol. V, 1st Sess., 35th Parl., September 22, 1994, at p. 6028 (Mr. Morris Bodnar); *Debates of the Senate*, vol. 135, No. 99, 1st Sess., 35th Parl., June 21, 1995, at p. 1871 (Hon. Duncan J. Jessiman).

47 In his subsequent testimony before the House of Commons Standing Committee on Justice and Legal Affairs (*Minutes of Proceedings and Evidence*, Issue No. 62, November 17, 1994, at p. 62:15), the Minister of Justice addressed the specific role the government hoped would be played by s. 718.2(*e*):

> [T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal persons make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons represent about 2% of

> Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.
>
> What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of the public -- alternatives to jail -- and not simply resort to that easy answer in every case. [Emphasis added.]

48 It can be seen, therefore, that the government position when Bill C-41 was under consideration was that the new Part XXIII was to be remedial in nature. The proposed enactment was directed, in particular, at reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders.

D. *The Context of the Enactment of Section 718.2(e)*

49 Further guidance as to the scope and content of Parliament's remedial purpose in enacting s. 718.2(*e*) may be derived from the social context surrounding the enactment of the provision. On this point, it is worth noting that, although there is quite a wide divergence between the positions of the appellant and the respondent as to how s. 718.2(*e*) should be applied in practice, there is general agreement between them, and indeed between the parties and all interveners, regarding the mischief in response to which s. 718.2(*e*) was enacted.

50 The parties and interveners agree that the purpose of s. 718.2(*e*) is to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples. They also agree that one of the roles of s. 718.2(*e*), and of various other provisions in Part XXIII,

is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations. As the respondent states in its factum before this Court, s. 718.2(*e*) "provides the necessary flexibility and authority for sentencing judges to resort to the restorative model of justice in sentencing aboriginal offenders and to reduce the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing".

51 The fact that the parties and interveners are in general agreement among themselves regarding the purpose of s. 718.2(*e*) is not determinative of the issue as a matter of statutory construction. However, as we have suggested, on the above points of agreement the parties and interveners are correct. A review of the problem of overincarceration in Canada, and of its peculiarly devastating impact upon Canada's aboriginal peoples, provides additional insight into the purpose and proper application of this new provision.

(1) The Problem of Overincarceration in Canada

52 Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison. Although the United States has by far the highest rate of incarceration among industrialized democracies, at over 600 inmates per 100,000 population, Canada's rate of approximately 130 inmates per 100,000 population places it second or third highest: see Federal/Provincial/Territorial Ministers Responsible for Justice, *Corrections Population Growth: First Report on Progress* (1997), Annex B, at p. 1; Bulletin of U.S. Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 1998* (March 1999); The

Sentencing Project, *Americans Behind Bars: U.S. and International Use of Incarceration, 1995* (June 1997), at p. 1. Moreover, the rate at which Canadian courts have been imprisoning offenders has risen sharply in recent years, although there has been a slight decline of late: see Statistics Canada, "Prison population and costs" in *Infomat: A Weekly Review* (February 27, 1998), at p. 5. This record of incarceration rates obviously cannot instil a sense of pride.

53 The systematic use of the sanction of imprisonment in Canada may be dated to the building of the Kingston Penitentiary in 1835. The penitentiary sentence was itself originally conceived as an alternative to the harsher penalties of death, flogging, or imprisonment in a local jail. Sentencing reformers advocated the use of penitentiary imprisonment as having effects which were not only deterrent, denunciatory, and preventive, but also rehabilitative, with long hours spent in contemplation and hard work contributing to the betterment of the offender: see Law Reform Commission of Canada, Working Paper 11, *Imprisonment and Release* (1975), at p. 5.

54 Notwithstanding its idealistic origins, imprisonment quickly came to be condemned as harsh and ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals. The history of Canadian commentary regarding the use and effectiveness of imprisonment as a sanction was recently well summarized by Vancise J.A., dissenting in the Saskatchewan Court of Appeal in *McDonald, supra*, at pp. 429-30:

> A number of inquiries and commissions have been held in this country to examine, among other things, the effectiveness of the use of incarceration in sentencing. There has been at least one commission or inquiry into the use of imprisonment in each decade of this century since 1914. . . .
>
> . . . An examination of the recommendations of these reports reveals one constant theme: imprisonment should be avoided if possible and should be

> reserved for the most serious offences, particularly those involving violence. They all recommend restraint in the use of incarceration and recognize that incarceration has failed to reduce the crime rate and should be used with caution and moderation. Imprisonment has failed to satisfy a basic function of the Canadian judicial system which was described in the Report of the Canadian Committee on Corrections entitled: "Toward Unity: Criminal Justice and Corrections" (1969) as "to protect society from crime in a manner commanding public support while avoiding needless injury to the offender". [Emphasis added; footnote omitted.]

55 In a similar vein, in 1987, the Canadian Sentencing Commission wrote in its report entitled *Sentencing Reform: A Canadian Approach*, at pp. xxiii-xxiv:

> Canada does not imprison as high a portion of its population as does the United States. However, we do imprison more people than most other western democracies. The *Criminal Code* displays an apparent bias toward the use of incarceration since for most offences the penalty indicated is expressed in terms of a maximum term of imprisonment. A number of difficulties arise if imprisonment is perceived to be the preferred sanction for most offences. Perhaps most significant is that although we regularly impose this most onerous and expensive sanction, it accomplishes very little apart from separating offenders from society for a period of time. In the past few decades many groups and federally appointed committees and commissions given the responsibility of studying various aspects of the criminal justice system have argued that imprisonment should be used only as a last resort and/or that it should be reserved for those convicted of only the most serious offences. However, although much has been said, little has been done to move us in this direction. [Emphasis added.]

56 With equal force, in *Taking Responsibility* (1988), at p. 75, the Standing Committee on Justice and Solicitor General stated:

> It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime.
>
> Since imprisonment generally offers the public protection from criminal behaviour for only a limited time, rehabilitation of the offender is of great importance. However, prisons have not generally been effective in reforming their inmates, as the high incidence of recidivism among prison populations shows.

> The use of imprisonment as a main response to a wide variety of offences against the law is not a tenable approach in practical terms. Most offenders are neither violent nor dangerous. Their behaviour is not likely to be improved by the prison experience. In addition, their growing numbers in jails and penitentiaries entail serious problems of expense and administration, and possibly increased future risks to society. Moreover, modern technology may now permit the monitoring in the community of some offenders who previously might have been incarcerated for incapacitation or denunciation purposes. Alternatives to imprisonment and intermediate sanctions, therefore, are increasingly viewed as necessary developments. [Emphasis added; footnotes omitted.]

The Committee proposed that alternative forms of sentencing should be considered for those offenders who did not endanger the safety of others. It was put in this way, at pp. 50 and 54:

> [O]ne of the primary foci of such alternatives must be on techniques which contribute to offenders accepting responsibility for their criminal conduct and, through their subsequent behaviour, demonstrating efforts to restore the victim to the position he or she was in prior to the offence and/or providing a meaningful apology.
>
> . . .
>
> [E]xcept where to do so would place the community at undue risk, the "correction" of the offender should take place in the community and imprisonment should be used with restraint.

57 Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(*e*) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions.

(2) The Overrepresentation of Aboriginal Canadians in Penal Institutions

58 If overreliance upon incarceration is a problem with the general population, it is of much greater concern in the sentencing of aboriginal Canadians. In the mid-1980s, aboriginal people were about 2 percent of the population of Canada, yet they made up 10 percent of the penitentiary population. In Manitoba and Saskatchewan, aboriginal people constituted something between 6 and 7 percent of the population, yet in Manitoba they represented 46 percent of the provincial admissions and in Saskatchewan 60 percent: see M. Jackson, "Locking Up Natives in Canada" (1988-89), 23 *U.B.C. L. Rev.* 215 (article originally prepared as a report of the Canadian Bar Association Committee on Imprisonment and Release in June 1988), at pp. 215-16. The situation has not improved in recent years. By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates: Solicitor General of Canada, Consolidated Report, *Towards a Just, Peaceful and Safe Society: The Corrections and Conditional Release Act -- Five Years Later* (1998), at pp. 142-55. The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia: Canadian Centre for Justice Statistics, *Adult Correctional Services in Canada, 1995-96* (1997), at p. 30.

59 This serious problem of aboriginal overrepresentation in Canadian prisons is well documented. Like the general problem of overincarceration itself, the excessive incarceration of aboriginal peoples has received the attention of a large number of commissions and inquiries: see, by way of example only, Canadian Corrections

Association, *Indians and the Law* (1967); Law Reform Commission of Canada, *The Native Offender and the Law* (1974), prepared by D. A. Schmeiser; Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991); Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (1996).

60 In "Locking Up Natives in Canada", *supra*, at pp. 215-16, Jackson provided a disturbing account of the enormity of the disproportion:

> Statistics about crime are often not well understood by the public and are subject to variable interpretation by the experts. In the case of the statistics regarding the impact of the criminal justice system on native people the figures are so stark and appalling that the magnitude of the problem can be neither misunderstood nor interpreted away. Native people come into contact with Canada's correctional system in numbers grossly disproportionate to their representation in the community. More than any other group in Canada they are subject to the damaging impacts of the criminal justice system's heaviest sanctions. Government figures -- which reflect different definitions of "native" and which probably underestimate the number of prisoners who consider themselves native -- show that almost 10% of the federal penitentiary population is native (including 13% of the federal women's prisoner population) compared to about 2% of the population nationally. . . . Even more disturbing, the disproportionality is growing. In 1965 some 22% of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33%. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities.
>
> Bad as this situation is within the federal system, it is even worse in a number of the western provincial correctional systems. . . . A study reviewing admissions to Saskatchewan's correctional system in 1976-77 appropriately titled "Locking Up Indians in Saskatchewan", contains findings that should shock the conscience of everyone in Canada. In comparison to male non-natives, male treaty Indians were 25 times more likely to be admitted to a provincial correctional centre while non-status Indians or Métis were 8 times more likely to be admitted. If only the population over fifteen years of age is considered (the population eligible to be admitted to provincial correctional centres in Saskatchewan), then male treaty Indians were 37 times more likely to be admitted, while male non-status Indians were 12 times more likely to be admitted. For women the figures are even more extreme: a treaty Indian woman was 131 times more likely to be admitted and a non-status or Métis woman 28 times more likely than a non-native.

> The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25 (that age range being the one with the highest risk of imprisonment). The corresponding figure for non-status or Métis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in an historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents. [Emphasis added; footnotes omitted.]

61 Not surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned. Aboriginal people are overrepresented in virtually all aspects of the system. As this Court recently noted in *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 58, there is widespread bias against aboriginal people within Canada, and "[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system".

62 Statements regarding the extent and severity of this problem are disturbingly common. In *Bridging the Cultural Divide*, *supra*, at p. 309, the Royal Commission on Aboriginal Peoples listed as its first "Major Findings and Conclusions" the following striking yet representative statement:

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada -- First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural -- in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

63 To the same effect, the Aboriginal Justice Inquiry of Manitoba described the justice system in Manitoba as having failed aboriginal people on a "massive scale",

referring particularly to the substantially different cultural values and experiences of aboriginal people: *The Justice System and Aboriginal People*, *supra*, at pp. 1 and 86.

64 These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

65 It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed

which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

E. *A Framework of Analysis for the Sentencing Judge*

(1) What Are the "Circumstances of Aboriginal Offenders"?

66 How are sentencing judges to play their remedial role? The words of s. 718.2(*e*) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

(a) *Systemic and Background Factors*

67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education,

substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

69 In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique

background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

(b) *Appropriate Sentencing Procedures and Sanctions*

70 Closely related to the background and systemic factors which have contributed to an excessive aboriginal incarceration rate are the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people. A significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community. The aims of restorative justice as now expressed in paras. (*d*), (*e*), and (*f*) of s. 718 of the *Criminal Code* apply to all offenders, and not only aboriginal offenders. However, most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s. 718.2(*e*).

71 The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence, as different issues and different conceptions of sentencing are addressed in their appropriate context. In general terms, restorative justice may be described as an approach to remedying crime in which it is

understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime. See generally, e.g., *Bridging the Cultural Divide*, *supra*, at pp. 12-25; *The Justice System and Aboriginal People*, *supra*, at pp. 17-46; Kwochka, *supra*; M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", [1992] *U.B.C. L. Rev. (Special Edition)* 147.

72 The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence. See Kwochka, *supra*, who writes at p. 165:

> At this point there is some divergence among proponents of restorative justice. Some seek to abandon the punishment paradigm by focusing on the differing goals of a restorative system. Others, while cognizant of the differing goals, argue for a restorative system in terms of a punishment model. They argue that non-custodial sentences can have an equivalent punishment value when produced and administered by a restorative system and that the healing process can be more intense than incarceration. Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.

73 In describing in general terms some of the basic tenets of traditional aboriginal sentencing approaches, we do not wish to imply that all aboriginal offenders, victims, and communities share an identical understanding of appropriate sentences for particular offences and offenders. Aboriginal communities stretch from coast to coast and from the border with the United States to the far north. Their customs and traditions and their concept of sentencing vary widely. What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities.

74 It is unnecessary to engage here in an extensive discussion of the relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects, which are available especially to aboriginal offenders. What is important to note is that the different conceptions of sentencing held by many aboriginal people share a common underlying principle: that is, the importance of community-based sanctions. Sentencing judges should not conclude that the absence of alternatives specific to an aboriginal community eliminates their ability to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved. Rather, the point is that one of the unique circumstances of aboriginal offenders is that community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities. It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.

(2) The Search for a Fit Sentence

75 The role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community. Nothing in Part XXIII of the *Criminal Code* alters this fundamental duty as a general matter. However, the effect of s. 718.2(*e*), viewed in the context of Part XXIII as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders. Section 718.2(*e*) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples.

76 In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at p. 567, Lamer C.J. restated the long-standing principle of Canadian sentencing law that the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender, and the community in which the offence took place. Disparity of sentences for similar crimes is a natural consequence of this individualized focus. As he stated:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

77 The comments of Lamer C.J. are particularly apt in the context of aboriginal offenders. As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors. Further, an aboriginal offender's community will frequently

understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight. Through its reform of the purpose of sentencing in s. 718, and through its specific directive to judges who sentence aboriginal offenders, Parliament has, more than ever before, empowered sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.

78 In describing the effect of s. 718.2(*e*) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

79 Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

80 As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this

offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

81 The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the *Criminal Code* and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(*e*), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and

purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

(3) The Duty of the Sentencing Judge

82 The foregoing discussion of guidelines for the sentencing judge has spoken of that which a judge must do when sentencing an aboriginal offender. This element of duty is a critical component of s. 718.2(*e*). The provision expressly provides that a court that imposes a sentence should consider all available sanctions other than imprisonment that are reasonable in the circumstances, and should pay particular attention to the circumstances of aboriginal offenders. There is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence.

83 How then is the consideration of s. 718.2(*e*) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

84 However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.

85 Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(*e*) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(*e*) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.

(4) The Issue of "Reverse Discrimination"

86 Something must also be said as to the manner in which s. 718.2(*e*) should not be interpreted. The appellant and the respondent diverged significantly in their interpretation of the appropriate role to be played by s. 718.2(*e*). While the respondent saw the provision largely as a restatement of existing sentencing principles, the appellant

advanced the position that s. 718.2(*e*) functions as an affirmative action provision justified under s. 15(2) of the *Charter*. The respondent cautioned that, in his view, the appellant's understanding of the provision would result in "reverse discrimination" so as to favour aboriginal offenders over other offenders.

87 There is no constitutional challenge to s. 718.2(*e*) in these proceedings, and accordingly we do not address specifically the applicability of s. 15 of the *Charter*. We would note, though, that the aim of s. 718.2(*e*) is to reduce the tragic overrepresentation of aboriginal people in prisons. It seeks to ameliorate the present situation and to deal with the particular offence and offender and community. The fact that a court is called upon to take into consideration the unique circumstances surrounding these different parties is not unfair to non-aboriginal people. Rather, the fundamental purpose of s. 718.2(*e*) is to treat aboriginal offenders fairly by taking into account their difference.

88 But s. 718.2(*e*) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal. To the extent that the appellant's submission on affirmative action means that s. 718.2(*e*) requires an automatic reduction in sentence for an aboriginal offender, we reject that view. The provision is a direction to sentencing judges to consider certain unique circumstances pertaining to aboriginal offenders as a part of the task of weighing the multitude of factors which must be taken into account in striving to impose a fit sentence. It cannot be forgotten that s. 718.2(*e*) must be considered in the context of that section read as a whole and in the context of s. 718, s. 718.1, and the overall scheme of Part XXIII. It is one of the statutorily mandated considerations that a sentencing judge must take into account. It may not always mean a lower sentence for an aboriginal offender. The sentence imposed will depend upon <u>all</u> the factors which must be taken into account in each individual case. The weight to be

given to these various factors will vary in each case. At the same time, it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples with the criminal justice system. The provision reflects the reality that many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.

(5) Who Comes Within the Purview of Section 718.2(*e*)?

89 The question of whether s. 718.2(*e*) applies to all aboriginal persons, or only to certain classes thereof, is raised by this appeal. The following passage of the reasons of the judge at trial appears to reflect some ambiguity as to the applicability of the provision to aboriginal people who do not live in rural areas or on a reserve:

> The factor that is mentioned in the *Criminal Code* is that particular attention to the circumstances of aboriginal offenders should be considered. In this case both the deceased and the accused were aboriginals, but they are not living within the aboriginal community as such. They are living off a reserve and the offence occurred in an urban setting. They [*sic*] do not appear to have been any special circumstances because of their aboriginal status and so I am not giving any special consideration to their background in passing this sentence.

It could be understood from that passage that, in this case, there were no special circumstances to warrant the application of s. 718.2(*e*), and the fact that the context of the offence was not in a rural setting or on a reserve was only one of those missing circumstances. However, this passage was interpreted by the majority of the Court of Appeal as implying that, "as a matter of principle, s. 718.2(*e*) can have no application to aboriginals 'not living within the aboriginal community'" (p. 137). This understanding of the provision was unanimously rejected by the members of the Court

of Appeal. With respect to the trial judge, who was given little assistance from counsel on this issue, we agree with the Court of Appeal that such a restrictive interpretation of the provision would be inappropriate.

90 The class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s. 718.2(*e*) must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*. The numbers involved are significant. National census figures from 1996 show that an estimated 799,010 people were identified as aboriginal in 1996. Of this number, 529,040 were Indians (registered or non-registered), 204,115 Metis and 40,220 Inuit.

91 Section 718.2(*e*) applies to all aboriginal offenders wherever they reside, whether on- or off-reserve, in a large city or a rural area. Indeed it has been observed that many aboriginals living in urban areas are closely attached to their culture. See the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, *Perspectives and Realities* (1996), at p. 521:

> Throughout the Commission's hearings, Aboriginal people stressed the fundamental importance of retaining and enhancing their cultural identity while living in urban areas. Aboriginal identity lies at the heart of Aboriginal peoples' existence; maintaining that identity is an essential and self-validating pursuit for Aboriginal people in cities.

And at p. 525:

> Cultural identity for urban Aboriginal people is also tied to a land base or ancestral territory. For many, the two concepts are inseparable.... Identification with an ancestral place is important to urban people because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders.

92 Section 718.2(*e*) requires the sentencing judge to explore reasonable alternatives to incarceration in the case of all aboriginal offenders. Obviously, if an aboriginal community has a program or tradition of alternative sanctions, and support and supervision are available to the offender, it may be easier to find and impose an alternative sentence. However, even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative. For all purposes, the term "community" must be defined broadly so as to include any network of support and interaction that might be available in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

VI. Summary

93 Let us see if a general summary can be made of what has been discussed in these reasons.

1. Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.

2. Section 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

3. Section 718.2(*e*) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

4. Section 718.2(*e*) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(*e*), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.

5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(*e*) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.

6. Section 718.2(*e*) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

8. If there is no alternative to incarceration the length of the term must be carefully considered.

9. Section 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

10. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

11. Section 718.2(*e*) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

13. It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

VII. Was There an Error Made in This Case?

94 From the foregoing analysis it can be seen that the sentencing judge, who did not have the benefit of these reasons, fell into error. He may have erred in limiting the application of s. 718.2(*e*) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, and perhaps as a consequence of the first error, he does not appear to have considered the systemic or background factors which may have influenced the appellant to engage in criminal conduct, or the possibly distinct conception of sentencing held by the appellant, by the victim Beaver's family, and by their community. However, it should be emphasized that the sentencing judge did take active steps to obtain at least some information regarding the appellant's aboriginal heritage. In this regard he received little if any assistance from counsel on this issue although they too were acting without the benefit of these reasons.

95 The majority of the Court of Appeal, in dismissing the appellant's appeal, also does not appear to have considered many of the factors referred to above. However, the dissenting reasons of Rowles J.A. discuss the relevant factors in some detail. The majority also appears to have dismissed the appellant's application to adduce fresh evidence. The majority of the Court of Appeal may or may not have erred in ultimately deciding to dismiss the fresh evidence application. The correctness of its ultimate decision depends largely upon the admissibility of the fresh evidence and its relevance to the weighing of the various sentencing goals. However, assuming admissibility and relevance, it was certainly incumbent upon the majority to consider the evidence, and especially so given the failure of the trial judge to do so. Moreover, if the fresh evidence before the Court of Appeal was itself insufficient to inform the court adequately regarding the circumstances of the appellant as an aboriginal offender, the proper remedy

would have been to remit the matter to the trial judge with instructions to make all the reasonable inquiries necessary for the sentencing of this aboriginal offender.

96 In most cases, errors such as those in the courts below would be sufficient to justify sending the matter back for a new sentencing hearing. It is difficult for this Court to determine a fit sentence for the appellant according to the suggested guidelines set out herein on the basis of the very limited evidence before us regarding the appellant's aboriginal background. However, as both the trial judge and all members of the Court of Appeal acknowledged, the offence in question is a most serious one, properly described by Esson J.A. as a "near murder". Moreover, the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be taken into account in the sentencing of the aboriginal appellant as it would be for any offender. For that offence by this offender a sentence of three years' imprisonment was not unreasonable.

97 More importantly, the appellant was granted day parole on August 13, 1997, after she had served six months in the Burnaby Correctional Centre for Women. She was directed to reside with her father, to take alcohol and substance abuse counselling and to comply with the requirements of the Electronic Monitoring Program. On February 25, 1998, the appellant was granted full parole with the same conditions as the ones applicable to her original release on day parole.

98 In this case, the results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the appellant and society. In these circumstances, we do not consider that it would be in the interests of justice to order a new sentencing hearing in order to canvass the appellant's circumstances as an aboriginal offender.

99 In the result, the appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: Gil D. McKinnon, Vancouver.

Solicitor for the respondent: The Ministry of the Attorney General, Vancouver.

Solicitor for the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Solicitor for the intervener the Attorney General for Alberta: Alberta Justice, Calgary.

Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Kent Roach and Kimberly R. Murray, Toronto.

Appendix 3 —

Resources for preparing Gladue reports

Appendix 3A:

Gladue report writer's style guide

Gladue report writer's style guide

As you're preparing your client's Gladue report, keep in mind the following style tips. This will help to ensure the Gladue report is clearly written and easy to read. If you have grammar questions that aren't addressed below, you may find Capital Community College Foundation's online Guide to Grammar and Writing helpful: grammar.ccc.commnet.edu/grammar.

Using the active voice

When you use the active voice in a sentence, the subject performs the action (verb). When you use the passive voice, the subject receives the action of the verb. Use the active voice — it's more direct, concise, and meaningful.

Passive voice: The sound of the schoolyard swing will always be remembered by him.

Active voice: He will always remember the sound of the schoolyard swing.

Passive voice: The younger siblings were watched over by older siblings when the adults were working.

Active voice: When the adults were working, the older siblings watched over the younger siblings.

Using apostrophes

Use an apostrophe for contractions, which eliminate a letter or letters from a word. Apostrophes are also used to show possession, when an "s" is added to a noun.

Contractions: do not — don't; will not — won't; cannot — can't

Possessive: George's car; a day's work; the boat's schedule

"Its" and "it's" are often confused. "It's" is a contraction for "it is." "Its" is the possessive for "it."

Example: It's hot outside.

Example: The book is missing its cover.

Using hyphens in numbers

Use a hyphen in a number when the number is used as an adjective (modifies a noun) that appears *before* the noun in the sentence.

Before the noun: The twenty-year-old car sped through the intersection. (Or, The 20-year-old car sped through the intersection.)

After the noun: Mary was twenty years old when she moved to Vancouver.

Capitalization

Capitalize proper nouns (names of people or places); always capitalize "Aboriginal." Titles (job titles or positions) don't need to be capitalized.

Proper nouns: The client, Jane Doe, self-identifies as Aboriginal.
Jane Doe lives in Vancouver, British Columbia.

Titles: The client's probation officer provided a pre-sentencing report.
The client's band leader provided a letter of reference.

Using quotation marks

Use quotation marks when you're providing a direct quote of something someone has said. Use a comma before the opening quotation mark. Use a period before the closing quotation mark.

Example: Jane Doe said, "I didn't see a car in the driveway."

Formality

Use a more formal style when writing a Gladue report. Refer to yourself as "the writer," instead of "I." Avoid informal terms such as "mom" or "dad"; instead use "mother" or "father."

Example: The writer interviewed Jane Doe's mother, Karen.

Appendix 3B:

Gladue report writer's checklist

Gladue report writer's checklist

This checklist is for advocates (or lawyers) who are helping their Aboriginal client prepare a Gladue report. In addition to the information described in the workbook on page 30, the following checklist provides a comprehensive outline of all the information necessary for a Gladue report. As you're writing the Gladue report, you may find it helpful to refer to the Gladue report writer's style guide in Appendix 3A, the sample in Appendix 3C, and the blank template in Appendix 3D.

Preparing a Gladue report

Preparing a Gladue report can be a significant time investment, and may take anywhere from eight to 20 hours. You will need to sit down with your client for several interviews to get all the information necessary for a Gladue report.

You will need to set up an initial interview with your client to go through the information necessary for a Gladue report. The initial interview can take up to three hours, and you may need to set up a second interview to complete the process. Once the initial interview is completed, you will need to get in touch with the community contacts your client provides. This can also take a significant amount of time. After talking with these contacts and compiling any letters of support and certificates, set up a final interview with your client to review the information.

You should have your client's Gladue report finalized one week before the court date. This means you should start preparing your client's Gladue report at least four weeks before the court hearing. Once the report is ready, give it to your client's lawyer.

Your client may become upset or traumatized by the information that comes up in the course of preparing a Gladue report. If your client becomes distressed, please stop the interview immediately. It's a good idea to have the contact information for a counsellor available to pass on to your client.

Checklist

Before you begin

- Does your client self-identify as Aboriginal? Aboriginal includes status or non-status Indians, First Nations, Métis, and Inuit.
- Is your client interested in having his or her bail or sentencing hearings in the First Nations Court in New Westminster? First Nations Court sits once a month and hears criminal and related child protection matters. Your client will need to apply to have his or her matter heard in First Nations Court, and will need to travel to New Westminster or get special permission to participate via telephone or videoconferencing.
  For more information, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).
- Does your client agree to have his or her Gladue report used in court? A Gladue report will include detailed information about your client's history and family life, and preparing a Gladue report can bring up painful and traumatic information. Discuss with your client whether he or she is ready to talk about his or her background. If your client is willing to go through the process of preparing a Gladue report, it's a good idea to make sure your client has support available and people he or she can talk to after your interview (family, friends, and counsellors).

Court and case information

- Where is the court located?
- Who is the presiding judge or justice? (The term judge is used for a Provincial Court case and the term justice is used in a Supreme Court case.)
- Who is the Crown counsel?
- Who is the defence counsel (your client's lawyer)?

Contact information

- What is your client's full name? Does he or she have any aliases (nicknames)?
- Does your client have an Aboriginal name?
- What is your client's date of birth? Where was your client born ("place of birth")?
- What is your client's home address? Does he or she have a mailing address?
- What is/are your client's phone number(s)?

It's a good idea to make sure you have more than one phone number for your client. In addition to his or her home phone, be sure to get any cell phone, work phone, school phone, and emergency (message) numbers where he or she can be reached if you can't reach him or her at the primary phone number.

Offence information

- What files are currently before the court? List the file numbers and the information in the charge.
- What was your client's date of arrest? When is the hearing for the Gladue report (i.e., when is the bail or sentencing hearing)?
- Who are your client's contact people? These might be friends, relatives, support workers, or hereditary or band chiefs. Be sure to get as many contacts as possible from your client, along with their phone numbers and cell phone numbers. If these people provide you with reference letters in support of your client, you can attach them to the Gladue report.

Documents for review

- Does your client have the particulars (disclosure) from the Crown? If not, you will need to contact your client's lawyer.
- If you're preparing a Gladue report for a sentencing hearing, ask your client if he or she has the pre-sentencing report from the probation officer.
- Does your client have any letters of support or certificates? For example, if his or her community members have written reference letters, or if he or she has a certificate of completion from a course, counselling program, or addictions treatment program, you can attach them to the Gladue report.

Your client's circumstances

- What kind of relationship does your client have with his or her family? Consider describing your client's family relationships in a separate paragraph (or more) for each significant family member.
- Is there a history of child protection issues in your client's family? For example, has your client ever been in foster care? Have members of his or her family been in foster care (his or her siblings or children)?
- Was your client raised by a single parent? Is he or she a single parent?
- What is your client's marital status? What was/is the length of your client's marriage or relationship?
- Does your client have any children? How old are they? Do the children live with your client? Have the children ever lived with your client? If not, why not?
- Who are your client's **associates** (friends)?
- What are your client's past and present living arrangements? For example, how many siblings and relatives lived in the same house while he or she was growing up? How many siblings and relatives does he or she share a home with now?

- What is your client's education? What is your client's reading ability? Does your client face any challenges that would prevent him or her from learning, such as trauma, learning disabilities, or Fetal Alcohol Spectrum Disorder (FASD)?
- What is your client's past and present employment record?
- Does your client have any special training, skills, or talent?
- Is your client a member of any clubs — social, professional, or religious?
- What are your client's interests, goals, and aspirations — educational, professional, or otherwise?
- What is your client's financial situation? Has your client been impacted by poverty? Does he or she have a history with social assistance, employment insurance, food banks, or shelters?
- Does your client have any mental health issues? What is his or her mental, emotional, and behavioural status?
- Is your client in good health? Does he or she have any health or physical problems?
- Has your client ever struggled with addictions or substance abuse (now or in the past)? Did your client grow up in a home where there was a history of addictions or substance abuse?
- Did your client grow up in a home where there was domestic violence or abuse?
- What is the Court History Assessment for your client? (The Court History Assessment is a listing of your client's past criminal record, which is included in the disclosure package from the Crown counsel.) You should review all of the offences listed with your client. Take note of any patterns. For example, you may notice that every December your client is in trouble. This could reflect a trauma, such as the death of a parent. It's also good to note any long periods of time during which your client wasn't charged with any offences. Discuss with your client the positive things that were happening in his or her life at that time.
- What is your client's attitude with regard to the offence?
- If you're preparing a Gladue report for a sentencing hearing, is your client receptive to any proposed conditions, such as a curfew or working with an elder?

Gladue considerations

- What is your client's Aboriginal affiliation? Is he or she a status or non-status Indian, First Nations, Métis, or Inuit? Does he or she have a band affiliation?
- Where is your client from? Which community or band is he or she from? Does he or she live in an urban or rural area? Does he or she live on reserve or off reserve?
- List the ways in which your client has been negatively impacted by colonization. For example, has your client been affected by racism? Did he or she attend an Indian residential school? This list should be detailed, personal, and specific to your client.
- Has your client been affected by suicides or other deaths of his or her family or friends?
- Does your client have any suicidal tendencies?

If your client has suicidal tendencies, please stop the interview and refer your client to a trained professional immediately.

- Do you notice a pattern in your client's life that is connected to the anniversary of the death of a loved one (or another trauma)?
- If applicable, note how your client compares to Jamie Gladue (see page 2 for more information).

Your client's Aboriginal community

For this section, you will need to interview your client, your client's relatives, and a representative from your client's Aboriginal community (such as a band social worker or hereditary chief). These interviews will allow you to confirm the facts of your client's situation.

- What is the general history and overview of your client's Aboriginal community?
- Was there an Indian residential school in or nearby the community?
- Ask your client to describe his or her community. Are there issues of substandard housing, lack of clean water, chronic unemployment, or seasonal employment? Is the community "dry," or are there issues of substance abuse within the community? What is the availability of treatment or rehabilitative services for substance abuse?
- How has colonization impacted the community as a whole? For example, are there issues with community health, unemployment, poor economic conditions, addictions, child welfare, etc.?
- How many people in the community speak the Aboriginal language?

- What are the positive, healing aspects of the community? What resources are available within the community that could help your client? What are the community's strengths? List any community programs, initiatives, successes, and role models.
- Is there anything your client can do to help his or her community? Are there volunteer opportunities?
- Who are the community elders?
- Are there community activities or cultural traditions that your client can participate in or volunteer for? Examples include potlatches, sweat lodges, winter dances, sundances, feasts, berry picking, gathering firewood, hunting, fishing, big house ceremonies, longhouse ceremonies, etc.

It's also a good idea to ask the community representative about cultural traditions your client can take part in. These activities are important to the recommendations you and your client's lawyer can make regarding your client's release or community sentencing.

- Is there someone in your client's community whom you can contact if your client needs assistance? (For example, the chief and council, elders, family members, friends, etc.)
- Has your client ever been involved with an Aboriginal restorative justice program, or with community elders or teachings? If so, give examples.

Your client's connection to his or her Aboriginal community

- Was your client raised in or does he or she have an awareness of his or her Aboriginal culture/community?
- Is your client connected to his or her Aboriginal community?
    - If yes, please explain.
    - If no, please explain why not. For example, was your client part of a "scoop" or otherwise placed in foster care? Does he or she have problems with his or her family or community?
    - If your client lives in an urban area, has he or she made connections in the city with other Aboriginal people?
    - If your client has an Aboriginal spouse or partner, has your client connected with his or her spouse's or partner's Aboriginal community?
- Does you client speak his or her Aboriginal language? If not, why not?
- Has your client been affected by dislocation from his or her community, community fragmentation, or loneliness?
- Did your client attend an Indian residential school? Did any of your client's family members attend an Indian residential school?
- Has your client spoken with an Indian residential school counsellor or therapist?

- Has your client filed a claim with the *Indian Residential School Settlement*?
- Has the Indian residential school system — including settlement payments — impacted your client's family or community?
- Has your client participated in Aboriginal community traditions, celebrations, or gatherings as a child or as an adult? Examples include sweat lodges, sundances, winter dances, potlatches, funeral feasts, berry picking, gathering firewood, fishing, hunting, long house ceremonies, family gatherings, etc.

Summary and proposed recommendations

Once you've spoken with your client and his or her family, friends, support workers, and Aboriginal community, you should have a clear idea of what's realistic and appropriate for your client for his or her bail or sentencing plan. Keep in mind that your bail or sentencing plan will need to address your client's specific situation and should not put at risk any vulnerable members of his or her community, including elders. For example, if your client is charged with assault, his or her sentencing plan should include a condition not to contact the victim. If your client is charged with theft, his or her sentencing plan should include staying away from the business or area where the theft took place.

The more detailed the bail or sentencing plan is, the better chance your client will have of staying in the community. Be as specific as you can. If you're making recommendations for bail, your plan should ensure that your client attends his or her court dates, that he or she is safe to be in the community, and should prevent your client from re-offending if he or she is released from jail. Standard sentencing recommendations include: keeping the peace, being of good behaviour, reporting regularly to a probation officer, attending personal counselling, attending alcohol or drug counselling, or attending anger management counselling. If appropriate, additional recommendations might include: not possessing firearms or weapons, obeying a curfew (as long as it doesn't interfere with employment), volunteering, and abstaining from drugs and alcohol.

As this is a Gladue report, it's important to emphasize culturally appropriate interventions, such as Aboriginal residential treatment facilities; Aboriginal restorative justice programs; or volunteering for elders, chief and council, other community members, or a friendship centre. Cultural recommendations (such as attending a sweat lodge once a week, or helping to prepare for a feast) should be specific to your client's Aboriginal community and traditions. Discuss with your client his or her availability to take part in the suggested conditions.

If your client lives in an urban area that's far from his or her Aboriginal community, look into local Aboriginal resources that might be helpful and meaningful to your client.

Once you've made your recommendations, review them with your client to ensure he or she agrees with everything that you've proposed, and that the plan is achievable and realistic. Discuss with your client any potential barriers to following the plan. Once you've written the Gladue report, review the report with your client to make sure it's accurate, and to make sure that your client understands that everything in the report will be shared with the court and that it may be read aloud in court. After reviewing the report with your client, review the report with your client's lawyer.

If your client is willing to share his or her Gladue report with the Legal Services Society for educational or training purposes, have him or her sign the Authorization for Release of Gladue Report Information in Appendix 3E.

The release of this information is optional. All of your client's and your client's contacts' identifying information will be removed and kept strictly confi ential.

Appendix 3C:

Gladue report for bail or sentencing hearing (sample)

Gladue report for [bail] [sentencing] hearing

The information contained in this Gladue report is privileged and confidential, and is intended for the use of the individual(s) named below and for the court hearing. Copying, distributing, or disseminating this report to third parties is prohibited.

Court and case information

Court:

Court file number:

Judge/Justice: Presiding justice:

Crown counsel: Phone:

Defence counsel: Phone:

Contact information

Name:

Date of birth: [day/month/year] Place of birth:

Current address:

Phone 1: Phone 2:

Offence data

[This information will be in the particulars for the offender. Crown counsel will provide the particulars or disclosure to defence counsel, including the Information, Initial Sentencing Position, and Report to Crown Counsel. If you have any questions, speak to the defence counsel about them.]

File number: _____

Count: _____

File number: _____

Count: _____

File number: _____

Count: _____

Information sources

[Try to contact a minimum of six people and/or organizations]

People contacted for the preparation of this report

1. _____ (Offender, in person)
2. _____ (in person, or by telephone)
3. _____ (in person, or by telephone)
4. _____ (in person, or by telephone)
5. _____ (in person, or by telephone)
6. _____ (in person, or by telephone)

Documents reviewed for the preparation of this report

1. Particulars from Crown on files
2. Pre-sentence report from probation office
3. Technical suitability report from probation office
4. Relevant case law [e.g., *R. v. Silversmith* for a bail hearing, *R. v. Kakekagamick* for a sentencing hearing.]
5. Other (any print or online materials regarding: client's First Nation, healing programs, Aboriginal restorative justice programs, medical reports or letters, psychiatric reports, etc.)

Current circumstances

Family relationships

[Include as many family members as possible — parents, grandparents, siblings, etc. Include anyone who has a significant relationship with your client, even if they aren't a member of his or her immediate family. For example, you can include an aunt who adopted him or her, or an uncle or cousin who provides guidance. Use a sub-heading for each person (e.g., "John Doe's mother, Ms. Rebecca Doe"). Under each heading, provide a description of that person's circumstances and his or her connection to your client.]

Current circumstances (continued)

Living arrangements

Associates

Education

Employment

Career goals

Finances

Current circumstances (continued)

Mental health, physical health, behavioural and emotional status

Addictions, substance abuse

Court history assessment

[Take note of how your client responded to any past sentences. Review your client's criminal history with him or her.]

Attitude towards previous and proposed interventions

[**Note:** This only applies to a Gladue report for sentencing. If you're preparing a Gladue report for a bail hearing, don't make any admissions of guilt or any statements regarding the offence on behalf of your client.]

Attitude towards and understanding of offence

Gladue considerations

[In the two sections that follow, state your client's Aboriginal affiliation — status or non-status Indian, Métis, or Inuit; include his or her band affiliation if applicable. Also list the ways in which your client has been negatively impacted by colonization. Some of these facts may have already been addressed above, but they can be restated here (e.g., "As indicated earlier, John Doe was raised in foster care").]

Client's Aboriginal community

[Provide a general history and overview of your client's Aboriginal community (e.g., reserve population, was there an Indian residential school in the community, etc.). Include ways in which the community has been impacted by colonization. You can also include any positive community programs and initiatives.

Keep in mind that you're providing this information to a judge or justice who may not be familiar with the Aboriginal community — give as complete a picture as possible.]

Client's connection to his or her Aboriginal community

[Include any cultural ties that your client has. For example, does your client participate in community or traditional activities or ceremonies? These can include hunting, fishing, berry picking, gathering firewood, family gatherings, or ceremonies such as a longhouse ceremony.

If your client is disconnected from his or her Aboriginal community, describe the cause of the disconnect (e.g., being placed in foster care, attending an Indian residential school, or experiencing the inter-generational impacts that resulted from a family member attending an Indian residential school, etc.)]

Summary and proposed recommendations

[Some things to keep in mind when making your recommendations:

- Be as specific as possible regarding a plan for your client to be in the community.
- Common recommendations include keeping the peace, being of good behaviour, curfews, etc.
- Emphasize any culturally appropriate interventions, such as Aboriginal residential treatment facilities or Aboriginal restorative justice programs. Include whether there's a waiting list for the programs you describe. You can also include volunteer work for the chief and council, friendship centre, band social workers, etc. For example, your client can volunteer to provide fish or game for an elder or a single mother in the community.
- Also include any non-Aboriginal programs, such as counselling or addictions treatment, that might be helpful to your client.
- Describe any barriers that your client might encounter in following the plan, and outline how those barriers have been addressed.
- List anyone who can act as a surety — this can be your client's Aboriginal community — or otherwise be responsible for your client's compliance with the plan.

You need to assure the court that your client will comply with the conditions set out in the plan.]

Respectfully submitted,

_____

Gladue report writer

cc:
Defence counsel
Crown counsel

[Your name] — Gladue report writer
Contact information: [Address, telephone, email]

Consent to release information
AUTHORIZATION FOR RELEASE OF RECORDS
Pursuant to section 33(b) of the
Freedom of Information and Protection of Privacy Act
RSBC, C. 165

[Once you have completed your report, have your client sign the following to authorize the release of his/her records to the court.]

Date: _____

I hereby consent to the release of any assessment, clinical information, medical, psychiatric, psychological, legal, educational, social, and family information to **[your name]**, Certified Gladue Report Writer.

I understand this information may be used by **[your name]** for compiling report(s) for the court in British Columbia and may be taken into account in making court decisions.

_____
Signed

_____
Name (please print)

_____
Address

_____

_____ _____
Date Witness [must be present when the client signs the form]

Appendix 3D:

Gladue report for bail or sentencing hearing (template)

Gladue report for _____ hearing

The information contained in this Gladue report is privileged and confidential, and is intended for the use of the individual(s) named below and for the court hearing. Copying, distributing, or disseminating this report to third parties is prohibited.

Court and case information

Court:

Court file number:

Judge/Justice: Presiding justice:

Crown counsel: Phone:

Defence counsel: Phone:

Contact information

Name:

Date of birth: Place of birth:

Current address:

Phone 1: Phone 2:

Offence data

File number: _____

Count: _____

File number: _____

Count: _____

File number: _____

Count: _____

Information sources

People contacted for the preparation of this report

1. _____ (Offender, in person)
2. _____ (in person, or by telephone)
3. _____ (in person, or by telephone)
4. _____ (in person, or by telephone)
5. _____ (in person, or by telephone)
6. _____ (in person, or by telephone)

Documents reviewed for the preparation of this report

1. Particulars from Crown on files
2. Pre-sentence report from probation office
3. Technical suitability report from probation office
4. Relevant case law
5. Other (any print or online materials regarding: client's First Nation, healing programs, restorative justice programs, medical reports or letters, psychiatric reports, etc.)

Current circumstances

Family relationships

Current circumstances (continued)

Living arrangements

Associates

Education

Employment

Career goals

Finances

Current circumstances (continued)

Mental health, physical health, behavioural and emotional status

Addictions, substance abuse

Court history assessment

Attitude towards previous and proposed interventions

Attitude towards and understanding of offence

Gladue considerations

Client's Aboriginal community

Client's connection to his or her Aboriginal community

Summary and proposed recommendations

Respectfully submitted,

_____

Gladue report writer

cc:
Defence counsel
Crown counsel

Contact information:

Consent to release information
AUTHORIZATION FOR RELEASE OF RECORDS
Pursuant to section 33(b) of the
Freedom of Information and Protection of Privacy Act
RSBC, C. 165

Date: _____

I hereby consent to the release of any assessment, clinical information, medical, psychiatric, psychological, legal, educational, social, and family information to _____, Certified Gladue Report Writer.

I understand this information may be used by _____ for compiling report(s) for the court in British Columbia and may be taken into account in making court decisions.

_____
Signed

_____
Name (please print)

_____
Address

_____

_____ _____
Date Witness

Appendix 3E:

Authorization for release of Gladue report information (template)

Authorization for release of Gladue report information

I, _____

HEREBY AUTHORIZE my Gladue report writer, _____ to release copies of my Gladue report to the Legal Services Society.

I consent to the use of this information by the Legal Services Society for educational or training purposes only.

I hereby release my Gladue report writer from any and all claims whatsoever that may arise as a result of the release of the above information.

This release of information is optional. All client information will be redacted (blacked out), so that the Gladue report, and the people contacted to prepare it, are anonymous.

I am 19 years of age or older.

SIGNATURE _____

DATED _____

WITNESS:

_____
Name

_____
Address

_____
Occupation

_____
Signature

Gladue Report Disbursement Pilot
Information for Lawyers

Project Objectives

The goal of the project is to fund *Gladue* report court submissions, separate and distinct from the *Gladue* component in a probation officer's pre-sentence report. *Gladue* reports are meant to effectively activate the remedial aspects of *Gladue* principles by providing the court with comprehensive information on the offender, the offender's community and a plan that looks at realistic and viable alternatives to prison. Reports will be funded for pre-sentence reports, bail and sentence appeals for the fiscal year ending March 2012.

Procedure

Lawyers will request a *Gladue* report by submitting a *Request for Authorization of Disbursements* to Case Management Disbursements.

- The report writer must be on the roster of LSS-certified writers maintained by Aboriginal Services. Note that all LSS-trained report writers have signed a LSS contractor confidentiality agreement, and have completed a Canadian Police Information Centre (CPIC) screening.
- Referred lawyers can access the roster via E-services Expert Search.
- Referred lawyers can request a specific writer from the roster. Case Management will accommodate requests where possible, but will approve the most appropriate writer for the case, in consultation with Aboriginal Services.
- The report writer will submit his/her invoice to the lawyer for payment.
- The lawyer is responsible for paying the report writer invoice upon receipt.
- The report writer will require a minimum of 8 weeks to complete the report.
- Unless the client explicitly requests that a report writer not be connected to his or her community, Case Management will match a *Gladue* report writer who is:
    - familiar with the client's culture and community, and
    - close to the client's residence or the correctional facility.

Priority for *Gladue* reports

Female clients or single parents are encouraged to apply. Priority will be given to cases where the client:

- is a youth
- has a lengthy record
- faces an indictable charge (excluding first degree murder)
- faces a federal prison sentence
- has mental health, addiction and/or FASD issues,
- is an Indian residential school survivor **or** former or current foster child
- has community and family support
- has a bail hearing

Requests *may* not be approved if:

- The client resides outside a 200 km radius for in-person interviews (this is to avoid LSS incurring excessive travel expenses) subject to exceptionally circumstances and budget availability.
- Fewer than eight weeks are available for the writer to prepare the report.

Bail

Gladue reports are available for bail hearings if the client is agreeable to the matter being adjourned to allow for the 8 weeks to complete the report.

Compensation for tariff lawyers

There is no additional fee available for tariff lawyers as they are not currently compensated for working with other expert report writers such as psychiatrists. Hourly tariffs have been simplified into the general preparation fee and the criminal block fee is expected to compensate for preparation of most reports.

For additional preparation requests please refer to the Tariff Guide, GTC section, items 41 and 42.

Compensation for *Gladue* Report Writers

- Case Management will approve the disbursement for up to 18 hours, for sentencing, bail and appeals, @ $60 per hour writer which will include an automatic authorization for meterage up to $115, and will insert the name of the assigned *Gladue* report
- Case Management can approve an additional 5 hours for updating a bail Gladue report for the purposes of sentencing which will include an automatic authorization meterage up to $115; Another block of meterage may be available if the budget permits.
- The report writer will submit their invoice to the lawyer detailing:
    - client name;
    - hearing date;
    - number of hours worked;
    - kilometers travelled and destination; and
    - date the report was submitted to the lawyer.

Payment

Payment will be made using the experts section of the billing form.

Gladue Report for [Client Name]—[Bail/Sentencing] Hearing

- Proofread BEFORE you submit to the editor.
- Read it out loud, then read each page in order of the last to the first.
- Make sure there are no inconsistent statements.
- Understand plagiarism. Cite all work that is not your own.

CONTACT INFORMATION

Name:
Date of birth:
Place of birth:
Address:

Aboriginal community:

COURT AND CASE INFORMATION

Court:
Court file number:
Defence counsel:
Court date:
Summary of the offence in plain language:

INFORMATION SOURCES

People contacted for the preparation of this report:

1. **XXX XXXX,** subject of this report (in person)
2. **[XXX XXXX,** grandmother (in person)]
3. **[XXX XXXX,** mother (in person)]

Documents reviewed for the preparation of this report:

1. Particulars from Crown files
2. *R. v. Gladue*, [1999] 1 S.C.R. 688
3. *R. v. Proulx,* (2000) SCC 5, [2000] 1 S.C.R. 61
4. *R. v. Kakekagamic,* (2006) OCA
5. *R. v. Ipeelee,* (2012) SCC 13 [—I've included these four commonly cited cases so that you have the proper citation for them. Please do not include them if you did not look at them, and only include citations that are properly formatted. When in doubt, you can look at case law to see how something is cited.]

6.

HISTORY & CURRENT CIRCUMSTANCES

Family relationships

[Name of the subject of the report]: [Please keep discussion of the alleged offence(s) in the sections below under "Court History Assessment." This section is more for background, to set the stage for the alleged incidents, not to describe them.]

[Name of second person listed, and so on]: [Please see instructions below.

[If someone has a married name, write it this way: Mae West (née Jones), where *West* is the married name and *Jones* is the birth name.

[In this section, please remember to write in the past tense—for example, "Ms. West said that her nephew…" instead of "Ms. West says…"

[You can refer to individuals by their first names, especially in cases where multiple people have the same last name.

[When conducting interviews, it is often helpful to establish a timeline in the first interview and then verify it with different interviewees. These details can then help you keep the narrative clear when you write. At the same time, please try to balance the amount of detail you include. "George moved back and forth between his mother's and his grandmother's houses eight times from the ages of two to nine" is more helpful than writing about each move in detail.

[Also, please use more formal terms in place of more colloquial ("slang") words (see the list below), and avoid contractions (*hadn't, wouldn't,* etc.) for the most part. The exception would be culturally significant words such as *auntie*, which are preferable because they have no formal equivalent.

In place of:	Use instead:
VIRC (etc.)	spell out all acronyms, especially lesser-known ones, such as facilities
Apparently,	Reportedly—or better yet, "George reports that…"
a couple months	two months
a lot	frequently
about a month	approximately one month
acid	LSD
all the	all of the/every
booze	alcohol
close with	close to, *or* intimate with
come and visit	visit
fight	altercation
hanging out	spending time
help out	help
high and drunk	under the influence of drugs and alcohol
hold down a job	stay/remain employed *or* keep a job

lifestyle	used drugs *or* used alcohol *or* shoplifted on a number of occasions (this is totalizing language—please do not characterize someone as engaging in a "lifestyle," but instead simply report behaviour)
mad	angry
mom and dad	mother and father
One time,	Once,
partying	using alcohol (etc.—do not use "party" as a verb)
pass *or* pass away	died
pot *or* weed	marijuana
really	very *or* extremely
scene	peer group (see note about "lifestyle," above)
would always…	repeatedly *or* regularly *or* habitually used to

[You must attribute the source of all information you include. This is especially important when it concerns potentially illegal activity; for example, "George said he remembered his father frequently physically abusing his mother," or "Geraldine said that George's father used to regularly use drugs and then physically assault his son."]

Living arrangements

[Please keep this section brief, unless the details are important to the report.]

Education

[This section can be longer, but please include relevant details only.]

Employment

[Relevant information only, please.]

Career goals

[Please keep this brief, unless more detail seems very helpful.]

Finances

- This section can of great assistance if the client has FASD: What is the defendant's source of income
- Could someone be put in charge of handling his finance's as a means of monitoring the defendant's behavior
- Could the defendant be put on an allowance
- Could some of his income be put toward a formal scheduled activity such as an athletic program, education, program that would be part of a release plan

Mental and physical health, behavioral and emotional status

[Please include details of any diagnosed disorders, such as fetal alcohol spectrum disorder, ADHD, HIV, etc. You can include undiagnosed disorders if you write the sentence this way: "XXX has not been evaluated for a diagnosis of FASD, but his mother's consumption of

alcohol during her pregnancy, combined with his difficulties with memory, impulse control, fine motor control, and learning, show that he may suffer from the disorder." The difficulties listed are just examples—please use your discretion.]

FASD

[Use this heading if necessary to emphasize for the court]

This is a common issue with our clients. Refer back to the FASD training: What are the resources, e.g. key workers. Explain the need for an "exterior brain."

Do not give expert medical/therapeutic evidence: describe behaviour or report behaviour described by others, citing the source. Whenever possible, corroborate using written sources.

If you report medication use, please remember to ask what the medication is prescribed for and include that information if you can. Please confirm that you are spelling the medication correctly before submitting the report. Brand names are capitalized (e.g. OxyContin), but generic names are not (e.g. oxycodone).

Addictions, substance abuse

[Please take care with how you present this information—objective description, without negative details, is best, e.g. "XXXX has admitted to using cocaine and believes he became addicted to it in the six months preceding the incident. He reportedly used cocaine a half hour before the incident, and he said that he believes it impaired his judgement." It's also best not to include or admit to crimes for which the person has not been charged here, such as, "He sometimes physically assaulted his girlfriend while intoxicated."]

Personal attributes and other resources

CORROBORATE CORROBRATE CORROBORATE – YOU ARE NOT A TRANSCRIBER; all information must be backed up. Do not make bald allegations. If the defendant says he/she has community support, GET IT IN WRITING; get a letter of support from the band, chief, teacher, and attach it. If someone is going to be their support, make sure they are able to provide that support with integrity and are not facing criminal charges themselves. Will the support be willing to attend court in support of the defendant?

[This is a good place to summarize the subject's strengths. These might include: a supportive family, band, counsellor, teacher, or former employer; personal attributes such as being a hard worker, good at math or athletics or fishing, a loyal friend, and/or a helper to the elders. Please try hard to find something to include, unless it would be so meager as to make the subject look bad—in which case you can cut the heading and write nothing.]

GLADUE CONSIDERATIONS

Client's Aboriginal community

Avoid quoting RCAP unless you can make very specific linkages to THIS defendant.

All quotes must be cited properly.

[Brief paragraph about the location of any reserve with which the defendant is affiliated.]

[Brief paragraph—or two at the most—about the band and its economic situation and traditional activities.]

[Optional paragraph about the educational situation of the band, such as whether the teenagers have to attend boarding school—if relevant.]

Client's connection to [his/her] Aboriginal community

[Please summarize in one paragraph, unless more detail is helpful. At the most, include two or three paragraphs.] The client might not recognize his own connection to his community or cultural traditions. Does he or she fish, sew, paint, carve, attend family functions, community gatherings, visit, berry pick

Indian residential school & intergenerational effects

[If the subject has been impacted by relatives' or their own experience with residential schools, by racism, by poverty, by FASD, by abused parents who became abusers, or other effects of colonization on his/her family, you can summarize it here.]

COURT HISTORY ASSESSMENT

[Please include relevant information only, in SUMMARY form—one sentence to one paragraph in length. Do not include each charge, but give a sense of the person's contact with the system, since even a lengthy history can be persuasive when it comes to arguing that incarceration has not worked. By the same token, if the record is mostly breaches or exclusively non-violent or minor charges, that is very important to include.

Please do not include charges of which the person was acquitted or those for which the case was dismissed, or the juvenile record.]

Court file information

Court File #

Count: #1:

Count: #2:

Court File # [if there is another file]

Count: #1:

Count#2:

Relevant dates:

[If it seems helpful, you might include a chronology of the alleged offences, being careful not to admit guilt. An example is below:]

April 10/11	Alleged altercation with XXXX (file XXXX).
April 12/11	Defendant arrested.
April 23/11	XXXX allegedly failed to report to bail supervisor in XXXX; his mother called probation to say he is in XXX, but he was allegedly in breach.
May 18/11	Information laid for the alleged assault of XXXX.
June 15/11	Information laid for the alleged breach of conditions.
July 14/11	Information is changed: charge of attempted murder is added and the file is now XXXX-X.
July 15/11	On or about this date, the Crown issued a warrant for XXXX's arrest for breach in connection with the April 23 failure to report.
July 17/11	XXXX is again arrested and transported from X to X, and then to X.
Sept. 9/11	Bail hearing.
Sept. 16/11	Bail decision is delivered and XXXX is released to XXXXX.

Attitude toward and understanding of offence

[This section would be a good place to insert any narrative concerning the events in question. Please only include details that are helpful to the defendant and highly relevant to the report. ***It is very important not to admit guilt for bail Gladue reports.*** Be certain to use terms such as "the alleged incident," and be certain that you do not mention other potentially criminal acts that have not been reported or investigated (with the exception of certain kinds of drug use, if they figure into the circumstances.)]

Attitude toward previous and proposed interventions

[Same as above. You can eliminate "previous and" in the heading if the subject of the report has no criminal history, so that it reads "Attitude toward proposed interventions."]

THE PLAN – Aim for a concrete plan, without gaps, outlining any limitations such as a treatment facility – are they able to accept a client with FASD, are they able to accept a client on narcotic medication, are they able to provide transport, how long is the waiting list, It is very important to note: who did you speak to.

Cultural options: the client might say they are not connected to their culture and their Aboriginal yet participate in family gatherings, fishing, berry picking, attending events. This is important information and can provide the basis for restorative justice measures such as fishing for the community, or grocery shopping for elders.

SUMMARY AND RECOMMENDATIONS

Avoid bias and advocacy. The lawyer is the advocate.

[Include a paragraph or two summing up the case and the circumstances surrounding the offence, including the defendant's background and how it played a role. This is your chance to connect the dots from the previous sections; for example, "George believes he has been addicted to heroin and alcohol from before his birth, and the results of suspected fetal alcohol spectrum disorder are apparent in his difficulties with memory, learning, and impulse control. However, he has functioned extremely well and managed to avoid substance use for long periods while living on the reserve…"]

[One or two paragraphs with recommendations and brief justifications for the recommendations, such as, "XXXX has been released on bail and is on strict conditions within his community of XXXX. The Chief and Council fully support him, his family fully supports him. As mentioned previously, he has by all reports functioned quite well in the community, leading a normal and productive life; it was reportedly only when he moved to the city that he was unable to adapt and said he was led astray…"]

Summarize the plan using bullets.

- Do not make recommendations for a specific sentence such as *house arrest, CSO, 2 years less a day, and terms of probation.*
- The court needs your practical recommendations here.
- It is unnecessary to include language such as *Report forthwith upon release from custody to his Parole Officer in New Westminster and report thereafter as and when and in the manner directed.*
- Treatment – what treatment, how long is the wait, transportation to the facility
- What is the safety plan—an AA sponsor, a trusted friend
- Who will monitor his comings and goings
- Attend AA meetings, or counseling with _____? To address what issue?
- Details of community service, who signs off on the activities
- Enroll in an education or employment training—specifics

Respectfully submitted,

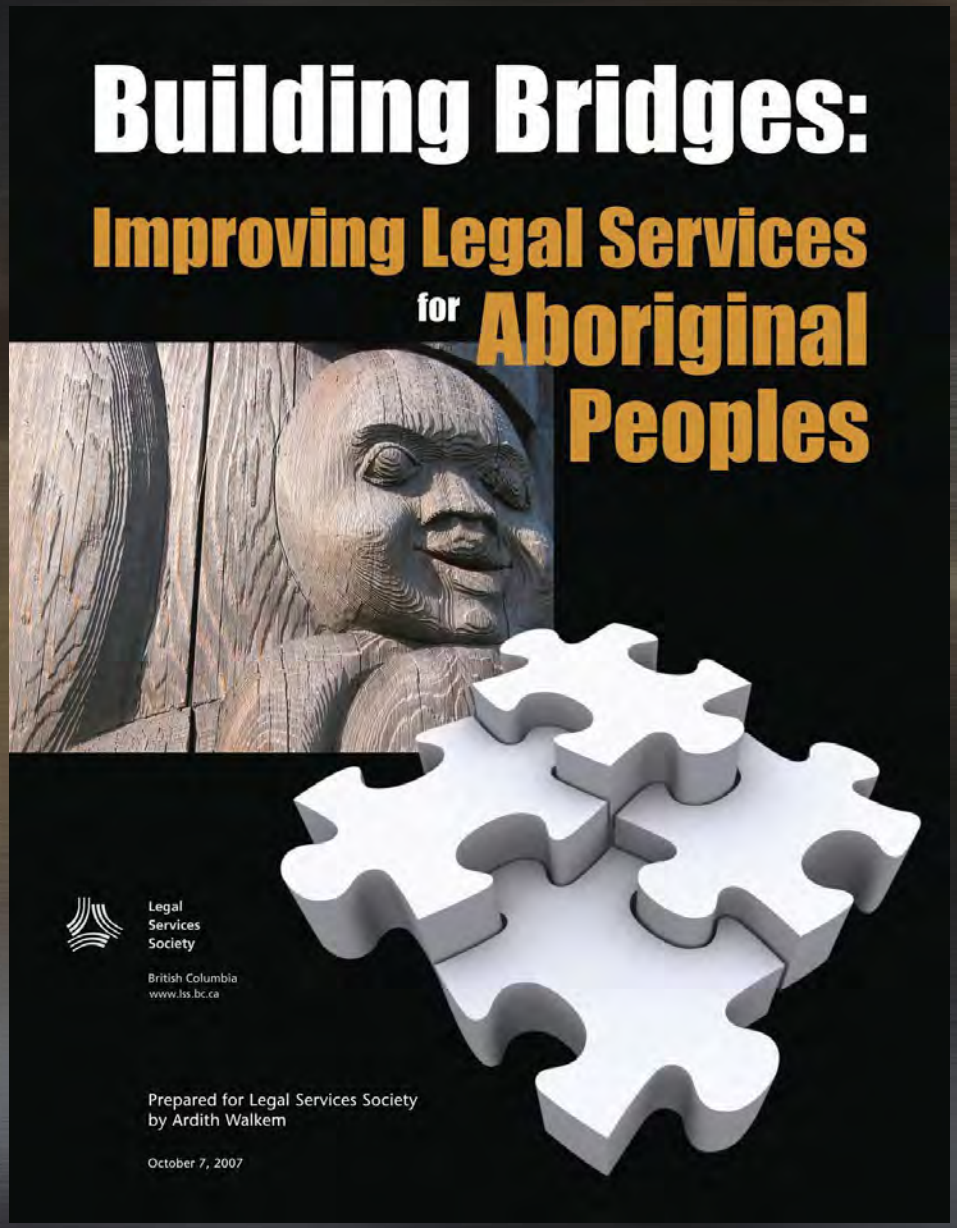
XXXX XXXXXX
Gladue Report Writer

CC:
Defence counsel
Crown counsel

IMPROVING LEGAL SERVICES

FOR ABORIGINAL PEOPLES

Pamela Shields
Manager, Aboriginal Services
Legal Services Society



A roadmap for improving legal services for Aboriginal peoples

October 2007
By Ardith Walkem

LEGACY OF COLONIALIST HISTORY

- INDIAN RESIDENTIAL SCHOOL GENERATIONAL IMPACT
- ILLITERACY
- CHILD APPREHENSION
- POVERTY
- FASD
- SEXUAL ABUSE

GOAL #1:

Reducing the number of

Aboriginal people in prison

GOAL #2:

Reducing the number of

Aboriginal children in care

GLADUE IN A NUTSHELL

Instructs judges at sentencing
to take notice of the unique circumstances of Aboriginal offenders, and consider all available sanctions

other than imprisonment

What is *Gladue?*

- 1999 Supreme Court of Canada decision
- Gave meaning to *Criminal Code* s. 718.2(e)
- For sentencing
- For bail

Gladue is for bail

Aboriginal people are more likely to be denied bail

and spend long periods in jail awaiting trial

What is *Gladue?*

an opportunity for fundamental and systemic change to the justice system

Gladue is **not**

a sentencing discount

nor a *get out of jail free* card

Who was Jamie Tanis *Gladue?*

- 19 year old Cree woman
- 2nd degree murder
- Stabbing death of her fiancé

Plead guilty to manslaughter

R. v. *Gladue* – The Facts

- Party on her 19th birthday
- Pregnant with their 2nd child
- Convinced her fiancé was cheating with her sister
- Fiancé left the party with her sister

R. v. *Gladue* – The Offence

- Confronted them leaving the sister's residence
- Victim and defendant argued
- He insulted her
- She chased him

and stabbed him in the heart

R. v. Gladue – Guilty Plea

- She was provoked
- Hyperthyroid condition
- Emotional
- Overreaction
- Remorseful

R. v. Gladue – Sentencing

- No criminal record
- Pregnant
- Family was supportive
- Alcohol abuse counselling
- Upgrading her education

R. v. *Gladue* – 3 Year Sentence

- Suspended sentence or conditional sentence was not appropriate
- Both were living in an urban area off- reserve
- No special circumstances arising from her Aboriginal status

R. v. *Gladue* – Appeal

Court of Appeal unanimously concluded that the trial judge had erred in concluding that s. 718.2(*e*) did not apply because the appellant was not living on a reserve

R. v. *Gladue*
Appeal Not Successful

- This was a serious crime
- vicious attack
- ‘near murder’ and
- Rowles J.A. agreed

…but

R. v. *Gladue* – Dissent

The circumstances were tragic

- Yet, there was provocation
- Undiagnosed medical problem
- Young & emotionally immature
- She had an alcohol problem but
- No history of violence

R. v. Gladue – Dissent

s. 718.2(*e*) invites recognition
and amelioration
of the impact of
systemic discrimination
in the criminal justice system

has upon aboriginal people.

R. v. Gladue – Rehabilitation

- Successful rehabilitation while on bail awaiting trial
- Taking steps to maintain her Aboriginal heritage
- 3 years' imprisonment was excessive

R. v. *Gladue* – Advancing Rehabilitation

- Rowles J.A. would have allowed the appeal
- Reduced the sentence to 2 years less a day
- Then a three-year period of probation

R. v. Gladue – The Supreme Court of Canada

For that offence by this offender a sentence of three years' imprisonment was not unreasonable:

She was granted day parole after 6 months

R. v. Gladue – Also…

"…there is something
different
about aboriginal
offenders
which may
specifically make
imprisonment
a less appropriate
or less useful sanction."

Remedial Purpose

Fear that s. 718.2(*e*)
will have no real impact:

In our view, s. 718.2(e)
creates a judicial duty
to give its

remedial purpose real force.

GLADUE IN PRACTICE ?

1998 to 2008
federal Aboriginal
prison population

Increased 19.7%*

**Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections 2009*

GLADUE IN PRACTICE?

In BC:
Aboriginal people are 4.5% of the population
yet…

22 % in prison

17% community supervision*

**A Profile of B.C. Corrections, Ministry of Public Safety and Solicitor General, January 2010*

Profile of an Aboriginal Woman Prisoner*

- 27 years old
- grade nine
- single mother of 3
- violence
- sex trade

And the cycle continues

Correctional Service of Canada http://www.csc-scc.gc.ca/text/prgrm/abinit/know/5-eng.shtml

Since The *GLADUE* Decision:

Aboriginal women

1998 – 2008
in federal
prisons
increased by

131%*

**Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections 2009*

R. v. Ipeelee, 2012

confirms and clarifies
the application of
Gladue in regard to
serious offenses
and

the role of *Gladue* reports

R. v. Ipeelee, 2012

Gladue reports are "an indispensable sentencing tool"

"counsel has a duty" to bring this <u>individualized</u> information to the court

R. v. Ipeelee, 2012

"poverty and other incidents of social marginalization may not be unique, but how people get there is."

No one's history in this country compares to Aboriginal people's

R. v. Ipeelee, 2012

Ipeelee cites RCAP:

the Canadian criminal justice system has failed Aboriginal people

What Are *Gladue* Reports *?*

- Information for the Court
- Judge
- Crown Counsel

Activating *Gladue* Principles

Gladue Reports

Activating the Remedy:

- Recognizes racism
- Sentencing options
- Healing

Restorative Justice

Gladue Report:

What circumstances brought this person before the court?

The Checklist:

- Personal History
- Family History
- Community History

Painting a picture of <u>this</u> defendant

GLADUE REPORTS

Advocating for Restorative Justice :

- Victim
- Community
- Offender
- Reparation

GLADUE IN PRACTICE

Responding to the Aboriginal Community

- 1-day workshops for lawyers & advocates
- 3-day Bootcamps
- The *Gladue* Primer
- *Gladue* Roster

GLADUE-U BOOTCAMPS

Gladue Initiative

- Trained 30 Aboriginal Advocates
- Corrections Protocol
- Pilot Disbursement
- $1,200/Report

GLADUE IN PRACTICE

- FASD
- Resources (Lack of)
- 8 Weeks Preparation
- Native Courtworkers
- Justice Institute

GLADUE Case Law

- *R. v. Ipeelee and Ladue,* 2012 SCC 13
- *R.* v. *Van Bibber*, 2010 YKTC 49
- *R.* v. *Belcourt*, 2011 BCCA 40
- *R.* v. *Cahoose* (25 March 2011) Kamloops 90534-2 (BC SC)
- *R.* v. *Corbiere,* 2012 ONSC 2405 (CANLII)
- *R. v. Tymiak*, 2012 BCCA 40 (CanLII)

Are you Aboriginal?

Do you have a bail hearing?

Are you being sentenced for a crime?

Do you know about First Nations Court?

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

If you self-identify as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code, often called Gladue rights. These rights apply to all Aboriginal people, whether you're status or non-status Indian, First Nations, Métis, or Inuit, and whether you live on or off reserve. In addition to your Gladue rights, you may be able to have your bail or sentencing hearing in the First Nations Court of BC in New Westminster.

What is Gladue?

In 1999, an Aboriginal woman named Jamie Gladue had her case heard by the Supreme Court of Canada. As a result of this case, the court said that there are too many Aboriginal people being sent to jail. The court also said that Aboriginal people face racism in Canada and in the justice system.

Now the word Gladue refers to the special consideration that judges must give an Aboriginal person when sentencing or setting bail. When your lawyer informs the court of your Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is sentencing you, he or she must consider *all options other than jail.*

Note: It's *your right* to have Gladue applied to your case. Your lawyer should do everything possible to make sure your Gladue rights are respected. More information on Gladue is available in the *Gladue Primer* (see www.legalaid.bc.ca/publications), or from the booklet *Are You Aboriginal?* (see www.cleonet.ca). If you don't have a lawyer, the judge must still apply Gladue.

NOTE

Contact legal aid immediately to find out if you qualify for a free lawyer.

Legal aid:

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

Will Gladue keep me out of jail?

Gladue does not automatically mean you won't get jail time. However, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place. This is called a **community sentence**. A community sentence might involve participating in drug rehabilitation or counselling. If you do a community sentence, you may get less or no time in jail.

However, the judge may have no choice but to send you to jail. If this is the case, the judge must still apply Gladue when deciding how long your jail sentence will be.

What is a Gladue report?

In order to apply Gladue, the judge needs to understand your circumstances and to know what kinds of community sentences are available. To help the judge, your lawyer needs to provide the court with a **Gladue report**. A Gladue report gives the judge, the **Crown counsel** (the government lawyer), and your lawyer as much information as possible about you. The other side of this fact sheet has some questions that can help you and your lawyer get started on preparing your Gladue report.

Continued over

Do you know about First Nations Court?

You may be able to have your bail or sentencing hearing at First Nations Court. First Nations Court takes a **restorative** approach to sentencing. This means that the judge, Crown counsel, Aboriginal community members, and your family will work with you and your lawyer to come up with a healing plan.

First Nations Court sits once a month and hears criminal and related child protection matters. For more information, contact the First Nations Court expanded **duty counsel** at **1-877-601-6066** (call no charge from anywhere in BC).

Duty counsel are lawyers who give free legal advice. If you don't have a lawyer, the expanded duty counsel can give you legal advice on or *before* the day of court. He or she can also help you prepare your Gladue report.

Note: It's *your choice* whether you exercise your Gladue rights or apply to have your matter heard in First Nations Court. Talk to your lawyer about what's best for you. If you don't have a lawyer, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).

Some questions for preparing your Gladue report

Note: Some of this information may be private or sensitive for you and you may not like to talk about it. If you don't want this information discussed out loud in court, you can ask your lawyer to give this information in writing to the judge and the government lawyer.

- Where are you from? Do you live in a city or in a rural area? Do you live on reserve?
- Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
- Did you or a family member attend an Indian residential school?
- Have you ever struggled with **substance abuse** (drug or alcohol abuse)? Have you been affected by someone else's substance abuse?
- What level of education do you have? What is your reading level?
- Did you or a family member have any issues that may have affected your opportunities to learn, such as trauma, Fetal Alcohol Spectrum Disorder (FASD), or learning disabilities?

Your important details

Name of lawyer: _____

Bail hearing: _____

Trial hearing: _____

Sentencing hearing: _____

Special thanks to Community Legal Education Ontario for use of the information in their booklet *Are you Aboriginal?* (2009).

Legal Services Society
www.legalaid.bc.ca

Building Bridges:

Improving Legal Services for Aboriginal Peoples

Legal Services Society

British Columbia
www.lss.bc.ca

Prepared for Legal Services Society
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October 7, 2007

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Executive Summary

Addressing the unmet legal needs of Aboriginal people requires acknowledging that solutions must be found within Aboriginal cultures and delivered in partnership with Aboriginal communities. There are four key areas where changes could be made by the Legal Services Society (LSS) to significantly improve Aboriginal peoples' access to, and use of, the legal services LSS provides: (1) Aboriginal representation within LSS, (2) legal representation available to Aboriginal people, (3) communication and outreach to Aboriginal communities, and (4) involvement of Aboriginal people in LSS program planning.

A significant portion of LSS's client base is Aboriginal. In many regions, Aboriginal people represent over 25% of LSS clients, yet few Aboriginal people work within LSS (less than 3% of staff overall) or are available to take LSS legal aid referrals. The lack of Aboriginal people within LSS impacts Aboriginal people's willingness and comfort with using or accessing LSS services. Representation of Aboriginal people within LSS should be proportional to the numbers of Aboriginal clients that LSS serves and could be accomplished through an Aboriginal equity policy in hiring, and increasing Aboriginal involvement on LSS board. Increasing the number of lawyers who take legal aid representation cases would be achieved by creating an Aboriginal articling student program, mentoring program, and Aboriginal Legal Aid Boot Camp. Creating the position of an Aboriginal community legal worker within LSS would assist in providing active outreach to Aboriginal communities and addressing the unmet legal needs of Aboriginal clients, particularly in the areas of criminal law, Aboriginal youth justice, and child protection services.

There is currently little active engagement between the LSS and Aboriginal communities. Responding to the real and pressing legal needs of Aboriginal peoples requires a commitment to outreach to Aboriginal communities to let them know of the services LSS provides, and also to provide meaningful opportunities for Aboriginal input into LSS program and policy planning. An Aboriginal Advisory Committee and an annual review

process would help LSS to remain responsive to Aboriginal peoples' legal and justice needs.

To the extent that Aboriginal people perceive LSS legal information services as impersonal, or technical and difficult to use, Aboriginal clients avoid using these services. Services such as the LawLINE and websites require adjustments to provide more opportunities for in-person service and content that is culturally relevant to Aboriginal peoples. The creation of an Aboriginal website and an Aboriginal LawLINE would allow these services to be delivered in culturally appropriate ways.

Aboriginal legal advocacy training workshops, delivered in Aboriginal communities, would empower people locally to help Aboriginal people in need of legal assistance. The Aboriginal Reference Group identified a need for LSS to foster understanding between Aboriginal communities and the legal system to encourage holistic resolutions to the legal issues that Aboriginal clients face by increasing opportunities for dialogue and education between Aboriginal peoples and the legal community.

There is a critical lack of legal representation available to Aboriginal peoples in the province. At the same time, levels of incarceration of Aboriginal peoples (particularly women and youth) continue to increase, as does the rate of Aboriginal children involved in the child protection system. Aboriginal peoples are often left with stop-gap legal services due to lack of legal representation, and steps are needed to increase the legal representation available to Aboriginal clients. The creation of expanded Aboriginal duty counsel would provide ongoing support and legal services within Aboriginal communities, particularly in the areas of (1) criminal law and (2) Aboriginal families (including family law and child protection). Similarly, changes to the *Guide to Legal Aid Tariffs* are necessary to reflect the additional time involved in addressing Aboriginal peoples' legal issues.

LSS currently treats family law and child protection as separate matters. Aboriginal Reference Group members suggested that these two issues should be treated in a holistic fashion and that LSS should target the services that it provides toward ensuring that family law and child protection services reflect the fact that Aboriginal children and families are part of extended families, communities, and nations.

LSS's willingness and commitment to investigating the changes necessary to increase Aboriginal peoples' access to, and use of, LSS services represents a positive opportunity for change.

Acknowledgements

Many people contributed their time and energy to this project. Thank you to the Aboriginal Reference Group members and individuals who attended the working group and or made time available for separate discussions, including Chief Leah George-Wilson, Professor June McCue, Professor Gordon Christie, Justice Marion Buller-Bennett, Raymond Phillips, Kelly Harvey Russ, Hugh Braker, Ken Pruden, Frank Charlie, Louise Mandell, Laurie Wilson, Linda Thomas, Ed Pongracz, Margaret Belcourt, Faith Tait, Farley Stewart, Elizabeth Duerr, Les Taylor, Keith McKay, Nancy Smith, and Pamela Shields.

Many people within LSS dedicated a significant amount of time and effort to ensuring that this project was supported, and provided valuable feedback and guidance, including the Aboriginal Project working group, comprised of project manager Fran Auckland, John Simpson, and Rochelle Appleby. Other LSS staff and management who offered comments or participated in the working group meetings include Heidi Mason, Michelle Angus, Coralie Gregoire, Rosanna Farrell, David Griffiths, Michael Bradshaw, Sherry MacLennan, Heidi Mason, Thom Quine, Allan Parker, Kyong-ae Kim, and Allen Vander Linde.

Contents

Executive Summary ..... **i**

Acknowledgements ..... **iii**

Introduction **1**

Barriers 3

Opportunities 4

Methodology 5

Key Recommendations — All LSS Service Areas **7**

Aboriginal representation within LSS 7

Key recommendation 1: Increase Aboriginal representation at all levels within LSS, including staff, management, board, tariff bar lawyers, and contractors. 7

Availability of legal representation 11

Key recommendation 2: Actively work to increase the number of lawyers with training specific to Aboriginal people who take legal aid cases. 11

Communication and outreach to Aboriginal communities 13

Key recommendation 3: Improve communications and outreach to Aboriginal governments, communities, and organizations. 13

Involving Aboriginal people in LSS program and policy planning 14

Key recommendation 4: Ensure Aboriginal participation in LSS policy and program development 14

Summary — Four key recommendations 16

Recommendations — Specific LSS Program Areas 17

Legal information and education services 17
Recommendation 5: LawLINE 18
Recommendation 6: LSS websites 19
Recommendation 7: Public legal education 21
Recommendation 8: Legal advocacy training 23

Legal representation services 24
Recommendation 9: Tariffs 25
Recommendation 10: Expanded Aboriginal duty counsel 28
Recommendation 11: Legal aid intake 29
Recommendation 12: Criminal law representation 30

Aboriginal Families 33
Recommendation 13: Family law representation and duty counsel services 35
Recommendation 14: Child protection representation and duty counsel services 36

Conclusion 39

Appendix A: Reports and Recommendations Considered 40

Appendix B: Summary of Recommendations 41

Key recommendations — All LSS service areas 41

Recommendations — Specific LSS service areas 44

Sources 49

1

Introduction

> [The] legal system has played an active role in the destruction, denial or limitation of First Nations cultural practices. The operations of the criminal justice system, whether intentional or not, have resulted in significant over-incarceration rates of First Nations peoples. This is coupled with their almost total invisibility at the most senior levels of policy-making and decision making in the administration of justice.[1]

Aboriginal people have a long and difficult history of involvement with the law and legal systems. Residential schools and the child welfare systems removed Aboriginal children from their families and communities and tore apart the social fabric of Aboriginal nations. Criminal law has been used to outlaw traditional governance systems and resource harvesting practices, and continues to incarcerate Aboriginal people at an alarming rate. Not surprisingly, the legacy of this history is that Aboriginal people continue to be disproportionately enmeshed with Canadian law and legal systems, reflected in the high numbers of Aboriginal peoples involved in criminal law, youth justice, and child protection systems. To many Aboriginal people, the legal process continues this history of interference, domination, and control, and its operation is far removed from any concept of justice or fairness. The impact of policies of assimilation (such as residential schools and the imposition of the *Indian Act* system) may mean that some Aboriginal people find it difficult

[1] Joanne St. Lewis. "Virtual Justice: Systemic Racism and the Canadian Legal Profession" in Racial Equality in the Canadian Legal Profession (Ottawa: Canadian Bar Association, 1999) at 69.

to challenge people in positions of authority, such as social workers, police, or others within the legal process.[2]

As Justice Anthony Sarich observed in the *Report on the Cariboo-Chilcotin Justice Inquiry*:

> The Canadian court process is a strange and bewildering one to most native people. Even those who have been through the process a number of times remain confused and frightened. With rare exceptions, natives simply don't trust those who operate in it and administer it.[3]

The Supreme Court of Canada in *R. v. Williams* acknowledged that there continues to be pervasive racism against Aboriginal people, which "includes stereotypes that relate to credibility, worthiness and criminal propensity" and is reflected in systemic discrimination in the justice system.[4] Knowledge of the systemic racism that has been acknowledged by the Supreme Court of Canada, and echoed in the voices of Aboriginal Reference Group members, provides useful consideration for assessing how to improve Aboriginal peoples' access to, and use of, legal services, and suggests that it is necessary for legal services to be provided in a way that actively involves Aboriginal peoples in program design and delivery, and actively reflects Aboriginal cultural values.

It is within this complex cultural and historical context that LSS operates. Providing legal services that meet Aboriginal people's justice and legal needs requires an awareness and commitment to not duplicating this history of control imposed from the outside, and instead working closely with Aboriginal peoples in seeking solutions. Addressing the legal issues that Aboriginal peoples face also requires a commitment to taking a holistic approach by acknowledging that people may be facing more than one legal

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2 Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples.* Vol. 1: *Looking Forward, Looking Back.* (Ottawa: Royal Commission on Aboriginal Peoples, 1996) at 376-77 [*Looking Forward, Looking Back (RCAP)*] described the intergenerational impacts of residential schools in this fashion:

> The schools were, with the agents and instruments of economic and political marginalization, part of the contagion of colonization. In their direct attack on language, beliefs and spirituality, the schools had been a particularly virulent strain of that epidemic of empire, sapping the children's bodies and beings. In later life, many adult survivors, and the families and communities to which they had returned, all manifested a tragic range of symptoms emblematic of 'the silent tortures that continue in our communities'. [References omitted]. See also: Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples.* Vol. 3: *Gathering Strength.* (Ottawa: Royal Commission on Aboriginal Peoples, 1996), esp. Chapter 2 [*Gathering Strength (RCAP)*].

3 Sarich, Anthony (Commissioner). *Report on the Cariboo-Chilcoten Justice Inquiry* (Victoria Ministry of Attorney General, 1993).

4 *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 58. See also *R. v. Gladue*, [1999] 1 S.C.R. 688.

problem at once (for example, child protection matters and a tenancy issue) and a satisfactory resolution might require legal assistance for both issues.[5]

Barriers

LSS has undertaken numerous studies to suggest improvements to the provision of legal services to Aboriginal peoples from the *Review of Legal Services to Aboriginal People in British Columbia* in 1999 to, most recently, the *Struggle for Justice: Northern Aboriginal Needs Assessment Report* in 2005. Similar studies have been undertaken in other jurisdictions across Canada. Each of these reports identified very real cultural differences and social barriers that impact Aboriginal peoples' ability to access and use legal services.

Aboriginal people have a greater need for legal services in areas such as criminal and child protection law, but also face greater barriers in accessing these services. Socio-economic and cultural factors that impact Aboriginal peoples' ability to access and use legal services include:

- Lower rates of literacy. Less than half of all Aboriginal people complete high school and only 25% of the on-reserve Aboriginal population has a minimum Grade 9 education level.[6]
- A history of institutional abuse at residential schools and within the child welfare and criminal justice systems leads to an increased level of distrust and difficulty in dealing with the courts and legal system.[7]
- Fetal Alcohol Spectrum Disorder (FASD) is a growing area of concern amongst Aboriginal clients. Cognitive impacts of FASD on attention, memory, and reasoning capacities lead people with FASD to be more

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5 Canadian Criminal Justice Association. *Aboriginal Peoples and the Criminal Justice System*. Bulletin. (Ottawa: Canadian Criminal Justice Association, 2000) which outlines the correlation between Aboriginal peoples' socio-economic conditions and involvement with the justice system and suggests that it is necessary to take these conditions into account when addressing the legal issues Aboriginal peoples face.

6 Indian and Northern Affairs Canada. *Comparison of Socio-economic Conditions, 1996 and 2001: Registered Indians, Registered Indians living on reserve and the total population of Canada*. (Ottawa: Minister of Indian Affairs and Northern Development, 2005) [*INAC, Socio-economic Conditions*]. The level of high school completion amongst Aboriginal people is 48.6%.

7 Royal Commission on Aboriginal Peoples. *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada.* (Ottawa: Royal Commission of Aboriginal Peoples, 1996) [*Bridging the Cultural Divide (RCAP)*].

involved in the legal system while simultaneously impairing people's abilities to seek the legal help that they need.[8]

- "Aboriginal People in Canada endure ill health, insufficient and unsafe housing, polluted water supplies, inadequate education, poverty and family breakdown at levels usually associated with impoverished developing countries."[9]
- Higher poverty rates amongst Aboriginal people pose a myriad of problems related to illness and lack of appropriate housing, nutrition, health care, transportation, and limited access to telephones and computers.[10]
- Many Aboriginal people live in remote communities, making it difficult to access and use legal services.[11]

Opportunities

At the same time that there are significant social, cultural, and economic barriers that prevent Aboriginal peoples from fully accessing legal services, there is an increased awareness of the need for change in the relationship between Aboriginal peoples and broader society. These changing values are reflected in the New Relationship entered into between British Columbia and Aboriginal organizations, which expressed a mutual commitment to "identify institutional, legislative and policy changes" necessary to "restore, revitalize and strengthen First Nations and their communities and families to eliminate the gap in standards of living with other British Columbians." The ongoing revitalization and strengthening of Aboriginal communities, and the resurgence of Aboriginal governance and justice systems, combine to present opportunities for transformative change.

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8 Child and Youth Officer for British Columbia. "Special Report: A Bridge to Adulthood: Maximizing the Independence of Youth in Care with Fetal Alcohol Spectrum Disorder." (Victoria: Child and Youth Officer for British Columbia, 2006) at ii, 12 and 17. The province estimates that a "significant" number of Aboriginal children in care suffer from FASD.

9 *Gathering Strength (RCAP)* at 1.

10 See: Linda Locke, *Struggle for Justice: Northern BC Aboriginal Needs Assessment Report* (Vancouver Legal Services Society, 2005) [Struggle for Justice] and Marion Buller, A *Review of Legal Services to Aboriginal People in British Columbia* (Vancouver: Legal Services Society, 1994) [*Review of Legal Services to Aboriginal People*] for two past examples of reports done for LSS which chronicle the interplay between poverty and barriers to getting legal help experienced by Aboriginal clients. For a survey of different quality of life indicators as they impact Aboriginal peoples, see: Indian and Northern Affairs Canada. *Basic Departmental Data 2004*. (Ottawa: Department of Indian and Northern Affairs, 2004) [*INAC, Basic Departmental Data*].

11 See: *Struggle for Justice* and *Review of Legal Services to Aboriginal People*.

The recommendations in this report identify solutions to eliminate the gap in the provision of legal services to Aboriginal peoples by strengthening Aboriginal peoples' ability to respond to their own legal needs. On a practical level, this requires the involvement of a greater number of Aboriginal people within LSS, and open and dynamic lines of communications between LSS and Aboriginal peoples.

Methodology

A review of existing studies by LSS and in other jurisdictions was done to explore barriers to the provision of legal services to Aboriginal peoples.[12] These reports chronicle a broad spectrum of access to justice and legal services issues faced by Aboriginal peoples. There is, likewise, a considerable amount of overlap in the issues that have been identified as impeding or denying Aboriginal peoples' access to legal services. Rather than re-documenting the problems that Aboriginal peoples face in accessing legal services, the goal of LSS with this project was to craft real, workable solutions.

The focus of the report was on all "Aboriginal people" within British Columbia. Included within this definition are status and non-status Indians (living on and off-reserve), Métis and Inuit. The Aboriginal Reference Group was made up of people who work with Aboriginal peoples in different regions across the province, including Vancouver Island, the North, Okanagan, Shuswap, as well as urban centres such as Vancouver and Kamloops.

An Aboriginal Reference Group made up of Aboriginal community legal workers, advocates, lawyers, and community members provided recommendations and direction at a two-day workshop based on their experience of working with Aboriginal peoples. The Aboriginal Reference Group was asked to generate innovative ideas for ways that LSS could change its services to better meet the legal needs of Aboriginal clients.

Additional discussions were held with Aboriginal lawyers, advocates, and justice and community workers. Further discussions were held with several members of the Aboriginal Reference Group about their particular areas of expertise and concern. LSS created a working group who provided on-going feedback and suggestions during the course of the drafting of the report.

Many recommendations were generated in the course of the Aboriginal consultations, and only those that the Aboriginal Reference Group prioritized as being the most important in different LSS services areas are reflected here. The recommendations in this report reflect the recommendations made by the Aboriginal Reference Group and Aboriginal community members, and in each

[12] For a full list of the reports considered, see Appendix A.

section are presented according to the priority assigned to them by the Aboriginal Reference Group.

Copies of the initial draft report were circulated to Aboriginal Reference Group members, Aboriginal people who had participated in individual discussions and lawyers, legal advocates, and justice workers who work with Aboriginal peoples on an on-going basis. The comments and suggestions generated from this review process were then incorporated into the final report. In total, the Aboriginal Reference Group, separate discussions, and commentary on drafts of this report involved review by approximately 40 people (excluding LSS management), who work with Aboriginal people to address their legal and justice issues across different regions of the province.

2

Key Recommendations — All LSS Service Areas

Across all LSS service areas, four recommendations were consistently highly prioritized by the Aboriginal Reference Group. These top four recommendations apply to all LSS service areas and form the four key recommendations of this report. The four areas where changes could be made by LSS to significantly improve Aboriginal peoples' access to, and use of, the legal services LSS provides are: (1) Aboriginal representation within LSS, (2) legal representation available to Aboriginal people, (3) communication and outreach to Aboriginal communities, and (4) involvement of Aboriginal people in LSS program planning.

Aboriginal representation within LSS

Key recommendation 1: Increase Aboriginal representation at all levels within LSS, including staff, management, board, tariff bar lawyers, and contractors.

There is a significant divide between the numbers of Aboriginal people who work within LSS (as directors, managers, staff, tariff bar lawyers, and contractors) and the number of Aboriginal people that LSS serves. In many regions of the province, Aboriginal people represent over 25% of LSS clients, yet few Aboriginal people work within LSS, or are available to take LSS legal aid referrals. The lack of Aboriginal people working within LSS impacts Aboriginal people's willingness to and comfort with using or accessing LSS services.

Percentages of LSS Aboriginal clients[13]

% of Aboriginal clients	Communities
Over 25% of all LSS clients	Campbell River, Chilliwack, Kamloops, Nanaimo, Port Alberni, Quesnel, Salmon Arm
Between 50%–88% of LSS clients	Dawson Creek, Duncan, Fort St. James, Hazelton, Prince George, Terrace, Williams Lake

Despite these numbers, there is a divide between LSS and Aboriginal communities. Few Aboriginal people work within LSS, and fewer still are actively involved in planning service delivery.

The lack of engagement between LSS and Aboriginal communities has led to a number of missed opportunities where adjustments to LSS policies and services could make a significant difference in responding to the real and pressing legal needs of Aboriginal people.

In both the Aboriginal Reference Group workshop, and in separate discussions with Aboriginal lawyers and justice workers, Aboriginal people consistently emphasized the need for more Aboriginal people (lawyers, LSS staff, community legal workers, and so on). Aboriginal people prefer to speak with an Aboriginal person and may not seek the legal help they need if they are unable to do so. This preference reflects the complex and difficult history of Aboriginal peoples' involvement within the justice system and inter-generational experience of institutional racism. The need to incorporate more Aboriginal people into the delivery of legal services to Aboriginal people has been explained as follows:

> [Aboriginal clients] are uncomfortable with seeking help from [non-Aboriginal people] because most of the times non-Aboriginal people are not sensitive or aware of Aboriginal history and culture, or do not fully understand their unique legal needs. Aboriginal peoples face ongoing stereotyping and discrimination…[14]

The lack of Aboriginal representation within LSS is a source of serious concern for Aboriginal Reference Group members and negatively impacts Aboriginal peoples' willingness to use or access LSS services.

Aboriginal people comprise approximately 4.5% of British Columbia's overall population.[15] The actual population of Aboriginal peoples in the regional centres that LSS serves is considerably higher.

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13 These figures reflect applications to LSS offices between 01/11/2005 and 31/10/2006.

14 *Struggle for Justice* at 5–6.

15 BC Stats. *2001 Census Fast Facts: BC. Aboriginal Identity Population — Regional Distribution*. (Victoria: Ministry of Management Services, 2004) [*2001 Census Fast Facts*]. This number is likely low given the lack of participation of a number of Aboriginal communities in the census. Figures used here are rounded to the nearest full percentage point.

Aboriginal populations in areas served by LSS regional centres and local agents[16]

Despite these numbers, Aboriginal people represent less than 3% of LSS staff.

Aboriginal population	Select regions
36–60%	Central Coast, Stikine, and Haida Gwaii
13–20%	Northern Vancouver Island, Alberni, Clayoquot, Bulkley-Nechako, and Peace River
6–12%	Cariboo, Lillooet, Thompson, Nicola, Cowichan Valley, and Powell River

Many areas with a large Aboriginal client base that are served by LSS regional centres or local agents have no Aboriginal staff. For example, there are no Aboriginal people working in LSS offices (or local agent offices) that serve Prince George and Duncan, despite the fact that at least 50% of all clients in these areas are Aboriginal. No senior management positions at LSS are filled by Aboriginal people. The lack of Aboriginal representation within LSS is acute and requires an organizational response. Representation of Aboriginal people within LSS management and front line services should be increased substantially to reflect the numbers of Aboriginal clients that LSS serves.

1.1 Institute an Aboriginal equity policy that addresses hiring, promotion, and retention of Aboriginal people at all levels of LSS.

1.1.1 Hiring

- Actively seek Aboriginal applicants to fill positions, including by posting jobs in Aboriginal media and using existing Aboriginal networks.
- Reflect the *requirement* for knowledge of Aboriginal cultures and the ability to work with Aboriginal people and organizations in job descriptions.
- Post positions outside of the LSS internal process (so that Aboriginal applicants are considered for new positions).
- Place proper and due weight on Aboriginal applicants' skills, knowledge, and ability, including exploring where this combined experience is equivalent to formal education.
- Involve local Aboriginal people in the hiring process.

[16] *2001 Census Fast Facts.*

1.1.2 Promotion and retention

- Increase opportunities for promotion and advancement of Aboriginal staff,
- Consult with Aboriginal employees about the organizational changes necessary to increase retention rates and eliminate barriers to advancement within LSS.

1.1.3 LSS Board

- Recruit Aboriginal people, including members of the Aboriginal bar, to join the LSS Board. At least three of the LSS Board seats should be filled by Aboriginal people.

1.1.4 Tariff bar lawyers

- Increase the number of Aboriginal lawyers who take legal aid representation cases by creating an Aboriginal articling student program, mentoring program, Aboriginal legal aid training courses, and an active recruitment process for Aboriginal students and lawyers.
- Initiate partnership opportunities with the University of British Columbia and University of Victoria law schools to teach or train law students in providing legal aid representation services, through legal clinics or other legal training programs.
- Consult with Aboriginal tariff bar lawyers, including the Indigenous Bar Association, on a regular basis, to identify and eliminate barriers that may prevent them from continuing with an LSS tariff practice.

1.2 Set organizational benchmarks for Aboriginal representation within LSS, proportional to the number of Aboriginal clients LSS serves. In regions where there is a substantial Aboriginal client base and no Aboriginal staff, remedial measures are necessary to identify internal barriers to the hiring and retention of Aboriginal employees. LSS managers should be required to produce a plan for recruiting and retaining Aboriginal staff.

1.3 Create a new position within LSS of Aboriginal community legal worker.

The duties of Aboriginal community legal workers would be broader than those of legal information and outreach workers (LIOWs), with increased responsibilities and a higher pay scale. Aboriginal community legal workers' duties would include:

- active outreach to Aboriginal communities about the services that LSS provides;

- coordinate and assist in delivering legal advocacy workshops regionally;
- help Aboriginal clients to identify and access appropriate LSS services;
- client advocacy and representation to address the key legal issues that Aboriginal peoples face (including criminal law, youth criminal justice, family and child protection matters, and non-family civil law) and how LSS may be able to assist;
- work with, and support, the work of expanded Aboriginal duty counsel (Recommendation 10.1); and
- assist with fostering a holistic approach between the legal system (courts, Crown and legal aid representation lawyers) and Aboriginal communities and people.

1.4 Create a senior position within LSS responsible for implementing the recommendations of this report within four months.

1.4.1 This senior position should report twice per year to the LSS Board, Aboriginal Advisory Committee (Recommendation 4.1), and Attorney General on the progress of LSS in implementing the recommendations of this report, including identifying progress that has been made or impediments to implementing the recommendations.

This position would work with the board and senior management of LSS to identify the steps necessary to implement the recommendations of this report. In the longer term, this position could ensure that LSS remains responsive to Aboriginal peoples' legal needs, and that Aboriginal peoples remain an active and dynamic part of LSS program planning.

Availability of legal representation

Key recommendation 2: Actively work to increase the number of lawyers with training specific to Aboriginal people who take legal aid cases.

The Aboriginal Reference Group highlighted the fact that there are few lawyers with the training and expertise to deal with issues specific to Aboriginal people, and identified the need for more Aboriginal lawyers with the training and ability to do legal aid work in the different regions of the

province.[17] Lack of legal representation and advice has a significant impact on Aboriginal people, particularly in areas serviced by circuit courts, or where Aboriginal community law offices were closed due to cutbacks. Aboriginal lawyers who were interviewed emphasized their observations that Aboriginal people often have no access to legal representation in advance of court dates which results in more cases proceeding to court because legal counsel is not available to resolve issues before they reach court (for example, by resolving issues with Crown counsel in criminal law matters). Aboriginal people in diverse regions of the province (from Northern Vancouver Island, the Kootenays, and Interior) commented that it is a common occurrence that Aboriginal people have no legal representation in court because duty counsel is conflicted out of acting because of other contracts with the Ministry of Children and Family Development or Crown counsel.

2.1 Increase opportunities for Aboriginal law students to article in areas of representation services covered by LSS.

- Create Aboriginal articling positions within LSS.
- Provide bursaries to private bar lawyers or firms who do legal aid work to encourage them to hire and train Aboriginal articling students. A bursary could help offset the salary and Professional Legal Training Course (PLTC) costs. Partnership opportunities could be explored with the Law Foundation and Law Society of BC.

2.2 Create a mentoring process to partner lawyers interested in developing an Aboriginal legal aid practice with lawyers who have knowledge and experience in legal aid representation.

2.3 Develop a "Providing Legal Aid Services to Aboriginal Clients Boot Camp" to train lawyers about Aboriginal legal aid practice areas.

Develop a practical two- to three-day "How to do legal aid with Aboriginal clients" workshop in partnership with the Continuing Legal Education Society of BC (CLE). The boot camp would cover:

1) criminal law representation (including Aboriginal youth criminal justice),
2) family law representation,

[17] Law Society of British Columbia. *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers* (Vancouver: Law Society of BC, 2000). This study shows a high non-practicing rate for Aboriginal lawyers — 30% of the Aboriginal lawyers were no longer actively practicing. The report suggests causes rooted in systemic discrimination, economic and other factors for this high non-practicing rate.

3) child protection representation,
4) other legal issues specific to Aboriginal peoples,
5) poverty law issues that impact Aboriginal people both on and off-reserve, such as housing, employment, debt, and social benefits,
6) a primer on LSS tariff system and administrative requirements,
7) cross-cultural issues in working with Aboriginal clients, and
8) the role of Aboriginal communities and advocates within the legal process.

The Providing Legal Aid Services to Aboriginal Clients Boot Camp, delivered in several regional centres, could incorporate local Aboriginal resources to assist people in building regional networks and taking a holistic approach to the delivery of legal services to Aboriginal clients. Opportunities for building relationships and networks locally would be increased if the boot camp was offered in conjunction with a First Nation Resource Day (Recommendation 8.4). A bursary program would encourage Aboriginal lawyers to attend.

Communication and outreach to Aboriginal communities

Key recommendation 3: Improve communications and outreach to Aboriginal governments, communities, and organizations.

Aboriginal Reference Group members observed that Aboriginal people and communities have little knowledge of the services that LSS provides, and identified a need for LSS to reach out to Aboriginal communities, including directly to First Nation organizations (bands, tribal councils, and political organizations) in addition to Friendship Centres and other Aboriginal service agencies or providers.

3.1 Target advertising and communications to existing Aboriginal media (newspapers, radio, APTN, community newsletters, websites) to publicize LSS services.

3.2 Dedicate a set amount of time for LSS regional managers and local agents to outreach to Aboriginal communities.

3.3 Provide cross-cultural training to LSS staff and legal aid lawyers in working with Aboriginal clients.

Topics for cross-cultural training could include:

- cultural sensitivity about Aboriginal societies, traditions and social values;
- working with people with FASD or addictions;
- issues in working with Aboriginal families, including child protection;
- legal issues specific to Aboriginal identity (wills and estates, membership and status, Métis issues, matrimonial property, on/off reserve issues, non-insured health benefits, and social assistance benefits on reserve);
- use of Aboriginal alternative dispute resolution processes such as restorative justice programs and family circles; and
- intergenerational impacts of residential schools and issues related to the Indian Residential School claim settlement process.

Involving Aboriginal people in LSS program and policy planning

Key recommendation 4: Ensure Aboriginal participation in LSS policy and program development.

Currently, LSS identifies the programs and services it will provide, and then asks how to make these services available to Aboriginal people. Aboriginal people are not actively involved in policy and program planning, and Aboriginal Reference Group members highlighted the need for a shift in the way that LSS delivers services.

An earlier LSS report, *A Review of Legal Services to Aboriginal People in British Columbia*, identified the need for greater Aboriginal involvement in LSS:

> LSS is charged with developing policies that affect the lives of Aboriginal people; yet, LSS receives little Aboriginal input.
>
> Herein lies LSS's challenge — accept Aboriginal people as having vital roles in [LSS's] administration, policies and programs. Aboriginal people are no longer willing to be consumers of the legal system; they demand to be active participants in its delivery.[18]

[18] Buller, Marion. *A Review of Legal Services to Aboriginal People in British Columbia* (Vancouver: Legal Services Society, 1994).

The need for Aboriginal involvement within LSS program and policy planning remains, and has become even more critical given the steadily increasing rate of Aboriginal involvement in areas such as criminal, youth justice, and child protection law.

4.1 Establish an Aboriginal Advisory Committee, with representation from the major BC Aboriginal political organizations, lawyers, board members, and LSS Aboriginal staff.

The Aboriginal Advisory Committee would work with LSS management and staff to:

- provide advice and recommendations, on an on-going basis, to ensure that LSS programs and services meet the needs of Aboriginal clients;
- create direct communication links with the Aboriginal community; and
- assist with seeking additional funding or partnership opportunities to support the provision of services to Aboriginal clients.

4.2 Review LSS programs and services on a yearly basis to assess how well they are meeting Aboriginal peoples' legal needs as part of LSS's planning process.

A regularly scheduled annual review (such as a workshop with LSS Aboriginal board members, LSS managers, Aboriginal lawyers, community legal workers and Aboriginal organizations) would (1) identify successful examples of service delivery to Aboriginal peoples, (2) identify areas where legal service delivery to Aboriginal clients is in need of improvement, and provide recommendations for those improvements to be made, and (3) ensure that all new LSS initiatives incorporate an Aboriginal component and respond to the needs of Aboriginal clients.

4.3 Actively engage Aboriginal people in the planning and implementation of the new family law and civil justice pilot hubs and any future hubs.

Specific actions could:

- ensure that the civil law hub addresses issues specific to Aboriginal people, such as residential school claims and settlements, Indian status and band membership, wills and estates, lands and leasing of reserve lands, and non-insured health benefits;
- ensure equity in the recruitment, consideration and hiring of Aboriginal staff;
- hire an Aboriginal community legal worker for each hub;

- ensure that the regional Aboriginal population, beyond the immediate vicinity of the hubs, accesses and benefits from the hubs;
- open satellite offices in local Aboriginal centers (For example, a Duncan satellite office for the Nanaimo family law hub);
- incorporate Aboriginal child protection advice services within family justice hubs; and
- evaluate how successful each hub is in serving Aboriginal clients.

Summary — Four key recommendations

The four key recommendations apply across all LSS service areas and reflect the need for LSS to explore new approaches to bridging the cultural, organizational, and policy gaps that exist between LSS and Aboriginal clients. Improving communications with Aboriginal governments and communities, and ensuring Aboriginal peoples' involvement in LSS program development and delivery can result in transformative change that responds to the critical legal needs of Aboriginal peoples. The invitation to action contained in this report is for a systemic shift in the way that LSS interacts with, and incorporates, Aboriginal peoples in the provision of legal services to Aboriginal clients.

3

Recommendations — Specific LSS Program Areas

The Aboriginal Reference Group offered innovative ideas for improving LSS service delivery to better meet the needs of Aboriginal clients. Many of these recommendations expand upon the four key recommendations, with more detailed discussions specific to each LSS service area.

Legal information and education services

LSS has undergone a shift in the way that it delivers services to incorporate the use of new and emerging technologies (such as websites and telephone information services) to provide legal information to clients so that they can advocate for their own legal needs. Aboriginal clients are not using these services to the same degree as other clients, and there are large areas where the legal needs of Aboriginal peoples remain unmet. Without a change in the way that these services are delivered, a larger gap and further unmet legal needs will result for Aboriginal clients. Aboriginal cultures and communities value personal interactions and relationships. To the extent that Aboriginal people perceive LSS legal information services as impersonal, or technical and difficult to use, Aboriginal clients avoid using these services.

Aboriginal Reference Group members identified the need to recognize the social and cultural barriers that Aboriginal people face in using legal information and education services, and to adapt these services in culturally appropriate ways to ensure Aboriginal people benefit from them. Expanding opportunities for in-person service and providing service portals specific to the Aboriginal community are two important ways to do this.

Recommendation 5: LawLINE

Aboriginal people report very low use of the LawLINE.[19] Reasons for lower Aboriginal use of the LawLINE, according to the factors identified by Aboriginal Reference Group members, include the cultural barriers posed by the impersonal nature of the service, difficulty understanding the telephone script, inability to access the information that they need, long wait times and lack of access to telephones. Aboriginal Reference Group members identified the fact that the current LawLINE is a near impossible service for clients with FASD to use.

5.1 Create an Aboriginal LawLINE staffed by Aboriginal staff and lawyers.

An Aboriginal LawLINE would:

- use evolving telephone technology to distribute calls to a roster of Aboriginal lawyers with different areas of expertise (criminal, family, child protection, other legal matters) throughout the province on a rotating basis;
- avoid the complex instructions and wait times that prevent many Aboriginal clients from using the current LawLINE;
- create a shortcut for Aboriginal community legal workers or advocates to get legal advice to help Aboriginal clients;
- have extended hours to address emergency child protection issues;
- incorporate a special Aboriginal intake line to help clients in remote areas apply for legal aid;
- serve as a single entry point for helping Aboriginal clients to access LSS services (this feature could be expanded if supported by a Web page that had centralized information about the different support services available regionally); and
- allow Aboriginal clients to file complaints about legal aid representation lawyers or other areas of LSS service over the telephone.

[19] While Aboriginal peoples generally represent a disproportionately large number of LSS client applications and referrals, internal intake statistics show that in 2006–2007, only 5% of all people who called the LawLINE were Aboriginal. While these figures may not be entirely accurate (given that not all clients are asked to identify their cultural heritage), the number of Aboriginal peoples using this service is significantly lower than in other areas of service that LSS provides.

5.2 Provide designated phone kiosks or wall phones in Native courtworkers' offices, Friendship Centres, and Band offices to allow people to directly call the Aboriginal LawLINE.

Designated phones would allow Aboriginal clients who do not have telephones, or access to a private phone, to use this service, and reduce the pressure on the workers at Aboriginal centres (such as Native courtworkers or Aboriginal community service offices) who often have their phone lines tied up for hours while clients try to use the LawLINE.

Recommendation 6: LSS websites

Two significant barriers prevent Aboriginal people from using the LSS website. The "first digital divide" concerns availability and access to Internet connected computers. The "second digital divide" refers to the fact that access to Internet-connected computers does not address the barriers that prevent Aboriginal people from using the Internet. Where LSS has provided computer kiosks in Aboriginal settings, they are rarely used by Aboriginal people. Aboriginal people may not use LSS websites because they are not comfortable with using the technology, prefer to deal with their legal problems on a personal basis, find the Web content not to be relevant to them, or other cultural factors.

Half of all Aboriginal people do not use the Internet (51% of Aboriginal men and 49% of Aboriginal women) and those who do are more likely to have higher education and income levels and live in urban areas.[20] Aboriginal people in rural areas, with lower income and education levels, are the least likely to be able to use and access the Internet. These factors combined mean that potential LSS Aboriginal clients are the least likely (of any population in Canada) to use Web-based services. Any legal services that LSS provides based solely on the Internet will not be able to reach across the digital divide to the Aboriginal clients who need help. Where LSS uses the internet to provide legal services to Aboriginal clients, significant adjustments are needed in the way these services are offered to empower Aboriginal peoples use of them. Changes to make Web-based information more accessible to Aboriginal clients should include incorporating in-person training and support opportunities, building upon existing community networks and relationships, and reflecting Aboriginal cultures in their delivery and design.

[20] Crompton, Susan. "Off-reserve Aboriginal Internet Users" Canadian Social Trends (Winter 2004). Ottawa: Statistics Canada (Catalogue No. 11-008).

6.1 Provide computers with Internet access in Aboriginal settings (such as Native Friendship Centres, Native courtworker offices or Band offices) with ongoing training and support to help Aboriginal people use this service.

Provide ongoing training and support to help Aboriginal clients access LSS websites by:

- designating Internet support as a regular part of regional Aboriginal community legal workers' job descriptions; and
- entering partnerships with Aboriginal organizations (such as the First Nations Technology Council, Native courtworkers, HRDC training centers, Bands, and Tribal Councils) to provide support and training to help Aboriginal peoples to access the websites on an ongoing basis.

6.2 Create an LSS Aboriginal website with content specific to Aboriginal peoples and communities.

The Aboriginal website should:

- use less complex language and include more audio and visual material;
- be built and maintained by Aboriginal people/staff;
- enable clients to ask legal questions (in a forum with other Aboriginal people or in a link to LSS staff); one possibility would be to have the same roster of lawyers who answer the Aboriginal LawLINE available to answer these e-mails;
- serve as a clearinghouse to distribute useful legal information to Aboriginal clients (e.g., links to PIVOT's information card on knowing your rights if you are arrested, and the RCMP's booklet on youth criminal justice); and
- list legal aid lawyers, Aboriginal community legal workers, advocates, and other services regionally.

6.3 Create a Web page for Aboriginal advocates on the Aboriginal website.

This Web page would include:

- a list of potential funding sources;
- links to free legal resources to help advocates in assisting Aboriginal clients;
- question/answer board for Aboriginal advocates to share advice and seek direction from their peers;

- legal advocacy training materials; and
- a linked e-mail address to allow Aboriginal advocates to ask LSS lawyers questions; one possibility would be to have the same roster of lawyers who answer the Aboriginal LawLINE available to answer these e-mails.

Recommendation 7: Public legal education

Lower levels of literacy among Aboriginal clients prevent many from fully accessing or using PLE materials. Of all Aboriginal students who enter Grade 8 within the province, over half do not progress through to high school graduation,[21] and over half of all Aboriginal people have not completed high school. While Aboriginal literacy rates are low, Aboriginal people are highly literate in oral traditions, and this fact suggests a need for greater audio-visual content and person-to-person interactions in providing legal services to Aboriginal peoples. LSS has made considerable efforts to develop PLE materials for Aboriginal people and Aboriginal Reference Group members felt that the materials were particularly useful for advocates who assist Aboriginal people. There remains a need to develop PLE materials that Aboriginal clients can use that respond to the real literacy challenges within Aboriginal communities.

7.1 Develop one-page "step-by-step problem-solving guides" about legal issues for Aboriginal clients.

Topics for these one-page fact sheets should include:

Criminal law	Family law	Child protection
• Arraignment • Bail • First appearances • Probation orders • Speaking to sentencing (*Gladue* hearings)	• Disclosure hearings • Areas for Aboriginal community involvement (cultural factors in the resolutions of family law matters) • How to seek/challenge variation orders	• Steps in the child protection process (before and after ministry involvement) • Kith and Kin Agreements • Different child protection orders

Legal advocacy training	General	Youth
• Role of advocates in the legal process	• Going to court • Client rights in dealing with legal aid representation lawyers • Changing legal aid lawyers • What to bring for intake	• *Youth Criminal Justice Act* proceedings

[21] British Columbia Ministry of Education. "Aboriginal Report 2005/06 — How Are We Doing?" (Ministry of Education: Victoria, 2006) at 27–29.

One-page fact sheets should:

- use flow charts and visual images to show steps in the legal process;
- be written at a Grade 7 reading and comprehension level (Aboriginal teachers would be hired to review these materials);
- include space to allow the client to turn the sheet into a "work book" where appropriate; for example, in speaking to sentencing (a *Gladue* hearing), include questions to help clients plan what they want to say, or help them to provide this information to their lawyer or legal advocate;
- be printed on colour-coded paper according to different areas of the law (criminal law, family law, child protection) to make them easier to find and use;
- be made available (and regularly re-stocked) at different courthouses, LSS offices, Friendship Centres, Band offices, Ministry of Children and Family Development offices, and probation offices; and
- be distributed to Aboriginal media and community newsletters as part of an on-going public legal education project.

Writing the series of one-page fact sheets could be accomplished at minimal cost by building upon existing resources developed by lawyers, Aboriginal advocates, and community workers. A working group could draft these fact sheets, possibly using software (such as Wikipages) that allows for collaborative writing. Additional partnership opportunities may be available to have law students develop these as part of legal advocacy training courses.

7.2 Develop PLE materials that use visual and audio content, including comic book or graphic formats and short videos.

- Utilize videos or graphic book formats to provide legal information in the areas of criminal law, Aboriginal youth criminal justice, and child protection.
- Print materials in a smaller format (cards, small pocket booklets, one-page fact sheets) so that clients can carry them around.
- Play short videos in waiting rooms or other places where Aboriginal people seek legal help.
- Link to videos from the Aboriginal Web page.

7.3 Hire Aboriginal writers and editors to develop PLE materials and field-test materials with Aboriginal clients before publishing them.

Recommendation 8: Legal advocacy training

Providing legal advocacy training to local Aboriginal community members would have long-term benefits in addressing the ongoing legal and justice needs of Aboriginal people in their communities. The legal needs of Aboriginal people at the community level are influenced by a number of factors that require knowledge of local culture and traditions. Resolving legal issues in criminal, child protection, and family law matters often requires the support and assistance of an Aboriginal client's home community. Training community members and people working within Aboriginal communities as advocates can help to resolve legal problems earlier and possibly avoid costly and lengthy court processes.

8.1 Deliver Aboriginal legal advocacy training workshops in Aboriginal communities.

Aboriginal legal advocacy training workshops, delivered in Aboriginal communities, would empower people locally to help Aboriginal people in need of legal assistance. Aboriginal legal advocacy training materials developed by LSS could include modules that address these topics:

- Criminal law (sentencing, diversion, representing yourself in court)
- Aboriginal youth criminal justice
- Child protection
- Domestic violence
- Residential school issues
- Aboriginal women's issues
- Legal rights within the prison system
- On-reserve housing
- Non-insured health benefits
- Wills and estates on reserve
- Indian status

Aboriginal communities could choose to focus on areas of particular concern to them. Partnership opportunities include Native courtworkers, Friendship Centres, Bands, Tribal Councils and other Aboriginal community service organizations. The host or partner organization would provide the space, advertise and recruit participants, provide refreshments, and invite local resource people to co-teach the workshops. LSS would develop the legal advocacy training materials and co-teach the workshops. Legal advocacy training workshops delivered regionally would incorporate existing programs and services and provide a holistic response to Aboriginal peoples' legal needs. LSS could also develop legal training modules with a view to training local Aboriginal community members to train others in their communities.

8.2 Employ a model of "cross-training" by offering legal advocacy workshops to a broad range of people who work with Aboriginal people on a daily basis.

A model of "cross-training" would provide legal advocacy training to non-traditional legal advocates to help ensure that the broadest numbers of people

are empowered to help Aboriginal people with the legal information that they need. Cross-training opportunities could be offered to Aboriginal community members, Chiefs and councils, teachers, social workers, youth workers, restorative justice workers, health and addiction workers, health nurses, school parent advisory committee members, victim's services workers, and Children and Family Development Ministry employees. Providing legal advocacy training to a broader range of people would increase the likelihood that Aboriginal people have access to legal information when they need it.

8.3 Develop information materials to inform the courts, legal aid lawyers, Crown counsel, and others in the court process about the role Aboriginal communities and advocates can play within the legal process.

Many judges and lawyers have no understanding of the role Aboriginal communities and advocates can play in the court process and the successful resolution of legal issues. The Aboriginal Reference Group identified a need for LSS to foster understanding between Aboriginal communities and the legal system to encourage a more holistic resolution to the legal issues that Aboriginal clients face.

8.4 Coordinate an annual First Nation Resource Day for Aboriginal community legal workers, First Nation organizations, judges, lawyers, and LSS staff.

A First Nation Resource Day, organized by LSS staff regionally, would create networking opportunities and a sense of community problem solving regionally between Aboriginal peoples and the legal community. The First Nation Resource Day could be offered in conjunction with the Providing Legal Aid Services to Aboriginal Client Boot Camp (recommendation 2.3) to increase the opportunities for networking.

Legal representation services

Members of the Aboriginal Reference group observed that legal representation tariffs control access to justice for many Aboriginal peoples involved in the legal system. Tariffs are one area where small changes in LSS policy could make a significant impact in improving Aboriginal peoples' use of, and access to, LSS services. The LSS tariff structure reflects the provision of service to non-Aboriginal clients, and makes little or no allowance for the very real differences faced by Aboriginal people within the legal system, or of the additional time required to address Aboriginal peoples' legal needs.

While LSS allows lawyers to apply for additional funding to cover some issues specific to Aboriginal people, this funding is not always available and

requires additional layers of administration and paperwork. The limitations of the LSS tariff system were highlighted in discussions with lawyers who work with Aboriginal clients. Over half of the Aboriginal lawyers interviewed had entirely eliminated, or greatly reduced, their time on Aboriginal legal aid cases because the administration and additional time involved in working with Aboriginal clients had made it financially unfeasible. In many cases, lawyers reported that justifying the few additional legal billing hours required to fully represent Aboriginal clients actually took more time than they were trying to bill for.

Even where case law and legislation have evolved to address the disparities experienced by Aboriginal people in the legal system (e.g., *Gladue* submissions for sentencing; Aboriginal youth criminal diversion programs; Aboriginal provisions in provincial child and family legislation), the LSS tariffs do not provide adequate legal aid coverage to allow Aboriginal clients to benefit from these changes.

Recommendation 9: Tariffs

9.1 Amend the *Guide to Legal Aid Tariffs* to reflect the additional time necessary to properly represent Aboriginal peoples' unique legal needs.

9.1.1 Aboriginal youth criminal justice issues — increase preparation time for applications under the *Youth Criminal Justice Act* (YCJA) to reflect cultural requirements in Aboriginal youth criminal matters.

Approximately 25% of all LSS youth criminal justice representations are for Aboriginal youth.[22] Preliminary involvement in the criminal justice system often leads to further involvement later, and successful attempts at diverting Aboriginal youth from this system would make a significant difference in the long term. Extra tariff coverage is needed for the conferencing provisions that are part of Aboriginal YCJA proceedings.

9.1.2 Aboriginal child protection issues — increase general preparation to cover alternate dispute resolution or mediation efforts that occur (formally or informally) within an Aboriginal context to divert escalating levels of ministry involvement.

This would include coverage for meetings with Aboriginal communities and extended families, in addition to the alternative dispute resolution and mediation options currently included in the *Guide to Legal Aid Tariffs*.

[22] Legal Services Society internal statistics. This figure is drawn from the referrals given in 2006–2007 and reflects only those youth who self-report as Aboriginal.

9.1.3 Criminal law diversion — create new tariff items to cover preparation and attendance at Aboriginal restorative justice or diversion projects, and increase the time spent prior to charges being laid on diversion efforts.

9.1.4 Criminal law sentencing (*Gladue* hearings) — create a new tariff item for preparing *Gladue* sentencing submissions.

In *R. v. Gladue*, the Supreme Court of Canada said that it was necessary to respond to the disproportionate number of Aboriginal people in prisons by considering factors such as the cultural background and possibility for rehabilitation and diversion in sentencing Aboriginal offenders.[23] Changes to the Canadian *Criminal Code* reflect this new direction in sentencing. However, in practice, very few Aboriginal offenders are actually able to use or benefit from these alternative sentencing provisions. In part, this stems from the lack of legal resources available for lawyers to prepare and make submissions. LSS has challenged whether or not it has an obligation to provide coverage for the preparation of *Gladue* sentencing reports.[24] Many Aboriginal people, who do not have the funds to pay for these reports or the extra legal time involved in presenting them, are denied the chance to present this information when they are convicted of a crime. Aboriginal Reference Group members felt very strongly that this was one area where tariffs (or lack of available tariffs) denies access to justice and requires change.

9.2 Change the rates and rules around travel tariffs for lawyers who are required to travel to meet with Aboriginal clients. Tariffs should be increased to a level that would attract lawyers to work on Aboriginal legal representation cases, particularly in remote areas or those serviced by circuit courts.

The current LSS travel tariff allows lawyers to claim for travel time when the total return trip is over 160 kilometres. Many Aboriginal clients live in small reserve communities surrounding larger villages and towns. In many cases, the reserve communities are close enough to the villages/towns that lawyers who travel to them are not eligible to charge for their travel time. At the same time, clients lack transportation to travel to meet with their lawyer in advance of court dates or about ongoing legal matters. Recommendations for changes to the travel tariff include the following.

9.2.1 Extend coverage to include travel time for client visits where clients reside in an Aboriginal community more than 60 kilometres return trip away and no public transit is available.

[23] [1999] 1 S.C.R. 688.
[24] *R. v. D.R.* (2000 BCSC 136).

9.2.2 Increase the current block fee (of $180 for a half day of travel) as it is not sufficient to compensate counsel for the time spent away from their offices.

9.3 Implement a Rural Aboriginal Legal Services Tariff that provides higher compensation to encourage lawyers to provide legal aid services to Aboriginal people in regions where the lack of legal representation is acute.

This model would operate in a similar way to the Northern Needs or Remote Community allowance used by governments to encourage people to work in Northern or remote areas. The additional amount reflected in the tariff should be sufficient to act as an incentive encouraging more lawyers in these regions to take LSS representation cases. Lawyers who provide legal aid representation services to Aboriginal people in specific regions would be eligible for increased tariff and travel costs. Pilot project areas could include North Vancouver Island, West Kootenays, Williams Lake, Prince George, and Prince Rupert. The Rural Aboriginal Legal Services tariff, and increased travel coverage, would be advertised to the local bar who would be encouraged to add an Aboriginal legal aid component to their practice. This recommendation could be coordinated with the Aboriginal legal aid boot camps (Recommendation 2.3) to also provide training to encourage lawyers to develop a legal aid representation practice.

9.4 Increase financial eligibility for Aboriginal clients.

Lack of financial resources is an abiding issue in Aboriginal communities with very high poverty and unemployment rates.[25] Aboriginal Reference Group members spoke of many instances where clients were denied legal aid coverage, despite the fact that they did not have the resources to hire a lawyer.

Several suggestions were made for ways to address the fact that Aboriginal clients who need legal aid assistance are denied legal aid, including:

- where people do not have full time employment throughout the year (for example, they work in construction, fishing, or other employment that is less than full time), ensure that intake workers take this fact into

[25] There is a plethora of research detailing Aboriginal peoples' high poverty and unemployment rates. See, for example, Statistics Canada. *Aboriginal peoples of Canada: A demographic profile*. [Available online: www12.statcan.ca/English/census01/Products/Analytic/companion/abor/Canada.cfm (Accessed: 11/03/2007)] [*Stats Can, Aboriginal peoples demographic profile*]; *INAC, Socio-economic Conditions*; *INAC, Basic Departmental Data*; and, *2001 Census Fast Facts*.

account in determining legal aid eligibility (include these questions as part of the script that intake workers use);

- increase financial eligibility levels so that more Aboriginal persons qualify for legal aid;
- create legal aid eligibility levels based on a proportional analysis of the legal costs involved measured against a client's income (for example, clients should be eligible for coverage if estimated legal costs for eligible legal issues would exceed 10% of a client's annual income) — LSS could develop a scale of the legal time required to address different categories of legal problems that clients face to simplify this process;
- consider factors specific to the Aboriginal community in assessing a person's eligibility including: support provided to extended family members (full time, or for parts of the year, who are not now recognized as dependents under LSS policy), cultural requirements (such as contributions to feasts or other cultural obligations and activities required in an Aboriginal context), and increased costs associated with living in rural or remote areas; and
- reflect a preventative approach by recognizing that preliminary convictions may lead to more serious charges in the future, and so increase eligibility for first-time charges on matters not currently eligible for tariff coverage to prevent escalating levels of involvement in the criminal justice system.

Recommendation 10: Expanded Aboriginal duty counsel

10.1 Create an Expanded Aboriginal Duty Counsel Program that provides representation, advice, and assistance to Aboriginal clients on a regular basis within Aboriginal communities.

This concept, in different manifestations, is in use in New Brunswick (Aboriginal Expanded Duty Counsel Project) and Ontario (Expanded Duty Counsel in some areas). Creation of an Expanded Aboriginal Duty Counsel Program would allow for a more cohesive approach to address Aboriginal peoples' legal needs, and respond to the fact that people often face a multitude of legal issues at once. Aboriginal peoples are often left with stop-gap legal services due to lack of legal representation. An Expanded Aboriginal Duty Counsel Program could be piloted in areas of the province with a high Aboriginal client base, and where there is a shortage of lawyers willing to take legal aid representation cases.

Expanded Aboriginal duty counsel would:

- offer services at locations that are easily accessible to local Aboriginal communities (Friendship Centres or Band offices, etc.) on a regular basis;
- allow for multiple visits and on-going assistance to Aboriginal clients to divert and solve legal issues before they escalate;
- be funded under a block-funding arrangement;
- have their travel time and costs covered to work with Aboriginal clients in remote or rural locations;
- work closely with Aboriginal communities;
- provide two types of expanded Aboriginal duty counsel services: (1) criminal law and (2) Aboriginal family law (including family law and child protection services);
- be supported by an Aboriginal community legal worker available to triage and do initial intake and to schedule appointments for clients where necessary; and
- preferably be Aboriginal lawyers who do not have contracts that would conflict them out of providing duty counsel representation to clients (for example, no conflicting contracts with the Crown or the Ministry of Children and Family Development).

Recommendation 11: Legal aid intake

11.1 Make legal aid intake regularly available in Aboriginal settings and accessible to clients before court dates.

11.1.1 Have existing intake workers shift where they do their work by providing regularly scheduled intake times at Friendship Centers, Band offices, or advocates' offices in advance of court dates;

11.1.2 Contract with Native courtworkers or other organizations regionally to assist Aboriginal clients in completing applications electronically.

11.1.3 Create a legal aid intake tariff that would allow legal aid lawyers to complete the legal aid application as part of their initial client interview.

Recommendation 12: Criminal law representation

The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit, and Métis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.[26]

The number of Aboriginal people incarcerated has increased steadily over the years. In 2006, approximately 18.5% of all federal inmates were Aboriginal. Aboriginal women and youth are even more disproportionately represented. Approximately 30% of all federal women inmates are Aboriginal[27] and "Aboriginal youth (25 years and under) represent approximately 41.3% of all federal Aboriginal inmates."[28] The number of Aboriginal people in federal prisons continues to grow at a crisis level, increasing by 21.7% from 1996 to 2004 (the growth rate for Aboriginal women was staggering, at 74.2%). During the same time, the non-Aboriginal population experienced a 12% reduction in their federal incarceration rates.

12.1 Ensure that Aboriginal clients in the criminal justice system have access to duty counsel services at all courthouses in the province.

Aboriginal Reference Group members reported a startling amount of cases where there is no duty counsel available (or they are conflicted out of acting) and Aboriginal peoples are left without legal representation in criminal law matters. LSS should focus a pilot project that operates in rural areas where Aboriginal people currently have limited access to duty counsel representation (Williams Lake, Port Hardy, Fort Saint James, West Kootenays, Fort Ware, Dease Lake, and Bella Bella). Expanded Aboriginal duty counsel (Recommendation 10.1) would address the lack of legal representation many Aboriginal peoples face in certain regions; however, where there is no expanded Aboriginal duty counsel available, LSS should take proactive steps to have duty counsel available to help Aboriginal clients. This would include having duty counsel travel to these locations and be available in advance of court dates, on court dates, and in interim periods between court dates.

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[26] *Bridging the Cultural Divide (RCAP)* at 309. See also: Michael Jackson, *Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988).

[27] Correctional Investigator of Canada. "Backgrounder: Aboriginal Inmates" [Available online at: www.oci-bec.ca/newsroom/bk-AR0506_e.asp (accessed 11/03/2007)] [*Aboriginal Inmates]*. These figures are based on 2006 figures.

[28] *Aboriginal Inmates*.

12.1.1 Work with court registries or existing duty counsel to identify matters where more than one accused is facing charges and arrange to have additional duty counsel available for those matters.

12.2 Support and dedicate resources to restorative justice initiatives, including prevention and diversion programs and circle sentencing.

LSS should target resources in the criminal law area towards preventative and restorative justice approaches and work with Aboriginal communities and organizations, the courts and Crown counsel, to increase the use of these restorative tools.

12.2.1 Expand tariff eligibility to focus on a preventative and restorative approach in the context of criminal law.

For example, creating new criminal law diversion tariff items (Recommendation 9.1.3) and criminal law sentencing (*Gladue* hearing) tariff items (Recommendation 9.1.4) would serve multiple functions by resolving or diverting criminal matters prior to court, or better preparing lawyers who represent Aboriginal clients.

12.2.2 Expand tariff eligibility for first time offenders.

12.3 Provide a greater degree of choice in legal representation to Aboriginal clients facing charges on hunting and fishing or other Aboriginal Rights, Title and Treaty Rights issues to retain lawyers with experience in Aboriginal law.

If there are two defences available, one based on Aboriginal or treaty rights, and one based on criminal law, LSS is often only willing to pay for the criminal law defence and requires that the Aboriginal client use a local lawyer with limited experience in Aboriginal and treaty rights defences. The result is that more legal time is spent and Aboriginal clients do not receive adequate representation in these very unique legal areas. LSS policy should not operate to limit or deny Aboriginal people's ability to rely on Aboriginal title rights or treaty rights defences in criminal law charges to retain lawyers in these highly specialized areas of law.

4

Aboriginal Families

Aboriginal Reference Group discussions treated the two categories of "family law" and "child protection" — distinct within LSS service provision — in a holistic fashion. Recommendations in both family law and child protection centered on the need to provide legal services in a way that acknowledges that Aboriginal children and families are part of larger communities and Nations.

There are very real differences between Aboriginal families and the general Canadian population, which require that LSS adapt the legal services it provides to Aboriginal families:

- The maintenance of relationships and obligations within Aboriginal Nations and communities is of paramount concern to Aboriginal people. Children and families are not viewed as isolated nuclear units but rather as part of the social fabric of Aboriginal communities and Nations.[29]
- Aboriginal men are three times more likely, and Aboriginal women two times more likely, to head single-parent families than their non-Aboriginal counterparts.[30]
- Aboriginal children are almost ten times more likely than non-Aboriginal children to live in households headed by relatives or

[29] Union of B.C. Indian Chiefs. *Calling Forth Our Future: Options for the Exercise of Indigenous Peoples' Authority in Child Welfare* (Vancouver: Union of BC Indian Chiefs, 2002) and Lavina White and Eva Jacobs, *Liberating Our Children Liberating Our Nations*. Report of the Aboriginal Committee Community Panel Family and Children's Services Legislation Review in British Columbia (Victoria: Aboriginal Committee Community Panel Family and Children's Services Legislation Review in British Columbia, 1992).

[30] Indian and Northern Affairs Canada. *Comparison of Socio-economic Conditions, 1996 and 2001: Registered Indians, Registered Indians living on reserve and the total population of Canada*. (Ottawa: Minister of Indian Affairs and Northern Development, 2005).

extended family members (grandparents, aunts, uncles, etc.) rather than their parents.[31]

- "One in seven aboriginal children will come through the child welfare system in B.C." and over 50% of all children in care in BC are Aboriginal.[32]

Given the history of the removal of Aboriginal children from their families and communities through residential schools and the child welfare system, it is not surprising that the number one priority — across both family law and children protection areas — identified by Aboriginal Reference Group members in providing legal services to Aboriginal families was to maintain and strengthen ties between Aboriginal children and their communities and Nations. The intergenerational impacts of the residential school experience continue to have a very direct impact on Aboriginal families:

> …the sad experience of many who attended these schools has had such an inter-generational effect on children and grandchildren that I have no hesitation in laying a significant portion of responsibility for today's unacceptable level of involvement of Aboriginal families in our child welfare system on the doorstep of that ill-conceived program of years ago.[33]

Currently, LSS family and child protection services reflect a limited model based on a nuclear family with no consideration of the larger social and cultural context that Aboriginal families exist within, and so do not provide necessary legal support to account for this cultural difference. To illustrate, current family or child protection legal services do not consider access requirements around cultural events and obligations (attendance at feasts, traditional activities, etc.) in resolving legal issues such as access or child protection orders.

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[31] *Stats Can, Aboriginal peoples demographic profile*: "Just under 5% of [Aboriginal children] living in large urban areas lived with either a relative other than their parent(s), or lived with a non-relative. This compares with only about 0.6% among non-Aboriginal children."

[32] B.C. Representative for Children and Youth, Mary Ellen Turpel-Lafond, quoted in "Too many native kids need help" The Province, A6, March 7, 2007. See also: Representative for Children and Youth and Provincial Health Officer (joint report). *Health and well-being of children in care in British Columbia: report 2 on educational experience and outcomes* (Victoria: Representative for Children and Youth and Provincial Health Officer (joint publication), 2007).

[33] Ted Hughes, *BC Children and Youth Review — Keeping Aboriginal Children Safe and Well* (Victoria: April 2006) at 49–50.

Recommendation 13: Family law representation and duty counsel services

13.1 Dedicate resources toward restorative solutions, such as mediation or alternative dispute resolution, in an Aboriginal context.

13.1.1 Involve Aboriginal communities, including houses/clans and extended families, in working together toward resolving family law disputes and dedicate resources to maintaining the broader concept of families reflected in Aboriginal cultures.

13.1.2 Incorporate a tariff for participation in mediation and dispute resolution services (including formal and informal) within an Aboriginal context, in addition to existing alternative dispute resolution and mediation tariff items.

13.1.3 Expand opportunities for diversion in domestic violence matters, which would provide legal support in seeking preventative and restorative solutions.

13.2 Expand tariff eligibility to include coverage for issues related to the removal of Aboriginal children from their home communities or territories.

There is currently no LSS tariff or service coverage in the family law area to address the removal of Aboriginal children from their home communities. A tariff does exist, generally, where children are removed from the province or country. In an Aboriginal context, the removal of children from their home communities or territories has deep and abiding social and cultural implications, and should likewise be eligible for legal aid tariff coverage.

13.3 Educate LSS staff, family law tariff lawyers, and the courts, on cross-cultural issues related to Aboriginal family law.

13.4 Ensure that LSS family law services are advertised in Aboriginal communities.

Aboriginal Reference Group members identified the need to inform Aboriginal peoples of the legal services available in the area of family law, and listed many examples where Aboriginal people had not sought LSS assistance because they were unaware of these services. Several Aboriginal Reference Group members shared their own observations that a disproportionate number of Aboriginal men are going to court, often unrepresented, in family maintenance enforcement proceedings, and many men are facing jail time. Aboriginal clients need to be educated on their eligibility for LSS family law services.

Recommendation 14: Child protection representation and duty counsel services

Levels of Aboriginal children in care are higher than they have ever been historically and the numbers continue to grow. Over one half of all children in care in the province are Aboriginal, and nearly half of all children in custody (43%) are Aboriginal.[34]

The high level of involvement of Aboriginal people within the child protection system reflects the tragic legacy of Aboriginal families being forcibly broken apart with the removal of Aboriginal children from their communities and their placement in residential schools. The number of Aboriginal children in the child welfare system has continued to grow over time as Aboriginal families face the intergenerational impacts of this history. The solution to the problem must be found in the rebuilding of Aboriginal families and communities, through supporting and increasing the opportunities for alternative dispute resolution and preventative measures built upon the strengths of Aboriginal cultures and families.

14.1 Increase and support the availability of preventative and restorative solutions, including alternative dispute resolution and mediation within an Aboriginal context.

14.1.1 Involve Aboriginal communities, including houses/clans and extended families, in working together to find solutions in child protection matters, in an attempt to divert escalating levels of ministry involvement.

14.1.2 Incorporate a tariff for participation in mediation and dispute resolution (including formal and informal) within an Aboriginal context, in addition to existing alternative dispute resolution and mediation tariff items.

14.1.3 Provide ongoing legal support for preventative measures in child protection.

14.1.4 Work with court registries or existing duty counsel to identify family law or child protection matters where both parents may need independent legal advice and assistance and arrange to have additional duty counsel available for those matters.

[34] Representative for Children and Youth. “Fact sheet” (Victoria: Representative for Children and Youth, 2007).

14.2 Educate LSS staff, legal aid lawyers, and the courts on cross-cultural issues related to child protection and Aboriginal children, including training on legislation specific to Aboriginal children.

14.2.1 Create, in partnership with Aboriginal child and family organizations or other Aboriginal organizations that work with Aboriginal families, a Guidebook for Aboriginal Child Protection matters for use by the courts and legal representation lawyers.

Many Aboriginal Reference Group members observed that there is currently very little practical consideration of the backgrounds and cultures of Aboriginal children in child protection matters. Despite the fact that provincial legislation has been amended to reflect the need to keep Aboriginal children connected to their extended families, communities and Nations, these provisions are seldom taken into account in child protection proceedings. For example, if legal aid representation lawyers are not aware of these provisions, or do not have contact with the Aboriginal community or Nation(s) that the child is part of, they do not address these issues.

LSS should take a proactive approach in educating LSS staff, legal aid lawyers and the courts about cultural issues and legislative provisions specific to Aboriginal children. One example of a way that this could be done is provided by a number of American jurisdictions where the *Indian Child Welfare Act* sets out specific provisions that relate to Indigenous children.[35] A number of states and Indigenous organizations have created "Bench Books" which serve as guides to assist the courts (as well as lawyers and other legal advocates) involved in child protection proceedings to inform them about the specific legal provisions and processes where an Indigenous child is involved.[36]

14.2.2 Dedicate resources to ensure that child protection services reflect the fact that the definition of "best interests of the child" in an Aboriginal context must incorporate the child's interest in maintaining a substantial and ongoing connection with his or her Aboriginal culture, extended family, community, and Nation.

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[35] 25 U.S.C. §§ 1901-63 [*ICWA*].

[36] See, for example: Shaening and Associates, Inc, New Mexico Tribal-State Judicial Consortium and New Mexico Supreme Court's Court Improvement Project Task Force, *Preserving Native American Families in New Mexico: The Indian Child Welfare Act & The Adoption & Safe Families Act* (New Mexico: New Mexico Supreme Court's Court Improvement Project and New Mexico Tribal-State Judicial Consortium, 2005) and the California Indian Legal Services, *California Judge's Bench Guide: Indian Child Welfare Act* (California: California Indian Legal Services, 2000).

14.3 **Hire and train Aboriginal community legal workers to work with Aboriginal children and families within each LSS Region.**

14.4 **Provide urgent advice services for Aboriginal child protection matters. This would include having a contact point at LSS after hours or in urgent situations (similar to the *Brydges* line for criminal law matters).**

14.5 **Teach self-advocacy skills to parents, families and Aboriginal communities so that Aboriginal people are empowered to advocate for themselves in the area of child protection.**

5

Conclusion

There is much work to be done. The recommendations in this report reflect the fact that solutions must reflect a willingness to build a bridge between Aboriginal communities and clients and LSS. LSS's willingness and commitment to investigating the changes necessary to increase Aboriginal peoples' access to, and use of, LSS services represents a positive opportunity for change. Addressing the unmet legal needs of Aboriginal people requires acknowledging that solutions must be found within Aboriginal cultures and delivered in partnership with Aboriginal communities. The recommendations of this report invite LSS to a greater level of commitment to working cooperatively with Aboriginal communities and incorporating Aboriginal peoples in decision making at all levels of LSS.

Appendix A

Reports and Recommendations Considered

A list of the reports and recommendations considered include:

- *A Review of Legal Services to Aboriginal People in British Columbia* (February, 1994)
- Bridging the Gap (Centre for International Indigenous Legal Studies, UBC Faculty of Law [Aboriginal Community Legal Needs Assessment], 2002)
- Newfoundland & Labrador Legal Aid Commission's Aboriginal Justice Project
- *Locking Up Natives in Canada* (Canadian Bar Association, 1987 – and as revisions are in progress)
- *Report on the Cariboo-Chilcotin Justice Inquiry*, 1993
- *Struggle for Justice: Northern BC Aboriginal Needs Assessment Report* (2005);
- Study of Unmet Civil Legal Needs in Nunavut, Northwest Territories and the Yukon, 2006
- Nanaimo First Nations Project, 2001
- Royal Commission on Aboriginal Peoples

Appendix B

Summary of Recommendations

Key recommendations — All LSS service areas

Key recommendation 1: Increase Aboriginal representation at all levels within LSS, including staff, management, board, tariff bar lawyers, and contractors.

1.1 Institute an Aboriginal equity policy that addresses hiring, promotion, and retention of Aboriginal people at all levels of LSS.

1.1.1 Hiring

- Actively seek Aboriginal applicants to fill positions, including by posting jobs in Aboriginal media and using existing Aboriginal networks.
- Reflect the requirement for knowledge of Aboriginal cultures and the ability to work with Aboriginal people and organizations in job descriptions.
- Post positions outside of the LSS internal process (so that Aboriginal applicants are considered for new positions).
- Place proper and due weight on Aboriginal applicants' skills, knowledge and ability, including exploring where this combined experience is equivalent to formal education.
- Involve local Aboriginal people in the hiring process.

1.1.2 Promotion and retention:

- Increase opportunities for promotion and advancement of Aboriginal staff.

- Consult with Aboriginal employees about the organizational changes necessary to increase retention rates and eliminate barriers to advancement within LSS.

1.1.3 LSS Board

- Recruit Aboriginal people, including members of the Aboriginal bar, to join the LSS Board. At least three of the LSS Board seats should be filled by Aboriginal people.

1.1.4 Tariff bar lawyers

- Increase the number of Aboriginal lawyers who take legal aid representation cases by creating an Aboriginal articling student program, mentoring program, Aboriginal legal aid training courses, and an active recruitment process for Aboriginal students and lawyers.
- Initiate partnership opportunities with the University of British Columbia and University of Victoria law schools to teach or train law students in providing legal aid representation services, through legal clinics or other legal training programs.
- Consult with Aboriginal tariff bar lawyers, including the Indigenous Bar Association, on a regular basis, to identify and eliminate barriers that may prevent them from continuing with an LSS tariff practice.

1.2 Set organizational benchmarks for Aboriginal representation within LSS, proportional to the number of Aboriginal clients LSS serves. In regions where there is a substantial Aboriginal client base and no Aboriginal staff, remedial measures are necessary to identify internal barriers to the hiring and retention of Aboriginal employees. LSS managers should be required to produce a plan for recruiting and retaining Aboriginal staff.

1.3 Create a new position within LSS of Aboriginal community legal worker.

1.4 Create a senior position within LSS responsible for implementing the recommendations of this report within four months.

1.4.1 This senior position should report twice per year to the LSS Board, Aboriginal Advisory Committee (Recommendation 4.1), and Attorney General on the progress of LSS in implementing the recommendations of this report, including identifying progress that has been made or impediments to implementing the recommendations.

Key recommendation 2: Actively work to increase the number of lawyers with training specific to Aboriginal people who take legal aid cases.

2.1 Increase opportunities for Aboriginal law students to article in areas of representation services covered by LSS.

- Create Aboriginal articling positions within LSS.
- Provide bursaries to private bar lawyers or firms who do legal aid work to encourage them to hire and train Aboriginal articling students. A bursary could help offset the salary and Professional Legal Training Course (PLTC) costs. Partnership opportunities could be explored with the Law Foundation and Law Society of BC.

2.2 Create a mentoring process to partner lawyers interested in developing an Aboriginal legal aid practice with lawyers who have knowledge and experience in legal aid representation.

2.3 Develop a "Providing Legal Aid Services to Aboriginal Clients Boot Camp" to train lawyers about Aboriginal legal aid practice areas.

Key recommendation 3: Improve communications and outreach to Aboriginal governments, communities, and organizations.

3.1 Target advertising and communications to existing Aboriginal media (newspapers, radio, APTN, community newsletters, websites) to publicize LSS services.

3.2 Dedicate a set amount of time for LSS regional managers and local agents to outreach to Aboriginal communities.

3.3 Provide cross-cultural training to LSS staff and legal aid lawyers in working with Aboriginal clients.

Key recommendation 4: Ensure Aboriginal participation in LSS policy and program development.

4.1 Establish an Aboriginal Advisory Committee, with representation from the major BC Aboriginal political organizations, lawyers, board members and LSS Aboriginal staff.

4.2 Review LSS programs and services on a yearly basis to assess how well they are meeting Aboriginal peoples' legal needs as part of LSS's planning process.

4.3 Actively engage Aboriginal people in the planning and implementation of the new family law and civil justice pilot hubs and any future hubs.

Recommendations — Specific LSS service areas

Legal information and education services

Recommendation 5: LawLINE

5.1 Create an Aboriginal LawLINE staffed by Aboriginal staff and lawyers.

5.2 Provide designated phone kiosks or wall phones in Native courtworkers' offices, friendship centres, and band offices to allow people to directly call the Aboriginal LawLINE.

Recommendation 6: LSS websites

6.1 Provide computers with Internet access in Aboriginal settings (such as Native Friendship Centres, Native courtworkers' offices or Band offices) with ongoing training and support to help Aboriginal people use this service.

6.2 Create an LSS Aboriginal website with content specific to Aboriginal peoples and communities.

6.3 Create a Web page for Aboriginal advocates on the Aboriginal website.

Recommendation 7: Public legal education

7.1 Develop one-page "step-by-step problem-solving guides" about legal issues for Aboriginal clients.

7.2 Develop PLE materials that use visual and audio content, including comic book or graphic formats and short videos.

7.3 Hire Aboriginal writers and editors to develop PLE materials and field-test materials with Aboriginal clients before publishing them.

Recommendation 8: Legal advocacy training

8.1 Deliver Aboriginal legal advocacy training workshops in Aboriginal communities.

8.2 Employ a model of "cross-training" by offering legal advocacy workshops to a broad range of people who work with Aboriginal people on a daily basis.

8.3 Develop information materials to inform the courts, legal aid lawyers, Crown counsel, and others in the court process about the role Aboriginal communities and advocates can play within the legal process.

8.4 Coordinate an annual First Nation Resource Day for Aboriginal community legal workers, First Nation organizations, judges, lawyers, and LSS staff.

Legal representation services

Recommendation 9: Tariffs

9.1 Amend the *Guide to Legal Aid Tariffs* to reflect the additional time necessary to properly represent Aboriginal peoples' unique legal needs.

9.1.1 Aboriginal youth criminal justice issues — increase preparation time for applications under the *Youth Criminal Justice Act* (YCJA) to reflect cultural requirements in Aboriginal youth criminal matters.

9.1.2 Aboriginal child protection issues — increase general preparation to cover alternate dispute resolution or mediation efforts that occur (formally or informally) within an Aboriginal context to divert escalating levels of ministry involvement.

9.1.3 Criminal law diversion — create new tariff items to cover preparation and attendance at Aboriginal restorative justice or diversion projects, and increase the time spent prior to charges being laid on diversion efforts.

9.1.4 Criminal law sentencing (*Gladue* hearings) — create a new tariff item for preparing *Gladue* sentencing submissions.

9.2 Change the rates and rules around travel tariffs for lawyers who are required to travel to meet with Aboriginal clients. Tariffs should be increased to a level that would attract lawyers to work on Aboriginal legal representation cases, particularly in remote areas or those serviced by circuit courts.

9.2.1 Extend coverage to include travel time for client visits where clients reside in an Aboriginal community more than 60 kilometres return trip away and no public transit is available.

9.2.2 Increase the current block fee (of $180 for a half day of travel) as it is not sufficient to compensate counsel for the time spent away from their offices.

9.3 Implement a Rural Aboriginal Legal Services Tariff that provides higher compensation to encourage lawyers to provide legal aid services to Aboriginal people in regions where the lack of legal representation is acute.

9.4 Increase financial eligibility for Aboriginal clients.

Recommendation 10: Expanded Aboriginal duty counsel

10.1 Create an Expanded Aboriginal Duty Counsel Program that provides representation, advice, and assistance to Aboriginal clients on a regular basis within Aboriginal communities.

Recommendation 11: Legal aid intake

11.1 Make legal aid intake regularly available in Aboriginal settings and accessible to clients before court dates.

11.1.1 Have existing intake workers shift where they do their work by providing regularly scheduled intake times at Friendship Centers, Band offices, or advocates' offices in advance of court dates;

11.1.2 Contract with Native courtworkers or other organizations regionally to assist Aboriginal clients in completing applications electronically.

11.1.3 Create a legal aid intake tariff that would allow legal aid lawyers to complete the legal aid application as part of their initial client interview.

Recommendation 12: Criminal law representation

12.1 Ensure that Aboriginal clients in the criminal justice system have access to duty counsel services at all courthouses in the province.

12.1.1 Work with court registries or existing duty counsel to identify matters where more than one accused is facing charges and arrange to have additional duty counsel available for those matters.

12.2 Support and dedicate resources to restorative justice initiatives, including prevention and diversion programs and circle sentencing.

12.2.1 Expand tariff eligibility to focus on a preventative and restorative approach in the context of criminal law.

12.2.2 Expand tariff eligibility for first-time offenders.

12.3 Provide a greater degree of choice in legal representation to Aboriginal clients facing charges on hunting and fishing or other Aboriginal rights, title and treaty rights issues to retain lawyers with experience in Aboriginal law.

Recommendation 13: Family law representation and duty counsel services.

13.1 Dedicate resources toward restorative solutions, such as mediation or alternative dispute resolution, in an Aboriginal context.

13.1.1 Involve Aboriginal communities, including houses/clans and extended families, in working together toward resolving family law disputes and dedicate resources to maintaining the broader concept of families reflected in Aboriginal cultures.

13.1.2 Incorporate a tariff for participation in mediation and dispute resolution services (including formal and informal) within an Aboriginal context, in addition to existing alternative dispute resolution and mediation tariff items.

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13.4 Ensure that LSS family law services are advertised in Aboriginal communities.

Recommendation 14: Child protection representation and duty counsel services.

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14.2.2 Dedicate resources to ensure that child protection services reflect the fact that the definition of "best interests of the child" in an Aboriginal context must incorporate the child's interest in maintaining a substantial and ongoing connection with his or her Aboriginal culture, extended family, community, and Nation.

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14.4 Provide urgent advice services for Aboriginal child protection matters. This would include having a contact point at LSS after hours or in urgent situations (similar to the *Brydges* line for criminal law matters).

14.5 Teach self-advocacy skills to parents, families and Aboriginal communities so that Aboriginal people are empowered to advocate for themselves in the area of child protection.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110325
Docket: 90534-2
Registry: Kamloops

Regina

v.

Merle Jones Cahoose

Before: The Honourable Mr. Justice Powers
in Chambers

Oral Reasons for Sentence

Counsel for the Crown:	C. Elliott
Counsel for the Accused:	K. Sommerfeld
Place of Trial/Hearing:	Kamloops, B.C.
Place and Date of Hearing:	Kamloops, B.C. March 25, 2011

[1] **THE COURT:** This matter is before me this afternoon for a decision on sentence. Mr. Cahoose entered a guilty plea on August 6, 2010, to a four-count indictment: Count 1 was attempted robbery; Count 2, robbery; Count 3, possession of stolen property of a value in excess of $5,000; and Count 4, dangerous driving. All of these offences occurred on July 14, 2010.

[2] The Crown is seeking a global sentence of four to five years. The accused has been in custody since July 14, 2010, which is 255 days as of today.

[3] The Crown is also seeking a lifetime ban on possession of firearms under s. 109 of the *Criminal Code* (the "*Code*"), a DNA sample, which is mandatory on Counts 1 and 2, and discretionary on Counts 3 and 4, a driving prohibition under s. 254 for a period of five years, and an order that the clothing seized by Mr. Cahoose can be returned to him if he wishes.

[4] Defence argues that the appropriate sentence would be between six months and one year, and a two to three-year driving prohibition. The defence says the six months to one year would be after giving credit for time served at one and a half days per day served.

[5] When the matter commenced, Mr. Sommerfeld advised he intended to call two witnesses on the sentencing hearing: Dr. Reid Webster, a psychologist, and Mr. Cahoose himself. This was a surprise to the Crown and, in addition, extended the estimated time considerably. Rather than adjourn the matter, I heard the preliminary submissions of the Crown, with them having liberty to make further submissions after all of the evidence was in, and we heard most of Dr. Webster's testimony in chief. The matter was adjourned over to fix another date and the matter came back before the court in February.

[6] By way of background, the offences occurred July 14, 2010, in Kamloops, B.C. With regard to Count 1, the attempted robbery, Mr. Cahoose drove up to a drive-through window at the Kentucky Fried Chicken location. The victim was the attendant. Mr. Cahoose demanded all of her large bills and reached through the

window and grabbed her arm, demanding again. She pulled away and closed the window, and Mr. Cahoose drove away in the vehicle.

[7] About 20 minutes later, Mr. Cahoose entered the liquor store on Rogers Way, Aberdeen Cold Beer and Wine, he picked up a 40-ounce bottle of whiskey, approached the clerk, who is the complainant in the second count, and demanded all of her $50 and $100 bills. She thought he was kidding. He then struck her on the side of the head above the left ear with the bottle, resulting in a large bump. She pushed the emergency button and called for help. Mr. Cahoose left the store, got into his vehicle and drove away.

[8] A short time later, Mr. Cahoose was seen by a police officer driving his vehicle on Versatile Drive. Mr. Cahoose saw or noted that the police officer had noticed him. Mr. Cahoose drove past, turned around, and then drove towards the police car at high speed, forcing the police car to take evasive action. Mr. Cahoose then continued, eventually entering into a parking lot and leaving the vehicle. The police attended and he was arrested at the parking lot. He had been hiding in the bushes. A broken bottle of whiskey was found on the ground about 40 feet from the vehicle Mr. Cahoose had been driving.

[9] Upon his arrest, there was a brief conversation, and there was a smell of liquor on his breath. He declared to the officer that he was drunk. He declined the opportunity to call a lawyer, but did speak to his common-law spouse. His common-law spouse advised the police that he had a drug and alcohol problem and needed to be forced into rehabilitation or treatment.

[10] Exhibits filed on November 26th included a *Gladue* report produced at the request of Mr. Cahoose, a psychological assessment produced or prepared by Dr. Chale, a psychiatrist, a pre-sentence report, and an exhibit report. Other documents, including letters of support for Mr. Cahoose, were also filed later.

[11] The Crown referred to Dr. Chale's report that indicates that Mr. Cahoose had been on a month-long binge, including cocaine, crystal meth, and tranquilizers. Dr.

Chale did a risk assessment and concluded that Mr. Cahoose was under a high risk to re-offend, but was motivated to seek counselling and programs that were available to him in the federal system.

[12] Mr. Cahoose's record is contained in the pre-sentence report, beginning at pages 3 to 5. The record began with one offence while Mr. Cahoose was a youth, and then as an adult there were a number of driving while suspended offences in 1989 and 1990, and one possession of a narcotic in 1990. In 1990, there were some property offences, including theft over $5,000, two counts, a robbery, break and enter, another possession of property obtained by a crime over $5,000, and a second possession of property obtained.

[13] Mr. Cahoose was sentenced to a period of incarceration during that time.

[14] There was also a charge of obstructing a peace officer, escaping lawful custody, failing to attend court, and failing to comply with a recognizance. All of that was in 1990.

[15] Between 1991 and 1994, there were a number of other offences, including some property offences and driving while suspended offences, and some breaches of parole.

[16] From 1994 to 2002, Mr. Cahoose did not come to the attention of the police, but in 2002, he had an offence of possession of property obtained by crime under $5,000, and he was given a suspended sentence. It is obvious that the court must have thought Mr. Cahoose had been doing well from 1994 up until 2002.

[17] Again, Mr. Cahoose did not come to the attention of the police again until 2005, and there were some very serious matters at that time. He had six robbery offences. He received a total of four and a half years, after being given credit for two and a half years of pre-custody time.

[18] Mr. Cahoose was released on parole, but on two occasions breached his parole and had his parole revoked.

[19] At the time of these offences in July of 2010, Mr. Cahoose was under the influence of alcohol and has little recollection of what occurred. The incidents did involve some violence and trauma to the victims.

[20] The Crown referred to the Supreme Court of Canada *Gladue* decision in 1999, particularly para. 78, for the proposition that with regard to some serious offences, and for someone with a serious record, their sentence would be similar to other offenders, even though they were a person of Aboriginal descent.

[21] The Crown refers to s. 718 of the *Code* and emphasizes denunciation, deterrence, and protection of the public in particular. The Crown's position is that their suggestion is really at the low end of the range.

[22] Dr. Webster gave evidence in support of Mr. Cahoose. He is a clinical psychologist with a PhD and registered as a clinical psychologist with the College of Psychologists in B.C. He works on a contract basis at the Kamloops Regional Correctional Centre, and is a full-time associate professor at Thompson Rivers University.

[23] He first came in contact with Mr. Cahoose in September of 2010. Mr. Cahoose was on a waiting list to see him and indicated a desire to deal with issues of trauma and abuse from his childhood. This appears to be the first time he has really opened up to a psychologist or a counsellor. Mr. Cahoose is anxious and nervous about this abuse. Dr. Webster had seen Mr. Cahoose approximately six times by November 26th, and said that Mr. Cahoose still exhibits nervousness, but has a desire to deal with these issues. The doctor believes that this is a genuine desire.

[24] The initial meeting was 50 to 60 minutes, and subsequent meetings 20 to 30 minutes. Mr. Cahoose as well did some reading and work on a workbook that had been provided to him between these meetings. Dr. Webster believes that Mr. Cahoose would benefit from additional counselling sessions, at least over the next six or seven months. Dr. Webster concluded that Mr. Cahoose suffers from

post-traumatic stress disorder as a result of his upbringing, as well as other disorders. He says it is not uncommon where there is post-traumatic stress disorder and substance abuse to see a history of criminal activity.

[25] Dr. Webster agreed that drugs and alcohol have been a factor in this criminal activity, and particularly where some of those activities were for the purposes of obtaining money for drugs and alcohol.

[26] The 25 sessions that Dr. Webster referred to is considered short-term therapy, but would allow for progress. He did not know whether Mr. Cahoose would be able to deal with all of his issues in that period of time.

[27] Between the November 26 appearance and February 22, 2011 appearance, Mr. Cahoose had been transferred from Kamloops Regional Correctional Centre to the North Fraser Pre-Trial Centre. Originally he was upset by this, because he was no longer able to see Dr. Webster. Mr. Cahoose quickly sought counselling from a psychologist at the North Fraser Pre-Trial and requested Dr. Webster's records. Mr. Cahoose continued to do the exercises in a workbook dealing with post-traumatic stress disorder.

[28] Dr. Webster thought that Mr. Cahoose was suitable for cognitive behavioural intervention dealing with post-traumatic stress disorder. The post-traumatic stress disorder relates largely to abuse in the home and in a residential school that had occurred to Mr. Cahoose while he was a child. The benefits of treatment depend on the motivation of Mr. Cahoose and his insights, and Dr. Webster believes that Mr. Cahoose is genuinely interested in dealing with these issues at this time, including his alcohol and drug issues.

[29] Mr. Cahoose does demonstrate some symptoms of personality disorder of an antisocial type, including impulsivity, reduced empathy, and a lack of remorse. Dr. Webster believed that Mr. Cahoose should continue with relapse prevention, despite the time he has been sober and in therapy. He agrees that a change in lifestyle is an

ongoing challenge. He described Mr. Cahoose as being pleasant, amiable, and sincere.

[30] Mr. Cahoose gave evidence himself. He is 41 years of age. He does not have much recollection of the subject events. He said that he had been living with his spouse and that with the encouragement of some relatives, he met with a lawyer to discuss issues of compensation for abuse he suffered while in residential school. This was the first time that he had really discussed these issues with anyone. He had some counselling before this, but he had not really opened up about these matters. He found that this was particularly disturbing and he began drinking again.

[31] His spouse did not accept this behaviour in the home. Mr. Cahoose had been drinking with some friends. He received a disturbing call about something that may have happened to his daughter in Kamloops. He paid $80 for a 2009 motor vehicle that he obtained from somebody at a drug house. He makes no excuses for that and recognizes it was a stolen vehicle. He then came to Kamloops. He continued to be under the influence of alcohol and drugs when he got to Kamloops. He continued to party, and he decided to commit these robberies; the motivation being money for liquor and drugs.

[32] He has provided a written history of himself and his family, and provided a number of letters of support from individuals who know him, as well as people he has taken counselling from. He describes the difficulty he had in coming to terms with and disclosing the abuse he suffered at the residential school. He also discussed the problems he had in dealing with these issues when he was in jail in the past. He said it was not a matter that you would discuss in a group session.

[33] I accept that Mr. Cahoose is sincere in his desire to deal with these issues and to re-establish himself as a productive member of society and a useful member of his family.

[34] He said that he found Dr. Webster's counselling very helpful, and it is his desire to be able to complete his period of incarceration in a provincial institution

where he can continue with counselling from Dr. Webster or somebody like him on a one-to-one basis. He hopes to attend a residential treatment centre or program after he is released from custody, and he has investigated such a treatment centre in Nanaimo, British Columbia.

[35] His counsel argues that these most recent robberies were not as serious as the earlier ones which were planned and deliberate; that these were spontaneous actions without any plan and occurred while Mr. Cahoose was severely intoxicated. As I say, I accept that Mr. Cahoose is genuinely remorseful for his actions and expressed an understanding of the impact his actions have had on the people affected by them.

[36] Defence counsel acknowledges that the reports indicate some risk to re-offend, but points to the fact that Mr. Cahoose is highly motivated to seek treatment and to rehabilitate himself. The defence, therefore, suggest six months to one year additional time, plus three years' probation.

[37] Mr. Cahoose is a status member of the Ulkatcho Indian Band. He has one child, 19 years old, from a prior relationship and one child who is seven years old, from his present relationship. Prior to these offences, his spouse had been working and Mr. Cahoose was responsible for management of the household and caring for the child.

[38] Mr. Cahoose attended a residential school for approximately five years, and was subject to and witnessed a number of incidences of significant physical and sexual abuse. In addition, his own household as he was growing up was dysfunctional and he suffered further abuse, including violence in that home. Both his parents were alcoholics. A large number of his family members have been alcoholics, and some of them have died as a result of consumption of alcohol or drugs, or if not directly, then indirectly.

[39] Mr. Cahoose began to abuse alcohol, he said, when he was seven years of age. In the *Gladue* report I believe the reference was when he was 11 years of age,

but certainly at a very young age. He was using marihuana by the time he was 13, and using cocaine, crack cocaine, crystal methamphetamine, and heroin by the time he was 16.

[40] His family history, which was marked as Exhibit 5, relates a history of multi-generational problems, including residential school experiences, substance abuse, and family violence. His criminal record reflects years of difficulty in dealing with substance abuse.

[41] As I pointed out earlier, he has also had a number of years without coming to the attention of the police.

[42] His spouse does support him, provided that he deals with the substance abuse issues and continues to do so.

[43] Mr. Cahoose's position is that this is the first time he has really confronted the issues of abuse in the residential school system, that this is the first time he has been diagnosed as having post-traumatic stress disorder and has begun taking counselling for that. If he can deal with those issues, he can and wants to be a productive member of society and a good family member, father and spouse.

[44] I have already outlined what his plan is, if he is able to serve six months to a year additional time in an provincial institution. During submissions, his counsel pointed out that if the sentence were, for instance, two years less a day, then after he completed his one-to-one counselling in about six months, he would simply be sitting in a provincial institution waiting to continue with his treatment when he was released, and that this was not a desirable situation for him; that it was less desirable for him than it would be spending time in a federal institution. Counsel pointed out the distinction between the environment in a federal institution and a provincial institution.

[45] Defence counsel accepts that the Crown's suggestion that the normal range for these offences could be a global sentence of four to six years. However, he argues that Mr. Cahoose should be sentenced to a much reduced sentence because

of his unique circumstances, including the recognition and treatment of his post-traumatic stress disorder.

[46] The Crown responds that such a sentence would place undue weight on rehabilitation and no weight on the other objectives of sentencing, such as deterrence and denunciation. As well, Crown points out that it would be inconsistent with the treatment of similar offenders committing similar offences.

[47] The Crown argues that Mr. Cahoose has shown his ability to refrain from the consumption of alcohol and drugs in the past and simply chose to again indulge in drugs or alcohol. Crown argues that he has had the benefit of counselling without a lasting effect in the past, and that essentially he has chosen to be self-medicating.

[48] It is true that somebody decides to pick up a bottle or to take drugs, but the reason they decide to do so is not always something that they have a lot of control over, and self-medicating might be an appropriate description. I am not overly critical of Mr. Cahoose because he is having problems dealing with issues from the past or because he has fallen off the wagon on more than one occasion.

[49] In determining what is an appropriate sentence, I have to consider the principles of sentencing contained in the *Code*. Those are the directions given to the courts by Parliament. Section 718 discusses

> The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims [in] the community.

[50] All of those objectives must be balanced in any sentence.

[51] The fundamental principle of sentencing is outlined in s.718.1, that:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[52] Section 718.2 states:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender ...

[53] Section 718.2 then refers to a number of specific things that are deemed to be aggravating circumstances, but do not apply in this case:

> > (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> >
> > (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
> >
> > (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
> >
> > (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[54] I should point out that under Counts 1 and 2, that is attempted robbery and robbery, the maximum sentence is life imprisonment. With regard to Count 3, possession of stolen property, it is up to 10 years, and in Count 4, dangerous use of a motor vehicle, it is up to five years, so those are all serious offences.

[55] I am satisfied that the Crown's position about the range from a global perspective of four to six years is appropriate. In determining what is an appropriate sentence, I have to consider the *Code* and those provisions I have already referred to. I have read and considered the *Gladue* report and the pre-sentence report. As

well, I have re-read my notes about what Dr. Webster said, what Dr. Chale said in his report, keeping in mind the clarifications that Mr. Cahoose made and that counsel referred to in their submissions. I have carefully considered Mr. Cahoose's evidence. I have also considered his significant record and the honest efforts he is making now at rehabilitation and the steps he has taken. I have also considered the fact that there was a very early guilty plea.

[56] I have to balance the needs for deterrence, denunciation and rehabilitation, and the treatment of similar offenders in a similar way as to other offenders who have committed similar offences.

[57] The suggestion by defence counsel, they say it would be outside the range, and I agree it would be far outside the range and I think I would be making an error of law if I were to exercise my discretion to the extent requested by defence. I have to agree with Crown that that would place undue weight upon rehabilitation alone, without considering the other principles of sentencing.

[58] The sentences I will impose will be served concurrently. The Crown suggests that is appropriate, and really all of these events occurred, although at separate locations and they are different, on the same afternoon within close proximity in time, and I am satisfied it is reasonable to treat them together.

[59] With regard to the attempted robbery, the appropriate sentence would be two years; with regard to the robbery, it would be four years; with regard to the possession of stolen property, one year; and with regard to the dangerous driving it would be one year. This is before giving credit for time served, so that would be a global sentence of four years before credit for time served.

[60] Mr. Cahoose has been in custody for 255 days. There was some discussion about whether credit should be given on the basis of one for one, or one and a half for one. The recent amendments to the *Code* are s.719 (3) and s.(3.1). Section (3) provides:

> In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

[61] Section (3.1) provides:

> Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

None of those two things apply.

[62] This is a new section of the *Code*, and there is not a great deal of law on it. Counsel did refer me to three decisions: two British Columbia decisions, one of them *R. v. Hindmarch*, 2010 BCSC 1257. In that case, there is in para. 19, reference to s. 719(3) and (3.1), but no discussion of that. At para. 31, the court simply says:

> There is no evidence before me to justify an increase in credit for time served ...

So the court simply gave one for one.

[63] There was a Provincial Court decision, *R. v. A.W.C.*, 2010 BCPC 0197. That case does discuss s. 718(3) and (3.1). There were some submissions made by defence counsel about the pre-trial circumstances and custody circumstances that the accused found himself in. The court said that those circumstances could be a reason for increasing the benefit or credit for time served. I am not sure exactly what happened at the hearings, but the court took the position there was no evidence, despite the submissions, that those circumstances actually existed. I say that is unusual, because in my experience, often on sentencing matters the court relies on submissions from counsel, both Crown and defence, unless there is something put in issue and then evidence may be required.

[64] If the Crown disputed the allegations made by the defence, then there may be a need for some evidence or some method of proving what the defence was saying

those circumstances were, but failing that, certainly it is my experience courts can and do rely on submissions from counsel.

[65] The court really in that case did not decide whether the circumstances would or would not justify a one-for-one or one-and-a-half-for-one time or credit served. It simply said they could, if there had been evidence of it.

[66] The most comprehensive decision that counsel were able to refer me to is *R. v. Johnson*, 2011 ONCJ 77. It is a decision of the Ontario Court of Justice which is equivalent to our Provincial Court. The decision is 203 paragraphs long. It was made after a hearing of what appears to be five days of evidence and argument, and on reading the decision, the evidence was extensive as were the arguments. The reasoning is very interesting. In that case, the validity of the legislation itself was being challenged on the basis that it was inconsistent with the *Charter of Rights and Freedoms*. The court concluded that it was not inconsistent with the *Charter* and dismissed that application, but made a number of comments about the meaning of "if the circumstances justify it" in (3.1), and what would be required.

[67] The court talked about the discussions that occurred in Parliament when that legislation was brought in, and what had been expressed by the Minister of Justice and by representatives of the Department of Justice to Parliament about what the intention was and the effect was. The legislation was aimed at a belief that at least on some occasions people would manipulate the system to extend their pre-trial custody, because they would get two-for-one credit for pre-trial custody, whereas if they were actually serving their sentence, they would not earn statutory release until two-thirds of their sentence had been served, and that was what Parliament was attempting to remedy.

[68] The legislation was called "Truth In Sentencing" and one of the suggestions was that it was intended to make sentencing clearer to the public and, therefore, requires the court, if they give one-and-a-half-for-one credit, then the court must give reasons for doing so; in other words, must explain why the circumstances justify it, so that it is clear to everybody what is happening.

[69] The court in *Johnson* then goes through a number of examples that illustrate why, in the court's opinion, that in most cases people should be able to argue successfully that they should be entitled to one and a half for one. The principal reason was that if the person, through no fault of their own, was unable to get before the court, enter their plea, and have their sentence imposed, they would in fact serve more time than if the matter could be dealt with expeditiously, because they would only be getting one-for-one credit, whereas if they were actually serving a sentence, they would serve two-thirds, which is the equivalent of one-and-a-half-to-one.

[70] The court went through a number of examples, showing how two people exactly situated, except for the fact that one got bail and the other did not, would end up being treated differently if only one-for-one were available.

[71] For example, if two people, Mr. Cahoose and somebody else exactly like Mr. Cahoose, were charged with exactly the same offences, had the same background, except one made bail and the other did not, and then they are sentenced on exactly the same day. Mr. Cahoose had spent a year waiting for sentence in jail and got one for one and the total sentence was two years less time served, so he gets an additional year, he would serve one and two-thirds years before he would get his statutory release. The person, though, who had been out on bail, who was sentenced to two years on the same day that Mr. Cahoose was, would now serve two-thirds of that sentence; in other words, only one and a half years, not one and two-thirds years. Of course, the greater the sentence and the greater the period between incarceration and sentencing, the greater the distinction.

[72] In *Johnson*, the court pointed out that was not the express intent of Parliament in all of the discussions, but that was the effect. Unless the courts recognized that it would not require exceptional circumstances, the argument such as is being presented by Mr. Cahoose is that he would in fact serve more time simply because of the delay between plea and sentencing or arrest and sentencing than if he had been out on bail until the day of his sentencing, and that is unfair.

[73] In this case, I am going to give Mr. Cahoose credit of one and a half for one. I think the circumstances justify it. Mr. Cahoose pled guilty at a very early opportunity. He made no complaint about whether or not he was guilty. He recognized that he was. He expressed his remorse. He wished to deal with the matter immediately. Quite properly, his counsel requested a pre-sentence report and requested a *Gladue* report, and those take time to put together. The sentence hearing itself took more time than normal, but that is not a fault of Mr. Cahoose. He was entitled to present the best case he could on sentencing.

[74] Somebody could argue that, well, he could have been sentenced immediately on pleading without a pre-sentence report and without a *Gladue* report. If counsel had proceeded without a *Gladue* report and if the court had agreed to proceed without fully canvassing whether or not a *Gladue* report was necessary, that would have been an error by the judge dealing with the sentencing. The Court of Appeal said on more than one occasion that *Gladue* reports and the *Gladue* case are not simply a *pro forma* matter. The court should say, "I have considered that", and move on. The court must treat those matters seriously, and I certainly have in this case.

[75] The effect really is that because Mr. Cahoose was doing what was necessary and the matter proceeded in a fashion which was necessary, he has been in custody for 255 days, and it would be unfair if he were required to serve more time simply because he was doing what was necessary or appropriate.

[76] Therefore, the global sentence before credit for time served would be four years. After credit for time served, I calculate the time served at one and a half times, at basically 12 and a half months -- 255 days times one and a half, on my math, comes to 382 and a half, which is about 12 and a half months. The balance of the sentence will be 35 and one-half months on a global basis.

[77] There will be a lifetime ban on the possession of firearms. That is mandatory under s. 109. Under that section, Mr. Cahoose, you are prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device,

ammunition, prohibited ammunition, and explosive substance for a period of your life. Do you understand that?

[78] THE ACCUSED: Yes.

[79] THE COURT: In addition, there will be an order that you provide a sample of your DNA, and that will simply will be done at KRCC or wherever you are transferred to for your sentence. It is mandatory, as I say, on Counts 1 and 2, and discretionary on Counts 3 and 4, and it is made on all of those counts.

[80] Your clothing can be returned to you, if you wish.

[81] With regard to the driving prohibition, the Crown sought a driving prohibition of five years. Defence suggested that it should be two years. Mr. Cahoose did have a driver's licence before this and that affects his employment. There must be a driving prohibition because of the driving offence, but I am going to make it for two years. I want to encourage Mr. Cahoose in his rehabilitation and the ability to find meaningful employment will help him in that.

[82] I accept, Mr. Cahoose, as I say, that you are genuine in your motivation to rehabilitate yourself, to deal with the past issues that you have had, and I encourage you to do that. My impression is the same as Dr. Webster's. You seem to be a very pleasant, decent sort of person when you are not drinking or under the influence of drugs. You are 41 years of age, but you have got a lot of life left ahead of you if you can deal with these problems. You have got a family that cares for you and supports you, so you really have lots of reasons to be highly motivated. I appreciate it is not easy, but I wish you all the best in accomplishing that. It will be better for you and your family, and better for society in general if you are a productive and contributing member of society.

[83] Waive the victim surcharge fine.

[84] Is there anything else then, Ms. Elliott?

[85] MS. ELLIOTT: I missed the length of the driving prohibition.

[86] THE COURT: Two years.

[87] MS. ELLIOTT: Two years, and --

[88] THE CLERK: That's under s. 259?

[89] THE COURT: 254, I thought counsel said, 254 or 259, Ms. Elliott?

[90] MS. ELLIOTT: I think it's 259.

[91] THE COURT: 259, all right.

[92] MS. ELLIOTT: Yes, *Criminal Code*, 259.

[93] THE CLERK: And can I get the breakdown of -- sorry.

[94] THE COURT: Yes.

[95] THE CLERK: [Inaudible/not near microphone] people need the [inaudible] downstairs need the breakdown of the actual time to be served.

[96] THE COURT: It is 35 and one half months.

[97] THE CLERK: Global for all --

[98] THE COURT: Global, and I gave you the specifics on each one, what the appropriate sentence on each one would be.

[99] THE CLERK: Yes.

[100] THE COURT: And it is all concurrent.

[101] THE CLERK: Thirty-five and a half months.

[102] THE COURT: Yes.

[103] MS. ELLIOTT: Your Honour, on the exhibits, my friend advises that Mr. Cahoose does want to have his clothes back. I would ask that Mr. Cahoose make

that request or his counsel make that request to the RCMP within 90 days or those exhibits can be destroyed.

[104] THE COURT: Any problem with that, Mr. Sommerfeld?

[105] MR. SOMMERFELD: No, My Lord.

[106] THE COURT: Okay, so the order is made. If Mr. Cahoose requests the return of his clothing from the RCMP, they will be returned to him. If you do not do that within 90 days, then the RCMP will be free to dispose of them.

POWERS J.

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 17, 2011

10 Reasons to Oppose Bill C-10

Bill C-10 is titled the *Safe Streets and Communities Act* — an ironic name, considering that Canada already has some of the safest streets and communities in the world and a declining crime rate. This bill will do nothing to improve that state of affairs, but, through its overreach and overreaction to imaginary problems, Bill C-10 could easily make it worse. It could eventually create the very problems it's supposed to solve.

Bill C-10 will require new prisons; mandate incarceration for minor, non-violent offences; justify poor treatment of inmates and make their reintegration into society more difficult. Texas and California, among other jurisdictions, have already started down this road before changing course, realizing it cost too much and made their justice system worse. Canada is poised to repeat their mistake.

The Canadian Bar Association, representing over 37,000 lawyers across the country, has identified 10 reasons why the passage of Bill C-10 will be a mistake and a setback for Canada.

1. **Ignoring reality**. Decades of research and experience have shown what actually reduces crime: (a) addressing child poverty, (b) providing services for the mentally ill and those afflicted with FASD, (c) diverting young offenders from the adult justice system, and (d) rehabilitating prisoners, and helping them to reintegrate into society. Bill C-10 ignores these proven facts.

2. **Rush job**. Instead of receiving a thorough review, Bill C-10 is being rushed through Parliament purely to meet the "100-day passage" promise from the last election. Expert witnesses attempting to comment on over 150 pages of legislation in committee hearings are cut off mid-sentence after just five minutes.

3. **Spin triumphs over substance**. The federal government has chosen to take a "marketing" approach to Bill C-10, rather than explaining the facts to Canadians. This campaign misrepresents the bill's actual content and ensures that its public support is based heavily on inaccuracies.

4. **No proper inspection**. Contrary to government claims, some parts of Bill C-10 have received no previous study by Parliamentary committee. Other sections have been studied before and were changed — but, in Bill C-10, they're back in their original form.

5. **Wasted youth**. More young Canadians will spend months in custodial centres before trial, thanks to Bill C-10. Experience has shown that at-risk youth learn or reinforce criminal behaviour in custodial centres; only when diverted to community options are they more likely to be reformed.

6. **Punishments eclipse the crime**. The slogan for one proposal was *Ending House Arrest for Serious and Violent Criminals Act*, but Bill C-10 will actually also eliminate conditional sentences for minor and property offenders and instead send those people to jail. Is roughly $100,000 per year to incarcerate someone unnecessarily a good use of taxpayers' money?

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7. **Training predators**. Bill C-10 would force judges to incarcerate people whose offences and circumstances clearly do not warrant time in custody. Prison officials will have more latitude to disregard prisoners' human rights, bypassing the least restrictive means to discipline and control inmates. Almost every inmate will re-enter society someday. Do we want them to come out as neighbours, or as predators hardened by their prison experience?

8. **Justice system overload**. Longer and harsher sentences will increase the strains on a justice system already at the breaking point. Courts and Crown prosecutors' offices are overwhelmed as is, legal aid plans are at the breaking point, and police forces don't have the resources to do their jobs properly. Bill C-10 addresses none of these problems and will make them much worse.

9. **Victimizing the most vulnerable**. With mandatory minimums replacing conditional sentences, people in remote, rural and northern communities will be shipped far from their families to serve time. Canada's Aboriginal people already represent up to 80% of inmates in institutions in the prairies, a national embarrassment that Bill C-10 will make worse.

10. **How much money**? With no reliable price tag for its recommendations, there is no way to responsibly decide the bill's financial implications. What will Canadians sacrifice to pay for these initiatives? Will they be worth the cost?

Canadians deserve accurate information about Bill C-10, its costs and its effects. This bill will change our country's entire approach to crime at every stage of the justice system. It represents a huge step backwards; rather than prioritizing public safety, it emphasizes retribution above all else. It's an approach that will make us less safe, less secure, and ultimately, less Canadian.

GLADUE BEFORE THE COURTS (2010-2011)[1]

Supreme Court of Canada (Pending)

R. v. Ipeelee, [2010] S.C.C.A. No. 129, 2010 CanLII 62497

In the first post-*Gladue* and *Wells* decision to be considered by the Supreme Court of Canada, defence counsel was granted leave to appeal the Ontario Court of Appeal's dismissal[2] of the defence appeal of a sentence of three years jail for breach of an alcohol abstention term of a Long Term Supervision Order. The accused breached the order by riding a bicycle while intoxicated and in possession of alcohol. Despite the fact that the breach itself was not violent, the sentencing judge had found that the accused was almost certain to offend if he consumed alcohol. The Court of Appeal held that, in the circumstances, denunciation, deterrence and protection of the public took priority over restorative justice. According to the Supreme Court of Canada website the tentative hearing date is October 18, 2011.

Yukon

R. v. Van Bibber, 2010 YKTC 49, 98 M.V.R. (5th) 33

A sentencing circle was involved in sentencing a 53-year-old man following his guilty pleas to driving over 80, failure to a provide breath sample, and two counts of failure to comply with recognizance (alcohol abstention and reporting to a bail supervisor). The circle recommended a strict alcohol treatment plan and an apology at

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[1] Erin Metzler, Duty Counsel, Legal Aid Ontario. Prepared for the 3rd National Conference on Aboriginal Criminal Justice Post-*Gladue*, Osgoode Professional Development Centre, 30 April 2011. This paper contains a selection of cases reported between March 2010 and early April 2011. More than 150 reported decisions from all levels of Canadian courts were reviewed. For analysis of reported appellate jurisprudence please see Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 C.L.Q. 470. See also, Jonathan Rudin, "Eyes Wide Shut: The Alberta Court of Appeal's Decision in *R. v. Arcand* and Aboriginal Offenders" (2011) 48 Alta. L. Rev. (forthcoming).

[2] *R. v. Ipeelee*, 2009 ONCA 892. See also, "*Gladue* before the Courts" prepared for the 2nd National Conference on Aboriginal Criminal Justice Post-*Gladue*, Osgoode Professional Development Centre, 24 April, 2010, at p.2.

the annual general assembly of the Northern Tutchone Council. The circle emphasised community support, the importance of taking responsibility for one's actions, the danger that impaired driving poses to the public, and the destruction caused by alcohol abuse.

The sentencing judge reviewed the case law on repeat drinking and driving offenders in the Yukon.[3] Jail sentences were imposed for the driving offences. The judge referred to deterrence, denunciation, restraint, s.718.2(e), and the accused's Aboriginal heritage, and ordered the jail sentences to be served concurrent, not consecutive, to each other. It appears that time served in custody prior to sentence fulfilled the jail sentences. Conditional sentences of 90 and 30 days consecutive to each other were imposed for the bail breaches. Driving prohibitions and probation were to follow. The judge also ordered that the matter return to the court docket every circuit so that the court could be kept up-to-date regarding the conditional sentences.

At the conclusion of the decision the judge made some comments regarding jail and Aboriginal offenders:[4]

> Is incarceration and jail ideal? Perhaps not and certainly in many cases, other community-based options would be preferable and of more benefit to the offender and to the community than incarceration. Those options, however, require committed individuals, communities, organizations and governments in order to make them viable as an alternative to incarceration in those cases where incarceration is not necessarily required in order to satisfy the principles of sentencing. In some cases it is necessary.

R. v. Smith, 2010 YKTC 67, [2010] Y.J. No. 67

The court found that a conditional sentence was not appropriate for a 32-year-old man for driving offences and domestic assault. Concern for safety of the public warranted a custodial sentence. There was no "*Gladue* style report" before the court and the court mentioned that the kind of information usually contained in such a report would be extremely helpful.[5]

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[3] *R. v. Van Bibber*, 2010 YKTC 49, 98 M.V.R. (5th) 33 at paras. 52-67.

[4] *Ibid.* at para. 103. See also paras. 100-104.

[5] *R. v. Smith*, 2010 YKTC 67, [2010] Y.J. No. 67 at para. 24.

Northwest Territories

R. v. Catholique, 2010 NWTSC 37, [2010] N.W.T.J. No. 45

The court agreed with a joint submission for 15 months less time served followed by 18 months probation for an 18-year-old man who plead guilty to aggravated assault. The court focused on rehabilitation mainly due to the accused's age and lack of criminal record (at the time of the offence). In contrast with Ontario case law,[6] the court commented that "[t]he accused is of Chipewyan descent although I have heard nothing to believe that this conduct is the product of systemic abuse such as would lead me to a close consideration of the so-called Gladue principles of the *Criminal Code*."[7] For similar reasoning on this issue see ***R. v. Tatzia*, 2010 NWTSC 47, [2010] N.W.T.J. No. 42.**

R. v. Paulette, 2010 NWTSC 31, [2010] 3 C.N.L.R. 201

A 38-year-old man received what was a joint submission for 10.5 months jail, which after pre-sentence custody credit worked out to "time served," followed by three years probation for the sexual assault of a 16-year-old female. The court stated that it wished to say "just a word" about the accused being Aboriginal.[8] The court appears to have considered intergenerational trauma:[9]

> In certain cases the Court recognizes that it should do all that it can to minimize the effects of a conviction for a criminal offence on aboriginal offenders but this is less so where the offences are serious in nature. I haven't heard anything about the background of this accused that suggests that he personally has been a victim of systemic abuse which would tend to call into play the so-called Gladue provisions of the *Criminal Code* and lead the Court to impose a less stringent sentence than it normally would. However I did hear from the father that as a result of his residential school experience, he didn't feel that he knew how to bring up his son. And so although the effect may not have been direct, the Court will accept and can accept that the residential school experience and what it meant to this family didn't end when Mr. Paulette completed his residential school experience.

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[6] See *R. v. Collins*, 2011 ONCA 182, [2011] O.J. No. 978 at para. 32 (discussed below).

[7] *R. v. Catholique*, 2010 NWTSC 37, [2010] N.W.T.J. No. 45 at para. 19.

[8] *R. v. Paulette*, 2010 NWTSC 31, [2010] 3 C.N.L.R. 201 at para. 21.

[9] *Ibid.* at para. 22.

Nunavut

R. v. Eegeesiak, 2010 NUCJ 10, [2010] 3 C.N.L.R. 166

A young Inuit RCMP officer received a suspended sentence and one year probation, as sought by the Crown, after pleading guilty to two counts of assault for beating two men who were in police custody. Defence sought a conditional discharge. The sentencing judge distinguished Nunavut from other jurisdictions regarding the particular offence.[10] Working in Iqaluit where the accused was born and raised was stressful because he had to police his family, friends, and others he had known his entire life. In deciding that a conditional discharge was not appropriate the court found that the Crown position already took into account the unique cultural circumstances of the accused.[11] The judge commented on sentencing in Nunavut generally:[12]

> The approach to sentencing in Nunavut, where 80% of the population is Inuit, is somewhat different than elsewhere in Canada. Typically, there is not a *Gladue*-style pre-sentence report, either because of a lack of capacity, or as in this case, defence counsel provides the details of family and personal history to give the court the essential factors for s. 718.2(e) consideration. In the communities, one, two and sometimes three elders sit with trial judges and make observations about the offender, sometimes in the fashion of a lecture or encouragement to the person to do better for themselves, their family and the community.

British Columbia

R. v. Ladue, 2011 BCCA 101, [2011] B.C.J. No. 366

A three-year jail term for breaching a Long Term Supervision Order (LTSO) by consuming an intoxicant was reduced by the majority of the Court of Appeal to one year. There are some factual parallels between this case and *Ipeelee*,[13] discussed above. For example, Mr. Ladue's pre-sentence report indicated "that 'alcohol and/or

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[10] *R. v. Eegeesiak*, 2010 NUCJ 10, [2010] 3 C.N.L.R. 166 at para. 58.

[11] *Ibid.* at para. 78.

[12] *Ibid.* at para. 54.

[13] *R. v. Ipeelee*, 2009 ONCA 892, leave to appeal to S.C.C. granted, [2010] S.C.C.A. No. 129, 2010 CanLII 62497.

drug use is a direct precursor to his criminal activity.'"[14] Despite this fact, the Court of Appeal held that "[h]e has not reoffended in a manner which threatens the safety of the public."[15] The predicate offence was break and enter and commit a sexual assault in the accused's home town in the Yukon. This was the 48-year-old man's fourth conviction for similar offences, all involving intoxicants. The LTSO was conceded by defence. The accused had three prior convictions for breaches of the LSTO and the order had been suspended a number of times. Due to a delay because of an outstanding DNA warrant he missed his chance to reside in a certain halfway house and instead was to live in downtown Vancouver. He begged his probation officer not to send him downtown because of the easy access to drugs.

The Court of Appeal held that the sentencing judge over-emphasised separation and isolation and under-emphasised rehabilitation and proportionality. As well, she did not give sufficient weight to the accused's circumstances as an Aboriginal offender. The accused had a difficult background including attending residential school and suffering physical and sexual abuse. The Court of Appeal stated that "[t]he direction from the Supreme Court could not be clearer. The unique circumstances of an Aboriginal offender must be taken into consideration when passing sentence. The extent to which these circumstances will affect a sentence will depend on each case."[16]

The Court of Appeal pointed out that statistics show that the over-incarceration of Aboriginal people is increasing.[17] While judges play a limited role in ameliorating this, Parliament and the Supreme Court have directed judges "to consider the unique circumstances of Aboriginal people and to implement community-based sentences whenever appropriate."[18] Where prison is required "it may be appropriate to focus on sanctions which incorporate less time in prison, rather than continuing to increase the

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[14] *R. v. Ladue*, 2011 BCCA 101, [2011] B.C.J. No. 366 at para. 11.

[15] *Ibid.* at para. 63.

[16] *Ibid.* at para. 45.

[17] *Ibid.* at para. 59.

[18] *Ibid.* at para. 52.

sentences imposed."[19] There must be more than a passing reference to s.718.2(e); there must be tangible, substantive consideration "which will often impact the length and type of sentence imposed."[20]

The Court of Appeal held that, for a person under LTSO designation, "the role of rehabilitation will depend on the circumstances of the offender and is not dependent on his or her designation."[21] The court stated:[22]

> In my respectful opinion, even when sentencing a long-term offender for a breach of a supervision order, particular attention must be given to the circumstances which brought the offender before the court. There are no doubt cases where the principles of restorative justice and rehabilitation have no, or little, role in sentencing. However, in this case, the circumstances of Mr. Ladue's background played an instrumental part in his offending over his lifetime and his rehabilitation is critical to the protection of the public.

The dissenting judgment held that sentencing judge did not err in her application of *Gladue*, but that the sentence should have been reduced to two years jail. The dissent included the following comment:[23]

> Reference was made in argument to the notion that the circumstances of an Aboriginal offender are less significant after a long-term offender designation. I do not think any case goes so far as asserting the circumstances of an Aboriginal offender should not be taken into account at all when considering a fit sentence for breach of a long-term offender supervision provision, but if there is that suggestion I would reject it. The relevant Criminal Code provision does not permit a court to ignore the circumstances of an Aboriginal offender in that or in any other context.

R. v. Belcourt, 2011 BCCA 40, [2011] B.C.J. No. 514

A defence appeal was allowed from sentences of three months for theft and nine months consecutive for breaking and entering. The 27-year-old man with 37 prior

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[19] *Ibid.* at para. 53.

[20] *Ibid.* at para. 64.

[21] *Ibid.* at para. 71.

[22] *Ibid.* at para. 82.

[23] *Ibid.* at para. 103.

convictions for mainly minor offences had a difficult background including numerous foster homes, abuse, addiction, and a brain injury. Although the sentence was the result of a joint submission the appellant argued that the sentencing judge failed to consider his Aboriginal background.

On appeal, fresh evidence about the appellant's heritage and a treatment program was admitted. The jail sentence was reduced by three months to allow the appellant to enrol in the treatment program when it became available. Although counsel had proposed a joint position, the accused spoke to the court and indicated that he had treatment lined up and asked that his sentence be served conditionally or intermittently. The fresh evidence revealed he had indeed been scheduled to begin treatment on the day following sentencing. The sentencing judge was not informed of this.

The Court of Appeal found two errors in law. First, the sentencing submissions were brief and did not provide a complete picture of the accused who pleaded guilty the day after his arrest. The judge should have had a more complete picture of the accused's circumstances.[24] Second, from the accused's comments it was clear that, despite the joint submission, he did not accept one year incarceration. Neither counsel nor the court made further inquires into what he was saying and this meant that there was no opportunity to consider a sanction other than imprisonment as required by s.718.2(e).[25]

R. v. Napesis, 2010 BCCA 499, [2010] B.C.J. No. 2172

The defendant appealed what was effectively a joint sentencing submission on the ground that no "*Gladue* hearing" took place. The sentence appeal was dismissed. The Court of Appeal held that the sentencing judge would have known the appellant was an Aboriginal person given his lawyer's mention of *Gladue* and some statements made by the appellant. The Court of Appeal commented on joint submissions in busy courts:[26]

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[24] *R. v. Belcourt*, 2011 BCCA 40, [2011] B.C.J. No. 514 at para. 14.

[25] *Ibid.* at para. 15.

[26] *R. v. Napesis*, 2010 BCCA 499, [2010] B.C.J. No. 2172 at para. 17.

> In my view, it behoves every sentencing judge, even those faced with what is effectively a joint submission on sentence in a busy court, not only to take seriously the duty to aboriginal offenders summarized at para. 93 of *Gladue*, but also to demonstrate on the record and in reasons that he or she has done so. As almost everyone involved in the justice system will attest, the very best result of a criminal prosecution is a rehabilitated offender. That result can be achieved only if counsel and the sentencing judge fulfill the expectations implicit in their acceptance of roles in that system, particularly during the sentencing process.

***R. v. Awasis*, 2010 BCCA 213, [2010] B.C.J. No. 1084**

The defence appeal of a 24-month jail sentence for robbery was dismissed. The judge considered the Aboriginal background of the accused. *Gladue* does not require an automatic reduction in sentence. Failure to specifically mention s.718.2(e) was not an error. A non-custodial sentence was not a reasonable alternative. It is not clear whether the Court of Appeal considered whether a shorter period of incarceration was appropriate as outlined in the more recent decision of *Ladue*, above. Of interest is that the accused had over 40 convictions on his record and had served a sentence of imprisonment, either in jail or in the community, for every one except for his first offence.

***R. v. Oliynyk*, 2010 BCCA 249, [2010] B.C.J. No. 1159**

A sentence of 12 years for conspiracy to import and traffic cocaine was upheld for co-accused LePage, a 47-year-old first offender. The Court of Appeal found that "when the circumstances of the offences are placed in the context of the overall fundamental purposes and principles of sentencing, the fact that he is an aboriginal offender is of little or no consequence."[27] For such serious offences the trial judge was correct to place the greatest weight on deterrence and denunciation. The trial judge did consider the accused's Aboriginal background and the principles of s.718.2(e).

Alberta

***R. v. Stimson*, 2011 ABCA 59, [2011] A.J. No. 156**

A Crown appeal was allowed from a 90-day intermittent sentence plus two years

[27] *R. v. Oliynyk*, 2010 BCCA 249, [2010] B.C.J. No. 1159 at para. 31.

probation and a three-year driving prohibition for impaired driving causing death and driving without a licence following the guilty plea of a 19-year-old woman with a tragic background and no prior record. The Court of Appeal held that the sentence was demonstrably unfit. The court found, in part, that "the sentencing judge erred by placing significant emphasis on community restoration without any clear representation of the community's view and against the express wishes of the victim's family."[28] The court, citing *Arcand*, discussed below, considered sentencing ranges. The court found that the appropriate range was between two and four years and imposed a sentence of two years less one day to be reduced by the 90 days already served and further reduced by one-for-one credit for the period of probation she served under house arrest.

***R. v. Arcand*, 2010 ABCA 363, 264 C.C.C. (3d) 134**

In a lengthy judgment the Alberta Court of Appeal reviewed the history and principles of sentencing with a focus on sexual assault offences, and starting point sentencing. The summary found at paragraph 299 of the majority decision contains 23 points. For analysis and discussion, please refer to Jonathan Rudin's article.[29] As well, contrast the reasoning of the Alberta Court of Appeal with the Ontario Court of Appeal's decision in *R. v. Jacko*, 2010 ONCA 452, 256 C.C.C. (3d) 113, 101 O.R. (3d) 1, discussed below.

After trial, the 18-year-old first offender was convicted of a sexual assault during which the complainant was unconscious. He was sentenced to 90 days intermittent jail followed by three years probation. The Crown had asked for a jail term of three to four years. On appeal, defence agreed that the sentence was unfit and suggested that one year imprisonment was appropriate. The Crown on appeal submitted that two years less one day plus probation would be a fit sentence. The Court of Appeal increased the sentence to two years less one day plus two years probation. However, citing "highly unusual circumstances" including the fact that the accused had served his original

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[28] *R. v. Stimson*, 2011 ABCA 59, [2011] A.J. No. 156 at para. 25.

[29] Jonathan Rudin, "Eyes Wide Shut: The Alberta Court of Appeal's Decision in *R. v. Arcand* and Aboriginal Offenders" (2011) 48 Alta. L. Rev. (forthcoming).

prison term and a great deal of his probation the court stayed the custodial portion of the sentence.[30]

Although the accused was Aboriginal, reference to *Gladue* is found only in a few footnotes, and the Court of Appeal mentioned the accused's Aboriginal background very briefly:[31]

> The sentencing judge ordered an assessment by the Forensic Assessment and Community Services (FACS) office. The FACS assessment and pre-sentence report provided information about the offender, his Aboriginal background and family, and the high degree of support he was receiving in his community.
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> ...
>
> The particular attention to be given to the circumstances of the offender as an Aboriginal person under s. 718.2(e) of the *Code* does not adjust the situation greatly here. If those circumstances were to be replicated for a non-Aboriginal young person, the effect would be much the same. Serious sexual assaults on women, including Aboriginal women, continue to be a clear and pressing problem in this country. (footnote omitted)

R. v. Cardinal, 2010 ABQB 673, [2010] A.J. No. 1245

A sentence of 90 days intermittent imprisonment for unlawfully selling fish was held to be excessive and was reduced to 30 days to be served intermittently. Of note is that even on appeal it was recognized that the majority of sentences for the same offence were fines. In contrast with Ontario case law,[32] the court commented:[33]

> The Learned Trial Judge found that there was no evidence to suggest that by virtue of Ernest Cardinal's unique circumstances or his unjust treatment by the justice system in the past that those factors have in some way contributed to his involvement in the present offences. No evidence was presented in that regard. Therefore, *R. v. Gladue* (1999), 133 C.C.C. (3d) 385 (S.C.C.), although important, has some limitations.

R. v. Ouelette, 2010 ABCA 285, 490 A.R. 200

A sentence of seven years was reduced to five-and-a-half years for a 19-year-old

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[30] *R. v. Arcand*, 2010 ABCA 363, 264 C.C.C. (3d) 134 at para. 298.

[31] *Ibid.* at paras. 256, 294.

[32] See *R. v. Collins*, 2011 ONCA 182, [2011] O.J. No. 978 at para. 32 (discussed below).

[33] *R. v. Cardinal*, 2010 ABQB 673, [2010] A.J. No. 1245 at para. 82.

man with a significant youth record who confessed to police and pleaded guilty to three convenience store robberies. The Court of Appeal was troubled by the fact that the accused's Aboriginal status was not mentioned at sentencing and there was no consideration of *Gladue* or s.718.2(e).[34]

***R. v. Giroux*, 2010 ABQB 642, [2010] A.J. No. 1184**

Following a guilty plea to manslaughter the court declined to reduce a jail sentence by virtue of *Gladue*. The court held:[35]

> Secondly, and importantly, no evidence has been placed before the Court showing the impact of these systemic and background factors on Mr. Giroux himself. Indeed, the evidence from his mother and others would suggest that he was raised in an environment that allowed him to avoid those factors that have often had devastating effects on others.

Saskatchewan

***R. v. Keepness*, 2010 SKCA 69, 255 C.C.C. (3d) 457, 359 Sask.R. 34**

On a Crown appeal of sentences for manslaughter and aggravated assault the Court of Appeal increased the global sentences from 11.5 years to 15 years for three co-accused, all of whom the court stated were of First Nations. *Gladue* and s.718.2(e) were not mentioned despite the fact that all three accused had "barely survived difficult childhoods" which in one case included living in 350 foster homes.[36]

***R. v. Moosomin*, 2010 SKPC 182, [2010] S.J. No. 779**

Sentences of 12 months jail plus $50,000 restitution were imposed for breach of trust and defrauding a First Nation's trust fund of one million dollars. The court indicated that, based on comparable decisions, 18 months jail would have been appropriate but for *Gladue* factors. The decision includes a thorough review of *Gladue* and its application. A conditional sentence was not warranted in the circumstances. After considering *Gladue* and the circumstances of the offenders the jail portion of the

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[34] *R. v. Ouelette*, 2010 ABCA 285, 490 A.R. 200 at para. 6.

[35] *R. v. Giroux*, 2010 ABQB 642, [2010] A.J. No. 1184 at para. 40.

[36] *R. v. Keepness*, 2010 SKCA 69, 255 C.C.C. (3d) 457, 359 Sask.R. 34 at para. 14.

sentence was set at 12 months.[37]

***R. v. Sandfly*, 2010 SKPC 39, 355 Sask.R. 130, 94 M.V.R. (5th) 100**

A jail sentence for was imposed for driving over 80. The court pointed out that "Gladue factors were not argued," despite the fact that the accused had suffered physical and sexual abuse as a child.[38]

Manitoba

***R. v. Sinclair*, 2010 MBCA 105, [2010] M.J. No. 341**

A 20-year-old man appealed from a global sentence of ten years for sexual assault with a weapon, forcible confinement, uttering threats, and attempting to obstruct justice, arguing that in totality the sentence was crushing. The Court of Appeal found that the sentencing judge was "hampered" because the accused did not seek a pre-sentence report or a *Gladue* report.[39] Further, the court held that "[b]oth the judge and this court were provided with a very limited picture of the accused and his prospects for rehabilitation save to place emphasis on the fact that he was a youthful offender."[40] Nonetheless, the appeal from sentence was denied.

***R. v. M.(K.)*, 2010 MBQB 56, 249 Man.R. (2d) 287**

A 24-year-old man pleaded guilty to manslaughter and was sentenced to seven years jail. No pre-sentence or *Gladue* report was prepared, and no evidence was before the court regarding the accused's circumstances as an Aboriginal offender. The court found that given the seriousness of the offence there was an "enhanced likelihood that an aboriginal offender may be dealt with in the same manner as a non-aboriginal offender."[41] Despite the lack of evidence regarding Aboriginal circumstances, the court

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[37] *R. v. Moosomin*, 2010 SKPC 182, [2010] S.J. No. 779 at paras. 64-65.

[38] *R. v. Sandfly*, 2010 SKPC 39, 355 Sask.R. 130, 94 M.V.R. (5th) 100 at para. 65.

[39] *R. v. Sinclair*, 2010 MBCA 105, [2010] M.J. No. 341 at para. 16.

[40] *Ibid.* at para. 21.

[41] *R. v. M.(K.)*, 2010 MBQB 56, 249 Man.R. (2d) 287 at para. 11.

considered that "there may well be some systemic and unique background factors that have led to his appearance before the court."[42]

***R. v. Monkman*, 2010 MBQB 72, 250 Man.R. (2d) 314**

In determining parole eligibility for second degree murder counsel advised that no *Gladue* report was being requested. The court was told that the accused did "not appear to have suffered from any of the classic systemic disadvantages of many people with his background."[43]

Ontario

***R. v. Collins*, 2011 ONCA 182, [2011] O.J. No. 978**

On appeal, the custodial portion of a sentence of 16 months jail followed by probation and restitution for a single count of fraud over $5,000 was reduced to ten months where the accused played a part in a much larger scheme defrauding the Ontario Works program administered by the Fort William First Nation. The size of the fraud was large, continued for a long period of time, involved significant planning, divided the community, and undermined public confidence in the First Nation's ability to govern. The 51-year-old accused woman had no criminal record and plead guilty. Her family background was difficult and included her father attending residential school, racism, substance use, and violence. She had a gambling addiction, health issues, and cared for her special needs child.

In holding that the trial judge erred in applying *Gladue* the Court of Appeal reproduced two passages from the reasons for sentence that highlight the error:[44]

> Notwithstanding the evidence that the poverty and suffering on the Fort William First Nation Reserve is considerable and that the residential school experience is in part responsible, *I find that the evidence does not support the argument that systemic factors are responsible for bringing the accused before this court.* In any event, this is the type of case referred to in Wells where the seriousness of the crime and the need for denunciation

[42] *Ibid.* at para. 35.

[43] *R. v. Monkman*, 2010 MBQB 72, 250 Man.R. (2d) 314 at para. 18.

[44] *R. v. Collins*, 2011 ONCA 182, [2011] O.J. No. 978 at paras. 30-31.

take precedence over any other considerations.

...

Each individual must be accountable for their own actions. Blaming others, your upbringing or minimizing one's participation cannot, generally speaking for serious crimes such as large scale fraud, absolve a person from the consequences of their actions.

The Court of Appeal clarified that the governing case law does not place "the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence." Nor is the approach under s.718.2(e) and *Gladue* about "about shifting blame or failing to take responsibility; it is recognition of the devastating impact that Canada's treatment of its Aboriginal population has wreaked on the members of that society."[45]

The Court of Appeal considered proportionality and the *Gladue* principles. In imposing a fit sentence the court concluded that a conditional sentence was not appropriate. The offence was too serious and the need for general deterrence and denunciation was overwhelming. However, *Gladue* principles require that where there is no alternative to incarceration the length of sentence must be carefully considered.[46] Accordingly, the term of imprisonment was reduced to ten months.

R. v. Jacko, 2010 ONCA 452, 256 C.C.C. (3d) 113, 101 O.R. (3d) 1

The Ontario Court of Appeal held that denunciation and deterrence were not the only principles to consider and that restorative objectives were crucial in the circumstances of sentence appeals following convictions at trial for violent offences committed during a home invasion.[47] The court found that the sentencing judged failed to accord sufficient weight to the two accuseds' Aboriginal heritage and to the objective of restorative justice. Both accused men were described as "youthful recidivists."[48] The sentences of four years in the penitentiary were reduced to two years less one day, and

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[45] *Ibid.* at para. 32.

[46] *Ibid.* at para. 40.

[47] *R. v. Jacko*, 2010 ONCA 452, 256 C.C.C. (3d) 113, 101 O.R. (3d) 1 at paras. 85-86.

[48] *Ibid.* at para. 1.

in the case of Mr. Jacko the sentence was to be served conditionally.[49]

The Court of Appeal made several important points regarding sentencing. The need for deterrence and denunciation does not necessarily foreclose the possibility of a conditional sentence.[50] Sufficient weight must be given to the community in which the crimes were committed including recommendations by sentencing circles.[51] Equating sentencing ranges with *de facto* minimum sentences is inconsistent with the fundamental principle of proportionality.[52] There is no universal rule that sentences for serious or violent offences must be the same for Aboriginal and non-Aboriginal people. Sentencing Aboriginal offenders must proceed on an individual basis. Sentencing courts are given substantial flexibility and discretion.[53] Restorative justice may be given the greatest weight even where the crime is serious, especially where offenders are youthful, including recidivists.[54] The court also provided a useful review of *Gladue* principles generally.[55]

This case highlights the importance of bail as it relates to subsequent sentencing. Mr. Jacko secured bail pending appeal which gave him the chance to demonstrate his real, tangible prospects of rehabilitation. In allowing Mr. Jacko's sentence appeal, the court was obviously impressed with his successful efforts with respect to education, employment, addiction, chosen associates, and family responsibilities. Those efforts must have made a difference in the sentence appeal and certainly in allowing the sentence to be served conditionally:[56]

> In cases such as these, we must do more than simply acknowledge restorative justice sentencing objectives and note approvingly the

[49] A conditional sentence was available because the offences were committed in 2006.

[50] *R. v. Jacko*, 2010 ONCA 452, 256 C.C.C. (3d) 113, 101 O.R. (3d) 1 at paras. 80, 94.

[51] *Ibid.* at paras. 81, 93.

[52] *Ibid.* at paras. 82, 90.

[53] *Ibid.* at para. 91.

[54] *Ibid.* at paras. 51, 92.

[55] *Ibid.* at paras. 58-64.

[56] *Ibid.* at para. 87. See also para. 88.

> rehabilitative efforts of those convicted. They must have some tangible impact on the length, nature and venue of the sentence imposed. The rehabilitative efforts here, more specifically those of Jacko, extend well beyond the promises made all too frequently between conviction and sentence, and all too infrequently executed and maintained in the days, weeks and months following imposition of a lenient sentence.

The significance of progress with respect to underlying issues while out of custody was considered by the Ontario Court of Appeal in dismissing the Crown's sentence appeal in ***R. v. Henry*, 2011 ONCA 79**.

***R. v. Nahmabin*, 2010 ONCA 737, [2010] O.J. No. 4709**

The successful sentence appeal by the accused in this case is a reminder of the importance of placing sufficient information about the accused's Aboriginal circumstances before the sentencing judge as well as confirmation that a sentencing judge must make further inquiries where insufficient information is provided. The Court of Appeal found an error in the judge's failure to inquire, but did point out that "[i]n fairness to the trial judge, it does not appear that defence counsel at trial wished to have a *Gladue* report."[57] Fresh evidence, namely a *Gladue* report, was admitted and the sentence was reduced to time served.

***R. v. Johnson*, 2011 ONCJ 77, [2011] O.J. No. 822**

This comprehensive decision interprets the amendments to the bail and sentencing provisions of the *Criminal Code* under the *Truth in Sentencing Act*, S.C. 2009, c.29, in force February 22, 2010. The Aboriginal offender argued that the new legislation violated his rights under sections 7 and 15 of the *Charter of Rights and Freedoms*. The court upheld the constitutionality of the sections of the legislation applicable to the case before the court, largely based on his finding that 1.5:1 credit, which accounts for lost remission, should usually be granted. The decision is important for any person, Aboriginal or not, who has spent time in pre-sentence custody in circumstances where the new legislation applies.

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[57] *R. v. Nahmabin*, 2010 ONCA 737, [2010] O.J. No. 4709 at para. 1.

Of particular interest in the bail context is that the court expressed concern with the constitutionality of sections 515(9.1) and 719(3.1) of the *Criminal Code* as amended by the new legislation.[58] Given that those sections were not engaged by the facts before the court, the determination of their constitutionality awaits another case. Those sections provide that when, at a bail hearing, a justice detains a person "primarily because of a prior conviction" or under s.524 of the *Criminal Code*, a future sentencing judge is bound by a 1:1 maximum credit without exception: s.719(3.1). Given the requirements of *Gladue* this will pose problems, and must be litigated, where an Aboriginal person is to be sentenced by a judge bound by s.719(3.1). This will be especially problematic where the offence carries a mandatory minimum jail sentence.

***R. v. Pierce*, 2010 ONSC 6154, [2010] O.J. No. 4925**

Given the new limitations on credit for pre-sentence custody, and the opportunity to demonstrate success in the community prior to sentence, obtaining bail is critical in relation to sentencing. In this bail review engaging the secondary and tertiary grounds the accused was released pursuant to *Gladue* principles and requirements.

Quebec

***R. c. Tremblay*, 2010 QCCA 2072, [2010] J.Q. No. 11741**

In this French language decision the Court of Appeal reduced a sentence for impaired driving from 42 months to 30 months noting that where a term of imprisonment is required the length of imprisonment must be considered per *Gladue*.[59] There was no error on the part of the sentencing judge because at first instance the accused had not identified himself as an Aboriginal person. On appeal, fresh evidence was allowed and considered by the court in reducing the sentence.

***R. v. Palliser*, 2011 QCCQ 1475, [2011] Q.J. No. 1778**

A 35-year-old Inuk first offender who pleaded guilty to dangerous driving causing

[58] *R. v. Johnson*, 2011 ONCJ 77, [2011] O.J. No. 822 at paras. 115-119.

[59] *R. c. Tremblay*, 2010 QCCA 2072, [2010] J.Q. No. 11741 at para. 49.

death was sentenced to ten months jail as proposed by the defence. A conditional sentence was not available. An interesting comment on this point was made:[60]

> As a judge of the Court of Québec working regularly with the itinerant Court, in the regions of Nunavik (the Inuit), James Bay (the Crees), and Abitibi and Temiscamingue (the Algonquins), I can confirm that many unwritten decisions concerning the sentencing of First Nation and Inuit people involve substituting conditional sentences of imprisonment to jail terms. When a conditional sentence is not an available sanction, the Court regularly orders reduced jail terms for aboriginal offenders, compared to non-aboriginal offenders, when the crime is not "more serious and violent", as stated in the *Gladue* decision. (footnotes omitted)

***R. v. Kaitak*, 2010 QCCQ 12464, [2010] Q.J. No. 22719**

The court accepted a joint submission for a conditional sentence for trafficking cannabis. Under s.113 of the *Criminal Code* a prohibition on firearms was lifted for the purpose of sustenance hunting for the Inuit accused.

New Brunswick

***R. v. Penny*, 2010 NBCA 49, 257 C.C.C. (3d) 372, 362 N.B.R. (2d) 255**

A Dangerous Offender application was upheld where the Court of Appeal noted that because the accused was an Aboriginal man, though not "raised as an issue," *Gladue* and *Wells* "should, perhaps, have been taken into consideration when sentencing the appellant."[61] The Court of Appeal cited some authorities for the proposition that "it is well settled that in matters involving aboriginal offenders, the more serious the offence, the less consideration is to be given to the principles arising from *R. v. Gladue* and *R. v. Wells*."[62]

Nova Scotia

***R. v. Benson*, 2011 NSSC 137, [2011] N.S.J. No. 184**

A *Gladue* report was relied upon in sentencing a first offender to 3.5 years jail

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[60] *R. v. Palliser*, 2011 QCCQ 1475, [2011] Q.J. No. 1778 at para. 70.

[61] *R. v. Penny*, 2010 NBCA 49, 257 C.C.C. (3d) 372, 362 N.B.R. (2d) 255 at para. 53.

[62] *Ibid.*

following his guilty plea to manslaughter. The accused suffered sexual abuse and racism as a child. A comment in the *Gladue* report, attributed to the accused, appeared to assist the Crown's submission regarding a factual discrepancy. In the end, the court was left with a reasonable doubt as to that issue and therefore did not resolve it in the Crown's favour.[63] As well, the court cited as a mitigating factor the potential distress caused to the accused while awaiting sentence given that the time involved in preparing the *Gladue* report delayed sentencing.[64]

Newfoundland and Labrador

R. v. Tuglavina, 2011 NLCA 13, [2011] N.J. No. 25

The Court of Appeal held that one year probation for sexual assault involving intercourse with an unconscious victim and witnessed by the victim's child was demonstrably unfit.[65] The accused was described as "delayed" with no history of breaching court orders and entered a guilty plea at his second court appearance.[66] The sentencing judge described the case to be extraordinary and found that the accused was at the bare minimum for criminal responsibility. The Court of Appeal held that this finding was not supported on the record. Further, the court held that the sentencing judge "overemphasized the circumstances of the offender and failed to give any consideration to most other relevant factors, including denunciation and deterrence, and the gravity of the offence and responsibility of the offender."[67] The Court of Appeal held:[68]

> This was a serious crime involving debasing physical action against an unconscious woman, and, consistent with the view expressed in Gladue, it would be difficult to justify a very substantially lesser punishment than

[63] *R. v. Benson*, 2011 NSSC 137, [2011] N.S.J. No. 184 at paras. 26-30.

[64] *Ibid.* at para. 50.

[65] At sentencing the Crown sought two years jail and defence sought one year.

[66] The accused was released on an undertaking with conditions, and sentencing took place a year and a half after the offence. The accused did not breach his release conditions.

[67] *R. v. Tuglavina*, 2011 NLCA 13, [2011] N.J. No. 25 at para. 38.

[68] *Ibid.* at para. 45.

would be imposed for the same offence on a similar offender who was not aboriginal.

Note that the Court of Appeal held that imposing a substantially lesser punishment "would be difficult to justify" and did not go as far as to say that the in the circumstances a sentence for an Aboriginal offender *must* be the same as a sentence for a non-Aboriginal offender.

The court held that a two year jail sentence would have been lenient. However, given the passage of time, the court declined to send the offender to jail. Despite holding that a sentence of probation was demonstrably unfit, the Court of Appeal instead increased the period of probation from one to three years.

GLADUE BEFORE THE COURTS[1]

This review of recent caselaw is provided as a brief supplement to Professor Kent Roach's comprehensive article: Kent Roach, "*One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal*" (2009), 54 C.L.Q. 470. This selection of recent reported decisions focuses on sentence appeals. Some reference is made to notable trial court decisions and cases expanding the scope of *Gladue*. Please refer to Prof. Roach's published article for discussion and analysis of reported appellate court jurisprudence.

SENTENCE APPEALS

The Ontario Court of Appeal released a number of significant sentencing decisions in 2009 and early 2010.[2] In ***R. v. Livingstone***, 2009 ONCA 213, a brief endorsement, the Ontario Court of Appeal held that the trial judge's belief that the respondent's convictions for 3 counts of possession for the purpose of trafficking, possession of proceeds of crime, and fail to comply with recognizance called for a penitentiary sentence rendered the imposition of a conditional sentence an error. However, the Court of Appeal was not persuaded that "such a sentence would have involved an error in principle or been so manifestly unfit so as to necessitate appellate intervention."[3] It would have been open to the trial judge to impose a conditional

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[1] Erin Metzler, Lawyer, Legal Aid Ontario. Prepared for the 2nd National Conference on Aboriginal Criminal Justice Post-*Gladue*, Osgoode Professional Development Centre, 24 April 2010.

[2] See also *R. v. Whiskeyjack sub nom. R. v. W. (R.)*, 2008 ONCA 800, 239 C.C.C. (3d) 47, 93 O.R. (3d) 743; *R. v. Batisse*, 2009 ONCA 114, 241 C.C.C. (3d) 491, 93 O.R. (3d) 643, both cited in Kent Roach, "*One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal*" (2009), 54 C.L.Q. 470 at 497-498.

[3] *R. v. Livingstone*, 2009 ONCA 213 at para. 2.

sentence. The Court accepted fresh evidence regarding the respondent's progress towards education and overcoming a drug addiction, and varied the sentence to time served (equivalent to 25 months) plus 3 years probation.

In ***R. v. Ipeelee***, 2009 ONCA 892, the Ontario Court of Appeal upheld a sentence of 30 months jail following 6 months presentence custody for a breach of an alcohol abstention term of a Long Term Supervision Order (LTSO). The 37-year-old Inuit pleaded guilty after being found intoxicated and in possession of alcohol while riding a bicycle in the wrong direction on a one-way street. While the circumstances of the LTSO breach were non-violent, the trial judge in the original long-term offender proceeding had found that if the accused consumed alcohol, his risk of offending was "as certain as night follows day."[4] Given this finding, Court of Appeal emphasized denunciation, deterrence and protection of the public, rather than restorative justice. Of note is that Sharpe J.A. made a plea to the correctional authorities that the appellant be given access to culturally appropriate resources:[5]

> I feel compelled to add, however, that the appellant's aboriginal background and the disadvantage he has suffered clearly provide insight into his sorry involvement with the criminal justice system. ... . He was not released in his home community in Iqualuit because the Inuit-oriented facility there refused to accept him on the ground that he posed an undue risk of re-offending. The community correctional facility in Kingston has relatively little to offer by way of aboriginal services.
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> ... It is regrettable that he has not been afforded more access to services tailored to his background and heritage, although I recognize that his condition and the attitude of his own community present the correctional authorities with many challenges with respect to his management and treatment. Still, I would feel remiss if I did not include in these reasons a plea that the correctional authorities make every effort to provide the appellant with appropriate aboriginal-oriented assistance.

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[4] *R. v. Ipeelee*, 2009 ONCA 892 at para. 3.

[5] *Ibid.*, at paras. 13-15. See also *R. v. Nuvaquiq*, 2009 CarswellNun 11 at paras. 19, 52 (C.J.) regarding the difficulties faced by Inuit offenders when serving penitentiary sentences or when incarcerated far from home.

In ***R. v. Peters sub nom. R. v. P. (H.A.)***, 2010 ONCA 30, 250 C.C.C. (3d) 277, the Ontario Court of Appeal (Watt J.A. dissenting) upheld a suspended sentence plus 3 years probation for a 26-year-old woman who pleaded guilty to aggravated assault. The court held that the sentence was not manifestly unfit and commented on the application of *Gladue* to serious and violent offences: [6]

> ... To say that the balance will *often* tilt in favour of deterrence and denunciation in the case of serious and violent offences, as this Court did in *W.(R.)* [(2008), 239 C.C.C. (3d) 47, at para. 31], is not to say that it *always* will. Neither *Gladue* nor its progeny establish that aboriginal offenders are to be sentenced to terms of incarceration in all cases of serious offences.

Watt J.A., in dissent, would have granted the sentence appeal and imposed incarceration for 12 months followed by a period of probation for 3 years. Of note is Watt J.A.'s comment that the unavailability of a conditional sentence "does not warrant imposition of a period of probation, a sentence that lacks any denunciatory or deterrent value and is not faithful to the fundamental principle of sentencing: proportionality."[7]

In two cases in which *Gladue* principles were argued on appeal, the Ontario Court of Appeal mentioned, but did not analyze, those principles. In ***R. v. M. (W.E.J.)***, 2009 ONCA 844, [2009] O.J. No. 5105, a Crown appeal of a Long Term Supervision Order, the Court of Appeal upheld the trial judge's LTSO. The Court of Appeal appears to have endorsed the trial judge's finding that *Gladue* principles apply to dangerous offender proceedings by stating "[t]he sentencing judge observed that... the respondent's aboriginal status should be considered in all sentencing proceedings."[8] However, the decision offers no discussion of the issue.

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[6] *R. v. Peters sub nom. R. v. P. (H.A.)*, 2010 ONCA 30, 250 C.C.C. (3d) 277 at para. 14.
[7] *Ibid.*, at para. 55. But see *R. v. Etuangat*, 2009 NUCA 1, 457 A.R. 172.
[8] *R. v. M. (W.E.J.)*, 2009 ONCA 844, [2009] O.J. No. 5105 at para. 45.

In ***R. v. Lebar***, 2010 ONCA 220, [2010] O.J. No. 1133, the Crown appealed the imposition of a conditional sentence where the accused pleaded guilty to robbery of an LCBO store while armed with a knife. At trial the Crown argued that a conditional sentence was not available because the offence fell under the "serious personal injury" definition in s.752 of the *Criminal Code* and sought a custodial period of 3-5 years. The trial judge imposed a conditional sentence as sought by defence counsel. The Court of Appeal allowed the Crown's appeal and found that the trial judge erred in evaluating the seriousness of the violence used in the robbery. Once she made a sustainable factual finding that the accused committed an act of violence, a conditional sentence was not permitted under ss.742.1 and 752 of the *Criminal Code*. The Court held that a sentencing judge must "determine whether the circumstances of the case demonstrate violence or attempted violence. Once demonstrated, there is no obligation to go further and measure the degree of violence."[9]

Finding an error in law, the Court of Appeal set aside the conditional sentence and imposed instead a custodial sentence of 6 months. Since the respondent had completed his conditional sentence, the Court found that the time served on the conditional sentence fulfilled the 6 month jail sentence.

Although the respondent was not Aboriginal, Aboriginal Legal Services was granted Intervener status on appeal. The Court of Appeal mentioned that counsel for the Intervener argued "that reducing the discretion of sentencing judges to impose conditional sentences would disproportionately affect aboriginal people."[10] The Court

[9] *R. v. Lebar*, 2010 ONCA 220, [2010] O.J. No. 1133 at para. 67.
[10] *Ibid.*, at para. 46.

addressed generally the loss of judicial discretion, but the reasons contain no discussion of the issue with respect to Aboriginal people:[11]

> My response to the concern about the loss of discretion is two-fold. First, it is clear from the legislative and committee debates that Bill C-9 was intended to remove a degree of judicial discretion in the use of conditional sentences. Second, the factual determination as to whether a particular set of actions constituted the use or attempted use of violence will always be within the interpretive discretion of the court.

In ***R. v. Loring***, 2009 BCCA 166, [2009] B.C.J. No. 744, the British Columbia Court of Appeal allowed the defence appeal of a sentence of 2 years less one day jail plus one year probation for breaking and entering and committing an assault, careless use of a firearm, and possession of a weapon for a dangerous purpose. The jail portion of the sentence was reduced to 9 months, and the probation period was increased to 2 years. The Court of Appeal paid deference to the trial judge's finding that a period of incarceration was required, and considered fresh evidence on appeal regarding the appellant's circumstances as an Aboriginal person. The Court of Appeal held that given the offender was a 21-year-old Aboriginal man with no adult criminal record "it was an error on the part of the sentencing judge to fail to give consideration to the rehabilitative aspect of the sentence imposed and to explore more fully the programs available to Mr. Loring in his community once his probationary period began."[12]

The British Columbia Court of Appeal in ***R. v. Sutherland***, 2009 BCCA 534, reiterated that a sentencing judge must consider the circumstances of an Aboriginal person as required by s.718.2(e). Where this is not done in express terms it must be apparent from the reasons.[13] At trial, neither counsel referred to the appellant's

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[11] *Ibid.*, at para. 68.
[12] *R. v. Loring*, 2009 BCCA 166, [2009] B.C.J. No. 744 at para. 20.
[13] *R. v. Sutherland*, 2009 BCCA 534 at para. 16; see *R. v. Jack*, [2008] B.C.J. No. 2078 (C.A.).

Aboriginal circumstances.[14] Further, since "the Pre-Sentence Report expressly linked the appellant's attitude toward sexual offending and available treatment programs with his Aboriginal background" the trial judge was required to "make it clear she had considered those factors in determining the appropriate sentence."[15] The failure to do so was an error of law.[16] The Court of Appeal reduced the sentence from 12 months to 9 months for the 57-year-old man convicted of sexual assault. As well, the Court varied a term of an order under s.161 of the *Criminal Code* banning him for life from community centres and other places. The s.161 order was varied to permit the appellant "to attend at community centres for the purpose of participating in Aboriginal treatment, social and cultural activities that do not involve children under the age of 16 years."[17]

In ***R. v. M. (R.R.)***, 2009 BCCA 578, the British Columbia Court of Appeal dismissed the defence appeal of a 2 year custodial sentence where a 37-year-old man turned himself in and pleaded guilty to the sexual assault of his 14-year-old stepdaughter. The Court of Appeal found that the trial judge's exclusion of banishment as a mitigating factor was an error in principle. However, the sentence was not demonstrably unfit. The Court of Appeal commented on deterrence and denunciation:[18]

> The sentencing of Aboriginal offenders for serious sexual assaults, where there is evidence that they have suffered from historical and systemic abuses, is not an easy task. This Court has observed that in sentencing Aboriginal offenders, while judges must be "sensitive to the conditions, needs and understandings of Aboriginal offenders and communities, this does not mean that sentences for such offenders will necessarily focus solely on restorative objectives or give less weight to conventional sentencing objectives such as deterrence and denunciation."

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[14] *R. v. Sutherland*, *ibid.*, at para. 19.
[15] *Ibid.*, at para. 17.
[16] *Ibid.*
[17] *Ibid.*, at para. 25.
[18] *R. v. M. (R.R.)*, 2009 BCCA 578 at para. 24.

In ***R. v. Bodaly***, 2010 BCCA 9, [2010] B.C.J. No. 172, the British Columbia Court of Appeal allowed the defence appeal of a jail sentence for trafficking, finding that "the sentencing judge did not give adequate weight to s.718.2(e) or to the personal and family circumstances that militated in favour of a conditional sentence"[19] The Court considered fresh evidence about non-custodial alternatives in the Aboriginal community, and varied the 3 month jail sentence to a 3 month conditional sentence. The Court stated that the accused was entitled to s.718.2(e) consideration, and the fact that "he lived apart from his Aboriginal community ... does not mean he is any the less a victim of his upbringing or disentitled to have s.718.2(e) given due consideration."[20] The Court pointed out that even if he was not Aboriginal he would have been entitled to a conditional sentence.

In ***R. v. Wilson***, 2009 ABCA 257, 457 A.R. 373, [2009] A.J. No. 781, the Alberta Court of Appeal varied a conditional sentence to 3.5 years jail for possession of cocaine for the purpose of trafficking. The Court of Appeal held that the trial judge made several errors and that the conditional sentence was clearly outside the acceptable range. On appeal, the Crown argued that the sentencing judge erred in "applying a full *Gladue* discount," and that *Gladue* and s.718.2(e) should hold little weight because the respondent (whose mother attended residential school) "was two years old when he left an aboriginal community, and has lived the rest of his life in general society, largely non-aboriginal, in the City of Fort McMurray."[21] Unfortunately, the Court of Appeal held that it was not necessary to address these arguments stating that "assuming *Gladue* factors

[19] *R. v. Bodaly*, 2010 BCCA 9, [2010] B.C.J. No. 172 at para. 12.
[20] *Ibid.*, at para. 11.
[21] *R. v. Wilson*, 2009 ABCA 257, 457 A.R. 373, [2009] A.J. No. 781 at para. 12.

are fully applicable here (on which we reach no decision), this sentence cannot be justified."[22]

In ***R. v. C. (T.)***, 2009 SKCA 124, 249 C.C.C. (3d) 1, 71 C.R. (6th) 35, 2009 CarswellSask 742, the Saskatchewan Court of Appeal found that a sentence of 4 months jail plus 18 months probation following the first offender's guilty plea to sexual assault of his common law spouse departed from the range, but was not demonstrably unfit due to significant mitigating factors, and *Gladue* factors particular to the respondent's childhood. The Court of Appeal deferred to the sentencing judge who acknowledged the appropriate range, but gave detailed reasons for departing significantly from the range.

The Manitoba Court of Appeal in ***R. v. Sinclair***, 2009 MBCA 71, 245 C.C.C. (3d) 331, 69 C.R. (6th) 163, [2009] M.J. No. 252, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 456, upheld a 6-year sentence for manslaughter imposed on Mr. Sinclair's 21-year-old co-accused Pruden-Wilson.[23] The sentencing judge "concluded that the seriousness of the offence outweighed any effect of his aboriginal heritage."[24] While acknowledging that incarceration would hinder rehabilitation, the sentencing judge held that "'the circumstances of this offence make the need for denunciation and general deterrence so pressing that these principles can only be adequately addressed by a lengthy penitentiary sentence.'"[25] The appellant argued "that the judge erred by not placing sufficient emphasis on rehabilitation and overemphasizing deterrence and

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[22] *Ibid.*, at para. 13.
[23] Mr. Sinclair's sentence appeal was not considered because his appeal against conviction was allowed.
[24] *R. v. Sinclair*, 2009 MBCA 71, 245 C.C.C. (3d) 331, 69 C.R. (6th) 163, [2009] M.J. No. 252, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 456 at para. 109.
[25] *Ibid.*, at para. 113.

denunciation," but did "not argue that the judge erred in her *Gladue* analysis."[26] The Court of Appeal found that the judge placed sufficient emphasis on rehabilitation and concluded that "[w]hile another judge may have placed different emphasis on that factor and, perhaps, imposed a lesser sentence, that does not equate to a reason to interfere with the sentence here."[27]

The New Brunswick Court of Appeal in ***R. v. P (C.)***, 2009 NBCA 65, [2010] 1 C.N.L.R. 314, [2009] N.B.J. No. 333, found that, following guilty pleas to assault, nothing in the reasons or record indicated that the particular circumstances of the Aboriginal young persons were considered, noting:[28]

> While it is evident the trial judge knew he was dealing with Aboriginal young people, there is no evidence he was provided any guidance from either the Crown or the defence regarding the circumstances of these particular Aboriginal youths. Surprisingly, neither counsel even mentioned the Supreme Court of Canada decisions in *R. v. Gladue*... and *R. v. Wells*[.]

It was impossible to know whether the sentencing judge considered all reasonable alternatives to incarceration. This was an error in principle and justified the receipt of fresh evidence and a variation of the duration of the sentences. The Crown consented to the admissibility of the fresh evidence and agreed that the sentences of 12 and 18 months custody and supervision for C.P. and J.A., respectively, were excessive. The Crown sought instead 6 months custody and supervision, and the appellants sought deferred custody and probation. The Court of Appeal found that the fresh evidence allowed it to consider the particular Aboriginal circumstances of the young people, thereby enabling it to reach a fit sentence. While acknowledging the view of some

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[26] *Ibid.*, at para. 117.
[27] *Ibid.*, at para. 120.
[28] *R. v. P (C.)*, 2009 NBCA 65, [2010] 1 C.N.L.R. 314, [2009] N.B.J. No. 333 at para. 6.

courts that denunciation and deterrence can limit the application of *Gladue*, the Court of Appeal rejected any limitation of *Gladue* principles to sentencing under the *Youth Criminal Justice Act*.[29] C.P. was sentenced to 3 months custody and supervision, and J.A. was sentenced to 6 months custody and supervision in light of a history of failure to comply with non-custodial sanctions. The appellants were to abide by certain conditions during their periods of supervision, including that they "report in writing to the Chief of the Elsigpogtog First Nation... with suggestions as to how the community can reduce the incidents of group attacks. In the written report... offer to appear personally before the Band Council to apologize to the community..."[30]

In ***R. v. Knockwood***, 2009 NSCA 98, 283 N.S.R. (2d) 156, the Nova Scotia Court of Appeal found no error where the trial judge held that *Gladue* factors did not apply personally to an accused person who had risen above the troubles in his community. Notwithstanding the finding that the appellant had "risen above" the challenges of his community, the Court described the appellant as a person with a recent criminal record as a "repeat domestic violence offender":[31]

> ... On the evidence before her she was justified in concluding that Mr. Knockwood had not been adversely affected by the troubles in his community. He had risen above these challenges and achieved considerable success and recognition, in spite of those difficulties. Judge MacDonald paid close attention to Mr. Knockwood's circumstances, as she was obliged to do. Given his criminal record as a repeat domestic violence offender, together with the information contained in Mr. Knockwood's pre-sentence report as to the *positive*, supportive aspects of his family, education and employment I see no error in Judge MacDonald's analysis and application of s. 718.2(e) in sentencing the appellant.

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[29] *Ibid.*, at para. 25.
[30] *Ibid.*, at para. 35.
[31] *R. v. Knockwood*, 2009 NSCA 98, 283 N.S.R. (2d) 156 at para. 25.

In ***R. v. Etuangat***, 2009 NUCA 1, 457 A.R. 172, the Crown appealed a suspended sentence and 2 years probation for assault of the respondent's spouse, possession of marijuana, and breaches of an undertaking prohibiting alcohol consumption, seeking instead a custodial sentence of 4 months. The Court of Appeal acknowledged that it may be correct that judges in Nunavut implicitly consider s.718.2(e) and *Gladue* even if not mentioned in the reasons for sentence.[32] However, the judge did not provide reasons to explain why deterrence and denunciation were rejected in favour of a rehabilitative sentence. The Court of Appeal found that the lack of reasons justified intervention, but upheld the suspended sentence and probation. Of note is the Court of Appeal's apparent approval of the approach taken by the trial judge after finding that a conditional sentence was not appropriate and the view that the prospect of revocation of probation may act as a deterrent:[33]

> This is a very borderline case where the trial judge appears to have come down on the side of rehabilitation because the accused demonstrated some progress since the assault and had enrolled in an educational program. I am not satisfied he erred in imposing probation after finding he could not use a conditional sentence. As noted by the Lamer J. in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, probation is purely rehabilitative while a conditional sentence is both rehabilitative and punitive. Probation is potentially more serious because the court may sentence on the charge after revoking the probation order[.]

The Northwest Territories Supreme Court made an interesting comment in a sentence appeal in ***R. v. Minoza***, 2009 NWTSC 7, [2009] N.W.T. No. 10. The appellant argued that the sentencing judge made several errors including failing to consider that he was an Aboriginal offender. While acknowledging that some appellate courts in

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[32] *R. v. Etuangat*, 2009 NUCA 1, 457 A.R. 172 at para. 21. Counsel for the respondent made this argument on the basis that most people appearing before the court in Nunavut are Aboriginal.
[33] *Ibid.*, at para. 40.

Canada have determined that failure to adequately consider *Gladue* factors is an error of law, the Court stated:[34]

> At the same time, sentencing is a highly individualized process, and takes place in a variety of contexts. The reality of circuit work in the Northwest Territories (and in certain other regions and jurisdictions in Canada) is one where the court, and counsel, work on a regular basis in small communities where most of the participants in the criminal justice system, (offenders, victims and witnesses), are aboriginal. How this impacts, if at all, on counsel's and sentencing judges' responsibilities is an issue that, to my knowledge, has yet to be examined in any depth in this jurisdiction.

The failure to consider the Aboriginal background of the accused did not warrant intervention, and the sentence was upheld. The judge saved "for another day the consideration of the broader question as to how, if at all, the specificity of this jurisdiction impacts on counsel's responsibilities, and the court's responsibility, in the day to day application and implementation of the principles set out in *Gladue*."[35]

TRIAL DECISIONS OF NOTE

A number of trial courts released sentencing decisions of note. A decision of the Provincial Court of Newfoundland and Labrador (Natuashish Circuit Court) provides a thorough and thoughtful discussion of the practical application of the *Gladue* decision in the context of violent offences.[36] Decisions that received significant media attention include a youth sentencing for a major arson in which the judge found a systemic failure in public policy was relevant to the current condition of the young people before the court,[37] and a high-profile case of criminal negligence causing the deaths of two young

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[34] *R. v. Minoza*, 2009 NWTSC 7, [2009] N.W.T. No. 10 at para. 27.
[35] *Ibid.*, at para. 32.
[36] *R. v. Pastiwet*, [2009] 4 C.N.L.R. 301, 2008 CanLII 82921 (NL P.C.). See especially paras. 115-135; 149-169.
[37] *R. v. P.-S. (Z.)*, 2009 ONCJ 580, [2009] O.J. No. 5115 at paras. 60-82; *R. v. P.-S. (Z.)*, 2010 ONCJ 31, [2010] O.J. No. 483. See also *Dantimo*, 2009 CarswellOnt 802, 2009 CanLII 6627 at paras. 22-42 (S.C.).

children in which a sentencing circle was found to be appropriate.[38] Despite the recommendation of the circle for a non-custodial sanction, the accused was sentenced to 3 years in jail.[39] A jail sentence was imposed following trial of a regulatory offence in a provincial court decision in which Aboriginal heritage and lack of a prior record appear to have worked against the accused.[40]

A provincial criminal court found that the accused had not established that he was Aboriginal while declining to make a finding, as requested by the Crown, that the accused was *not* Aboriginal.[41] *Gladue* factors were considered in deciding whether to impose an adult or a youth sentence.[42] Several dangerous offender proceedings involved discussion or application of *Gladue* principles.[43] The principles were applied in granting discharges, both conditional[44] and absolute.[45] An Aboriginal man's sentence was reduced due in part to his "diminished moral responsibility... resulting from his FASD."[46] Finally, in some cases, *Gladue* was specifically *not* considered at *defence* counsel's request.[47]

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[38] *R. v. Pauchay*, 2009 SKPC 4, 64 C.R. (6th) 77, [2009] S.J. No. 2.
[39] *R. v. Pauchay*, 2009 SKPC 35, [2009] S.J. No. 128, [2009] 2 C.N.L.R. 314.
[40] *R. v. Cardinal*, 2009 ABPC 296, [2009] 4 C.N.L.R. 276 at paras. 26, 29 (90 days jail for unlawfully selling fish where majority of decisions imposed fines for same offence).
[41] *R. v. Kelly*, 2009 ONCJ 667 at paras. 17, 18.
[42] *R. v. H. (N.)*, 2009 NSPC 36, 280 N.S.R. (2d) 148.
[43] *R. v. Ewenin*, 2009 SKQB 207; *R. v. Nome*, 2009 SKQB 149; *R. v. Natomagan*, 2010 SKPC 7, [2010] S.J. No. 45; *R. v. Saunders*, 2009 ONCJ 284, [2009] O.J. No. 2765 at para. 42; *R. v. Standingwater*, 2010 SKQB 33.
[44] *R. v. Bardy*, 2008 ONCJ 751, [2008] O.J. No. 5707; *R. v. Stevens*, 2009 NSPC 46.
[45] *R. c. Idlout*, 2009 QCCQ 5104, [2009] 3 C.N.L.R. 321, [2009] Q.J. No. 575.
[46] *R. v. Q. (B.R.)*, 2009 YKTC 54 at para. 86.
[47] *R. v. Andersen*, 2009 NLTD 143 at para. 11 (Aboriginal background and *Gladue* principles not considered at defence counsel's request); *R. v. M. (R.T.)*, 2009 ABQB 594 at para. 3 (defence counsel did not request a "*Gladue* hearing").

DECISIONS CONSIDERING *GLADUE* BEYOND THE SENTENCING CONTEXT

Prior caselaw has applied the principles and factors of the *Gladue* decision beyond the realm of criminal sentencing.[48] The scope of *Gladue* continues to expand. *Gladue* principles were applied in the context of Aboriginal jury representation,[49] and in deciding whether the *Kienapple* principle should be applied.[50] Several jurisdictions have recently considered *Gladue* principles in bail proceedings,[51] including in a decision granting bail to a man charged with murder.[52]

In the context of judicial interim release, the *Truth in Sentencing Act*, S.C. 2009, c.29, in force February 22, 2010, provides that the outcome of bail hearings can eliminate the discretion of future sentencing judges with respect to granting credit for presentence custody. The resulting amendments to the bail and sentencing provisions of the *Criminal Code* are especially significant for Aboriginal persons in light of mandatory *Gladue* sentencing principles; the relationship between these new provisions and *Gladue* requirements must be litigated.

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[48] See Kent Roach, *supra*, note 2, at 499-503.
[49] *R. v. Robinson* (22 April 2009), London (Ont. S.C.J.).
[50] *R. v. Poker*, 2009 NLCA 33 at para. 24 (Crown appeal allowed: *Gladue* relates to sentencing and has no relevance to a stay application).
[51] See, for example, *R. v. Robinson*, 2009 ONCA 205, 95 O.R. (3d) 309 (In Chambers); *R. v. Rich*, 2009 NLTD 69, [2009] N.J. No. 117 at paras. 17-22.
[52] *R. v. Joe* (18 December 2009), Vancouver 25214 (B.C. S.C.) (In Chambers).

SUPREME COURT OF CANADA

CITATION: R. *v.* Ipeelee, 2012 SCC 13

DATE: 20120323
DOCKET: 33650, 34245

BETWEEN:

Manasie Ipeelee
Appellant
and
Her Majesty The Queen
Respondent
- and -
Director of Public Prosecutions and Aboriginal Legal Services of Toronto Inc.
Interveners

AND BETWEEN:

Her Majesty The Queen
Appellant
and
Frank Ralph Ladue
Respondent
- and -
British Columbia Civil Liberties Association and Canadian Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 98): LeBel J. (McLachlin C.J. and Binnie, Deschamps, Fish and Abella JJ. concurring)

REASONS DISSENTING IN PART: (paras. 99 to 157): Rothstein J.

Manasie Ipeelee *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions and
Aboriginal Legal Services of Toronto Inc. *Interveners*

- and -

Her Majesty The Queen *Appellant*

v.

Frank Ralph Ladue *Respondent*

and

British Columbia Civil Liberties Association and
Canadian Civil Liberties Association *Interveners*

Indexed as: R. *v.* Ipeelee

2012 SCC 13

File Nos.: 33650, 34245.

2011: October 17; 2012: March 23.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella and Rothstein JJ.

ON APPEAL FROM THE COURTS OF APPEAL FOR ONTARIO AND BRITISH COLUMBIA

Criminal law — Sentencing — Aboriginal offenders — Breach of condition of long-term supervision order — Principles governing sentencing of Aboriginal offenders — Whether principles outlined in R. v. Gladue apply to breach of long-term supervision order — Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(e).

These two appeals involve Aboriginal offenders with long criminal records. Both Aboriginal offenders were declared long-term offenders and had long-term supervision orders ("LTSO") imposed. The offender I is an alcoholic with a history of committing violent offences when intoxicated. He was sentenced to six years' imprisonment followed by an LTSO after being designated a long-term

offender. After his release from prison, I committed an offence while intoxicated thereby breaching a condition of his LTSO. He was sentenced to three years' imprisonment, less six months of pre-sentence custody at a 1:1 credit rate. The Court of Appeal dismissed the appeal brought by I. The offender L is addicted to drugs and alcohol and has a history of committing sexual assaults when intoxicated. L was sentenced to three years' imprisonment followed by an LTSO after being designated a long-term offender. After his release from prison, he failed a urinalysis test; thereby breaching a condition of his LTSO. L was sentenced to three years' imprisonment, less five months of pre-sentence custody at a 1.5:1 rate. A majority of the Court of Appeal allowed L's appeal and reduced the sentence to one year's imprisonment.

Held (Rothstein J. dissenting in part): The appeal should be allowed in *Ipeelee*. The appeal should be dismissed in *Ladue*.

Per: McLachlin C.J. and Binnie, **LeBel**, Deschamps, Fish and Abella JJ.

The central issue in these appeals is how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender in particular. Trial judges enjoy a broad discretion in the sentencing process. A sentencing judge has a duty to apply all of the principles mandated by ss. 718.1 and 718.2 of the *Criminal Code* in order to devise a fit and proper sentence which respects the well-established principles and objectives of sentencing set out in Part XXIII of the *Criminal Code*. Proportionality is the *sine qua non* of a just sanction. Proportionality, the fundamental principle of sentencing, is intimately tied to the fundamental purpose of

sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. An appellate court must be satisfied that the sentence under review is proportionate to both the gravity of the offence and the degree of responsibility of the offender.

The purpose of an LTSO is two-fold: to protect the public and to rehabilitate offenders and reintegrate them into the community. It is the sentencing judge's duty, adopting a contextual approach, to determine which sentencing options will be proportionate to both the gravity of the offence and the degree of responsibility of the offender. Sentencing is an individual process. The severity of a given breach will ultimately depend on all of the circumstances, including the nature of the condition breached, how that condition is tied to managing the particular offender's risk of re-offence, and the circumstances of the breach.

Section 718.2(*e*) of the *Criminal Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(*e*). Section 718.2(*e*) does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. The enactment of s. 718.2(*e*) is a specific direction by Parliament to pay particular attention to the circumstances of Aboriginal offenders

during the sentencing process because those circumstances are unique and different from those of non-Aboriginal offenders. To the extent that current sentencing practices do not further the objectives of deterring criminality and rehabilitating offenders, those practices must change so as to meet the needs of Aboriginal offenders and their communities. Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination. Just sanctions are those that do not operate in a discriminatory manner.

When sentencing an Aboriginal offender, a judge must consider the factors outlined in *R. v. Gladue*, [1999] 1 S.C.R. 688: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives

of sentencing in a particular community. The principles from *Gladue* are entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples.

When sentencing an Aboriginal offender, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel. However, these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. The parity principle which is contained in s. 718.2(*b*) means that any disparity between sanctions for different offenders needs to be justified. To the extent that the application of the *Gladue* principles lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances

which are rationally related to the sentencing process. Counsel has a duty to bring individualized information before the court in every case, unless the offender expressly waives his right to have it considered. A *Gladue* report, which contains case-specific information, is tailored to the specific circumstances of the Aboriginal offender. A *Gladue* report is an indispensable sentencing tool to be provided at a sentencing hearing for an Aboriginal offender and it is also indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*.

The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. If the sentencing judge fails to apply the *Gladue* principles in any case involving an Aboriginal offender this would run afoul of this statutory obligation. Furthermore, the failure to apply the *Gladue* principles in any case would also result in a sentence that is not fit and is not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including the breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

In the instant case of I, the courts below made several errors in principle warranting appellate intervention. The courts below erred in concluding that rehabilitation was not a relevant sentencing objective. As a result of this error, the courts below gave only attenuated consideration to I's circumstances as an Aboriginal offender. A sentence of one years' imprisonment should be substituted. In the instant

case of L, the decision of the majority of the Court of Appeal is well founded and adequately reflects the principles and objectives of sentencing. The appeal is dismissed and the sentence of one years' imprisonment is affirmed.

Per Rothstein J. (dissenting in part): In sentencing for the breach of a condition of a LTSO, which is central to the risk of the long-term offender violently reoffending, the protection of the public, more so than the rehabilitation or reintegration of the offender, must be the dominant consideration of the sentencing judge in the determination of a fit and proper sentence. The majority in this case, does not specifically address the issue of the sentencing of Aboriginal offenders who have been found to be long-term offenders and have been found guilty of breaching a condition of a LTSO. They have not taken account of the difference between the objectives and requirements of LTSOs for long-term offenders who abide by the conditions of their LTSO and the objectives and requirements of sentencing long-term offenders who have breached a condition of their LTSO.

The breach of a LTSO raises serious concerns that rehabilitation and reintegration are not being achieved and calls into doubt whether, despite supervision, the long-term offender has demonstrated that the substantial risk of reoffending in a violent manner in the community by the long-term offender can be adequately managed. Section 753.3(1) of the *Criminal Code* provides that a breach of a LTSO constitutes an indictable offence, as opposed to a hybrid offence, with a maximum sentence of ten years. The maximum term is for the breach of the LTSO exclusively

and is not dependant on the long-term offender having been found guilty of another substantive offence, violent or otherwise. The necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time. Where a breach is central to the substantial risk of reoffending, such as where alcohol or substance consumption has been found to be the trigger for violent offences by the long-term offender, the breach must be considered to be very serious.

Section 718.2(*e*) of the *Criminal Code* requires a sentencing judge to consider background and systemic factors in crafting a sentence, and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to Aboriginal offenders, including long-term Aboriginal offenders. As with all sentencing, this must be done with regard to the particular individual, the threat they pose, and their chances of rehabilitation and reintegration. Evaluating these options lies within the discretion of the sentencing judge. In the case of long-term offenders, the paramount consideration is the protection of society. This applies to all long-term offenders, including Aboriginal long-term offenders who have compromised the management of their risk of reoffending by breaching a condition of their LTSO.

Once an Aboriginal individual is found to be a long-term offender, and the offender has breached one or more conditions of his or her LTSO, alternatives to a

significant prison term will be limited. The alternatives to imprisonment must be viable and the sentencing judge must be satisfied that they are consistent with protection of society. Alternatives may include returning Aboriginal offenders to their communities. However, as in all cases, this must be done with protection of the public as the paramount concern; Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal. Where the breach of a LTSO goes to the control of the Aboriginal offender in the community, rehabilitation and reintegration into society will have faltered, if not failed. In such case, the sentencing judge may have no alternative but to separate the Aboriginal long-term offender from society for a significant period of time. Nevertheless, during the period of incarceration, the Aboriginal status of the long-term offender should be taken into account for the purpose of providing appropriate programs that are intended to rehabilitate the offender so that upon release, the substantial risk of re-offending may be controlled.

In this case, it has not been shown that the sentence imposed on the offender I was demonstrably unfit and the appeal should be dismissed. The sentencing judge's findings demonstrate a thorough appreciation of the circumstances. He properly recognized that protection of the public was the paramount concern in breaches of LTSOs. As a long-term offender, I has been found to show a pattern of repetitive behaviour with a likelihood of causing death or physical or psychological injury or a likelihood of causing injury, pain or other evil to

other persons in the future through failure to control his sexual impulses. His alcohol consumption is central to such behaviour.

With respect to the offender L, one year imprisonment was a fit and proper sentence and the appeal should be dismissed. The sentencing judge did not err in focussing on protection of society as the paramount consideration in her sentencing decision. The sentencing judge found that the only way to protect the community, given L's high risk of re-offending sexually and moderate to high risk of re-offending violently, was to emphasize the objective of isolation. She noted that even if L did not commit a substantive offence, his breach was serious. But this was a case where there was a realistic opportunity for rehabilitation that was denied L because of a "bureaucratic error". The sentencing judge does not appear to have considered that it was this error that caused L to be sent to a residential halfway house, which apparently tolerates serious drug abusers and does not provide programs for Aboriginal offenders. This failure meant that L's moral blameworthiness was not properly assessed.

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By LeBel J.

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S.C.R. 486; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163; *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20; *R. v. Nelson*, [2007] O.J. No. 5704 (QL); *R. v. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228; *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207; *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120; *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50; *R. v. Poucette*, 1999 ABCA 305, 250 A.R. 55; *R. v. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. v. Andres*, 2002 SKCA 98, 223 Sask. R. 121; *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88; *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245; *R. v. Carrière* (2002) 164 C.C.C. (3d) 569; *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192.

By Rothstein J. (dissenting in part)

Referred to: *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20; *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Sharpe and Cronk JJ.A.), 2009 ONCA 892, 99 O.R. (3d) 419, 264 O.A.C. 392, [2009] O.J. No. 5402 (QL), 2009 CarswellOnt 7783, affirming a decision of Megginson J., 2009 CarswellOnt 7864. Appeal allowed, Rothstein J. dissenting.

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Chiasson and Bennett JJ.A.), 2011 BCCA 101, 302 B.C.A.C. 93, 511 W.A.C. 93, 271 C.C.C. (3d) 90, [2011] 2 C.N.L.R. 277, [2011] B.C.J. No. 366 (QL), 2011 CarswellBC 428, reversing a decision of Bagnall Prov. Ct. J., 2010 BCPC 410, [2010] B.C.J. No. 2824 (QL), 2010 CarswellBC 3822. Appeal dismissed.

Fergus J. (Chip) O'Connor, for the appellant Manasie Ipeelee.

Gillian E. Roberts, for the respondent Her Majesty the Queen.

Susanne Boucher and *François Lacasse*, for the intervener the Director of Public Prosecutions.

Jonathan Rudin and *Amanda Driscoll*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Mary T. Ainslie, for the appellant Her Majesty the Queen.

Hovan M. Patey, *Laurence D. Myers, Q.C.*, and *Kristy L. Neurauter*, for the respondent Frank Ralph Ladue.

Written submissions only by *Kent Roach* and *Kelly Doctor*, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *Clayton C. Ruby*, *Nader R. Hasan* and *Gerald J. Chan*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ. was delivered by

LEBEL J. —

I. Introduction

[1] These two appeals raise the issue of the principles governing the sentencing of Aboriginal offenders for breaches of long-term supervision orders ("LTSO"). Both appeals concern Aboriginal offenders with long criminal records. They provide an opportunity to revisit and reaffirm the judgment of this Court in *R. v. Gladue*, [1999] 1 S.C.R. 688. I propose to allow the offender's appeal in *Ipeelee* and to dismiss the Crown's appeal in *Ladue*.

II. Manasie Ipeelee

A. *Background and Criminal History*

[2] Mr. Manasie Ipeelee is an Inuk man who was born and raised in Iqaluit, Nunavut. His life story is far removed from the experience of most Canadians. His mother was an alcoholic. She froze to death when Manasie Ipeelee was five years old.

He was raised by his maternal grandmother and grandfather, both of whom are now deceased. Mr. Ipeelee began consuming alcohol when he was 11 years old and quickly developed a serious alcohol addiction. He dropped out of school shortly thereafter. His involvement with the criminal justice system began in 1985, when he was only 12 years old.

[3] Mr. Ipeelee is presently 39 years old. He has spent a significant proportion of his life in custody or under some form of community supervision. His youth record contains approximately three dozen convictions. The majority of those offences were property-related, including breaking and entering, theft, and taking a vehicle without consent (joyriding). There were also convictions for failure to comply with an undertaking, breach of probation, and being unlawfully at large. Mr. Ipeelee's adult record contains another 24 convictions, many of which are for similar types of offences. He has also committed violent crimes. His record includes two convictions for assault causing bodily harm and one conviction each for aggravated assault, sexual assault, and sexual assault causing bodily harm. I will describe these offences in greater detail, as they provided the basis for his eventual designation as a long-term offender.

[4] In December 1992, Mr. Ipeelee pleaded guilty to assault causing bodily harm. He and a friend assaulted a man who was refusing them entry to his home. Mr. Ipeelee was intoxicated at the time. During the fight, he hit the victim over the

head with an ashtray and with a chair. He was sentenced to 21 days' imprisonment and one year probation.

[5] In December 1993, Mr. Ipeelee again pleaded guilty to assault causing bodily harm. The incident took place outside a bar in Iqaluit and both Mr. Ipeelee and the victim were intoxicated. Witnesses saw Mr. Ipeelee kicking the victim in the face at least ten times, and the assault continued after the victim lost consciousness. The victim was hospitalized for his injuries. At the time of the offence, Mr. Ipeelee was on probation. He received a sentence of five months' imprisonment.

[6] In November 1994, Mr. Ipeelee pleaded guilty to aggravated assault. The incident involved another altercation outside the same bar in Iqaluit. Once more, both Mr. Ipeelee and the victim were intoxicated. During the fight, Mr. Ipeelee hit and kicked the victim. After the victim lost consciousness, Mr. Ipeelee continued to hit him and stomp on his face. The victim suffered a broken jaw and had to be sent to Montréal for treatment. Mr. Ipeelee was once again on probation at the time of the offence. He was sentenced to 14 months' imprisonment.

[7] Mr. Ipeelee received an early release from that sentence in the fall of 1995. Approximately three weeks later, while still technically serving his sentence, he committed a sexual assault. The female victim had been drinking in her apartment in Iqaluit with Mr. Ipeelee and others, and was passed out from intoxication. Witnesses observed Mr. Ipeelee and another man carrying the victim into her room. Mr. Ipeelee was later seen having sex with the unconscious woman on her bed. Mr. Ipeelee was

sentenced to two years' imprisonment. He remained in custody until his warrant expiry date in February 1999, as Corrections Canada officials deemed him to be a high risk to reoffend.

[8] After serving his sentence, Mr. Ipeelee moved to Yellowknife. He began drinking within one half-hour of his arrival and was arrested for public intoxication that evening, and again 24 hours later. In the six months leading up to his next conviction, he was arrested at least nine more times for public intoxication.

[9] On August 21, 1999 Mr. Ipeelee committed another sexual assault, this one causing bodily harm, which led to his designation as a long-term offender. Mr. Ipeelee, while intoxicated, entered an abandoned van that homeless persons frequented. Inside, a 50-year-old woman was sleeping. She awoke to find Mr. Ipeelee removing her pants. She struggled and Mr. Ipeelee began punching her in the face. When she called out for help, he told her to shut up or he would kill her. He then sexually assaulted her. The victim was finally able to escape when Mr. Ipeelee fell asleep. He was arrested and the victim was taken to the hospital to be treated for her injuries.

[10] At the sentencing hearing for this offence, Richard J. of the Northwest Territories Supreme Court noted that Mr. Ipeelee's criminal record "shows a consistent pattern of Mr. Ipeelee administering gratuitous violence against vulnerable, helpless people while he is in a state of intoxication" (*R. v. Ipeelee*, 2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL), at para. 34). The expert evidence produced at the

sentencing hearing indicated that Mr. Ipeelee did not suffer from any major mental illness and had average to above average intelligence. However, he was diagnosed as having both an antisocial personality disorder and a severe alcohol abuse disorder. The expert evidence also indicated that Mr. Ipeelee presented a high-moderate to high risk for violent reoffence, and a high-moderate risk for sexual reoffence. After evaluating all of the evidence, Richard J. concluded that there was a substantial risk that Mr. Ipeelee would reoffend and designated him a long-term offender under s. 753.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. Mr. Ipeelee was sentenced to six years' imprisonment for the sexual assault, to be followed by a ten-year LTSO.

B. *The Current Offence*

[11] Mr. Ipeelee was detained until his warrant expiry date for the 1999 sexual assault causing bodily harm. His LTSO came into effect on March 14, 2007 when he was released from Kingston Penitentiary to the Portsmouth Community Correctional Centre in Kingston. One of the conditions of Mr. Ipeelee's LTSO is that he abstain from using alcohol.

[12] Mr. Ipeelee's LTSO was suspended on four occasions: from June 13 to July 5, 2007 for deteriorating performance and behaviour, and attitude problems; from July 23 to September 14, 2007 for sleeping in the living room and the kitchen, contrary to house rules; from September 24 to October 24, 2007 for being agitated and noncompliant, and for refusing urinalysis; and from October 25, 2007 to May 20, 2008 as a result of a fraud charge being laid against him (the charge was subsequently

withdrawn). Mr. Ipeelee served those periods of suspension at the Kingston Penitentiary.

[13] On August 20, 2008, the police found Mr. Ipeelee riding his bicycle erratically in downtown Kingston. He was obviously intoxicated and had two bottles of alcohol in his possession. He was charged with breaching a condition of his LTSO, contrary to s. 753.3(1) of the *Criminal Code*. Mr. Ipeelee pleaded guilty to that offence on November 14, 2008.

C. *Judicial History*

1. Ontario Court of Justice, 2009 CarswellOnt 7864

[14] On February 24, 2009, Megginson J. of the Ontario Court of Justice sentenced Mr. Ipeelee to three years' imprisonment, less six months of pre-sentence custody at a 1:1 credit rate. He emphasized the serious nature of the offence, stating:

> On its facts, this was a serious and not at all trivial breach of a very fundamental condition of the offender's [LTSO]. It is a very central and essential condition, because alcohol abuse was involved, not only in the "predicate" offence, but also in most of the offences on the offender's criminal record. On his history, Mr. Ipeelee becomes violent when he abuses alcohol, and he was assessed as posing a significant risk of re-offending sexually. Defence counsel argued that the facts of the present breach disclose no movement toward committing another sexual offence, but I think that is beside the point. [para. 10]

[15] Megginson J. held that, when sentencing an offender for breach of an LTSO, the paramount consideration is the protection of the public and rehabilitation plays only a small role. With that in mind, he addressed the requirement imposed by s. 718.2(*e*) of the *Criminal Code* that he consider Mr. Ipeelee's unique circumstances as an Aboriginal offender. He began by noting that Mr. Ipeelee's Aboriginal status had already been considered during sentencing for the 1999 offence giving rise to the LTSO. He went on to conclude that, when protection of the public is the paramount concern, an offender's Aboriginal status is of "diminished importance" (para. 15).

2. Ontario Court of Appeal, 2009 ONCA 892, 99 O.R. (3d) 419

[16] Mr. Ipeelee appealed his sentence on the grounds that it was demonstrably unfit, and that the sentencing judge did not give adequate consideration to his circumstances as an Aboriginal offender. The Court of Appeal dismissed the appeal.

[17] Sharpe J.A., writing for the court, was not convinced that the sentence was demonstrably unfit. He agreed with the sentencing judge's characterization of the offence as a serious breach of a vital condition of the LTSO. Sharpe J.A. found that, despite the sentencing judge's comments, Mr. Ipeelee's Aboriginal status had not factored into the sentencing decision. He did not, however, think this was an error (para. 13):

> It is not at all clear to me, however, that in the circumstances of this case, consideration of his aboriginal status should lead to a reduction in his sentence for breach of the long-term offender condition. The appellant's commission of violent offences and the risk he poses for re-offending when under the influence of alcohol make the principles of denunciation, deterrence and protection of the public paramount. This is one of those cases where "the appropriate sentence will ... not differ as between aboriginal and non-aboriginal offenders": *R. v. Carrière* … (2002), 164 C.C.C. (3d) 569 ([Ont.] C.A.), at para. 17. As the appellant has been declared a long-term offender, "consideration of restorative justice and other features of aboriginal offender sentencing ... play little or no role": *R. v. W. (H.P.)* (2003), A.J. No. 479, 327 A.R. 170 (C.A.), at para. 50.

[18] Sharpe J.A. did concede that Mr. Ipeelee's Aboriginal background and the disadvantages he had suffered provided some insight into his repeated involvement with the criminal justice system. He concluded, however, that these considerations should not affect the sentence. He ended his reasons with a plea to correctional authorities to make every effort to provide Mr. Ipeelee with appropriate Aboriginal-oriented assistance.

III. Frank Ralph Ladue

A. *Background and Criminal History*

[19] Mr. Frank Ralph Ladue, now 49 years old, is a member of the Ross River Dena Council Band, a small community of approximately 500 people located 400 kilometres north-east of Whitehorse in the Yukon Territory. Mr. Ladue's parents had severe alcohol abuse problems, so he was raised by his grandparents. His mother and father both died when Mr. Ladue was still very young, and records indicate that his

mother may have been murdered. When Mr. Ladue was five years old, he was removed from his community and sent to residential school, where he alleges he suffered serious physical, sexual, emotional and spiritual abuse.

[20] When Mr. Ladue was nine years old, he returned to Ross River to resume living with his grandparents. The effects of his residential school experience were readily apparent. He could no longer speak his traditional language, having been forbidden to do so in residential school. Unable to communicate his painful experiences to his family, he began drinking and acting out. Before long, he was living with foster families and spending time in juvenile detention. Mr. Ladue continued to drink heavily throughout his life (with the exception of a six-year period of sobriety in the 1990s which coincided with a period free from criminal convictions). Mr. Ladue also began using heroin, cocaine and morphine while in a federal penitentiary.

[21] Mr. Ladue's life experiences may seem foreign to most Canadians, but they are all too common in Ross River. The community suffered a number of abuses in the 1940s when the United States Army was building a pipeline through the region. There were reports of community members being assaulted or raped by members of the army. The community was further traumatized through the residential school experience. The effects of that collective experience continue to be evident in the high rates of alcohol abuse and violence in the community.

[22] The first offence on Mr. Ladue's criminal record occurred in 1978 when he was 16 years old. His record lists over 40 convictions since that time, approximately ten of which were as a young offender. Some of the offences are property-related, including taking a vehicle without consent, mischief, breaking and entering, and theft. Mr. Ladue also has a series of alcohol-related offences and convictions for failure to comply with various court orders. His violent offences include robbery convictions in 1978 and 1980, and common assault convictions in 1979 and 1982. Mr. Ladue has also been convicted of a number of sexual assaults. These sexual assaults will be described in some detail, as they ultimately led to his designation as a long-term offender.

[23] In 1987, Mr. Ladue entered a woman's bedroom following a party. He sexually assaulted the victim while she was either sleeping or passed out from intoxication. In 1997, Mr. Ladue sexually assaulted another woman who was passed out from intoxication. When she awoke, the bottom half of her clothing was removed and Mr. Ladue was sexually assaulting her. Another incident took place in 1998, although it did not lead to a conviction for sexual assault. Mr. Ladue entered the home of a woman who was sleeping and placed a sleeping bag over her head and shoulders. He was interrupted by the woman's daughter and he fled the residence. Mr. Ladue's sentences for these convictions ranged from four months' imprisonment (for the 1998 offence) to 30 months' imprisonment.

[24] Mr. Ladue committed the offence giving rise to his LTSO on October 6, 2002. On that date, he entered a dwelling house without permission from the occupants. The 22-year-old victim had passed out from alcohol consumption and was lying in the living room. She awoke to find Mr. Ladue touching her breasts over her clothing and attempting to unbutton her pants. She was unable to resist due to her state of intoxication. Fortunately, other residents of the house were awakened by what was going on and Mr. Ladue fled from the home. Mr. Ladue was convicted of breaking and entering and sexual assault.

[25] At the sentencing hearing (2003 YKTC 100 (CanLII)), Faulkner J. of the Yukon Territorial Court noted the similarity surrounding the circumstances of each sexual assault. The psychological assessment prepared for the court indicated that Mr. Ladue was incapable of refraining from the use of alcohol and was unable to control his sexual impulses. He was also diagnosed as a sexual sadist and as having an anti-social personality disorder. Faulkner J. nevertheless concluded that there was some prospect for eventual management in the community, given Mr. Ladue's lengthy period of successful sobriety in the 1990s, which coincided with a period free from criminal activity. Defence counsel conceded that the requirements of s. 753.1 of the *Criminal Code* were met, and Mr. Ladue was designated as a long-term offender. Faulkner J. sentenced Mr. Ladue to three years' imprisonment for breaking and entering and committing sexual assault, after taking into account the 14 months he had spent in custody prior to sentencing. He also imposed a seven-year LTSO.

B. *The Current Offence*

[26] Mr. Ladue's LTSO began on December 1, 2006 when he was released from prison for the 2002 offence giving rise to the LTSO. The LTSO has been suspended on numerous occasions. In addition, Mr. Ladue's criminal record includes two previous convictions for breaching a condition of the LTSO. On June 5, 2007, he was convicted of two counts of breaching the condition in the LTSO that he abstain from intoxicants. He received concurrent six-month sentences of imprisonment with credit for 4.5 months of pre-sentence custody. On June 19, 2008 he was convicted of breaching the same condition and was sentenced to one day of imprisonment after being credited for one year of pre-sentence custody.

[27] On August 12, 2009, Mr. Ladue was released from prison following a suspension of his LTSO. He was supposed to be released to Linkage House in Kamloops, British Columbia where he anticipated receiving considerable culturally relevant support from an Aboriginal Elder. Instead, Mr. Ladue was arrested at the prison gate on an outstanding DNA warrant. The warrant had been ordered months earlier but, as a result of an administrative error by Crown officials, it was not executed during Mr. Ladue's period of detention. Furthermore, the warrant may have been superfluous as it appears Mr. Ladue had already provided his DNA under a previous warrant. Mr. Ladue was detained until the warrant was executed and, as a result of that delay, he lost his placement at Linkage House. Instead, he was released to Belkin House in downtown Vancouver, despite his concerns over the propriety of

the placement due to the accessibility of drugs both in the residence and in the neighbourhood. Once at Belkin House, Mr. Ladue began associating with another offender who was a known drug user. Mr. Ladue was asked to provide a urine sample on August 19. On August 24, he advised the staff that the urinalysis would come back positive for cocaine, which it did. Mr. Ladue provided a second urine sample on August 27, which also returned positive for cocaine. He was charged with breaching a condition of his LTSO, contrary to s. 753.3(1) of the *Criminal Code* and pleaded guilty to that offence on February 10, 2010.

C. *Judicial History*

1. Provincial Court of British Columbia, 2010 BCPC 410 (CanLII)

[28] At the sentencing hearing, the Crown requested a sentence in the range of 18 months to two years. Bagnall Prov. Ct. J. concluded that this range was inadequate in the circumstances. She emphasized the serious nature of the offence:

> Once released from custody, even under close supervision, Mr. Ladue's pattern is to relapse very quickly back into drug or alcohol use. He cannot be managed, nor can he manage himself in the community at the present time. The harm that is likely for another member of the community, or members of the community, if Mr. Ladue consumes intoxicants is very serious. This can be seen from the history that I have detailed. [para. 31]

Bagnall Prov. Ct. J. therefore held that isolation was the most important sentencing objective in the circumstances and imposed a three-year term of imprisonment, less

five months of pre-sentence custody at a 1.5:1 credit rate. Bagnall Prov. Ct. J. referred to the tragic aspects of Mr. Ladue's history, but apparently concluded that they should not impact on his sentence.

2. Court of Appeal for British Columbia, 2011 BCCA 101, 302 B.C.A.C. 93

[29] Mr. Ladue appealed his sentence on the grounds that the sentencing judge failed to adequately consider his circumstances as an Aboriginal offender, and that the ultimate sentence was unfit. The majority of the Court of Appeal allowed his appeal and reduced the sentence to one year's imprisonment. Chiasson J.A., dissenting, would have allowed the appeal and imposed a two-year sentence.

[30] Bennett J.A., writing for the majority, began by reviewing the principles and objectives of sentencing set out in the *Criminal Code*. She discussed, in detail, s. 718.2(*e*) of the *Code* and this Court's decision in *Gladue*. Bennett J.A. concluded that, although the sentencing judge was alive to Mr. Ladue's unique circumstances as an Aboriginal offender, she did not give any tangible consideration to those circumstances in determining the appropriate sentence. As a result, the sentencing judge had overemphasized the objective of isolation of the offender at the expense of rehabilitation and failed to meet the requirements of s. 718.2(*e*): "If effect is to be given to Parliament's direction in s. 718.2(*e*), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed" (para. 64).

[31] Bennett J.A. concluded that a three-year sentence was not proportionate to the gravity of the offence and the degree of responsibility of the offender, especially considering Mr. Ladue's background and how he came to be at Belkin House. At para. 63, she states:

> Mr. Ladue desires to succeed, as exhibited by his request not to be sent to Belkin House. However, he is addicted to drugs and alcohol, which can directly be related to how he was treated as an Aboriginal person. He has not reoffended in a manner which threatens the safety of the public. He will ultimately be released into the community without supervision. Unless he can manage his alcohol and drug addiction in the community he will very likely be a threat to the public. Repeated efforts at abstinence are not unusual for those dealing with addiction. Indeed, Mr. Ladue demonstrated that he is capable of abstinence as shown by his conduct a number of years ago.

Bennett J.A. therefore reduced the sentence to one year's imprisonment.

[32] Chiasson J.A. would have allowed the appeal and reduced the sentence to two years' imprisonment. He did not agree with the majority that the sentencing judge had erred in her consideration of Mr. Ladue's Aboriginal circumstances. However, in Chiasson J.A.'s view, the sentencing judge had been wrong in failing to consider that the present breach did not place Mr. Ladue on the path to reoffending. In Chiasson J.A.'s view, a sentence of two years was a sufficient step-up from Mr. Ladue's previous sentence to reflect the severity of the offence. Imposing a sentence of three years, on the other hand, would risk placing Mr. Ladue beyond hope of redemption.

IV. Issues

[33] These two appeals raise issues concerning the application of the principles and objectives of sentencing set out in Part XXIII of the *Criminal Code*. Specifically, the Court must determine the principles governing the sentencing of Aboriginal offenders, including the proper interpretation and application of this Court's judgment in *Gladue*, and the application of those principles to the breach of an LTSO. Finally, given those principles, the Court must determine whether either of the decisions under appeal contain an error in principle or impose an unfit sentence warranting appellate intervention.

V. Analysis

A. *The Principles of Sentencing*

[34] The central issue in these appeals is how to determine a fit sentence for a breach of an LTSO in the case of an Aboriginal offender. In particular, the Court must address whether, and how, the *Gladue* principles apply to these sentencing decisions. But first, it is important to review the principles that guide sentencing under Canadian law generally.

[35] In 1996, Parliament amended the *Criminal Code* to specifically codify the objectives and principles of sentencing (*An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, S.C. 1995 c. 22 (Bill C-41)).

According to s. 718, the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society". This is accomplished by imposing "just sanctions" that reflect one or more of the traditional sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[36] The *Criminal Code* goes on to list a number of principles to guide sentencing judges. The fundamental principle of sentencing is that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. As this Court has previously indicated, this principle was not borne out of the 1996 amendments to the *Code* but, instead, has long been a central tenet of the sentencing process (see e.g. *R. v. Wilmott* (1966), 58 D.L.R. (2d) 33 (Ont. C.A.), and, more recently, *R. v. Solowan*, 2008 SCC 62, [2008] 3 S.C.R. 309, at para. 12, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 40-42). It also has a constitutional dimension, in that s. 12 of the *Canadian Charter of Rights and Freedoms* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*.

[37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:

> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[38] Despite the constraints imposed by the principle of proportionality, trial judges enjoy a broad discretion in the sentencing process. The determination of a fit sentence is, subject to any specific statutory rules that have survived *Charter* scrutiny,

a highly individualized process. Sentencing judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender. Appellate courts have recognized the scope of this discretion and granted considerable deference to a judge's choice of sentence. As Lamer C.J. stated in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. [Emphasis in original.]

[39] There are limits, however, to the deference that will be afforded to a trial judge. Appellate courts have a duty to ensure that courts properly apply the legal principles governing sentencing. In every case, an appellate court must be satisfied that the sentence under review is proportionate to both the gravity of *the offence* and the degree of responsibility of *the offender*. I will now turn to an assessment of these factors as they pertain to the present appeals.

B. *The Offence — Sentencing for Breach of a Long-Term Supervision Order*

[40] These two appeals involve persons designated as long-term offenders who are charged with breaching a condition of their LTSO. This is the first time the Court has had the opportunity to discuss this particular offence. In order to weigh the

various principles and objectives of sentencing and reach a conclusion regarding a fit sentence, it is important to understand the long-term offender regime.

[41] Part XXIV of the *Criminal Code* sets out the process for designating offenders as either dangerous or long-term offenders. Special provisions to deal with the unique circumstances of habitual repeat offenders have existed in Canada since the first half of the twentieth century. In 1938, the Archambault Commission recommended that legislation be enacted to provide for the indeterminate detention of hardened criminals (*Report of the Royal Commission to Investigate the Penal System in Canada*). The purpose of this detention, according to the Commission, was to be "neither punitive nor reformative but primarily segregation from society" (cited in *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 321-22).

[42] In 1947, Canada acted on the recommendations of the Archambault Commission and introduced its first piece of legislation authorizing the indeterminate detention of "habitual criminal[s]" (*An Act to amend the Criminal Code*, S.C. 1947, c. 55, s. 18). Amendments made in 1977 narrowed the scope of the provision to specifically target "dangerous offender[s]" — those convicted of serious personal injury offences (*Criminal Law Amendment Act*, 1977, S.C. 1977, C. 53, s. 14). La Forest J. described the rationale of the legislation in *Lyons*, at p. 329:

> It is thus important to recognize the precise nature of the penological objectives embodied in Part XXI [now Part XXIV]. It is clear that the indeterminate detention is intended to serve both punitive and preventive purposes. Both are legitimate aims of the criminal sanction. Indeed, when society incarcerates a robber for, say, ten years, it is clear that its goal is

> both to punish the person and prevent the recurrence of such conduct during that period. Preventive detention in the context of Part XXI, however, simply represents a judgment that the relative importance of the objectives of rehabilitation, deterrence and retribution are greatly attenuated in the circumstances of the individual case, and that of prevention, correspondingly increased. Part XXI merely enables the court to accommodate its sentence to the common sense reality that the present condition of the offender is such that he or she is not inhibited by normal standards of behavioural restraint so that future violent acts can quite confidently be expected of that person. In such circumstances it would be folly not to tailor the sentence accordingly. [Emphasis in original.]

[43] The rationale for the dangerous offender designation can be contrasted with that of the long-term offender provisions, which were not introduced to the *Criminal Code* until 1997. That year, extensive amendments were made to Part XXIV of the *Criminal Code* by Bill C-55 (*An Act to amend the Criminal Code (high risk offenders), the Corrections and Conditional Release Act, the Criminal Records Act, the Prisons and Reformatories Act and the Department of the Solicitor General Act*, S.C. 1997, c. 17). These amendments, following the recommendations of the Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders (the "Task Force"), introduced the long-term offender designation and the availability of LTSOs. The Task Force noted that a lacuna existed in the law whereby serious offenders were denied the support of extended community supervision, except through the parole process. LTSOs were designed to fill this gap and supplement the all-or-nothing alternatives of definite or indefinite detention (Report of the Federal/Provincial/Territorial Task Force on High-Risk Violent Offenders, *Strategies for Managing High-Risk Offenders* (1995)).

[44] Section 753.1(1) of the *Criminal Code* now directs when a court may designate an offender as a long-term offender. The section states:

> **753.1** (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> (*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (*b*) there is a substantial risk that the offender will reoffend; and
>
> (*c*) there is a reasonable possibility of eventual control of the risk in the community.

If the court finds an offender to be a long-term offender, it must impose a sentence of two years or more for the predicate offence and order that the offender be subject to long-term supervision for a period not exceeding ten years (*Criminal Code*, s. 753.1(3)).

[45] LTSOs are administered in accordance with the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"). LTSOs must include the conditions set out in r. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620. In addition, the National Parole Board (NPB) may include any other condition "that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender" (*CCRA*, s. 134.1(2)). A member of the NPB may suspend an LTSO when an offender breaches any of the LTSO conditions, or where the NPB is satisfied that suspension is necessary and reasonable to prevent such a breach or to protect society (*CCRA*, s. 135.1(1)). Offenders serve the duration of the period of suspension in a federal

penitentiary. Failure or refusal to comply with an LTSO is also an indictable offence under s. 753.3(1) of the *Criminal Code*, punishable by up to ten years' imprisonment.

[46] According to the *CCRA*, "[t]he purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens" (*CCRA*, s. 100). The *CCRA* also sets out a number of principles that shall guide the NPB in achieving the purpose of conditional release. These include, *inter alia*, "that the protection of society be the paramount consideration in the determination of any case" and "that parole boards make the least restrictive determination consistent with the protection of society" (*CCRA*, ss. 101(*a*) and 101(*d*)). These principles are intended to guide the NPB in its decision making, whereas courts must adhere to the principles set out in the *Criminal Code* when sentencing for breach of an LTSO.

[47] The legislative purpose of an LTSO, a form of conditional release governed by the *CCRA*, is therefore to contribute to the maintenance of a just, peaceful and safe society by facilitating the rehabilitation and reintegration of long-term offenders. This direction is consistent with this Court's discussion at para. 42 of *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, on the distinction between the dangerous offender designation (which does not include a period of conditional release) and the long-term offender designation.

> Although they both contribute to assuring public safety, the dangerous offender and long-term offender designations have different objectives. Unlike a *dangerous* offender (s. 753 *Cr. C.*), who will continue to be deprived of liberty, since such offenders are kept in prison to separate them from society (s. 718.1), a *long-term* offender serves a sentence of imprisonment of two years or more and is then subject to an order of supervision in the community for a period not exceeding 10 years for the purpose of assisting in his or her rehabilitation (s. 753.1(3) *Cr. C.*). This measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with [TRANSLATION] "the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty" (Dadour, at p. 228). [Emphasis in original.]

[48] Reading the *Criminal Code*, the *CCRA* and the applicable jurisprudence together, we can therefore identify two specific objectives of long-term supervision as a form of conditional release: (1) protecting the public from the risk of re offence, and (2) rehabilitating the offender and reintegrating him or her into the community. The latter objective may properly be described as the ultimate purpose of an LTSO, as indicated by s. 100 of the *CCRA*, though it is inextricably entwined with the former. Unfortunately, provincial and appellate courts have tended to emphasize the protection of the public at the expense of the rehabilitation of offenders. This, in turn, has affected their determinations of what is a fit sentence for breaching a condition of an LTSO.

[49] *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, is the leading appellate court decision to consider the matter. In that case, the Alberta Court of Appeal canvassed the purpose of the long-term offender regime and how it bears on

the sentencing process for breach of an LTSO. Ritter J.A. summarized the view of the court, at para. 46, stating:

> Because the protection of society is the paramount goal when sentencing an offender who has breached a condition of his long-term supervision order, sentencing principles respecting specific and general deterrence together with separation of the offender from the community are called into play. Rehabilitation has a limited role to play as the status of long-term offender is such that rehabilitation has already been determined to be extremely difficult or impossible to achieve.

Subsequent provincial and appellate court cases have generally adhered to this approach. For example, in *R. v. Nelson*, [2007] O.J. No. 5704 (QL), Masse J. of the Ontario Court of Justice held, at paras. 14 and 21, that "[t]he main consideration in sentencing these offenders is the protection of the public" and that "significant sentences must be imposed even for slight breaches of a long-term supervision order".

[50] The foregoing characterization of the long-term offender regime is incorrect. The purpose of an LTSO is two-fold: to protect the public *and* to rehabilitate offenders and reintegrate them into the community. In fact, s. 100 of the *CCRA* singles out rehabilitation and reintegration as the purpose of community supervision including LTSOs. As this Court indicated in *L.M.*, rehabilitation is the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime. To suggest, therefore, that rehabilitation has been determined to be impossible to achieve in the long-term offender context is simply wrong. Given this context, it would be contrary to reason to conclude that rehabilitation is not an

appropriate sentencing objective and should therefore play "little or no role" (as stated in *W. (H.P.)*), in the sentencing process.

[51] This is not to say that rehabilitation will always be the foremost consideration when sentencing for breach of an LTSO. The duty of a sentencing judge is to apply all of the principles mandated by ss. 718.1 and 718.2 of the *Criminal Code* in order to devise a sentence that furthers the overall objectives of sentencing. The foregoing simply demonstrates that there is nothing in the provisions of the *Criminal Code* or the *CCRA* to suggest that any of those principles or objectives will not apply to the breach of an LTSO. As with any sentencing decision, the relative weight to be accorded to each sentencing principle or objective will vary depending on the circumstances of the particular offence. In all instances, the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender.

[52] It would be imprudent to attempt to determine in the abstract the gravity of the offence of breaching a condition of an LTSO. The severity of a given breach will ultimately depend on all of the circumstances, including the nature of the condition breached, how that condition is tied to managing the particular offender's risk of re-offence, and the circumstances of the breach. However, a few comments may be instructive.

[53] Breach of an LTSO is an indictable offence punishable by up to ten years' imprisonment. This can be contrasted with breach of probation which is a

hybrid offence with a maximum sentence of either 18 months or two years' imprisonment. In each of the present appeals, the Crown places significant emphasis on this distinction, suggesting that the high maximum penalty indicates that breach of an LTSO is a particularly serious offence warranting a significant sentence. My colleague, Rothstein J., reiterates this point at para. 123 of his reasons, concluding that the "necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time".

[54] The lengthy maximum penalty certainly indicates that Parliament views the breach of an LTSO differently (and more seriously) than the breach of a probation order. However, it would be too much to suggest that the mere existence of a high statutory maximum penalty dictates that a significant period of imprisonment should be imposed for any breach of an LTSO. Breaches can occur in an infinite variety of circumstances. Parliament did not see fit to impose a mandatory minimum sentence. Where no minimum sentence is mandated by the *Criminal Code*, the entire range of sentencing options is open to a sentencing judge, including non-carceral sentences where appropriate. In its recommendations, the Task Force specifically stated that a key factor to the success of a long-term offender regime is "a speedy and flexible mechanism for enforcing the orders which does not result in lengthy re-incarceration in the absence of the commission of a new crime" (p. 19 (emphasis added)).

[55] It is the sentencing judge's duty to determine, within this open range of sentencing options, which sentence will be proportionate to both the gravity of the offence and the degree of responsibility of the offender. The severity of a particular breach of an LTSO will depend, in large part, on the circumstances of the breach, the nature of the condition breached, and the role that condition plays in managing the offender's risk of reoffence in the community. This requires a contextual analysis. As Smith J.A. states in *R. v. Deacon*, 2004 BCCA 78, 193 B.C.A.C. 228, at para. 51, "the gravity of an offence under s. 753.3 must be measured with reference not only to the conduct that gave rise to the offence, but also with regard to what it portends in light of the offender's entire history of criminal conduct". Breach of an LTSO is not subject to a distinct sentencing regime or system. In any given case, the best guides for determining a fit sentence are the well-established principles and objectives of sentencing set out in the *Criminal Code*.

C. *The Offender — Sentencing Aboriginal Offenders*

[56] Section 718.2(*e*) of the *Criminal Code* directs that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". This provision was introduced into the *Code* as part of the 1996 Bill C-41 amendments to codify the purpose and principles of sentencing. According to the then Minister of Justice, Allan Rock, "the reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations

of Canada" (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994, at p. 15).

[57] Aboriginal persons were sadly overrepresented indeed. Government figures from 1988 indicated that Aboriginal persons accounted for 10 percent of federal prison inmates, while making up only 2 percent of the national population. The figures were even more stark in the Prairie provinces, where Aboriginal persons accounted for 32 percent of prison inmates compared to 5 percent of the population. The situation was generally worse in provincial institutions. For example, Aboriginal persons accounted for fully 60 percent of the inmates detained in provincial jails in Saskatchewan (M. Jackson, "Locking Up Natives in Canada" (1988-1989), 23 *U.B.C. L. Rev.* 215, at pp. 215-16). There was also evidence to indicate that this overrepresentation was on the rise. At Stony Mountain Penitentiary, the only federal prison in Manitoba, the Aboriginal inmate population had been climbing steadily from 22 percent in 1965 to 33 percent in 1984, and up to 46 percent just five years later in 1989 (Commissioners A. C. Hamilton and C. M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice System and Aboriginal People*, at p. 394). The foregoing statistics led the Royal Commission on Aboriginal Peoples ("RCAP") to conclude, at p. 309 of its Report, *Bridging the Cultural Divide*: *A Report on Aboriginal People and Criminal Justice in Canada* (1996):

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada — First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principle reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

[58] The overrepresentation of Aboriginal people in the Canadian criminal justice system was the impetus for including the specific reference to Aboriginal people in s. 718.2(*e*). It was not at all clear, however, what exactly the provision required or how it would affect the sentencing of Aboriginal offenders. In 1999, this Court had the opportunity to address these questions in *Gladue*. Cory and Iacobucci JJ., writing for the unanimous Court, reviewed the statistics and concluded, at para. 64:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(*e*), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

[59] The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have

recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(*e*) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[60] Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for

Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*.

[61] It would have been naive to suggest that sentencing Aboriginal persons differently, without addressing the root causes of criminality, would eliminate their overrepresentation in the criminal justice system entirely. In *Gladue*, Cory and Iacobucci JJ. were mindful of this fact, yet retained a degree of optimism, stating, at para. 65:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders. There are many aspects of this sad situation which cannot be addressed in these reasons. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing

> judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

[62] This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened. In the immediate aftermath of Bill C-41, from 1996 to 2001, Aboriginal admissions to custody increased by 3 percent while non-Aboriginal admissions declined by 22 percent (J. V. Roberts and R. Melchers, "The Incarceration of Aboriginal Offenders: Trends from 1978 to 2001" (2003), 45 *Can. J. Crim. & Crim.* Just. 211, at p. 226). From 2001 to 2006, there was an overall decline in prison admissions of 9 percent. During that same time period, Aboriginal admissions to custody increased by 4 percent (J. Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2008-2009), 54 *Crim. L.Q.* 447, at p. 452). As a result, the overrepresentation of Aboriginal people in the criminal justice system is worse than ever. Whereas Aboriginal persons made up 12 percent of all federal inmates in 1999 when *Gladue* was decided, they accounted for 17 percent of federal admissions in 2005 (J. Rudin, "Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going", in J. Cameron and J. Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (2008), 687, at p. 701). As Professor Rudin asks: "If Aboriginal overrepresentation was a crisis in 1999, what term can be applied to the

situation today?" ("Addressing Aboriginal Overrepresentation Post-*Gladue*", at p. 452).

[63] Over a decade has passed since this Court issued its judgment in *Gladue*. As the statistics indicate, section 718.2(*e*) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system. Granted, the *Gladue* principles were never expected to provide a panacea. There is some indication, however, from both the academic commentary and the jurisprudence, that the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(*e*) and this Court's decision in *Gladue*. The following is an attempt to resolve these misunderstandings, clarify certain ambiguities, and provide additional guidance so that courts can properly implement this sentencing provision.

1. Making Sense of Aboriginal Sentencing

[64] Section 718.2(*e*) of the *Criminal Code* and this Court's decision in *Gladue* were not universally well-received. Three interrelated criticisms have been advanced: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle

of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2(*e*) of the *Criminal Code*.

[65] Professors Stenning and Roberts describe the sentencing provision as an "empty promise" to Aboriginal peoples because it is unlikely to have any significant impact on levels of overrepresentation (P. Stenning and J. V. Roberts, "Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders" (2001), 64 *Sask. L. Rev.* 137, at p. 167). As we have seen, the direction to pay particular attention to the circumstances of Aboriginal offenders was included in light of evidence of their overrepresentation in Canada's prisons and jails. This overrepresentation led the Aboriginal Justice Inquiry of Manitoba to ask in its Report: "Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves immediately: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system" (at p. 85); see also RCAP, at p. 33). The available evidence indicates that both phenomena are contributing to the problem (RCAP). Contrary to Professors Stenning and Roberts, addressing these matters does not lie beyond the purview of the sentencing judge.

[66] First, sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must

change so as to meet the needs of Aboriginal offenders and their communities. As Professors Rudin and Roach ask, "[if an innovative sentence] can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?" (J. Rudin and K. Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002), 65 *Sask. L. Rev.* 3, at p. 20).

[67] Second, judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing. Professor Quigley aptly describes how this occurs:

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.
>
> (T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in R. Gosse, J. Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, at pp. 275-76)

Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.

[68] Section 718.2(*e*) is therefore properly seen as a "direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process" (*Gladue*, at para. 64 (emphasis added)). Applying the provision does not amount to "hijacking the sentencing process in the pursuit of other goals" (Stenning and Roberts, at p. 160). The purpose of sentencing is to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality. Just sanctions are those that do not operate in a discriminatory manner. Parliament, in enacting s. 718.2(*e*), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.

[69] Certainly sentencing will not be the sole — or even the primary — means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge's fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. Nor does it turn s. 718.2(*e*) into an empty promise. The sentencing judge has an admittedly limited, yet important role to play. As the Aboriginal Justice Inquiry of Manitoba put it, at pp. 110-11:

> To change this situation will require a real commitment to ending social inequality in Canadian society, something to which no government in Canada has committed itself to date. This will be a far-reaching

> endeavour and involve much more than the justice system as it is understood currently ….
>
> Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.

Cory and Iacobucci JJ. were equally cognizant of the limits of the sentencing judge's power to effect change. Paragraph 65 of *Gladue* bears repeating here:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. …. What can and must be addressed, though, is the limited role that sentencing judges will play in remedying injustice against aboriginal peoples in Canada. Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

[70] The sentencing process is therefore an appropriate forum for addressing Aboriginal overrepresentation in Canada's prisons. Despite being theoretically sound, critics still insist that, in practice, the direction to pay particular attention to the circumstances of Aboriginal offenders invites sentencing judges to impose more lenient sentences simply because an offender is Aboriginal. In short, s. 718.2(*e*) is seen as a race-based discount on sentencing, devoid of any legitimate tie to traditional principles of sentencing. A particularly stark example of this view was expressed by Bloc Québecois M.P. Pierrette Venne at the second reading for Bill C-41 when she

asked: “Why should an Aboriginal convicted of murder, rape, assault or of uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic justice, a cultural justice? Where would it stop? Where does this horror come from?” (*House of Commons Debates*, vol. 133, 1st Sess., 35th Parl., September 20, 1994, at p. 5876).

[71] In *Gladue*, this Court rejected Ms. Gladue’s argument that s. 718.2(*e*) was an affirmative action provision or, as the Crown described it, an invitation to engage in “reverse discrimination” (para. 86). Cory and Iacobucci JJ. were very clear in stating that “s. 718.2(*e*) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal” (*Gladue*, at para. 88 (emphasis added)). This point was reiterated in *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 30. There is nothing to suggest that subsequent decisions of provincial and appellate courts have departed from this principle. In fact, it is usually stated explicitly. For example, in *R. v. Vermette*, 2001 MBCA 64, 156 Man. R. (2d) 120, the Manitoba Court of Appeal stated, at para. 39:

> The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgement that to achieve real equity, sometimes different people must be treated differently.

[72] While the *purpose* of s. 718.2(*e*) may not be to provide "a remission of a warranted period of incarceration", critics argue that the *methodology* set out in *Gladue* will inevitably have this effect. As Professors Stenning and Roberts state: "[T]he practical effect of this alternate methodology is predictable: the sentencing of an Aboriginal offender is less likely to result in a term of custody and, if custody is imposed, it is likely to be shorter in some cases than it would have been had the offender been non-Aboriginal" (p. 162). These criticisms are unwarranted. The methodology set out by this Court in *Gladue* is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.

[73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in *Wells* where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (*Wells*, at para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal

offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of *R. v. Skani*, 2002 ABQB 1097, 331 A.R. 50, after describing the background factors that lead to Mr. Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment *per se*. As Cory and Iacobucci JJ. state in *Gladue*, at para. 69:

> In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

[74] The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the

effectiveness of the sentence itself. As Cory and Iacobucci JJ. point out, at para. 73 of *Gladue*: "What is important to recognize is that, for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities." As the RCAP indicates, at p. 309, the "crushing failure" of the Canadian criminal justice system *vis-à-vis* Aboriginal peoples is due to "the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice." The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.

[75] Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms

this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[76] A third criticism, intimately related to the last, is that the Court's direction to utilize a method of analysis when sentencing Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are otherwise similarly situated. This, in turn, violates the principle of sentence parity. This criticism is premised on the argument that the circumstances of Aboriginal offenders are not, in fact, unique. As Professors Stenning and Roberts put it (at p. 158):

> If the kinds of factors that place many Aboriginal people at a disadvantage *vis-à-vis* the criminal justice system also affect many members of other minority or similarly marginalized non-Aboriginal offender groups, how can it be fair to give such factors more particular attention in sentencing Aboriginal offenders than in sentencing offenders from those other groups who share a similar disadvantage?

[77] This critique ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP,

p. 309*)*. As Professor Carter puts it, "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's" (M. Carter, "Of Fairness and Faulkner" (2002), 65 *Sask. L. Rev.* 63, at p. 71). Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ. specifically state, at para. 69, in *Gladue*, that "background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender".

[78] The interaction between s. 718.2(*e*) and 718.2(*b*) — the parity principle — merits specific attention. Section 718.2(*b*) states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". Similarity, however, is sometimes an elusory concept. As J.-P. Brodeur describes ("On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts" (2002), 65 *Sask. L. Rev.* 45, at p. 49):

> "[H]igh unemployment" has a different meaning in the context of an Aboriginal reservation where there are simply no job opportunities and in an urban context where the White majority exclude Blacks from segments of the labour-market; "substance abuse" is not the same when it refers to young men smoking crack cocaine and to kids committing suicide by sniffing gasoline; "loneliness" is not experienced in a similar way in bush reservations and urban ghettoes.

[79] In practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the

same crime in the exact same circumstances. Section 718.2(*b*) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(*e*). As Professor Quigley cautions (at p. 286):

> Uniformity hides inequity, impedes innovation and locks the system into its mindset of jail. It also prevents us from re-evaluating the value of our aims of sentencing and their efficacy.
>
> It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.

2. Evaluating Aboriginal Sentencing Post-*Gladue*

[80] An examination of the post-*Gladue* jurisprudence applying s. 718.2(*e*) reveals several issues with the implementation of the provision. These errors have significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*.

[81] First, some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge. The decision of the Alberta Court of Appeal in *R. v. Poucette*, 1999 ABCA 305, 250 A.R. 55, provides one example. In that case, the court concluded, at para. 14:

> It is not clear how Poucette, a 19 year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, *Gladue* requires that their influences be traced to the particular offender. Failure to link the two is an error in principle.
>
> (See also *R. v. Gladue*, 1999 ABCA 279, 46 M.V.R. (3d) 183; *R. v. Andres*, 2002 SKCA 98, 223 Sask. R. 121.)

[82] This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*. As the Ontario Court of Appeal states in *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33:

> There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence....
>
> As expressed in *Gladue*, *Wells* and *Kakekagamick*, s. 718.2(e) requires the sentencing judge to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.

(See also *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245.)

[83] As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

> Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

Furthermore, the operation of s. 718.2(*e*) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[84] The second and perhaps most significant issue in the post-*Gladue* jurisprudence is the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences. As Professor Roach has

indicated, "appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments — paragraphs that discuss the relevance of *Gladue* in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders" (K. Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2008-2009), 54 *Crim. L.Q.* 470, at p. 472). The passage in *Gladue* that has received this unwarranted emphasis is the observation that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for Aboriginals and non-Aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (*Gladue*, at para. 79; see also *Wells*, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)).

[85] Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear, at para. 82, that sentencing judges have a *duty* to apply s. 718.2(*e*): "There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence." Similarly, in *Wells*, Iacobucci J. reiterated, at para. 50, that

> [t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In

> each case, the sentencing judge must look to the circumstances of the aboriginal offender.

This element of duty has not completely escaped the attention of Canadian appellate courts (see, e.g., *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192).

[86] In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(*e*) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 *Osgoode Hall L.J.* 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(*e*) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the

sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

[87] The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

VI. Application

A. *Manasie Ipeelee*

[88] Megginson J. sentenced Mr. Ipeelee to three years' imprisonment, less credit for pre-sentence custody. The Court of Appeal upheld that sentence. Both courts emphasized the serious nature of the breach, given the documented link between Mr. Ipeelee's use of alcohol and his propensity to engage in violence. As a result, both courts emphasized the objectives of denunciation, deterrence, and protection of the public.

[89] In my view, the courts below made several errors in principle warranting appellate intervention. First, the courts reached the erroneous conclusion that protection of the public is the paramount objective when sentencing for breach of an LTSO and that rehabilitation plays only a small role. As discussed, while protection of the public is important, the legislative purpose of an LTSO as a form of conditional release set out in s. 100 of the *CCRA* is to rehabilitate offenders and reintegrate them into society. The courts therefore erred in concluding that rehabilitation was not a relevant sentencing objective.

[90] As a result of this error, the courts below gave only attenuated consideration to Mr. Ipeelee's circumstances as an Aboriginal offender. Relying on *Carrière*, the Court of Appeal concluded that this was the kind of offence where the sentence will not differ as between Aboriginal and non-Aboriginal offenders, and relying on *W. (H.P.)*, held that features of Aboriginal sentencing play little or no role when sentencing long-term offenders. Given certain trends in the jurisprudence discussed above, it is easy to see how the court reached this conclusion. Nonetheless, they erred in doing so. These errors justify the Court's intervention.

[91] It is therefore necessary to consider what sentence is warranted in the circumstances. Mr. Ipeelee breached the alcohol abstention condition of his LTSO. His history indicates a strong correlation between alcohol use and violent offending. As a result, abstaining from alcohol is critical to managing his risk in the community. That being said, the conduct constituting the breach was becoming intoxicated, not

becoming intoxicated and engaging in violence. The Court must focus on the actual incident giving rise to the breach. A fit sentence should seek to manage the risk of reoffence he continues to pose to the community in a manner that addresses his alcohol abuse, rather than punish him for what might have been. To engage in the latter would certainly run afoul of the principles of fundamental justice.

[92] At the time of the offence, Mr. Ipeelee was eighteen months into his LTSO. He was living in Kingston, where there were few culturally-relevant support systems in place. There is no evidence, other than one isolated instance of refusing urinalysis, that he consumed alcohol on any occasion prior to this breach. Mr. Ipeelee's history indicates that he has been drinking heavily since the age of 11. Relapse is to be expected as he continues to address his addiction.

[93] Taking into account the relevant sentencing principles, the fact that this is Mr. Ipeelee's first breach of his LTSO and that he pleaded guilty to the offence, I would substitute a sentence of one year's imprisonment. Given the circumstances of his previous convictions, abstaining from alcohol is crucial to Mr. Ipeelee's rehabilitation under the long-term offender regime. Consequently, this sentence is designed to denounce Mr. Ipeelee's conduct and deter him from consuming alcohol in the future. In addition, it provides a sufficient period of time without access to alcohol so that Mr. Ipeelee can get back on track with his alcohol treatment. Finally, the sentence is not so harsh as to suggest to Mr. Ipeelee that success under the long-term offender regime is simply not possible.

B. *Frank Ralph Ladue*

[94] Bagnall Prov. Ct. J. sentenced Mr. Ladue to three years' imprisonment, less credit for pre-sentence custody. The majority of the Court of Appeal intervened and substituted a sentence of one year's imprisonment. Bennett J.A., writing for the majority, held that the sentencing judge made two errors warranting appellate intervention.

[95] First, the majority of the Court of Appeal held that the sentencing judge failed to give sufficient weight to Mr. Ladue's circumstances as an Aboriginal offender. Although she acknowledged Mr. Ladue's Aboriginal status in her reasons for sentence, she failed to give it any "tangible consideration" (para. 64). In my view, the Court of Appeal was right to intervene on this basis. The sentencing judge described Mr. Ladue's history in great detail, but she failed to consider whether and how that history ought to impact on her sentencing decision. As a result, she failed to give effect to Parliament's direction in s. 718.2(*e*) of the *Criminal Code*. As the Court of Appeal rightly concluded, this was a case in which the unique circumstances of the Aboriginal offender indicated that the objective of rehabilitation ought to have been given greater emphasis:

> Mr. Ladue desires to succeed, as exhibited by his request not to be sent to Belkin House. However, he is addicted to drugs and alcohol, which can directly be related to how he was treated as an Aboriginal person. He has not reoffended in a manner which threatens the safety of the public. He will ultimately be released into the community without supervision. Unless he can manage his alcohol and drug addiction in the community he will very likely be a threat to the public. Repeated efforts at abstinence

> are not unusual for those dealing with addiction. Indeed, Mr. Ladue demonstrated that he is capable of abstinence as shown by his conduct a number of years ago. [para. 63]

[96] Second, the majority of the Court of Appeal held that a sentence of three years' imprisonment was not proportionate to the gravity of the offence and the degree of responsibility of the offender. The Court of Appeal placed particular emphasis on the manner in which Mr. Ladue came to arrive at Belkin House rather than Linkage House. In my view, this emphasis was entirely warranted. Mr. Ladue is addicted to opiates — incidentally, a form of the same drug he first began using while incarcerated in a federal penitentiary. He had arranged to be released to Linkage House where he would have access to culturally-relevant programming and the resources of an Elder. Instead, as a result of errors made by correctional officials, he was released to Belkin House where he was immediately tempted by drugs. The Court of Appeal was therefore justified in reaching the following conclusion:

> I acknowledge that Mr. Ladue's repeated failure to abstain from substances while on release required some time back in prison. However, in my respectful opinion, a sentence of one year would properly reflect the principles and purpose of sentencing. I say this because it is enough time for Mr. Ladue to achieve sobriety, and enough time for the correctional staff to find an appropriate placement for him, preferably Linkage House or another halfway house which emphasizes Aboriginal culture and healing. In addition, a one-year sentence is more reflective of and more proportionate to the nature of his offence and his circumstances. ...
>
> [T]he circumstances of Mr. Ladue's background played an instrumental part in his offending over his lifetime and his rehabilitation is critical to the protection of the public. [paras. 81-82]

[97] The judgment of the Court of Appeal is well founded. Bennett J.A. cogently analysed this Court's decisions in *Gladue* and *L.M.* and correctly applied those principles to the facts of the specific case. A sentence of one year of imprisonment adequately reflects the principles and objectives of sentencing set out in the *Criminal Code*. As a result, I would dismiss the Crown's appeal and affirm the sentence of one year's imprisonment imposed by the majority of the Court of Appeal.

VII. Conclusion

[98] For the foregoing reasons, I would allow the offender's appeal in *Ipeelee* and substitute a sentence of one year's imprisonment. I would dismiss the Crown's appeal in *Ladue*.

The following are the reasons delivered by

ROTHSTEIN J. —

I. Introduction

[99] I have had the opportunity of reading the reasons of my colleague Justice Lebel. While I am in agreement with much of what my colleague has written in the context of general sentencing principles and application of those principles to Aboriginal offenders, I am of the respectful opinion that he does not specifically address the issue of the sentencing of Aboriginal offenders who have been found to

be long-term offenders and have been found guilty of breaching a condition of a long-term supervision order ("LTSO").

[100] I believe that LeBel J.'s reasons conflate the purpose and objective of LTSOs with the purpose and objective of sentencing for breaches of such orders. My concern is that the message they send to sentencing judges as to the weight to be given to considerations relevant to the sentencing for breaches in such cases is not consistent with Parliamentary intent. In my opinion, Parliament has said that protection of society is the paramount consideration when it comes to such sentencing. Elevating rehabilitation and reintegration into society to a more significant factor diverts the sentencing judge from adhering to the expressed intention of Parliament.

[101] With respect to sentencing of Aboriginal offenders, I agree that s. 718.2(*e*) of the *Criminal Code*, R.S.C. 1985, c. C-46, pertaining to Aboriginal offenders, is mandatory and must be applied in all cases, including the case of long-term Aboriginal offenders. However, once an Aboriginal individual is found to be a long-term offender, and the offender has breached one or more conditions of his or her LTSO, alternatives to a significant prison term will be limited. The risk the Aboriginal offender poses in the community is substantial and the management of that risk has been compromised. That is the reality facing the judge charged with fixing an appropriate sentence in such circumstances.

II. Facts

A. *Manasie Ipeelee*

[102] Manasie Ipeelee, an Inuk, was born on December 28, 1972 in Iqaluit and grew up in that community. He suffered a tragic upbringing, which saw the death of his alcoholic mother when he was a child and the development of his own serious alcohol addiction by the time he was 12 years old. His life is marked by an ever-present alcohol addiction coupled with a propensity to inflict brutal violence on those with whom he comes into contact while intoxicated.

[103] From the age of 12 to 18, he accumulated a record of 36 convictions, mostly property related. As an adult, Mr. Ipeelee continued to commit property offences, but added to them a series of increasingly violent crimes. The series of violent offences began in September 1992, when he was 19. On this occasion, he attacked a man with an ashtray and chair when he was refused entry into the victim's home. He pled guilty to assault causing bodily harm and was sentenced to 21 days' imprisonment followed by one year probation.

[104] In August 1993, he committed a second assault causing bodily harm when, while on probation for the prior offence, he beat an individual unconscious outside a bar in Iqaluit, kicking him in the face at least ten times and continuing the assault after the individual had lost consciousness. This attack left the victim hospitalized. Less than one year later he pled guilty to yet another aggravated assault. This time the victim was hospitalized after being beaten to unconsciousness by Mr. Ipeelee, who then continued to stomp on his face. Mr. Ipeelee was sentenced to 5

months' imprisonment for the August 1993 offence and 14 months for the subsequent offence.

[105] Three weeks after receiving early release from prison for this attack, he committed a sexual assault in which he and another man raped a woman who had passed out from intoxication at a party. He pled guilty and received a sentence of two years in prison. A consecutive 8 month sentence was added for his escape from prison two days before the plea and sentencing hearing. In the six months after his release for this offence, he was arrested at least nine times for public intoxication.

[106] In August 1999, he committed a sexual assault causing bodily harm when he raped a homeless woman, during the course of which he threatened to kill her, and punched her repeatedly in the face. The woman required treatment in hospital for her injuries. It was this crime that led to his designation as a long-term offender. At the hearing the sentencing judge noted (2001 NWTSC 33, [2001] N.W.T.J. No. 30 (QL)):

> This summary of Mr. Ipeelee's crimes of violence shows a consistent pattern of Mr. Ipeelee administering gratuitous violence against vulnerable, helpless people while he is in a state of intoxication. [para. 34]

Mr. Ipeelee was sentenced to six years' imprisonment for this offence to be followed by a 10 year LTSO.

[107] The offence that led to this appeal occurred in August 2008 after Mr. Ipeelee had been on release for 17 months. On this occasion, police found Mr. Ipeelee intoxicated in downtown Kingston and he was charged with breaching the abstention from intoxicants condition of his LTSO. He pled guilty on November 14, 2008 and received a sentence of three years in prison.

B. *Frank Ralph Ladue*

[108] Frank Ladue is a member of the Ross River Dena Council, an Aboriginal community of approximately 500 individuals located 400 kilometres northeast of Whitehorse. He was born in 1962 and, like Mr. Ipeelee, suffered a tragic childhood, with both alcoholic parents dying while he was quite young. At the age of five, he was sent to a residential school and on his return, he lived with his grandparents. It was then, at the age of nine, that he began drinking. He has continued to have serious problems with alcohol and drugs throughout his life, with the exception of a six-year period of sobriety in the 1990s, a time when he was also free of convictions.

[109] Mr. Ladue has a criminal record of 40 convictions. It includes a lengthy list of property and impaired driving offences. He has two convictions for robbery, and two convictions for common assault. His most serious convictions stem from a series of sexual assaults. The first occurred in 1987 when he sexually assaulted an unconscious woman at a party. In 1998, he was convicted of breaking and entering. During the break and enter, he placed a sleeping bag over a sleeping woman's head and shoulders, but fled when her daughter interrupted him. Although he was not

convicted of sexual assault, the sentencing judge at Mr. Ladue's 2003 hearing, where he was designated a long-term offender, found the incident "eerily similar" to the previous sexual assaults (2003 YKTC 100 (CanLII), at para. 7). In June of 1999, he was found guilty of sexually assaulting yet another unconscious woman. For the 1987 conviction, he was sentenced to imprisonment for 23 months, for the 1998 conviction four months and for the 1999 conviction 30 months.

[110] His most recent sexual assault occurred in 2002. On this occasion he entered a dwelling house without permission from the occupants and found a 22-year-old woman in the living room unconscious due to alcohol consumption. When she awoke, Mr. Ladue was assaulting her and attempting to remove her pants. She was unable to resist due to her intoxication, but the attack was interrupted when other residents of the house were awakened by what was happening and Mr. Ladue escaped from the home. He was convicted following a trial for break and enter and sexual assault and sentenced to three years' imprisonment. It was this offence that caused him to be found a long-term offender.

[111] Mr. Ladue was released under a 7 year LTSO in December 2006. During the time between his release and the breach in question in this appeal, he was convicted for breaching his LTSO by consuming intoxicants on three occasions and sentenced in total to two years in prison, with sixteen and a half months credited for pre-sentence custody. On May 23, 2009, he had his LTSO suspended for the tenth

time between December 2006 and May 2009 and remained in custody until August 12, 2009.

[112] Upon release he was designated by the Correctional Services of Canada ("CSC") to be sent to Linkage House in Kamloops, British Columbia, where he would receive culturally specific support from an Aboriginal Elder. However, an outstanding warrant requiring Mr. Ladue to submit to a DNA test was discovered at the time of his release. Apparently, due to a bureaucratic error, the warrant had not been executed during his period of detention and, according to counsel for Mr. Ladue in this Court, may have been altogether unnecessary, as a DNA sample may have been provided under a previous warrant. The warrant required that he appear in Surrey, B.C. This resulted in Mr. Ladue being sent to Belkin House, in downtown Vancouver, which did not offer the specialized support of Linkage House in Kamloops. Upon arrival, he was informed that his residency status did not allow an immediate transfer to Linkage House and that he would have to remain at Belkin House until the National Parole Board made the necessary change to his status. Within one week of his arrival at Belkin House, he reoffended and was subsequently charged with breaching his LTSO by consuming intoxicants. He pled guilty in February 2010 and received a sentence of three years in prison.

III. General Principles of Sentencing

[113] The statutory provisions referred to in these reasons are set out in the Appendix in full. Section 718 of the *Criminal Code* codifies the objectives and

principles of sentencing. They apply to the sentencing of all offenders including long-term offenders who breach their LTSOs.

[114] I agree with Justice LeBel that a fundamental principle of sentencing must be proportionality and that the weight given to the different objectives of sentencing must respect that fundamental principle. The first question that arises in this case is how these objectives and principles are to be applied when a judge is required to fix a sentence for a long-term offender who has breached one or more conditions of his LTSO.

IV. Long-Term Offenders

[115] Section 753.1(1) of the *Criminal Code* sets out three criteria for finding an individual to be a long-term offender:

> **753.1** (1) The court may ... find an offender to be a long-term offender if it is satisfied that
>
> (*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
>
> (*b*) there is a substantial risk that the offender will reoffend; and
>
> (*c*) there is a reasonable possibility of eventual control of the risk in the community.

[116] Section 753.1(1)(*b*) requires a finding that there be a substantial risk that the offender will reoffend. Section 753.1(2) provides the criteria for a finding of substantial risk of re-offending by the offender. The court must be satisfied that the

offender has committed a specified sexual offence or a violent offence that involves a sexual element and a pattern of repetitious behaviour or previous conviction for a sexual offence, thereby showing a likelihood of causing death, injury, inflicting psychological damage, pain, or other evil in the future. The criminal history of these individuals and their propensity to reoffend demonstrates the extraordinary danger they pose to society.

V. Long-Term Supervision Orders

[117] The distinction between dangerous offenders, who are incarcerated indefinitely, and long-term offenders is the finding that there is a reasonable possibility for eventual control in the community of the long-term offender's substantial risk of reoffending. If the court finds an offender to be a long-term offender, it shall order that the offender be subject to long-term supervision for up to ten years (s. 753.1(3)(*b*)), during which he or she is to be supervised in the community, by a parole supervisor (s. 753.2(1)). Thus, instead of indefinite detention, long-term offenders will return to the community under supervision and be subject to a series of conditions prescribed in s. 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620, as may be modified or supplemented by the National Parole Board under s. 134.1(2) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"). Section 134.1(2) provides that the

conditions prescribed by the Board are to be reasonable and necessary for both the protection of society and the successful reintegration into society of the offender.

[118] Section 100 of the *CCRA* states:

> The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

[119] Section 100 applies to all offenders, including long-term offenders. The maintenance of a just, peaceful and safe society is the purpose of a release with conditions. Decisions on the timing and conditions of release that will best facilitate rehabilitation and reintegration into society are the means by which the purpose is to be effected. However, to achieve the purpose of conditional release, s. 101(*a*) of the *CCRA* states

> that the protection of society be the paramount consideration in the determination of any case.

The principle of protection of society is, of course, especially important in the case of long-term offenders because of their substantial risk of violently reoffending.

[120] To this point, my only difference with Justice LeBel is that I read the relevant legislation as providing that protection of the public is the paramount consideration in setting the timing and conditions for release. I do not view

rehabilitation and reintegration into society as an equal consideration. Rather, if the objectives of rehabilitation and reintegration are met, they will be the most effective and permanent methods to achieve the protection of the public. However, there is no guarantee that rehabilitation and reintegration will be achieved with long-term offenders in view of their history of repetitive sexual or violent behaviour. Therefore, in accordance with s. 101(*a*), protection of the public must stand as the paramount consideration in fixing the timing and conditions of release, especially in the case of long-term offenders, who pose a threat of serious violence and harm to other members of society.

VI. Breaches of Long-Term Supervision Orders

[121] Where I part serious company with my learned colleague is with respect to the proper approach to sentencing for breaches of an LTSO. In my respectful opinion, LeBel J. has not taken account of the difference between the objectives and requirements of LTSOs for long-term offenders who abide by the conditions of their LTSO and the objectives and requirements of sentencing long-term offenders who have breached a condition of their LTSO.

[122] The breach of the LTSO raises serious concerns that rehabilitation and reintegration are not being achieved and calls into doubt whether, despite supervision, the long-term offender has demonstrated that the substantial risk of reoffending in a violent manner in the community by the long-term offender can be adequately managed. Therefore, protection of society must be the dominant consideration in

sentencing for breaches of an LTSO. Indeed, if protection of the public is the paramount consideration when setting the conditions of release, it logically must remain the paramount consideration when sentencing for a breach of those conditions.

[123] In this context, it is significant that s. 753.3(1) of the *Criminal Code* provides that a breach of an LTSO constitutes an indictable offence, as opposed to a hybrid offence, with a maximum sentence of ten years. The maximum term is for the breach of the LTSO exclusively and is not dependant on the long-term offender having been found guilty of another substantive offence, violent or otherwise. The necessary implication is that Parliament viewed breaches of LTSOs as posing such risk to the protection of society that long-term offenders may have to be separated from society for a significant period of time. In effect, Parliament requires a sentencing judge not to wait until a long-term offender wounds, maims, sexually assaults, or kills someone before receiving a significant sentence.

[124] Of course, while all conditions of an LTSO are intended to minimize the risk of reoffending, breach of some conditions will be more important than others. As Ritter J.A. pointed out in *R. v. W. (H.P.)*, 2003 ABCA 131, 18 Alta. L.R. (4th) 20, at para. 44:

> I also recognize that the seriousness of any breach will be greatly diminished if the breach is purely technical. For example, a breach regarding a reporting requirement should be regarded as nominal if the offender, for reasons beyond his control, was a few minutes late for a reporting appointment.

[125] On the other hand, where a breach is central to the substantial risk of reoffending, such as where alcohol or substance consumption has been found to be the trigger for violent offences by the long-term offender, the breach must be considered to be very serious. Such a breach demonstrates that management of the offender in the community has been less than effective and the substantial risk of a violent reoffence is heightened. Therefore, in sentencing for the breach of a condition of an LTSO, which is central to the risk of the long-term offender violently reoffending, the protection of the public, more so than the rehabilitation or reintegration of the offender, must be the dominant consideration of the sentencing judge in the determination of a fit and proper sentence.

VII. Sentencing Principles Applicable to Aboriginal Offenders

[126] I agree with Lebel J. that s. 718.2(*e*) requires a sentencing judge to consider background and systemic factors in crafting a sentence, and all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to Aboriginal offenders. These factors operate, not as an excuse or justification for criminal conduct, but rather as context for the sentencing judge to determine an appropriate sentence. They do not create a race-based discount in sentencing and do not mandate remedying over-representation by artificially reducing incarceration rates.

[127] Cory and Iacobucci JJ. pointed out in *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 65, that sentencing judges have only a limited role in remedying injustice

against Aboriginal peoples in Canada. This limited role, however, does not mean they do not have an important role. Sentencing judges must guard against racial discrimination in sentencing. I do not go so far as to endorse the academic commentary cited by my colleague, but I do agree that racial discrimination in sentencing, such as the propensity of Aboriginal offenders to receive unjustifiably longer sentences than non-Aboriginals or imprisonment when non-Aboriginals would not be imprisoned, is something for which sentencing judges must remain vigilant.

[128] The role of a sentencing judge in remedying such injustice may most effectively be carried out through alternative sentencing. However, this requires that they be presented with viable sentencing alternatives to imprisonment that may play a stronger role "in restoring a sense of balance to the offender, victim, and community, and in preventing future crime" (*Gladue*, at para. 65). As with all sentencing, this must be done with regard to the particular individual, the threat they pose, and their chances of rehabilitation and reintegration. Evaluating these options lies within the discretion of the sentencing judge.

VIII. The Application of Section 718.2(*e*) and *Gladue* to Long-Term Offenders

[129] The particular circumstances of long-term offenders leads me to disagree with my colleague when it comes to sentencing Aboriginal long-term offenders for breaches of conditions of their LTSOs. At para. 79 of *Gladue*, Cory and Iacobucci JJ. observed:

> Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.

I agree with LeBel J. that these comments are not to be read by sentencing judges as a justification not to apply s. 718.2(*e*) or to ignore the unique situation of Aboriginal offenders (paras. 84-85). But, in the context of s. 718.2(*e*), sentencing judges are obliged to exercise their discretion as to the appropriate sentence, having regard to all relevant considerations. Obviously, the substantial risk a long-term offender poses to the community is a relevant consideration in sentencing for the breach of an LTSO.

[130] I have set out my views above that in the case of long-term offenders, the paramount consideration is the protection of society. This applies to all long-term offenders, including Aboriginal long-term offenders who have compromised the management of their risk of reoffending by breaching a condition of their LTSO. In these circumstances, the alternatives to imprisonment become very limited.

[131] I do not rule out alternatives. However, the alternative must be viable. The sentencing judge must be satisfied that they are consistent with protection of society. Alternatives may include returning Aboriginal offenders to their communities. However, as in all cases, this must be done with protection of the public as the paramount concern; Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal. Where the breach of an LTSO goes to the control of the Aboriginal offender in the community, rehabilitation

and reintegration into society will have faltered, if not failed. In such a case, the sentencing judge may have no alternative but to separate the Aboriginal long-term offender from society for a significant period of time. Nevertheless, during the period of incarceration, the Aboriginal status of the long-term offender should be taken into account for the purpose of providing appropriate programs that are intended to rehabilitate the offender so that upon release, the substantial risk of re-offending may be controlled.

IX. Application

A. *Ipeelee*

[132] The sentencing judge, Justice Megginson, sentenced Mr. Ipeelee to three years' imprisonment (2009 CarswellOnt 7864). The Court of Appeal upheld Justice Megginson's decision (2009 ONCA 892, 99 O.R. (3d) 419). The question is whether this is a fit and proper sentence.

[133] In my opinion, Justice Megginson's findings demonstrate a thorough appreciation of the circumstances. He considered Mr. Ipeelee's circumstances, his personal and criminal history, and his efforts at rehabilitation and reintegration while in the community. He acknowledged that Mr. Ipeelee was Inuit and entitled to consideration of his Aboriginal status. He noted that crafting an alternative sentence would be difficult, as Mr. Ipeelee had been refused residency at a facility in Iqaluit.

In my view, he properly recognized that protection of the public was the paramount concern in breaches of LTSOs.

[134] Lebel J. finds at paras. 89 and 95 of his reasons that in this appeal and in *Ladue*, the courts erred in concluding that rehabilitation was not a relevant factor in their sentencing decisions. I do not read their decisions or the decision of the Ontario Court of Appeal in that way. On my reading of those decisions, all judges considered the principle of rehabilitation in sentencing, only to ultimately find that it should play a small role given that Mr. Ipeelee and Mr. Ladue are long-term offenders and as both had breached conditions of their LTSOs.

[135] In *Ipeelee*, the Crown requested a sentence of three to five years, while Mr. Ipeelee requested a sentence not exceeding twelve months. Justice Megginson imposed a sentence of three years, at the low end of the range proposed by the Crown, which, in his opinion, adequately reflected Mr. Ipeelee's Aboriginal status and the mitigating effect of his guilty plea.

[136] Justice LeBel minimizes the significance of Mr. Ipeelee's breach because it only involved intoxication, not becoming intoxicated and engaging in violence. With respect, this ignores the basic fact that Mr. Ipeelee's intoxication is the pre-cursor to his engaging in violence and it is the management of the high risk of a violent reoffence that has been compromised by his alcohol consumption.

[137] As a long-term offender, Mr. Ipeelee has been found to show a pattern of repetitive behaviour with a likelihood of causing death or physical or psychological injury or a likelihood of causing injury, pain or other evil to other persons in the future through failure to control his sexual impulses. His alcohol consumption is central to such behaviour. I emphasize that s. 753.3(1) provides that breach of an LTSO is an indictable offence with a maximum sentence of up to ten years and no substantive offence, violent or otherwise, need have also been committed. Parliament obviously considered the breach of an LTSO, by itself, a serious offence. That is what the sentencing judge considered relevant, and I can find no fault in his so doing.

[138] The exercise of discretion by a sentencing judge is entitled to significant deference from an appellate court. Deference is appropriate as sentencing judges have important advantages over appellate courts in crafting a particular sentence. Those advantages were well set out by Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500:

> A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of

> and in the community. The discretion of a sentencing judge should thus not be interfered with lightly. [para. 91]

[139] Lamer C.J. outlined the limited role of appellate courts in matters of sentencing:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. [para. 90]

[140] I find no error in principle, no failure to consider relevant factors or an overemphasis on the appropriate factors by Justice Megginson. I cannot say the sentence he imposed was demonstrably unfit. I would dismiss this appeal.

B. *Ladue*

[141] In this case, Judge Bagnall sentenced Mr. Ladue to three years' imprisonment (2010 BCPC 410 (CanLII)). The majority of the Court of Appeal reduced the three year sentence to one year. Chiasson J.A., dissenting in the Court of Appeal, would have ordered a sentence of two years (2011 BCCA 101, 302 B.C.A.C. 93).

[142] The sentencing judge commented on Mr. Ladue's particular background. She quoted from his pre-sentence report which referenced his "horrible and tragic" experience in a residential school and commented on his bleak future (para. 22). She

also referred to his appraisal report, which further documented his residential school experience and that he had been the victim of abuse.

[143] With regard to his LTSO, she observed that Mr. Ladue had been previously convicted three times for breaching the order by consuming intoxicants. She noted that he was initially scheduled to be released to Linkage House, in Kamloops, but, because of an outstanding DNA warrant, was sent to Belkin House in downtown Vancouver to have it attended to. She acknowledged Mr. Ladue's submission that being placed at Belkin House minimized his chance for successful rehabilitation, but did not accept it. She said that, upon arrival at Belkin House, he was warned not to associate with a particular offender, but did so and slipped almost immediately back into drug and alcohol use. He was given a second chance at Belkin House, but to no avail, and eventually admitted to using cocaine and morphine since his arrival. This led to the charge of breaching his LTSO.

[144] A community assessment report compiled by a parole officer in September 2009 for the benefit of the Kamloops Parole Office was critical of Mr. Ladue's placement at Belkin House.

> [Mr. Ladue] desperately needs to get away from downtown Vancouver. He requires the onsite resources of an Elder and ceremony. He needs to get immediately in touch with a residential school trauma counsellor.
>
> . . .
>
> The purpose of this report is to re-screen Mr. Ladue into Linkage House for potential residence while serving his Long-Term Supervision Order (LTSO).

. . .

> Mr. Wolkosky continues to believe Mr. Ladue could be managed at Linkage House. It is expected that Mr. Ladue's negative associates will not be located in the Kamloops region. Substance abuse is not tolerated at Linkage and consequences can be expected if this were to occur. Mr. Wolkosky feels CSC, JHS and RCMP can work together (sic) to assist Mr. Ladue with successful reintegration. [A.R., at pp. 139-40]

[145] An appraisal report dated September 2009 noted that Mr. Ladue had participated in Aboriginal programs to address "his need areas", but none were sufficient to address his risk. In the end, the report found that his "risk to the community is high and currently unmanageable" (A.R., at p. 136).

[146] The Crown sought a sentence of eighteen months to two years. Mr. Ladue asked for a much shorter sentence. The sentencing judge found that the only way to protect the community, given Mr. Ladue's high risk of reoffending sexually and moderate to high risk of reoffending violently, was to emphasize the objective of isolation. She found that in spite of successful completion of treatment, he was unable or unwilling to abstain from the consumption of intoxicants and that he was much more likely to reoffend in such circumstances. She noted that the indictable nature of the breach and the maximum sentence of ten years indicate Parliament's view that this is a serious offence and that, even if Mr. Ladue did not commit a substantive offence, his breach was serious. The judge found the eighteen to twenty-four month range recommended by the Crown inadequate and sentenced Mr. Ladue to three years' imprisonment.

[147] In reducing Mr. Ladue's sentence to one year, the majority of the Court of Appeal found that the sentencing judge did not give sufficient weight to the circumstances of Mr. Ladue as an Aboriginal offender, overemphasised the principle of separating the offender and gave insufficient weight to the principle of rehabilitation. The majority said that the sentencing judge did not give Mr. Ladue's Aboriginal heritage tangible consideration "which will often impact the length and type of sentence imposed. ... There is nothing to indicate that [Mr. Ladue] had come close to engaging in the violent sexual behaviour.... [T]he role of rehabilitation will depend on the circumstances of the offender and is not dependent on his or her designation" (paras. 64, 68 and 71).

[148] The majority also observed that the corrections report found that Linkage House in Kamloops offered the best chance at rehabilitation for Mr. Ladue. However,

> [b]ecause of a bureaucratic error, he was not sent there following his last release. Instead, he was sent to Belkin House, which placed him back into a milieu where he was sorely tempted by drugs. [para. 76]

[149] In the opinion of the majority, a one-year sentence would be enough time for Mr. Ladue to deal with his substance abuse problem and for CSC to find an appropriate placement for him, preferably Linkage House or another halfway house which emphasizes Aboriginal culture and healing. They observed that his prior sentence for violation of his LTSO was based on time served on remand. An increase to three years was found to be excessive.

[150] In dissent, Chiasson J.A. was of the opinion that the sentencing judge did not err in her consideration of the Aboriginal circumstances of Mr. Ladue but did fail to recognize that his breach of condition did not lead him on a path of reoffending. He would have imposed a sentence of two years.

[151] I agree with Chiasson J.A. that Mr. Ladue's Aboriginal background was considered and weighed in the sentencing judge's decision. As I noted in the case of Mr. Ipeelee, it is not open to an appellate court to interfere with a sentence simply because it would have weighed the relevant factors differently. It is only when it can be said that the exercise of discretion was unreasonable that the appeal court may interfere with the sentence.

[152] While I do not entirely agree with the reasoning of the majority of the Court of Appeal, nonetheless, in my respectful opinion, there is another reason to agree with the one-year sentence they imposed.

[153] The distinguishing aspect of this case is what the Court of Appeal called the "bureaucratic error" (para. 76). Because of that error, Mr. Ladue was sent to Belkin House in downtown Vancouver rather than Linkage House in Kamloops. The sentencing judge does not appear to have considered that it was this error that caused Mr. Ladue to be sent to Belkin house, which apparently tolerates serious drug abusers and does not provide programs for Aboriginal offenders.

[154] I do not absolve Mr. Ladue of responsibility for his own conduct. However, CSC said that Linkage House was the appropriate location for Mr. Ladue. It was their error that caused him to be placed in an environment where, having regard to his known addiction, he was especially vulnerable to breaching his LTSO.

[155] The sentencing judge does not refer to the fact that the cause of Mr. Ladue being sent to Belkin House rather than Linkage House was a "bureaucratic error". In my respectful opinion, she failed to take account of this relevant consideration. Due to no fault of his own and contrary to the recommended course of rehabilitation, Mr. Ladue was sent to a facility that placed him in harm's way.

[156] Section 718.1 of *Criminal Code* provides:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

This is not a situation where the offender failed to take up an opportunity that the criminal justice system had given him to rehabilitate. Rather, the system's bureaucratic error deprived him of that opportunity. CSC must bear some "degree of responsibility" for Mr. Ladue's breach.

[157] For the reasons that I have given, the sentencing judge did not err in focussing on protection of society as the paramount consideration in her sentencing decision. But this was a case where there was a realistic opportunity for rehabilitation

that was denied Mr. Ladue by the system's "bureaucratic error". This relevant consideration was not taken into account by the sentencing judge. This failure meant that Mr. Ladue's moral blameworthiness was not properly assessed (see *M. (C.A.)*, at para 79, and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 42). In the circumstances and having regard to the fact that the CSC must bear some responsibility for Mr. Ladue's breach, I would agree with the result reached by the majority of the Court of Appeal and Justice LeBel and find that one year was a fit and proper sentence. I would dismiss this appeal.

APPENDIX

Criminal Code, R.S.C. 1985, c. C-46

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;

(*b*) to deter the offender and other persons from committing offences;

(*c*) to separate offenders from society, where necessary;

(*d*) to assist in rehabilitating offenders;

(*e*) to provide reparations for harm done to victims or to the community; and

(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

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

(*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

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

753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that

(*a*) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;

(*b*) there is a substantial risk that the offender will reoffend; and

(*c*) there is a reasonable possibility of eventual control of the risk in the community.

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(*a*) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), subsection 163.1(3) (distribution, etc., of child pornography), subsection 163.1(4) (possession of child pornography), subsection 163.1(4.1) (accessing child pornography), section 172.1 (luring a child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(*b*) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

(3) If the court finds an offender to be a long-term offender, it shall

(*a*) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and

(*b*) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.

753.2 (1) Subject to subsection (2), an offender who is subject to long-term supervision shall be supervised in the community in accordance with the *Corrections and Conditional Release Act* when the offender has finished serving

(*a*) the sentence for the offence for which the offender has been convicted; and

(*b*) all other sentences for offences for which the offender is convicted and for which sentence of a term of imprisonment is imposed on the offender, either before or after the conviction for the offence referred to in paragraph (*a*).

753.3 (1) An offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

Corrections and Conditional Release Regulations, SOR/92-620

161. (1) For the purposes of subsection 133(2) of the Act, every offender who is released on parole or statutory release is subject to the following conditions, namely, that the offender

(*a*) on release, travel directly to the offender's place of residence, as set out in the release certificate respecting the offender, and report to the offender's parole supervisor immediately and thereafter as instructed by the parole supervisor;

(*b*) remain at all times in Canada within the territorial boundaries fixed by the parole supervisor;

(*c*) obey the law and keep the peace;

(*d*) inform the parole supervisor immediately on arrest or on being questioned by the police;

(*e*) at all times carry the release certificate and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(*f*) report to the police if and as instructed by the parole supervisor;

(*g*) advise the parole supervisor of the offender's address of residence on release and thereafter report immediately

(i) any change in the offender's address of residence,

(ii) any change in the offender's normal occupation, including employment, vocational or educational training and volunteer work,

(iii) any change in the domestic or financial situation of the offender and, on request of the parole supervisor, any change that the offender has knowledge of in the family situation of the offender, and

(iv) any change that may reasonably be expected to affect the offender's ability to comply with the conditions of parole or statutory release;

(*h*) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor; and

(*i*) in respect of an offender released on day parole, on completion of the day parole, return to the penitentiary from which the offender was released on the date and at the time provided for in the release certificate.

(2) For the purposes of subsection 133(2) of the Act, every offender who is released on unescorted temporary absence is subject to the following conditions, namely, that the offender

(*a*) on release, travel directly to the destination set out in the absence permit respecting the offender, report to a parole supervisor as directed by the releasing authority and follow the release plan approved by the releasing authority;

(*b*) remain in Canada within the territorial boundaries fixed by the parole supervisor for the duration of the absence;

(*c*) obey the law and keep the peace;

(*d*) inform the parole supervisor immediately on arrest or on being questioned by the police;

(*e*) at all times carry the absence permit and the identity card provided by the releasing authority and produce them on request for identification to any peace officer or parole supervisor;

(*f*) report to the police if and as instructed by the releasing authority;

(*g*) return to the penitentiary from which the offender was released on the date and at the time provided for in the absence permit;

(*h*) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the parole supervisor.

Corrections and Conditional Release Act, S.C. 1992, c. 20

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are

(*a*) that the protection of society be the paramount consideration in the corrections process;

(*b*) that the sentence be carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, other information from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders;

(*c*) that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public;

(*d*) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders;

(*e*) that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;

(*f*) that the Service facilitate the involvement of members of the public in matters relating to the operations of the Service;

(*g*) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(*h*) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;

(*i*) that offenders are expected to obey penitentiary rules and conditions governing temporary absence, work release, parole and statutory release, and to actively participate in programs designed to promote their rehabilitation and reintegration; and

(*j*) that staff members be properly selected and trained, and be given

(i) appropriate career development opportunities,

(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and

(iii) opportunities to participate in the development of correctional policies and programs.

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(*a*) that the protection of society be the paramount consideration in the determination of any case;

(*b*) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

(*c*) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

(*d*) that parole boards make the least restrictive determination consistent with the protection of society;

(*e*) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

(*f*) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

134.1 (1) Subject to subsection (4), every offender who is required to be supervised by a long-term supervision order is subject to the conditions prescribed by subsection 161(1) of the *Corrections and Conditional Release Regulations*, with such modifications as the circumstances require.

(2) The Board may establish conditions for the long-term supervision of the offender that it considers reasonable and necessary in order to protect society and to facilitate the successful reintegration into society of the offender.

(3) A condition imposed under subsection (2) is valid for the period that the Board specifies.

(4) The Board may, in accordance with the regulations, at any time during the long-term supervision of an offender,

(*a*) in respect of conditions referred to in subsection (1), relieve the offender from compliance with any such condition or vary the application to the offender of any such condition; or

(*b*) in respect of conditions imposed under subsection (2), remove or vary any such condition.

134.2 (1) An offender who is supervised pursuant to a long-term supervision order shall comply with any instructions given by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, or given by the offender's parole supervisor, respecting any conditions of long-term supervision in order to prevent a breach of any condition or to protect society.

(2) In this section, "parole supervisor" means

(*a*) a staff member as defined in subsection 2(1); or

(*b*) a person entrusted by the Service with the guidance and supervision of an offender who is required to be supervised by a long-term supervision order.

Appeal 33650 allowed, ROTHSTEIN J. *dissenting. Appeal 34245 dismissed.*

Solicitor for the appellant Manasie Ipeelee: Fergus J. (Chip) O'Connor, Kingston.

Solicitor for the respondent Her Majesty the Queen: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Iqaluit.

Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitor for the appellant Her Majesty the Queen: Attorney General of British Columbia, Vancouver.

Solicitors for the respondent Frank Ralph Ladue: Myers, McMurdo & Karp, Vancouver.

Solicitor for the intervener the British Columbia Civil Liberties Association: University of Toronto, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Ruby, Shiller, Chan, Toronto.

THE CANADIAN BAR ASSOCIATION

Office of the President

November 17, 2011

Dear CBA Colleague,

I am writing to all CBA colleagues in response to a growing number of enquiries concerning the CBA position on the Omnibus Crime Bill (C-10) and how members can help support our position.

Our 100-page CBA submission was presented to the House of Commons Standing Committee on Justice and Human Rights on October 18, and again on November 3.

A 10-point summary of the submission is reproduced below this letter and is also available in printer-friendly pdf.

You can add your voice to the CBA position by bringing the summary (and our full submission) to the attention of your Member of Parliament or any other interested groups. Here is a link to the government directory to help you contact your MP.

Time is of the essence, as the Commons Committee began clause-by-clause consideration of the Bill on November 15, and is expected to report back to the House in the near future.

Please let me know if you were able to contact your MP.

I look forward to hearing back from you and thank you for your support.

Trinda L. Ernst, Q.C.

10 Reasons to Oppose Bill C-10

Bill C-10 is titled *The Safe Streets and Communities Act* – an ironic name, considering that Canada already has some of the safest streets and communities in the world and a declining crime rate. This bill will do nothing to improve that state of affairs, but, through its overreach and overreaction to imaginary problems, Bill C-10 could easily make it worse. It could eventually create the very problems it's supposed to solve.

Bill C-10 will require new prisons; mandate incarceration for minor, non-violent offences; justify poor treatment of inmates and make their reintegration into society more difficult. Texas and California, among other jurisdictions, have already started down this road before changing course, realizing it cost too much and made their

QUESTIONS?

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justice system worse. Canada is poised to repeat their mistake.

The Canadian Bar Association, representing over 37,000 lawyers across the country, has identified 10 reasons why the passage of Bill C-10 will be a mistake and a setback for Canada.

1. **Ignoring reality**. Decades of research and experience have shown what actually reduces crime: (a) addressing child poverty, (b) providing services for the mentally ill and those afflicted with FASD, (c) diverting young offenders from the adult justice system, and (d) rehabilitating prisoners, and helping them to reintegrate into society. Bill C-10 ignores these proven facts.

2. **Rush job**. Instead of receiving a thorough review, Bill C-10 is being rushed through Parliament purely to meet the “100-day passage” promise from the last election. Expert witnesses attempting to comment on over 150 pages of legislation in committee hearings are cut off mid-sentence after just five minutes.

3. **Spin triumphs over substance**. The federal government has chosen to take a “marketing” approach to Bill C-10, rather than explaining the facts to Canadians. This campaign misrepresents the bill's actual content and ensures that its public support is based heavily on inaccuracies.

4. **No proper inspection**. Contrary to government claims, some parts of Bill C-10 have received no previous study by Parliamentary committee. Other sections have been studied before and were changed – but, in Bill C-10, they're back in their original form.

5. **Wasted youth**. More young Canadians will spend months in custodial centres before trial, thanks to Bill C-10. Experience has shown that at-risk youth learn or reinforce criminal behaviour in custodial centres; only when diverted to community options are they more likely to be reformed.

6. **Punishments eclipse the crime**. The slogan for one proposal was *Ending House Arrest for Serious and Violent Criminals Act*, but Bill C-10 will actually also eliminate conditional sentences for minor and property offenders and instead send those people to jail. Is roughly $100,000 per year to incarcerate someone unnecessarily a good use of taxpayers' money?

7. **Training predators**. Bill C-10 would force judges to incarcerate people whose offences and circumstances clearly do not warrant time in custody. Prison officials will have more latitude to disregard prisoners' human rights, bypassing the least restrictive means to discipline and control inmates. Almost every inmate will re-enter society someday. Do we want them to come out as neighbours, or as predators hardened by their prison experience?

8. **Justice system overload**. Longer and harsher sentences will increase the strains on a justice system already at the breaking point. Courts and Crown prosecutors' offices are overwhelmed as is, legal aid plans are at the breaking point, and police forces don't have the resources to do their jobs properly. Bill C-10 addresses none of these problems and will make them much worse.

9. **Victimizing the most vulnerable**. With mandatory minimums replacing conditional sentences, people in remote, rural and northern communities will be shipped far from their families to serve time. Canada's Aboriginal people already represent up to 80% of inmates in institutions in the prairies, a national embarrassment that Bill C-10 will make worse.

10. **How much money**? With no reliable price tag for its recommendations, there is no way to responsibly decide the bill's financial implications. What will Canadians sacrifice to pay for these initiatives? Will they be worth the cost?

Canadians deserve accurate information about Bill C-10, its costs and its effects. This bill will change our country's entire approach to crime at every stage of the justice system. It represents a huge step backwards; rather than prioritizing public safety, it emphasizes retribution above all else. It's an approach that will make us less safe, less secure, and ultimately, less Canadian.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20091218
Docket: 25214
Registry: Vancouver

Regina

v:

Phillip Joe Jr.

Ban on Publication: s. 517(1) CCC

Before: The Honourable Mr. Justice Bowden

Oral Reasons for Judgment

In Chambers

Counsel for the Crown:	D. Mulligan
Counsel for Phillip Joe Jr.:	J.D. Tarnow
Place and Date of Trial/Hearing:	Vancouver, B.C. December 10, 2009
Place and Date of Judgment:	Vancouver, B.C. December 18, 2009

[1] **THE COURT:** Referring to Sechelt court file 15321-C-2, Phillip Joe Jr. is charged with the second degree murder of Conrad Joe contrary to s. 235(1) of the *Criminal Code*. Mr. Joe is in custody and seeking his release. The Crown is seeking his detention under s. 515(10)(b) and (c) of the *Criminal Code*, which are generally referred to as the secondary and tertiary grounds for detention. I will review the background and circumstances, and I am describing the circumstances based on what the Crown prosecutor has informed the Court.

[2] On August 28, 2009, the accused was at his father's residence playing cards and drinking beer with Conrad Joe, his brother, Trevor Joe, whose relationship to the accused, if any, was not indicated to the Court, and Dylan Baptiste. None of them were severely intoxicated. His father, Phillip Joe Sr., was not present.

[3] At some point in the evening the accused and Conrad Joe started arguing with each other. The Crown says that the accused was angry at Conrad because he had been ordering drugs from his father's home. A neighbour heard them arguing. One of the persons present tried to separate the accused and Conrad.

[4] At some point the neighbour saw the accused hold a kitchen knife above Conrad Joe, and heard Conrad say, "Are you going to do something with that?" The neighbour then saw the accused lunge at Conrad while holding the knife. Conrad Joe then ran out of the residence and the accused followed him. They proceeded to run around the house while the accused called Conrad to come back and said, "I'm going to fucking kill you." The neighbour lost sight of them, but heard a struggle take place.

[5] Another witness saw the accused and Conrad running and ending up near two abandoned cars, where they went to the ground. He saw the accused punch Conrad several times while yelling at him.

[6] Trevor Joe and Dylan Baptiste then came out of the residence, went to the area of the abandoned cars, and found Conrad with his face down and a bloodied shirt, while the accused was yelling at Conrad.

[7] Trevor and Dylan tried to get Conrad to get up. They said they heard mumbling noises coming from Conrad. They helped Conrad up and took him back to the residence. They checked Conrad's pulse and found none. Trevor called for police and an ambulance, which arrived quickly. Conrad Joe appeared to have two stab wounds and could not be revived by EHS attendants. He was declared deceased.

[8] After this a neighbour saw the accused in the residence, appearing to wash out cans.

[9] A patch of blood was found near the two abandoned cars. A knife was seized from the kitchen floor of the residence, but it is not clear that it was used by the accused.

[10] I will now review the criminal record of the accused. The accused has a criminal record going back to 1995. He has been convicted of break and enter, theft, possession of a weapon, sexual assault in 1996 and again in 1998, and again in 2001, uttering threats and numerous breaches of probation orders, primarily between 1998 and 2001.

[11] The last conviction is in 2001 for sexual assault in Sechelt, B.C. For that offence he was sentenced to an 18-month conditional sentence. I note that the CSO was imposed even after the accused had been sentenced to two years less a day in jail for the same offence in 1998. The CSO was also imposed after the breaches of probation orders that have been referred to. It would seem that the sentencing judge was satisfied then that the accused did not pose a danger to the safety of the community.

[12] The Crown initially alleged that the accused was in breach of that CSO, but withdrew that allegation, because the breach is not disclosed on the CPIC record filed with this Court.

[13] Defence counsel has informed the Court that the accused did not breach that conditional sentence order. In the end result, the accused has abided by court-

ordered conditions since his last conviction some eight years ago, and there have been no other offences since that time.

[14] The Crown acknowledges the passage of the time since the last conviction of the accused, but emphasizes that a number of the offences committed by the accused involve violence and he often failed to abide by court-ordered conditions. Relying on his criminal history, the Crown submits that if released there is a substantial likelihood that the accused will commit an offence.

[15] The Crown also says that there is some concern about maintaining the integrity of Crown witnesses if the accused is released. He said that those witnesses have not expressed concern to the Crown, so I take it that the Crown is concerned primarily with the apparent inability of the accused to obey court orders because any conditions of release would have to include appropriate no-contact orders.

[16] With regard to the tertiary ground, the Crown says that they have a relatively strong case against the accused. It is a very grave offence, carrying a sentence of life imprisonment, and the detention of the accused is necessary to maintain the confidence of society in the administration of justice.

[17] The Crown acknowledges that the pre-bail report says that the accused would be accepted back into his Native community, but says that there is no indication that in the past the accused has taken advantage of any of the support or programs available to him in that community.

[18] Defence counsel submitted that the concerns expressed by the Crown regarding the secondary and tertiary grounds for detention under s. 515(10) may be adequately addressed so as to justify the release of the accused. Defence counsel also says that the court should have in mind the principles enunciated in s. 718.2(e) regarding the sentencing of aboriginal offenders.

[19] When considering the judicial interim release of an aboriginal who has been charged with an offence, defence counsel says that, while the death of Conrad Joe was a tragic event, only he and the accused really knew what happened that night.

He said that the accused's defence will be that he was the subject of an unprovoked attack by Conrad Joe and had to defend himself. He said that Conrad Joe routinely attacked the accused in the past. He informed the Court that Conrad had served a sentence of ten years for manslaughter.

[20] Defence counsel referred to the pre-bail report by Mr. Stuart Cadwallader, who was present in the courtroom. That report contains information that is very helpful to the Court in making this decision.

[21] The accused is 35 years of age. He was born in Sechelt, B.C., and is a registered member of the Sechelt First Nations. His mother was a member of the same native group. She was described as an alcoholic and as a chronic poly substance abuser. Alcohol and substance abuse was an ongoing occurrence in the household where the accused lived. He and his siblings also suffered physical, emotional and sexual abuse, both from visitors and extended family alike.

[22] His mother committed suicide when he was about five years old, and it appears that the accused saw his mother taking her life. Following this, he and his siblings were placed into foster care by the Ministry. His father had a problem with alcohol until 1984, when he stopped drinking and was then able to have the children returned to his care.

[23] The accused is also the product of three generations of residential school survivors and severe alcoholism. On the maternal side of the accused's family there is a history of mental health and FAS problems. However, there is nothing to indicate that the accused has any history of diagnosed psychological or mental disability.

[24] The accused acknowledges that he has struggled with substance abuse. He has, however, had significant periods of sobriety, including three-and-a-half years following treatment at a Native treatment facility which he had voluntarily attended. It is also noted that he completed his last sentence of 18 months followed by one year of probation in the community without incident.

[25] The accused has resided most of the time with his father at the family home in Sechelt. It seems that he has a positive relationship with his father. The father spoke to the Court and confirmed what is said in the report, and that he would ensure that his son is closely supervised in the community if he is released. The father has agreed to act as surety for the accused.

[26] There is some indication that the accused suffers cognitive and behavioural issues which are consistent with fetal alcohol syndrome. Nevertheless, his past employer, Mr. Bill Neff, characterized him as a punctual and diligent employee who he would not hesitate in rehiring.

[27] The pre-bail report also goes into extensive *Gladue* considerations, including some of the history of the family of the accused and the Sechelt First Nations. That Nation became an independent self-governing body with municipal status in 1986.

[28] The report concludes that the primary challenge of the accused is the effective management of his abstinence from substance abuse and concurrent treatment, including counselling.

[29] The Sechelt Nation has expressed a desire to have the accused returned to the community so that both he and the community can begin the healing process.

[30] His father has also expressed a desire to have the accused returned to the family home, where he is committed to his son's supervision, involvement in programs, and compliance with court-ordered conditions.

[31] Letters from the Chief of the Sechelt Indian Band dated November 5 and December 9, 2009, were provided to the Court. Chief Garry Feschuck stated that he has known both the accused and his father for his entire life. He also states that, being fully aware of the allegations against the accused, the Sechelt Nation would offer the accused structured supervision within the community, as well as cultural and spiritual programs. The Sechelt Band would also provide opportunities for employment for the accused.

[32] The father of the accused, Phillip Joe Sr., is 70 years of age. He provided an affidavit to the Court setting out information in support of his son's release. He said that during a period of ill health his son acted as his sole caregiver. He also says when he last acted as a surety for the accused there was never a problem with him complying with the conditions of bail. He owns his own home in Sechelt and he says that he knows that the accused would not jeopardize that investment. The father addressed the Court and said that if the son strayed from the conditions imposed by the Court he would not hesitate to turn him in and that his word in his house is the law.

[33] The accused has also filed an affidavit with the Court saying, among other things, that if he is released he will reside with his father and obey all of the conditions of the court and not jeopardize his father's home.

[34] Defence counsel referred to a number of case authorities in support of his position that the accused should be released. I will just briefly refer to a couple of those.

[35] *R. v. Michel,* [1996] B.C.J. No. 2569, which is a decision of the B.C. Court of Appeal overturning a decision of the bail court and releasing the accused who was facing a charge of second degree murder. The Court of Appeal was satisfied that based on the prospect for employment of the accused, the support of his family, and an indication that he would attend court to answer the charge, he was a suitable candidate for release.

[36] In *R. v. Hennessey*, [2008] A.J. No. 1521, the Court of Queen's Bench of Alberta released the accused. The accused was facing four counts of first degree murder in relation to the tragic killing of four RCMP officers in Mayerthorpe, Alberta. The charges arose because of the alleged assistance given to the killer, James Roszko, by Hennessey. As in this case, the Crown sought the detention of Hennessey on the secondary and tertiary grounds. The Court agreed with defence counsel that if a stringent set of conditions were imposed Hennessey could be released into the community without a substantial likelihood that he would commit an

offence or interfere with the administration of justice. The Court commented that the conditions should ensure that the slightest move to interfere with a witness would result in the cancellation of bail.

[37] In considering the tertiary ground, the Court expressed some concern about the strength of the Crown's case. In addition, the Court was impressed by the support of Hennessey shown by friends and members of his family and their willingness to act as sureties to secure his release. The Court applied the test of what a reasonable, right-thinking, objective member of the public, who understands the presumption of innocence and has the knowledge that the judge has from the hearing, would think about his release, including also knowledge of his personal circumstances as well as the community support for him, together with the stringent conditions of release that would be imposed, and concluded they would remain confident in the administration of justice.

[38] Defence counsel also referred to a decision of Warren P.C.J. in *R. v. Wesley*, [2002] B.C.J. No. 3401, as support for his position that the principles enunciated in *R. v. Gladue*, [1999] 1 S.C.R. 688, regarding the sentencing of an aboriginal offender should also be considered in a bail hearing. In a similar vein counsel referred to a decision of the Ontario Superior Court of Justice in *R. v. Silversmith*, [2008] O.J. No. 4646.

[39] In these proceedings the onus has been on the accused under s. 522(2) of the *Criminal Code* to show cause why his detention in custody is not justified under s. 515(10). In my view the accused has satisfied that onus.

[40] I will first say that I agree with the view that the principles of the *Gladue* decision should be considered in a bail hearing. Recently Justice Rosenberg of the Ontario Court of Appeal, in a speech to the Criminal Lawyers Association of Ontario, commented that aboriginal adults represent 3% of the population, but almost 20% of the remand population. In other words, one-fifth of the prisoners held in remand are aboriginal. If they are young aboriginals that proportion is increased to one-quarter. The overrepresentation of aboriginals in our prisons is one of the reasons the

principles of *Gladue* must be considered in a sentencing hearing. In my view it clearly follows that they must also be considered in a bail hearing.

[41] With regard to the secondary ground, while the accused has a criminal record, including crimes of violence, the record is somewhat dated in that his last conviction was in 2001. Furthermore, the accused completed an 18-months' conditional sentence and one year probation in respect of that offence without a breach. In addition, he has the support of his First Nations community, including the Chief, who has said that opportunities for employment will be made available to the accused.

[42] I am satisfied that, if released, there is not a substantial likelihood that the accused will commit an offence or interfere with the administration of justice.

[43] Applying the approach of the Court of the Queen's Bench in *Hennessey*, the accused has also satisfied me that he need not be detained on the tertiary ground.

[44] The accused, Phillip Moses Joe Jr., will be released on a $25,000 surety. That is higher than counsel suggested and I will comment on that – to be posted by his father, Phillip Joe Sr., to ensure his good behaviour until his trial and his attendance at court when required. The reason for the surety being increased to $25,000 is to emphasize to Phillip Joe Sr. the responsibility that he is taking on in this matter, and to emphasize to Phillip Joe Jr. the importance of abiding by the conditions.

[45] The conditions of his release will be as follows:

1. To keep the peace and be of good behaviour;

2. To appear in court when required to do so;

3. To report within 72 hours of release to a bail supervisor at 275 East Cordova Street in the City of Vancouver, and thereafter as and when directed by the bail supervisor. It would seem to me that reporting in

his community would be advisable, and that could be arranged through his bail supervisor or through the office in Vancouver

4. To reside at his father's residence, which I understand is located at 5750 East Porpoise Bay Road in Sechelt, B.C. I have added to obey the rules regarding living in such residence as told to you by your father, and not change that residence without the prior written consent of your bail supervisor.

5. You shall not contact directly or indirectly Trevor Joe, Dylan Baptiste, Marcella Bailey, Nicholas Thibault, or Mike Solomon.

6. You shall not be outside your place of residence from 6:00 p.m. each day until 6:00 a.m. the following day, seven days a week, unless it is for the purpose of going immediately to or coming immediately from a place of lawful employment which has been approved in advance by your bail supervisor.

7. You shall answer the phone of your residence or respond to the attendance of a peace officer at the door of the residence during the hours of your curfew to ensure that you are complying with the immediate preceding condition.

8. You shall not leave the territory of the Sechelt First Nations except for attending at scheduled meetings with your bail supervisor or appearance in court.

9. While you are in your place of residence there shall not be anyone other than your father present, unless your father himself is present.

10. You shall seek and maintain lawful and gainful employment and inform your bail supervisor if you are successful in obtaining such employment.

11. You shall abstain absolutely from the possession, use or consumption of alcohol or any non-prescription drugs, and you shall not enter any establishment whose primary business is the sale of alcoholic beverages.

12. Having consented in this hearing to such testing, upon demand by your bail supervisor or by a peace officer you shall attend as directed for urinalysis or breathalyzer testing to ensure compliance with the immediately preceding condition.

13. You shall not possess any firearm or crossbow, or any weapon as defined in the *Criminal Code*, and you shall not possess a knife, except for the immediate preparation and consumption of food.

14. You shall attend at, participate in and successfully complete counselling as directed, which shall include but is not limited to First Nations counselling or education programs, mental health, substance abuse and life skills counselling as directed by your supervisor. A failure to attend or complete such programs shall be reported by you or the program director to your bail supervisor and shall constitute a breach of this condition.

[46] Are there any questions concerning the conditions?

[DISCUSSION RE 72 HOUR REPORTING CONDITION]

[47] THE COURT: So Mr. Registrar, that 72 hours will be changed to report within five days of release.

[48] THE CLERK: Yes, thank you.

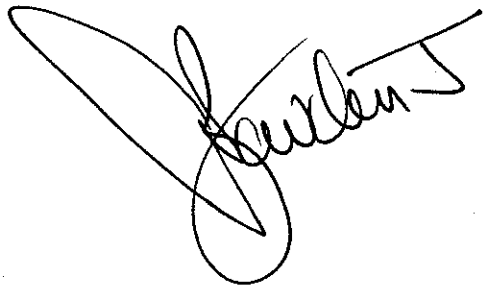
[DISCUSSION RE CONDITION 5]

[49] THE COURT: So, Mr. Registrar, in condition 5, the no-contact provision, the wording will continue, except incidental contact which may occur at -- I would use

the term longhouse ceremony, is that adequate, or longhouse ceremony or similar First Nations ceremony --

[50] MR. TARNOW: Similar traditional First Nations.

[51] THE COURT: -- similar traditional ceremony, provided that the father, Phillip Joe Sr., is present and provided that Phillip Joe Jr. shall not engage in any discussion with these individuals.



CITATION: R. v. Corbiere, 2012 ONSC 2405
COURT FILE NO.: CR-11-2228
DATE: 20120507

Delivered Orally: May 7, 2012

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HER MAJESTY THE QUEEN	)	Thomas Meehan, for the Crown
– and –	)	
Perry Leonard Corbiere	)	Frank P. Retar, for Perry Leonard Corbiere
Defendant	)	Chris Diana, for the Ministry of Community Safety and Correctional Services
	)	Marc Garson, for the Ministry of the Attorney General

POMERANCE J.:

Introduction

[1] Perry Corbiere pleaded guilty to one count of sexual assault and one count of robbery. A third count, alleging break and enter, is to be withdrawn by the Crown. The charges arise from an incident in which Perry Corbiere broke into the home of the victim, who was 62 years of age, stole her money and

jewellery, and sexually assaulted her, forcing fellatio and vaginal intercourse.

[2] It was acknowledged by all before the court, including counsel for Mr. Corbiere, that the offences call for a lengthy term of imprisonment in the penitentiary. The defence submits that a sentence in the range of eight years should be imposed. The Crown submits that a sentence of ten years should be imposed and that, pursuant to s. 743.6(1) of the *Criminal Code*, the offender should be ordered to serve one half of his sentence before being eligible for parole.

[3] Perry Corbiere is an Aboriginal offender with ties to his culture and heritage. He has, in the past, participated in the healing traditions of his community. His background, and that of his family, reflects systemic disadvantage and discrimination of the type historically aimed at Aboriginal peoples in Canada. This is a case in which the remedial provisions of s. 718.2(e) of the *Criminal Code* are engaged.

The Offence

[4] On August 16, 2010, the victim, S.G., was at home watching television when Perry Corbiere entered her residence through an unlocked door. Upon

entering, he demanded money. S.G. obtained her purse and offered the money inside, which amounted to four dollars in change. The offender was not satisfied and asked for jewellery. He began to search the residence, opening cupboards, checking the fridge and freezer, and searching through her bedroom drawers. He ordered that the victim remove several rings from her hands. The victim begged the suspect to let her keep the wedding band on her right hand as it belonged to her mother. He allowed her to do so.

[5] After taking the victim's jewellery, Perry Corbiere demanded that she expose her breasts. He fondled her breasts and sucked on them. He then took the victim into the bedroom where he directed her to get on the bed. He ordered her to perform fellatio and she complied. He told the victim to pull her pants down and he penetrated her vaginally with his penis from behind. After a few minutes, he removed his penis and told her to lie on her back. He tried to penetrate her again without success. He then told the victim to kneel on all fours, whereupon he forcibly entered her again. He asked her if it felt good and if she liked it. The victim was afraid and therefore said that it felt good and that he was doing it well. At one point, the offender stopped. He told the victim that he had not ejaculated. He got dressed and fled out the back door.

[6] A DNA sample taken from the victim's breast was submitted to the national DNA data bank. It generated a "hit" on Perry Corbiere's profile, causing a DNA warrant to be obtained which linked him directly to the offence.

[7] This offence had a devastating impact on the victim, as chronicled in her victim impact statement. Her sense of safety and security has been shattered. Immediately after the offence, she left her home and continues to experience fear of other people. She has withdrawn from the world, isolating herself emotionally from everyone, including friends and family. She perceives that women and children are prey and must be constantly on guard for their safety. As she poignantly described the effect of the incident in her victim impact statement: "Life can change in a blink of an eye".

The Sentencing Hearing: Limited availability of *Gladue* Reports in Windsor

[8] Mr. Corbiere first came before the court to enter a plea and be sentenced on December 2, 2011. The material then before the court included a 2006 *Gladue* report prepared for an earlier offence. This material needed to be updated. When I expressed my intention to order an updated *Gladue* report, counsel for Mr. Corbiere advised that he had already looked into the matter. He had been told by Aboriginal Legal Services Toronto (ALST) that the agency did not have the funding to send a trained *Gladue* caseworker to

Windsor. ALST could only prepare a report for Mr. Corbiere if the correctional officials transferred him to the Sarnia jail. When asked directly by the court, Perry Corbiere expressed a clear wish to have updated *Gladue* material presented at his sentencing hearing. It was suggested by counsel that I recommend a transfer to Sarnia.

[9] This caused me concern. First, while the court could recommend a transfer to Sarnia, this would not bind correctional officials, who could choose whether or not to follow the recommendation. Mr. Corbiere required special accommodation in custody to protect him from the general population; his transfer would depend on those facilities being available in Sarnia. In any event, it seemed that the availability of a *Gladue* report should not depend on the good graces of correctional officials and their willingness to transfer a prisoner in a given case. Nor, it seemed, should the availability of such information depend on where an offender is situated. Section 718.2(e) applies to offenders across Canada, wherever they may reside and wherever they may be sentenced. As I put it in my later endorsement of January 6, 2012:

> The remedial provisions of s. 718.2(e) of the *Criminal Code* are not location specific. These provisions require that courts in all jurisdictions across Canada have access to comprehensive information about offenders' aboriginal backgrounds and the extent to which systemic disadvantage, discrimination and other related factors have influenced the offenders'

> circumstances. This is an important objective relating to the proper administration of justice. It is designed to address and ameliorate the overrepresentation of aboriginal offenders in Canadian jails.

[10] In light of these difficulties, I directed that the matter go over one week. In the interim, on November 8, 2011, I received a letter from Jonathan Rudin, Program Director of ALST. In his letter, Mr. Rudin explained that the *Gladue* caseworkers employed by ALST serve four distinct geographic areas – Toronto, Brantford-Hamilton, Waterloo-Wellington, and Sarnia. Mr. Rudin confirmed that his agency does not receive funding to provide *Gladue* reports for offenders outside these catchment areas.

[11] Perry Corbiere was back before the court on November 9, 2011. In order to address the funding issue, I made an order directing that the Ministry of Community Safety and Correctional Services (MCSCS), Probation and Parole Division, provide the funding to allow a properly trained *Gladue* worker to attend in Windsor and prepare a *Gladue* report for Perry Corbiere. Mindful of the fact that the Ministry was not represented before the court, I stipulated that, if the Ministry wished to challenge the order, it could file material no later than December 30, 2011 and a hearing would be scheduled.

[12] No formal materials were filed by the Ministry. Nor did the Ministry request a hearing. Rather, a letter dated December 21, 2011 was sent to me by

Natalie Osadchy, counsel in the Legal Services Branch of the MCSCS. In her letter, Ms. Osadchy reported:

> The Ministry has determined that operationally it is in a position to transfer Mr. Corbiere from the Windsor Jail to the Sarnia Jail for the purpose of having a case worker from Aboriginal Legal Services of Toronto (ALST) prepare an updated Gladue report.

[13] In the letter, Ms. Osadchy pointed out that funding for the ALST was provided by the Ministry of the Attorney General of Ontario, the Department of Justice, and Legal Aid Ontario. She closed her letter with the following request:

> The Ministry is respectfully inquiring, in light of the aforementioned circumstances, whether Your Honour would consider rescinding or varying the Order of December 9, 2011 without the necessity of a full Hearing in this matter (perhaps administratively, if feasible) or alternatively on or before the next return date?

[14] I was not prepared to rescind or vary the order of December 9 on an administrative or other basis. The fact remained that Mr. Corbiere did not have access to *Gladue*-related services in Windsor that would have been available to him in other city centres. An assurance that he would be transferred to Sarnia offered a band-aid solution, but it did not address the underlying injury. There persisted the systemic concern that Aboriginal offenders in Windsor were being denied access to certain services available to Aboriginal offenders in other city centres. In a written ruling released on

January 6, 2012, I expressly declined to rescind the order, directing that a hearing take place:

> I will instead direct that a hearing take place on the question of whether the appropriate ministry and/or agency should provide the funding necessary to allow a properly trained *Gladue* worker to attend in Windsor, Ontario to prepare an updated *Gladue* report for Mr. Corbiere. I understand from Ms. Osadchy's letter that the ministries and agencies responsible for such funding may include the Ministry of the Attorney General of Ontario, the federal Department of Justice and Legal Aid Ontario. I direct that this order be served upon appropriate representatives of those Ministries and agencies, as well as Mr. Rudin, legal director of Aboriginal Legal Services of Toronto.

[15] The hearing was set for February 3, 2012.

[16] On February 3, 2012, Chris Diana, counsel for MCSCS, appeared before the court, as did Marc Garson, counsel for the Ministry of the Attorney General of Ontario (MAG). At the outset of the hearing, I was advised that, sometime after my ruling of January 6, 2012, Mr. Corbiere had been transferred to the Sarnia jail where an updated *Gladue* report had been prepared.

[17] This came as a surprise to the court. Giving government officials the benefit of the doubt, I will assume that Mr. Corbiere was not transferred to Sarnia for the purpose of sidestepping the broader systemic issue. I will assume that the transfer was motivated by a desire to assist the court, rather than a desire to frustrate the stated objective of the hearing.

[18] Be that as it may, the effect of having the *Gladue* report prepared outside of Windsor was that the hearing became academic, at least where Perry Corbiere was concerned. It is the case before the court that drives its jurisdiction. Mr. Garson's position was that, once a *Gladue* report was produced for Mr. Corbiere, the jurisdiction of the court to inquire into the availability of such reports was effectively spent. I had to agree. It is not my role, as a sentencing judge, to conduct a reference or general inquiry. Nor is it my place to direct allocation of government resources in the abstract. The concern of the court was to ensure that Mr. Corbiere had the full benefit of the remedial *Gladue* principles in the context of his sentencing hearing. By virtue of the Sarnia report, that goal was met.

[19] It is nonetheless appropriate to summarize counsel's assertions about the availability of *Gladue* reports outside of the ALST catchment areas. These representations might assist counsel and judges in future cases.

[20] Counsel for MAG, Mr. Garson, explained that there are four dedicated *Gladue*-based service providers operating within Ontario. ALST serves four distinct geographic areas – Toronto, Brantford-Hamilton, Waterloo-Wellington and Sarnia. The Ontario Federation of Indian Friendship Centres offers services within London Ontario. The United Chiefs and Counsel of

Manitoulin (UCCM) operates in parts of Northern Ontario. The Thunder Bay region is covered by Thunder Bay Gladue Services. These agencies are variously funded by the Ministry of the Attorney General, the Department of Justice and Legal Aid Ontario.

[21] Outside of these catchment areas, the preparation of *Gladue* material falls to the MCSCS, as the Ministry responsible for preparation of pre-sentence reports (PSR). Mr. Diana reported that probation and parole officers are trained that, when dealing with an Aboriginal offender, they are to prepare a pre-sentence report "with a *Gladue* component". During submissions, I expressed concern about the adequacy of these "*Gladue* components", as compared to the focussed and comprehensive material found in the "*Gladue* reports". Counsel assured me that the quality of information about an Aboriginal offender in a PSR should be no different than the quality of information found in a *Gladue* report. Counsel submitted that, where a PSR falls short of this standard, the court should direct the author to attend court to provide further information.

[22] It follows then that, at least in theory, a pre-sentence report prepared for Aboriginal offenders should contain the same type of information that would ordinarily be found in a *Gladue* report. It remains to be seen whether this

standard is met in practice. It has been observed by some authors that: "Gladue reports contain considerably more detailed information regarding the offender's background, family and life circumstances than PSRs". (see K. Hannah-Moffat and P. Maurutto, "Re-contextualizing pre-sentence reports: Risk and race" (2010) 12 Punishment & Society 262, at pp. 265, 273, 275, 278, as cited by Hill J. in *R. v. Knockwood*, 2012 ONSC 2238 at para. 54(10)). This was attributed to factors such as the training of dedicated *Gladue* caseworkers, the in-depth approach taken to the gathering of information about Aboriginal history and background, and the conceptual difference between a *Gladue* report and a PSR:

> A Gladue report and its recommendations are holistic and contextualized accounts that characterize the Aboriginal offender's needs, risk and community options differently from the actuarial risk-based character of PSRs. Essentially, they adopt a non-actuarial model and more contextualized approach to situate and frame Aboriginal offender's risk.

[23] There is no magic in a label. A "*Gladue* Report" by any other name is just as important to the court. Its value does not depend on it being prepared by a particular agency. Its value *does* hinge on the content of the document and the extent to which it has captured the historical, cultural, social, spiritual and other influences at play in this context. In *R. v. Kakekagamick*, [2006] O.J. No. 3346 (C.A.), LaForme J.A. observed that a court sentencing an Aboriginal offender must be guided by directed by information about:

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

[24] More recently, the Supreme Court of Canada affirmed that this type of information is "indispensable" to a sentencing court. As explained in *R. v. Ipeelee and Ladue*, 2012 SCC 13, at paragraph 60:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*. [emphasis added]

[25] Ultimately, it is the responsibility of the court to ensure that the full range of necessary information is available. LaForme J.A. made this point in *Kakekagamick*, at paragraphs 45-46:

> 45. Where counsel does not adduce the evidence, it is still incumbent on the sentencing judge to try to acquire information on the circumstances of the offender as an Aboriginal person (*Gladue*, para. 84). In most cases, the

> information contained in a pre-sentence report may be sufficient to meet the requirement of special attention to the circumstances of Aboriginal offenders. But, where that information is insufficient, s. 718.2(e) permits the sentencing judge to request that witnesses be called to testify as to reasonable alternatives to a custodial sentence.
>
> 46. While the role of the sentencing judge is not that of a board of inquiry, there is nevertheless an obligation to make inquiries beyond the information contained in the pre-sentence report in "appropriate circumstances", where such inquiries are "practicable" (*Gladue*, para. 84). The sentencing judge's assessment of whether further inquiries are either appropriate or practicable is to be accorded deference (*Wells*, para. 54).

[26] If a pre-sentence report is lacking in its richness of detail or historical/systemic background, it is incumbent upon the sentencing judge to make further inquiries. The court may direct that the report be supplemented in writing or it may direct the attendance of witnesses that can offer the information and perspective that is needed.

[27] Alternatively, where *Gladue* information is not made available in a proper, timely or comprehensive manner, the court may consider other remedies. In *R. v. Knockwood,* 2012 ONSC 2238, Hill J. concluded that deficiencies in *Gladue*-based services in Quebec warranted a reduction in an Aboriginal offender's sentence. Applying the principle in *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, Hill J. ruled as follows in paragraphs 69-72:

> 69. The sentencing hearing in this case ought to have proceeded in early December 2011. Instead, the sentencing occurred 4 months later and 8 months after the offender's plea of Guilt. This is not as soon as practicable.
>
> 70. The circumstances of the delay are important:

> (1) almost immediately after the court's order for a *Gladue* report, Quebec probation services reported that because *Gladue* reports are not prepared in that province one would not be prepared
>
> (2) Ms. Knockwood, an Aboriginal person, was compelled to settle for an offer of a PSR with "*Gladue* content"
>
> (3) Quebec probation services balked at preparing the report in a timely fashion
>
> (4) while the report was filed with the court within the prescribed time, it had no *Gladue* content, was otherwise content-inadequate, and typed in the French language which the offender could not understand
>
> (5) upset, insulted and afraid that the court would not receive the background information necessary to understanding who she was as an offender, Ms. Knockwood on her own attempted to get a *Gladue* report in Montreal only to find that she would have to pay for such a report
>
> (6) the Province of Quebec may get to the training necessary for the preparation of *Gladue* reports over a dozen years after the *Gladue* case was decided
>
> (7) the offender has suffered stress and upset as a result of the delay in preparation of the report and the sentencing itself.
>
> 71. The outrageousness of this story is self-evident. A shameful wrong. Contempt for the rights of Aboriginal Canadians. A denial of equality.
>
> 72. The state misconduct is measured as much in the circumstances and consequences of the delay for Ms. Knockwood as it is in the actual months of delay. But for the intervention of Mr. Diana and the work of Mr. King, the damage would have been further aggravated. The misconduct falls squarely to be addressed by a *Nasogaluak* remedy.

[28] I am satisfied that the updated *Gladue* report prepared by ALST for Mr. Corbiere while he was in the Sarnia jail captured the relevant and necessary information about his Aboriginal status and background. However, problems relating to the obtaining of *Gladue* information in Windsor and other centres

raise continuing concerns for the administration of justice. There is no reason to believe that offenders in Windsor will be transferred to Sarnia jail for *Gladue* reports as a matter of course. To the contrary, the indication was that Perry Corbiere's transfer was an exception to the norm. What of the Aboriginal offender who is not in custody? Would he or she be expected to travel to Sarnia? Would a *Gladue* report even be available for an offender who was willing to travel, or would he or she be required to settle for a pre-sentence report with *Gladue* content? The *Gladue* framework requires a factual foundation, without which it is a hollow gesture. In *Ipeelee and Ladue*, the Supreme Court of Canada revitalized the remedial principles at stake in this context. Their application in Windsor and similarly situated locations will be seen in due course.

[29] I will now turn to a discussion of the circumstances of Perry Corbiere, as they relate to the sentencing determination .

Circumstances of the Offender

[30] Perry Corbiere was born on March 8, 1984 to Lucy and Gerald Corbiere in West Bay (Manitoulin Island) Ontario. He is the second of four children. Gerald Corbiere was a registered band member in West Bay. Lucy Corbiere

was a band member from the nearby community of Wikwemikong. Perry Corbiere is registered with the M'Chigeeng First nation.

[31] The offender's mother, Lucy Corbiere, was born to an alcoholic mother. She and each of her six sisters had different fathers. She was initially raised by her grandparents, who had a farm where they harvested animals and fish for food. After Lucy's grandmother died, the children were returned to their birthmother who remained an alcoholic. After a fire broke out in the home, the seven girls became wards of the Children's Aid Society. Lucy Corbiere was told that she was too old to be adopted and would therefore be placed in foster homes. Thus began a terrible ordeal. She woke up one morning to find her long hair cut off and was told: "all you Indian kids have stringy, dirty hair". She was denied food for two weeks because she did not know how to use a fork and knife properly. She was physically and sexually abused.

[32] These experiences left an imprint on Lucy Corbiere, and affected her ability to parent. Perry Corbiere was conceived five months after his mother Lucy and father Gerald began dating. His father, Gerald, was a violent alcoholic. His mother and father drank and fought on a regular basis when he was young. His father assaulted his mother on various occasions, but stopped after four or five criminal charges had been laid. As the domestic turmoil

calmed, Gerald began staying away from home. Lucy Corbiere was, functionally, a single parent.

[33] She experienced difficulties in the parenting role. Perry Corbiere was born three weeks early. He had experienced a lack of oxygen in the womb and his heartbeat was only 28 beats a minute. This led doctors to predict that he might suffer from a mental disability. As he grew older, Perry Corbiere's cognitive skills were slow to develop. When he was about seven years old, he was diagnosed with Attention Deficit Hyperactivity Disorder and was prescribed Ritalin. He had difficulty in school and could not read and write though he was in grade seven. On his first day of high school, he was kicked out of school because he became violent and broke the vice-principal's nose after being called a "wagonburner".

[34] Perry Corbiere began stealing money from his parents when he was 15 or 16 years of age. It was around that time that he also started drinking alcohol and consuming drugs such as marijuana, hash and hash oil. He was having difficulty fitting into his school and social environment.

[35] A dramatic turning point occurred when Perry Corbiere was 17 years of age. He had travelled with his family to his mother's community in Wikwemikong. While his family attended a funeral, Mr. Corbiere played

basketball with a friend. Seven or eight adults approached the two teenagers as they played ball. Mr. Corbiere did not feel threatened by these people. Sadly, his instincts were terribly wrong. The adults were drunk and set upon Perry Corbiere just as his friend managed to run away. The offender was brutally beaten. He recalls seeing women jumping on his head with both feet and stomping on his face. He lost consciousness and was later found face down in a nearby creek.

[36] Perry Corbiere was taken to a nearby hospital where he spent time in the intensive care unit with severe head trauma. He was in a coma for several days. The doctors reported that one more blow could well have killed him. The psychological scars of this event remain with Perry Corbiere to this day. He experiences flashbacks when confronted with violent or potentially violent situations. He experiences difficulties that may be attributable to acquired brain trauma suffered as a result of the beating. This type of brain injury can lead to problems in cognitive, behavioural and emotional functioning. There is reason to believe that Perry Corbiere would benefit from being assessed for brain injury, as well as mental health issues. He is currently taking Seroquel, an anti-psychotic medication as well as Cipralex, an anti-depressant. While in Sarnia, he told his *Gladue* worker:

> I have problems sometimes thinking straight, or remembering stuff. I hear voices telling me that people want to hurt me; that I'm not wanted, end life, but I'd never do that. I know it all comes from that attack when I was younger. They never tested me after that and I think they should have.

[37] Perry Corbiere has not been able to secure a mental health evaluation while in jail. He was seen by one worker from the Canadian Mental Health Association, but was transferred out of the Sarnia jail before he could see Dr. Komer.

[38] Despite his youth, the offender has amassed a lengthy criminal record, dating back to 1998, when he was a young offender. He has been in a perpetual cycle of incarceration, registering criminal convictions in virtually every year between 1998 and 2010. His typical pattern is to commit a new offence within a short time of being released from jail. As it was put in the updated *Gladue* report:

> For the offences for which his first Gladue report was prepared, Perry was sentenced to two months and ten days incarceration. He was released on November 25, 2006 and on January 1, 2007, 59 days after his release, Perry was arrested again. When that sentence was complete, even though he was to be released on February 22, 2007, he was arrested that day on other charges and was incarcerated until March 9, 2007. After 93 days, Perry was once again incarcerated until 24 days. Once released on July 4, 2007, it was 144 days before being arrested November 25, 2007. When released on January 9, 2008, Perry was only out for 11 days before being arrested again January 20, 2008. Although he was to be released on February 8, he was arrested on other charges and stayed incarcerated until April 22, 2008. After that arrest, Perry remained out of jail for 322 days. In 2009, Perry spent 15 days in jail and was released on March 24 2009. After that date, Perry stayed out of jail for 544 days until he was arrested on September 19, 2010 and has been incarcerated since that date.

[39] Perry Corbiere has prior convictions for uttering threats, robbery, break and enter, and assault. He does not have prior convictions for sexual offences. The longest sentence that has served is one of nine months incarceration for attempt robbery and break, enter and theft in 2004. His uncle is serving a life sentence in Kingston, having been incarcerated for the last 28 years. Mr. Corbiere is afraid of meeting a similar fate, but is well on his way if he continues on the path of criminality. At least part of his difficulty stems from substance abuse. Perry Corbiere told his *Gladue* worker he had a serious addiction to crack cocaine and that he engaged in "heavy" use of the drug between 2006 to 2008. He asserts that he has now been drug free for three years.

[40] While incarcerated in relation to this offence, Mr. Corbiere has taken steps to improve himself. He has enrolled in various courses, including Bible studies for which he has obtained several certificates. At the same time, he candidly acknowledged to the *Gladue* worker that he has had "60 misconducts this time being incarcerated". He attributes these disciplinary infractions to situations in which he is prompted to fight other inmates. Mr. Corbiere asserts that, because of his size, he is targeted by other inmates who wish to assert their superiority. Counsel submitted that he is also targeted

because of the nature of the charges against him. When he is set upon in a violent fashion, he responds in kind. According to the offender, when he is under attack, he experiences flashbacks to the attack left him in a coma many years ago.

[41] Perry Corbiere's link to his Aboriginal heritage is a stabilizing influence in his life. From time to time, he has benefitted from Aboriginal healing programs and initiatives. According to Leslie Saunders, the program coordinator at the Meeting Place Drop-in Centre in Toronto, Perry Corbiere has participated in a weekly spirit circle with the Elder. A letter from St. Christopher House, dated in June 2009, noted that Perry Corbiere had attended a three day traditional healing retreat, and that he had participated in healing circles and sweat lodges. He delivered a "thoughtful, honest and dynamic speech" to families and Elders about his experiences in the criminal justice system. He has worked in other capacities to tell his story to Aboriginal youth. His involvement in cultural and traditional ceremonies tends to increase during periods of sobriety. Currently, he wants to enter a treatment centre or healing lodge so that he can break the cycle of incarceration.

[42] Perry Corbiere has acknowledged that he needs help. He says that he is ready to change his life. As he told the *Gladue* worker:

> I've had enough. I don't want to be in here anymore. This time is my last chance. When I get out I have to straighten up. I want to get involved in the Native community events so that eventually I can become an Elder. I know I could help younger people to keep outta trouble. I just have to stay away from dope and old friends.

[43] Similar sentiments were contained in a letter to the court from Mr. Corbiere, read into the record by his counsel during the sentencing hearing.

Analysis

[44] The offences before the court are serious. Perry Corbiere broke into the victim's home; stole her property; and when the property was gone, robbed her of her sexual integrity. This was a callous attack on a vulnerable victim. The sexual acts demanded by the offender were highly invasive. He ordered that she perform fellatio and raped her, penetrating her on more than one occasion. The sentence imposed must reflect the court's abhorrence for the offence and society's denunciation of crimes of sexual violence. The targeting of the victim in her own home is a significant aggravating factor exacerbating the trauma and impact on the victim. The home is a protective haven; a place where we should all expect to feel safe. The actions of the offender have destroyed the victim's sense of security in her home and have left her feeling unsafe everywhere.

[45] The range submitted to the court by counsel is eight to ten years in the penitentiary. The defence seeks a sentence of eight years incarceration. The Crown submits that ten years should be imposed, together with an order that the offender serve one-half of the sentence before parole eligible (s. 743.6(1) of the *Code*). Perry Corbiere was arrested for these offences on April 25, 2011. Both counsel advocate the application of one for one credit for days spent in pre-sentence custody.

[46] In requesting a sentence of eight years, counsel for Mr. Corbiere observed that ten years is the maximum penalty for the count of sexual assault. He submitted that the robbery was separated in time from the sexual assault and was more in the nature of a theft than a robbery. I cannot agree. There is no indication of how long Perry Corbiere remained in the victim's home. What is clear is that the events formed a single transaction of implied and actual violence. I do not think it appropriate to parse the events in the manner suggested. The total sentence should reflect both offences to which the offender pleaded. The break and enter count is to be withdrawn by the Crown. Nonetheless, the intrusion into the victim's home is an aggravating feature of the facts available for the court's consideration.

[47] While the offences are serious, I must nonetheless give full consideration to the sentencing principles set out in *R. v. Gladue* and its progeny. These principles apply to all offences and it is the duty of the sentencing judge to apply them. This approach does not necessarily dictate a different sentencing result; it does, however, call for a different methodology in the calculation of a fit sentence. As noted in *Ipeelee* and *Ladue*, at paragraphs 59-60:

> 59. The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(*e*) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).
>
> 60. Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These

> matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.

[48] No direct causal link need be shown between background factors and the offences before the court. It would be difficult for an offender to demonstrate such a link. The process is, more broadly concerned with the intergenerational effects of the collective experiences of Aboriginal peoples. As recently observed the Supreme Court of Canada in *Ipeelee and Ladue,* at paragraph 83: “Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence”.

[49] This context is relevant in this case. Perry Corbiere has experienced several challenges in his life, many of which relate to his Aboriginal status and background. These include the discrimination and abuse experienced by his mother; the consequent difficulties that she experienced raising the offender; the alcoholism of his father; the offender’s own experience of discrimination; his addiction to destructive substances; his learning difficulties; the potential impact of brain injury and the violence and trauma that has followed him since he was brutally beaten as a teenager.

[50] I accept that Perry Corbiere is genuinely remorseful about the events that have brought him to court. This is evident from his plea of guilt and the heartfelt letter that was read on his behalf into the court record. I accept that he genuinely wishes to turn his life around. It is for him to make that happen, albeit with the help of others in his environment. He has given to and received from the Aboriginal community in the past, and has demonstrated a commitment to the betterment of himself and others. He has used his experience in the criminal justice system as a cautionary tale to dissuade other youths who might be tempted to break the law.

[51] Unfortunately, these positive experiences have not prevented Perry Corbiere from committing further offences. They did not prevent him from committing the offences for which he is now to be sentenced. These offences mark a jump in the severity of his crimes – a disturbing escalation of violence. The commitment to *Gladue* principles does not foreclose application of the principles of general deterrence and denunciation in connection with violent offences. The principle of proportionality requires a sentence that reflects the gravity of the offence and the moral culpability of the offender, just as it requires a sentence reflecting the systemic and contextual factors contributing to the criminality.

[52] Having considered the contextual backdrop and "*Gladue*" factors, together with the circumstances of the offence, I am satisfied that a sentence of nine years in the penitentiary is a fit and appropriate sentence, minus credit for days served in pre-sentence custody, on a one for one basis.

Parole Eligibility

[53] Counsel for the Crown requested that I consider making an order under s. 743.6(1) of the *Criminal Code* that would require Perry Corbiere to serve one-half of his sentence before he is eligible for parole.

[54] Section 746.3(1) of the *Code* provides as follows:

> Notwithstanding subsection 120(1) of the Corrections and Conditional Release Act, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

[55] This section requires the court to consider principles of deterrence and denunciation in dictating an increased period of parole ineligibility. The *Gladue* methodology has as much application in this context as it does in the fixing of a fit sentence. An increase in the period of parole ineligibility is, on its face, contrary to the restorative principles underlying s. 718.2(e). This does not mean that such an order is unavailable for Aboriginal offenders. Rather, it means that the court can only make such an order where it has undertaken a full analysis of the systemic, cultural, and background factors referenced by *Gladue*.

[56] I am disinclined to make an order delaying Perry Corbiere's eligibility for parole. First, I am not convinced that it is consistent with *Gladue* principles to make such an order in this case. Secondly, and in any event, I believe that the parole authorities are in the best position to assess Perry Corbiere's prospects for parole when the time comes. They will be best placed to consider the relevant factors, including his Aboriginal heritage, in deciding whether his release should be delayed.

Recommendations

[57] Perry Corbiere faces many challenges on the road to rehabilitation, including issues relating to his substance abuse, anger management, flashbacks,

learning difficulties, quite possibly, the ramifications of a brain injury. He has performed well in the past when given a meaningful opportunity to participate in Aboriginal traditions. It is through continued involvement in his community and culture that he may find the strength to conquer his demons and turn his life around.

[58] It is for that reason that I recommend to correctional officials that Perry Corbiere be incarcerated at a facility and in circumstances that give full recognition to his Aboriginal status. I further recommend that Perry Corbiere be given access to programs that allow him to explore and benefit from Aboriginal culture and traditions, such as healing lodges and Aboriginal based counselling services.

Ancillary Orders

[59] Perry Corbiere shall provide a DNA sample for purposes of the DNA data bank, pursuant to s. 487.051 of the *Criminal Code*.

[60] He shall comply with the Sexual Offender Information and Registration Act for a period of 20 years.

[61] He shall be subject to a lifetime weapons prohibition pursuant to s. 109 of the *Criminal Code*.

Renee M. Pomerance
Justice

Delivered Orally: May 7, 2012

CITATION: R. v. Corbiere, 2012 ONSC 2405

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

Perry Leonard Corbiere

Defendant

REASONS FOR JUDGMENT

Pomerance J.

Delivered Orally: May 7, 2012

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Tymiak*,
2012 BCCA 40

Date: 20120126
Docket: CA033573

Between:

Regina

Respondent

And

Gregory Glen Tymiak

Appellant

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, 24 November 2005 (*R. v. Tymiak*, Penticton Docket No. 31330)

The Appellant appeared in person

Counsel for the Respondent: M.J. Brundrett

Counsel for the Intervenor, Attorney General of Canada: K. J. Elvin-Jensen

Place and Date of Hearing: Vancouver, British Columbia
January 12th and 13th, 2012

Place and Date of Judgment: Vancouver, British Columbia
January 26th, 2012

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Chief Justice Finch:

I.

[1] Mr. Tymiak applies to reopen his sentence appeal which was dismissed as abandoned by a division of this Court on 14 July 2009. If the application is granted, he seeks additional orders for the appointment of counsel and other relief. Mr. Tymiak was self-represented on this application, appearing by videoconference from his place of detention.

[2] The principal ground put forward for reopening the appeal is that the sentencing judge did not consider, or consider adequately, Mr. Tymiak's Aboriginal heritage as required by s. 718.2(e) of the *Criminal Code*. In his oral submissions, Mr. Tymiak advanced other grounds as well. The Crown opposes the application to reopen.

[3] The applicant was convicted in British Columbia Supreme Court on 3 December 2004, of a number of offences committed in January 2003, relating to the "home invasion" of a residence in Penticton, involving an assault on one of its occupants. An appeal from conviction was dismissed by this Court in reasons pronounced 5 March 2009 (*R. v. Tymiak*,2009 BCCA 98 (CanLII), 2009 BCCA 98, [2009] B.C.J. No. 465).

[4] Following Mr. Tymiak's conviction, the Crown applied for an order declaring him to be a long-term offender. In written reasons pronounced 24 November 2005, the sentencing judge made that declaration. The judge then imposed a custodial sentence of 12 years, to run concurrently with a sentence of ten years which the applicant was already serving for offences committed in Alberta, of which he was convicted on 24 April 2003.

[5] In addition to the 12-year custodial sentence, the Supreme Court also imposed a ten year term of supervision in the community, in accordance with s. 753.2 of the *Corrections and Conditional Release Act*.

[6] Counsel, on behalf of the applicant, filed a notice of appeal against sentence. On 11 June 2009, Mr. Tymiak filed a Notice of Abandonment of the sentence appeal, and on 14 July 2009, this Court dismissed the sentence appeal as abandoned.

[7] As indicated, the basis of this application is that the sentencing judge did not consider, or consider adequately, the applicant's Aboriginal heritage.

II.

[8] Mr. Tymiak was born on 30 November 1981, and he was 23 years old at the time the B.C. sentence was imposed.

[9] There is nothing in the sentencing judge's reasons of 24 November 2005, to suggest that the question of Aboriginal heritage was raised in the hearing of the long-term offender application. Mr.Tymiak testified on that hearing, and it does not appear that he was asked to answer any

questions concerning his Aboriginal heritage. There is nothing in the transcript of counsel's submissions on that hearing which addresses the matter.

[10] The Crown points out that Mr. Tymiak has filed no material explaining why the matter of his Aboriginal heritage was not relied on either at the sentencing hearing or as a basis of a sentence appeal.

[11] Mr. Tymiak has now filed an affidavit of his mother, Judith Mary Beaudry, in which she deposes that her father was "part Saulteau", her mother was "part Cree", that she considers herself Métis, and that (as of 3 October 2011) she was in the process of applying for her Métis status card.

[12] Appended to Mr. Tymiak's affidavit of 19 July 2011 is a "Program Performance Report" on his completion of a program for persons of Aboriginal descent who are in custody ("In Search of Your Warrior Program" ("ISOYWP")), in which there are references to the applicant's childhood, his experiences as a victim of bullying, and conflicts with his family.

[13] Mr. Tymiak draws attention to this passage in the report:

> Mr. TYMIAKexplored racism and it's impact on violence, and wrote in his journal; "This was a good session, I looked back at racism as an adolescent and how this affected the way I felt about my ethnic identity. I knew I could hide behind the colour of my skin, and did not want to get picked on so I hid part of my identity. I was ashamed then, and this played a role at lashing out on other ethnic groups. I addressed the issue before coming in (jail) because I respect all ethnic cultures."

[14] In his submissions to us, Mr. Tymiak said that the references to his "ethnic identity" and to knowledge that he "could hide behind the colour of my skin", meant that he knew as a teenager he had Aboriginal ancestry, but that that was not apparent from his skin colour, and he kept that ancestry hidden to avoid being bullied.

[15] Mr. Tymiak was interviewed prior to his admission into the ISOYWP program, and the report says this concerning the interview:

> Gregory, at the time, was limited in his knowledge of culture, tradition and Aboriginal Spirituality. He has been following the teachings of the sweat at Mission. He wants to continue to learn about the teachings and of the ceremonies. He also wants to research his Aboriginal background, this is one of the teachings Elders speak about in our longhouse, identity. Knowing who you are, your roots, this is part of healing and change.

[16] During his time in custody, Mr. Tymiak has also participated in and completed a program for "Aboriginal Offender Substance Abuse". It records that he began to use drugs at age 13, and began to consume alcohol at age 11.

[17] However, as was the case before the sentencing judge, there is nothing before us as to what effect, if any, the applicant's claimed Aboriginal heritage had on his education, development, antisocial behaviour, or life experience in general.

III.

[18] This Court has jurisdiction to set aside an order dismissing an appeal that has not been decided on its merits. The test is whether, in all the circumstances, it is in the interests of justice that the order be set aside or varied: see *R. v. Henry*, 2009 BCCA 12 (CanLII), 2009 BCCA 12, [2009] B.C.J. No. 46 and *R. v. Clymore*, 1999 BCCA 225 (CanLII), 1999 BCCA 225, [1999] B.C.J. No. 800.

[19] Section 718.2(e) of the *Code* is in mandatory terms. It reads:

> A Court that imposes a sentence shall also take into consideration the following principles:
>
> ....
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[20] It seems clear from the sentencing judge's reasons at paras. 32-34, where he refers in part to ss. 718.1 and 718.2, that the applicant's Aboriginal heritage was not brought to his attention, because s. 718.2(e) is not mentioned.

[21] The leading case on the application of s. 718.2(e) is *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, 133 CCC (3d) 385. Passages relevant for the purposes of this appeal include the following:

> [69] ... While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. ...
>
> ....
>
> [75] ... Section 718.2(e) requires that sentencing determinations take into account the *unique circumstances* of aboriginal peoples.
>
> ...
>
> [79] ... Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.
>
> [80] As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: for *this* offence, committed by *this*offender, harming *this* victim, in *this* community, what is the appropriate sanction under the *Criminal Code*?
>
> ...
>
> [83] ... for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. ....
>
> [84] However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether

> the offender resides in a rural area, on a reserve or in an urban centre, the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. ...
>
> [85] Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. ...
>
> [Emphasis added.]

[22] In its summary, the Court stated:

> [93] 11. Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.
>
> [Emphasis added.]

[23] What is clear from this discussion is that while the terms of s. 718.2(e) are mandatory, the purpose of the provision is to direct sentencing courts to find alternatives to imprisonment, where possible, especially in cases where the offender is of Aboriginal heritage.

[24] On the record in this case, in the circumstances of this offender, and these offences, it is very difficult to see any real alternative to imprisonment. As noted at para. 79 of *Gladue*,"Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing."

[25] The question on this application, therefore, is whether, in all the circumstances, it is in the interests of justice to reopen the sentence appeal so that consideration might be given to the appellant's asserted Aboriginal history. I will assume for this purpose that the appellant's mother is Métis, and that the appellant is similarly entitled to be considered as a person of Aboriginal heritage.

[26] On the evidence before us on this application, we are left to speculate as to what effects, if any, that heritage may have had on the applicant, which might differentiate him from the non-Aboriginal population. We do not know whether any such effects would require the Court to reconsider the long-term offender declaration, and to impose a custodial sentence of lesser duration.

[27] There is nothing before us to show that "unique background and systemic factors ... may have played a part in bringing [Mr.Tymiak] before the courts." What does emerge from this record, and from the reports on Mr. Tymiak's participation in the prison programs, is that the factors that may have led Mr. Tymiak into a criminal lifestyle are common to many offenders,

both Aboriginal and non-Aboriginal. Those factors include family discord and eventual separation of his parents, early abuse of drugs and alcohol, disinterest in and difficulty at school, early association with other young people engaged in an anti-social lifestyle, a tendency to be easily led, and impulsive behaviour without regard for consequences.

[28] Section 718.2(e) is directed to reducing the incarceration of Aboriginal persons, by finding other appropriate sentences. It is difficult at this point to consider that any sentence other than significant jail time would have been appropriate. While it is conceivable that there are circumstances in Mr. Tymiak's past that could serve to mitigate this sentence, there is presently no evidence of what they might be.

[29] Mr. Tymiak put forward a number of other grounds of appeal which, in his submission, might be arguable if his sentence appeal were reopened. He referred to the 10 programs he has completed while in custody, to his relative youth, and to the emphasis that the sentencing judge placed on his prospects for rehabilitation. He also referred to indicia suggesting that he is a substantially reformed person, and that it would be useless for him to continue "wasting" his life in prison when he could be out and doing something useful.

[30] There appear to be some reasons to believe that Mr. Tymiak has made considerable progress towards his ultimate rehabilitation, and that he is developing a more mature and responsible understanding of himself in relation to others. However, these are matters that are properly left to the consideration of the correctional authorities. They may be factors in determining the timing of his ultimate release from custody, and any conditions that may apply upon that release. They are not matters that this Court could properly consider on an appeal from sentence: see *R. v. Jimmie*,2009 BCCA 215 (CanLII), 2009 BCCA 215, [2009] B.C.J. No. 969 and *R. v. K.R.H.*, 2002 BCCA 575 (CanLII), 2002 BCCA 575, [2002] B.C.J. No. 2364.

[31] Mr. Tymiak also suggested that he was not fully advised when he abandoned his sentence appeal, and that he did not understand the legal consequences of taking that step. His former counsel has filed an affidavit, upon Mr. Tymiak having waived solicitor-client privilege, as to the circumstances in which Mr. Tymiak instructed her to abandon the sentence appeal. I am not satisfied that Mr. Tymiak was not properly advised, or that the assistance of his then counsel was ineffective.

[32] Mr. Tymiak directed the Court to consider the Ontario Court of Appeal decision of *R. v. Kakekagamick*, 214 O.A.C. 127,211 C.C.C. (3d) 289. Given the particular circumstances of Mr. Tymiak's application, this judgment does not assist him.

[33] I am therefore of the view that it would not be in the interests of justice to reopen the sentence appeal. I would not foreclose that possibility in the future, if the sort of evidence referred to in *Gladue* became available. At this time, however, the possibility of a variation in the sentence imposed is only hypothetical.

[34] I would dismiss the application to reopen the appeal against sentence.

"The Honourable Chief Justice Finch"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Mr. Justice Hinkson"

Legal Services Society Aboriginal Publications

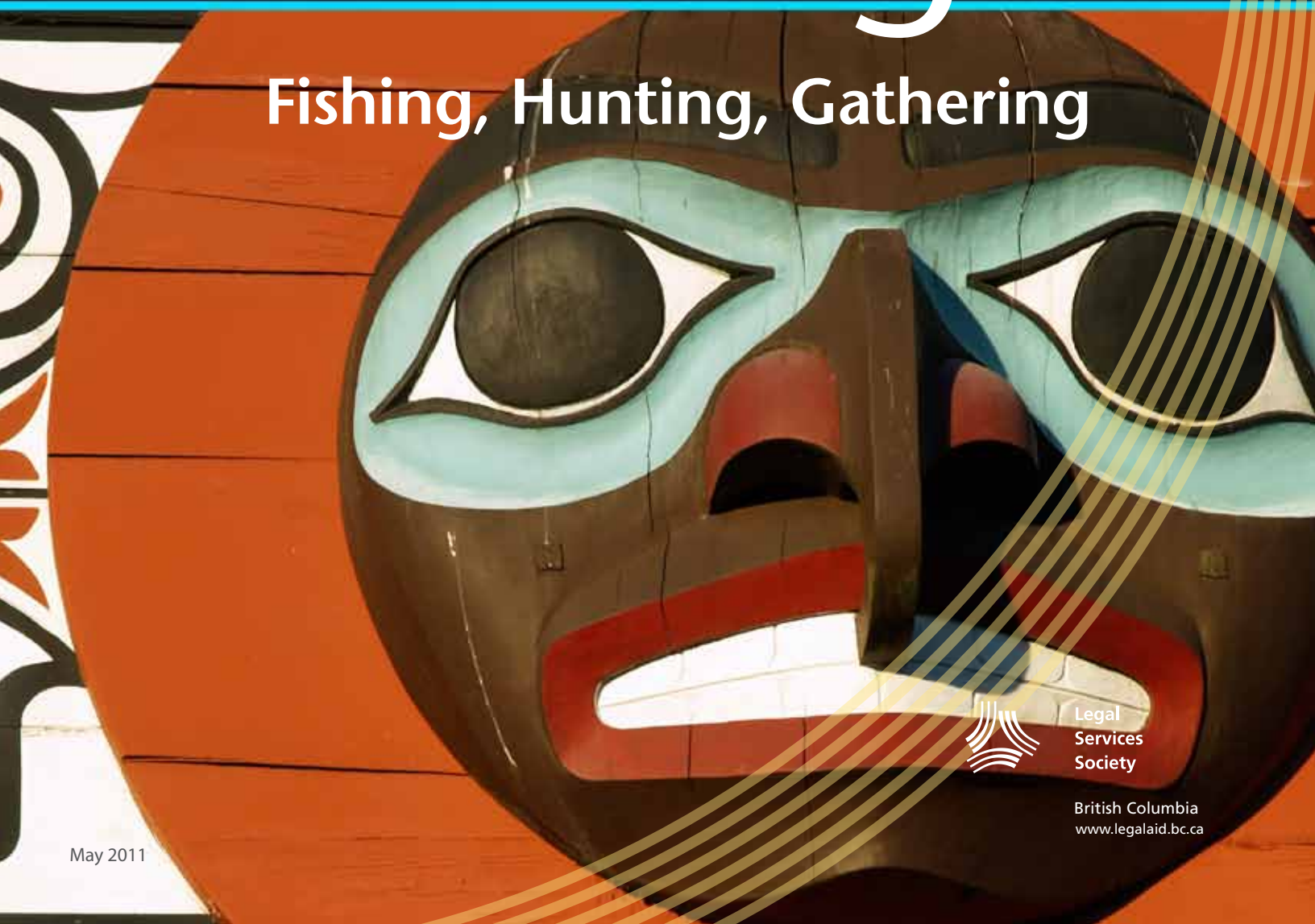
Legal Services Society
British Columbia
www.legalaid.bc.ca

Aboriginal Services Publications

1. A guide to Aboriginal Harvesting Rights
2. A guide to Wills and Estates on Reserve
3. Aboriginal Child Protection Poster
4. Aboriginal Child Protection Flyer
5. Aboriginal Harvesting Rights Fact Sheet
6. Aboriginal People and the Law in BC
7. Are you Aboriginal Fact Sheet
8. Benefits Services and Resources for Aboriginal Peoples
9. Estate Administration on Reserve in BC Fact Sheet
10. Indian Residential Schools Settlement Fact Sheet
11. Live safe staying in the Family home on the Reserve
12. Social Assistance on Reserve Fact Sheet
13. Understanding Child Protection Removal Matters
14. Understanding Aboriginal Delegated Agencies Fact Sheet
15. Understanding Court Hearings Fact Sheet

A Guide to Aboriginal Harvesting Rights

Fishing, Hunting, Gathering



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This booklet explains the law in general. It is not intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help. *A Guide to Aboriginal Harvesting Rights* is up to date as of **May 2011.**

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Read online at **www.legalaid.bc.ca** (under Aboriginal, click Aboriginal publications)

Order online: **www.crownpub.bc.ca** (under Quick Links, click Legal Services Society)

Questions?
Phone: 604-601-6000
Email: distribution@lss.bc.ca

Contents

Introduction 1

Who this booklet is for 1

Aboriginal rights 1

Aboriginal harvesting rights 1

Aboriginal title 1

Treaty rights 2

Métis rights 2

Getting legal help 3

Legal aid 3

Other options 3

What does my lawyer need to know? 3

Where are you from? 3

Where did the offence take place? 3

Did you have permission to hunt, fish, trap, or gather plants where the offence took place? 4

Who can your lawyer contact in your Aboriginal community? 4

Do you have a record? 4

Will you be available to attend court? 5

Gladue rights 5

What can I expect from my lawyer? 6

What happens in court? 7

Trial, Phase 1 — Did you commit the offence? 7

Trial, Phase 2 — Did you have the right to harvest resources when and where you did? 7

Was the government justified in pressing charges against you? 8

Verdict 8

Harvesting rights — Court process 9

What happens if I plead guilty? 10

Sentencing 10

First Nations Court 11

Restorative justice 12

Your important details 13

Case information 13

Court dates 13

Introduction

Aboriginal rights give Aboriginal people (status and non-status Indians, First Nations, Inuit, and Métis) the right to participate in their traditional activities on their ancestral lands, including their traditional harvesting activities. In Canada, Aboriginal rights are protected under the Constitution Act. If you're Aboriginal and you're charged with a harvesting offence, such as illegally hunting or fishing, you may have a defence based on your Aboriginal rights. **You have the right to get a lawyer. Call legal aid immediately to find out if you qualify for a free lawyer** (see page 3 for more information on getting legal help and applying for legal aid).

In this booklet, words that you might not know appear bold. These words are defined or explained, usually within the same sentence or paragraph. Sometimes you will be referred to a different page, where the word is explained in detail.

Who this booklet is for

This booklet is for Aboriginal people who have been charged with a harvesting offence, or whose Aboriginal rights are otherwise being interfered with by the government. This booklet may also be helpful to First Nations governing bodies, Aboriginal advocates, Aboriginal community members, and the legal community.

Aboriginal rights

The rights that are protected under the Constitution Act are the activities, practices, and traditions that are fundamental to the distinctive cultures of Canada's Aboriginal people. Aboriginal rights are based on traditional activities that were practised before contact with Europeans. However, these activities can be carried out using modern methods. For example, if hunting used to be done using a bow and arrow and it's now done with a rifle and ammunition, the right to hunt doesn't change. Generally, Aboriginal rights only apply within the ancestral territory of your Aboriginal community. Aboriginal rights include **Aboriginal harvesting rights**, **Aboriginal title**, and **treaty rights**. Aboriginal rights apply to status and non-status Indians, First Nations, Inuit, and Métis.

Aboriginal harvesting rights

Aboriginal harvesting rights may include fishing, hunting, trapping, and gathering plants, including harvesting wood. Aboriginal rights may also include the right to trade, barter, or sell part of the harvest.

Aboriginal title

Aboriginal title refers to the rights of Aboriginal people to live on their traditional lands as their ancestors did.

Treaty rights

Treaty rights are Aboriginal rights that are set out in a treaty. Many treaties were made with Aboriginal people across Canada between the 18th century and the early part of the 20th century. These older treaties usually specified harvesting rights. For example, the Douglas Treaties give some First Nations on southern Vancouver Island the right to carry on fisheries "as formerly," and Treaty 8 gives First Nations in north-eastern BC the "liberty to hunt over unoccupied lands." There are also a small number of modern treaties that have been entered into in BC; for example, the Nisga'a and Tsawwassen First Nations. However, most of BC isn't covered by treaty.

Métis rights

The Aboriginal rights of Métis people are also protected under the Constitution. Like other Aboriginal rights, Métis rights are applied to the practices and traditions that are fundamental to Métis culture, and may include fishing, hunting, trapping and gathering plants. Métis rights apply to people who **self-identify** as Métis (meaning they think of themselves as Métis), who have Métis ancestors, and who are part of the modern Métis community. Proving your Métis rights will depend on a number of factors.

Getting legal help

If you have been charged with a harvesting offence (such as illegally hunting or fishing), you have the right to get a lawyer. A lawyer can work with you to defend your Aboriginal rights, and can help you decide what the best course of action is for you, depending on the circumstances of your case.

Legal aid

Aboriginal harvesting offences are covered by legal aid. Call legal aid immediately to find out if you qualify for a free lawyer at **604-408-2172** (in Greater Vancouver) or **1-866-577-2525** (elsewhere in BC, no charge). Whether you qualify for a free lawyer through legal aid depends on your financial circumstances and the circumstances of your charges.

Other options

If you're not eligible for legal aid, your Aboriginal community might be willing to help pay for a lawyer. This will depend on the circumstances of your offence and the circumstances of your Aboriginal community.

To find a lawyer who is experienced with Aboriginal rights cases, call the Lawyer Referral Service. The Lawyer Referral Service will give you the name and phone number of a lawyer who practises in the area of law that applies to your case. You will have to phone the lawyer to set up an appointment. You're entitled to a half hour consultation in which the lawyer will determine whether you have a case. The consultation costs $25 (plus taxes). In Greater Vancouver, call **604-687-3221**. Elsewhere in BC, call **1-800-663-1919** (no charge). The cost of hiring a lawyer will depend on the circumstances of your case.

What does my lawyer need to know?

When you meet with your lawyer, bring the **particulars** (details) of your case, along with any other information that the **Crown counsel** (government lawyer) gave you. The information given to you by the Crown counsel is sometimes called a **disclosure**. Your lawyer will also need to know the information listed below.

Where are you from?

Your lawyer will need to know your address and which Aboriginal community you're connected to. If you're connected to a First Nation, your lawyer will also need to know if your First Nation is under treaty.

Where did the offence take place?

Your lawyer will need to know where you were when you were charged with the offence and whether that area is part of your Aboriginal community's traditional territory.

Did you have permission to hunt, fish, trap, or gather plants where the offence took place?

If the area where the offence took place isn't part of your traditional territory but another First Nation gave you permission to hunt, fish, or gather plants in its territory, it's important for your lawyer to know this. If your Aboriginal community has an understanding or agreement with the First Nation whose land you were on that allows you to hunt, fish, trap or gather plants there, this is also important.

Some First Nations have the authority to manage their own natural resources. Tell your lawyer if you were harvesting resources under the authority of your First Nation. For example, some First Nations manage their own fisheries and issue their own fishing openings. However, those openings aren't necessarily the same as the openings issued by the Department of Fisheries and Oceans, in which case you might be charged by the Department of Fisheries and Oceans.

Who can your lawyer contact in your Aboriginal community?

Your lawyer will need to meet with the people who represent your Aboriginal community. Members of your community who can help your lawyer get a better understanding of your case might include:

- the elected chief and council;
- the hereditary chief or the council of hereditary chiefs;
- elders;
- a representative from your First Nation's fisheries, forestry, or natural resources department; and
- the manager of your community's restorative justice program.

Your lawyer will want to meet with your community representatives as soon as possible so that he or she can find out whether your Aboriginal community supports you with regard to your case. Even if your Aboriginal community can't support you financially, if they feel that you had a right to do what you were doing when you were charged, this will strengthen your case. However, if your Aboriginal community doesn't support you, it's still important for you to tell your lawyer this.

Meeting with these people will also give your lawyer the chance to get an idea of what kind of relationship your Aboriginal community has with the agency that charged you. The relationship between your Aboriginal community and the agency might affect your options for dealing with your charges.

Do you have a record?

Your lawyer will need to know whether you've been charged with a similar offence in the past, or whether you've been charged with any other crimes now or in the past. For example, sometimes when you're charged with a harvesting offence, you might also be charged with criminal offences related to your situation at the time you were charged (such as uttering threats, obstruction of justice, or assaulting a peace officer).

Will you be available to attend court?

Your lawyer will need to know whether you will be available to attend court. If your case goes to trial, it could take more than a year for the court process to finish. How long your case will take will depend on a number of factors, including the court location. It's very important for you to be prepared to attend every day that your case is before a judge, particularly once the trial has started. (Before the trial has started, you may be able to arrange with your lawyer to have him or her attend court on your behalf for short preliminary appearances, such as to schedule the trial dates.) The only time you don't have to attend a day of trial is if there are extenuating circumstances and the court has allowed you to be excused. For example, the court might excuse you from attending court if you're really sick, or if you have a family emergency. You and your lawyer should make sure that the court dates don't conflict with important commitments, such as cultural or harvesting activities. Your lawyer can try his or her best to work with the court to schedule your appearances accordingly.

Gladue rights

If you self-identify as Aboriginal, you have special rights under the Criminal Code, often called **Gladue rights**. Gladue refers to the special consideration that judges must give an Aboriginal person when setting bail or during sentencing. When your lawyer informs the court of your Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. During sentencing, the judge must consider all options other than jail.

In order to apply Gladue, the judge needs to understand your circumstances. To help the judge, your lawyer must provide the court with a **Gladue report**. A Gladue report gives the judge, Crown counsel, and your lawyer as much information about you as possible. The fact sheet and booklet listed below can help you and your lawyer or advocate prepare a Gladue report.

For more information about Gladue and Gladue reports, see the fact sheet *Are You Aboriginal? Do You Have a Bail Hearing? Are You Being Sentenced For a Crime? Do You Know About First Nations Court?* and the *Gladue Primer* at **www.legalaid.bc.ca/aboriginal/pubs.asp**.

It's your right to have Gladue applied to your case. Your lawyer should do everything possible to make sure your Gladue rights are respected. If you don't have a lawyer, the judge must still apply Gladue.

What can I expect from my lawyer?

Once your lawyer has met with you to discuss the details of your case, he or she will do some research to find out more about your Aboriginal community's harvesting rights, and about the laws around harvesting rights.

Your lawyer will meet with your Aboriginal community, and he or she will let you know what your community's position is on your charges. If your Aboriginal community doesn't support you, this could affect your chances of success at trial.

Once your lawyer has the information he or she needs about your case, he or she will let you know what your options are. Your lawyer will also discuss with you whether your community's position changes how you want to proceed. If you aren't sure of how you want to proceed, your lawyer can ask the court to **adjourn** your case to give you more time to discuss your options. This means that your case won't proceed for a specified period of time. It will depend on the circumstances of your case whether the court agrees to an adjournment.

If you decide to go ahead with a trial, your lawyer will develop a strategy to defend you. Your lawyer will need to work with you closely to develop your strategy.

What happens in court?

Harvesting rights trials can take a long time. Depending on your case and where you live, a trial will take a number of months — and is likely to take more than a year — before it's resolved. Because of the time and work involved in a trial, it will require a great deal of commitment from you. As well, if you don't qualify for legal aid, your legal fees could be expensive. Depending on the circumstances of your offence, your lawyer may be able to convince the Crown to resolve the matter outside of court, without you pleading guilty. If you feel you can accept responsibility for the offence, you can ask your lawyer to speak to the Crown counsel about a possible restorative or alternative justice **disposition** (sentencing or other settlement to your case). Talk to your lawyer about what's best for you. If you decide to go ahead with a trial, your lawyer will talk to the court to set up the trial dates.

Trial, Phase 1 — Did you commit the offence?

In the first phase of the trial, the Crown counsel will have to prove that you committed the elements of the offence **beyond a reasonable doubt**. This means that if the court has any serious doubts as to whether you committed the offence, you will be found not guilty and the trial won't proceed any further. If the court finds that the Crown has proven its case, the trial will proceed to the second, Aboriginal rights phase.

Trial, Phase 2 — Did you have the right to harvest resources when and where you did?

In the second phase of the trial, your lawyer must prove that you had the Aboriginal right to participate in the harvesting activities you were involved in when and where you were charged. To do this, your lawyer may get an expert, such as an **anthropologist** (someone who studies different cultures, including ancient cultures), to prove that you were engaged in traditional activities that are important to your culture. Your lawyer may also get someone from your Aboriginal community to share your culture's oral histories.

If your lawyer is able to prove that you had a right to harvest resources when and where you did, then your lawyer must prove that the charges against you interfered with your Aboriginal rights.

Was the government justified in pressing charges against you?

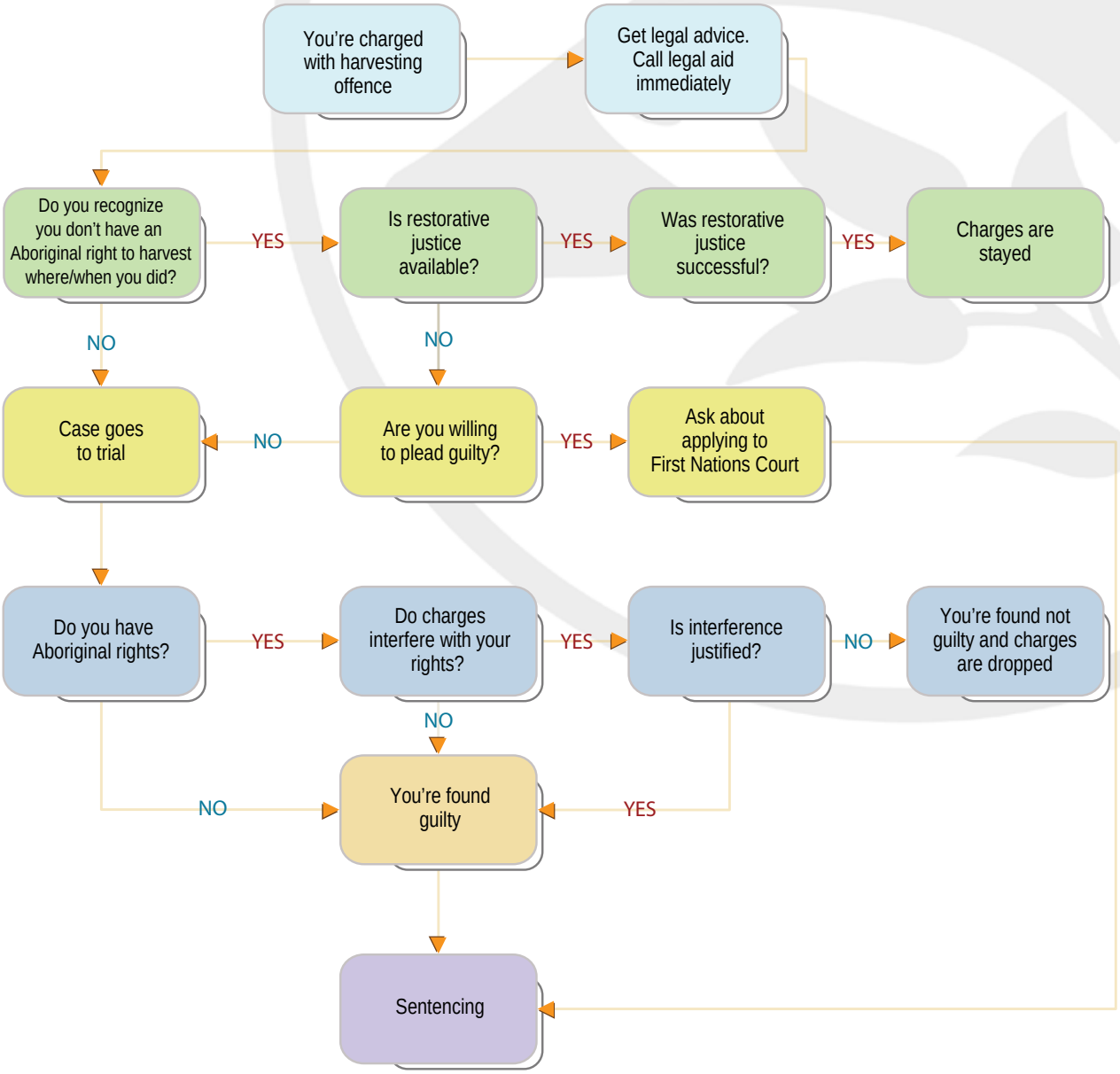
If your lawyer is able to prove that your Aboriginal rights were interfered with, Crown counsel must prove that the government was justified in pressing charges against you. For example, you may have been charged with a fisheries offence for fishing an endangered species. You may have a right to fish in the area in which you were charged, and traditionally your culture may have relied upon the species of fish in question. However, if fishing that species threatens its well-being, the government may be able to prevent you from fishing for that particular species.

In some cases, the government may admit that the charges against you interfere with your Aboriginal rights. In this case, your lawyer won't have to prove that you had the right to harvest resources when and where you were charged, or that the charges against you interfered with your Aboriginal rights. Instead, the Crown counsel must prove that the government was justified in pressing charges against you. This would be similar to the example above (your activities threatened the greater good, such as harvesting an endangered species).

Verdict

Once the court has heard all of the **evidence** (facts) from both sides, it will decide whether you're guilty or not guilty. If you're found guilty, you will be sentenced. See page 10 for more information on sentencing. The flowchart on the next page outlines the court process.

Harvesting rights — Court process



Legal aid

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

First Nations Court duty counsel 1-877-601-6066 (call no charge from anywhere in BC to apply to have your matter heard in First Nations Court)

What happens if I plead guilty?

If you're thinking of pleading guilty, it's very important to *get legal advice first*. Even if you don't qualify for a lawyer through legal aid, you may still be able to get free legal advice from **duty counsel** in Provincial Court. Duty counsel are lawyers who give free legal advice on or before the day of court. Call legal aid to find out when and where you can find the duty counsel in your area. In Greater Vancouver, call **604-408-2172;** elsewhere in BC, call **1-866-577-2525** (no charge).

If you're going to plead guilty to your charges, you may be able to have your bail or sentencing hearing in **First Nations Court** in New Westminster. See page 11 for more information. If First Nations Court isn't available to you, you may be able to participate in an **Aboriginal restorative justice program** (see page 12).

Sentencing

If you plead guilty to your charges, your case won't go to trial. Instead, the judge will **sentence** you for your offence. A sentence is the penalty or punishment for your charges. Your lawyer and Crown counsel will each suggest an appropriate sentence for your case, but the judge will make the final decision on a sentence that he or she thinks is appropriate. If this is your first offence, the usual sentence for a harvesting rights case is a fine. However, the judge will take into account your personal circumstances, the circumstances of the offence, and whether you have a record. You may also have to **forfeit** (give up) any profits you made from selling the resources you harvested and/or the tools you used to harvest them. For example, if you're charged with a fisheries offence, you may have to forfeit your boat or net, along with the fish and any profits you made if you sold the fish.

Your lawyer should present a strong argument to the court on why you shouldn't have to forfeit items such as your boat or net, especially if this would mean that you can't provide for your family.

If you need time to pay a fine, your lawyer needs to let the court know this. If you can't afford to pay the fine, your lawyer may be able to arrange with the court for you to be put on probation and do community service. In this case, your lawyer should contact your Aboriginal community to find out what kind of community service your community needs, and what kind of service would be relevant to the charges you face.

In some instances, your sentence could be more serious, such as jail time or a **conditional sentence order** (sometimes called a **CSO**). A conditional sentence order is a prison sentence that's served in the community. A conditional sentence will have conditions that restrict your freedom, and you must follow certain conditions for a specified length of time in order to stay out of jail. For example, you may have to stay in your home except to go to work or medical appointments. If you don't follow the conditions, you will have to complete your remaining sentence in jail. The judge would consider a more serious sentence if you have a previous record, haven't paid fines, or have a history of not complying with probation orders.

First Nations Court

If you self-identify as Aboriginal and are going to plead guilty to your charges, you may be able to have your bail or sentencing hearing at the First Nations Court in New Westminster. First Nations Court takes a holistic, restorative, and healing approach to sentencing that may be more culturally appropriate and meaningful to you.

First Nations Court is different from other provincial courts. First Nations Court focuses on community, and makes sure everyone involved in the case has a chance to be heard. During sentencing, the judge, Crown counsel, Aboriginal community members, anyone affected by your actions and their family, and you and your family are invited to sit around a table where everyone gets a chance to speak. After each person has spoken, the judge will work with everyone at the table to come up with a healing plan. The healing plan might involve programs that are appropriate to your culture, job training, education, and referrals to counsellors. You're expected to stick to your healing plan, and you must go to future court dates to report on your progress.

First Nations Court has duty counsel who can help you. If you don't have a lawyer, the duty counsel can give you free legal advice on or *before* the day of court.

You must apply to have your matter heard in First Nations Court, which sits once a month. If you're interested in applying to have your case heard in the First Nations Court, you or your lawyer can call the First Nations Court duty counsel at **1-877-601-6066** (no charge) for more information.

It's your choice whether you apply to have your matter heard in First Nations Court. Talk to your lawyer about what's best for you. If you don't have a lawyer, call the First Nations Court duty counsel at 1-877-601-6066 (no charge).

Restorative justice

If you recognize that you don't have an Aboriginal right to harvest resources where and when you did, you may be able to participate in an Aboriginal **restorative justice** program instead of going to court for sentencing. Restorative justice is a form of justice that focuses on repairing the harm done by your actions, and gives you and anyone affected by your actions opportunities to heal. The goal of restorative justice is to help you, your community, and anyone affected by your actions to move forward. Some restorative justice programs might be more appropriate and meaningful to your culture than the court process. For example, the Qwi:qwelstom restorative justice program is based on traditional Sto:lo ways of dispute resolution, where family members and the affected community gather to discuss the charges and to reach an agreement on how best to address the harm done and restore harmony.

In order to participate in a restorative justice program:

- you must take responsibility for your actions,
- your lawyer must arrange for your participation with the First Nation or community group that runs the program, and
- Crown counsel should agree to your participation in the program as a way to resolve the charges against you.

A list of restorative justice programs in BC is available on the Department of Justice website at **www.justice.gc.ca/eng**. You can navigate to the page as follows:

1. On the left-hand navigation bar, click Programs and Initiatives. The Programs and Initiatives page appears.
2. Scroll down and, under Aboriginal Justice, click Aboriginal Justice Strategy. The Aboriginal Justice Strategy page appears.
3. On the left-hand navigation bar, click Programs. The Community-Based Justice Programs page appears.
4. Click British Columbia. The Community-Based Justice Programs for British Columbia page appears.

Your important details

Case information

Date you were charged with a harvesting offence: _____

Date you called legal aid for a lawyer: _____

Name of lawyer: _____

First Nation/Band or friendship centre contact: _____

Court dates

A Guide to Wills and Estates on Reserve

Note: Terms that appear **bold** are defined in the Glossary at the end of this guide.

General law

A will is a legal document containing instructions as to what a person (the **will-maker**) wants done with their **estate** when they die. A will may also be used to appoint a guardian for children under 19 whom the will-maker had sole guardianship of at the time of death.

In a will, the will-maker appoints someone (an **executor**) to administer their estate. The executor takes charge of and settles the estate that the deceased left behind.

The province has general **jurisdiction** over wills and estates in the province. However, under the *Indian Act*, the Minister of Aboriginal Affairs and Northern Development Canada (AANDC) has jurisdiction over the wills and estates of "**Indians** ordinarily resident" on reserve or Crown lands. This means that if you ordinarily live off reserve, your will must be valid under BC provincial law. If you ordinarily live on reserve, your will must be valid under the *Indian Act*, but does not need to be valid under BC provincial law.

Wills and estates under provincial law — if the will-maker lives off reserve

To be completely valid, a will under the provincial *Wills Act* must:

- be made by a mentally capable person 19 years of age or over (though married people, members of the armed forces, and mariners at sea can make wills at any age);
- be clear that it is to take effect on the person's death;
- be signed at the end by the will-maker in the presence of two mentally capable adult witnesses who are neither beneficiaries nor spouses of beneficiaries of the will; and
- be signed at the end by both of the witnesses in the presence of each other and in the presence of the will-maker.

Note: The BC legislature has passed a new law called the *Wills, Estates and Succession Act*, but it is not yet in force. Once it is, it will change a number of the requirements of the current BC *Wills Act*.

Generally, a will is binding, though a person may challenge a will if the will-maker was not mentally competent at the time of making it, or if the will does not meet formal requirements set out in the provincial *Wills Act*.

A will may also be challenged under the provincial *Wills Variation Act* on the basis that it does not adequately provide for the proper maintenance and support of the will-maker's spouse (including a common-law spouse of two years or more) or the will-maker's children.

If there is no will

If a person dies without a will (intestate), in most cases, his or her property is distributed to next of kin according to the provincial *Estate Administration Act*. The formula for distribution is:

- The first $65,000 goes to the surviving spouse (including common law), if any.
- The rest of the estate is divided among a surviving spouse, if any, and the will-maker's surviving descendants.
- If there is no surviving spouse or descendants, the estate is distributed to surviving next of kin in the following order: parents, siblings, nieces and nephews, and then the next of kin according to consanguinity (blood connection).

Wills and estates under the Indian Act — if the will-maker lives on reserve

The Minister of AANDC may accept as a will any written document signed by an Indian ordinarily resident on reserve or Crown land, provided the will expresses the intention to dispose of property upon death.

However, such a document has no legal force until the minister approves (probates) the will, or the minister grants an order transferring his or her jurisdiction over the estate to the Supreme Court of British Columbia and the Supreme Court "approves" it. Because a will has no legal effect until the will-maker dies (until then, the will-maker can change the will or make a new will anytime she or he chooses), the time at which the minister "approves" a will is after the will-maker's death.

Under the *Indian Act*, as long as the document is in writing, expresses the intention to dispose of property upon death, and is signed by the will-maker, AANDC may accept it as a valid will, even if there are no witnesses and it otherwise does not meet the formal requirements of the provincial *Wills Act*.

Note: The minister only has jurisdiction to approve a will if the will-maker was an Indian who was ordinarily resident on reserve or Crown land at the time of death, regardless of whether the will-maker lived on reserve *at the time of writing the will*. Therefore, will-makers living on reserve are encouraged to write a will that complies with the requirements of the provincial *Wills Act*.

The minister has the authority to declare the will void (invalid) in whole or in part if he or she is satisfied that:

- it was executed under duress (too much pressure) or undue influence;
- the will-maker did not, at the time of writing the will, have testamentary capacity (the mental ability needed to make a valid will);
- the terms of the will would impose hardship on people the will-maker had a responsibility to provide for (such as his or her spouse or young children);
- the will disposes of Indian reserve land in a manner contrary to the interest of the band or the *Indian Act*; or
- the terms of the will are too vague, uncertain, or capricious (meaning they were made by impulse or whim rather than by necessity or reason).

A person may appeal the minister's decision to declare a will void, and other estate-related decisions made by the minister, to the Federal Court of Appeal. The matter being appealed must normally be worth at least $500 and the person must bring the appeal *within two months* of the minister's decision.

If there is no will

When an Indian ordinarily resident on reserve or Crown land *at the time of their death* dies without a valid will (intestate), the property is distributed to next of kin. The formula for distribution is:

- The first $75,000 goes to the surviving spouse or to the common-law partner of at least one year.
- The rest of the estate is divided among a surviving spouse, if any, and the will-maker's surviving issue (descendants).
- If there is no surviving spouse, common-law partner or issue, the estate is distributed among surviving parents.
- If there are no surviving parents, the estate is distributed among the siblings (brothers and sisters) of the deceased. Where a sibling is deceased, his or her children (the deceased's nieces or nephews) may inherit their parent's share of the deceased's estate.
- If there are no surviving siblings of the deceased and the closest surviving heirs are the deceased's nieces and nephews, or more remote next-of-kin, the deceased's interest in reserve land goes to the Crown for the benefit of the band, and the rest of the estate is distributed among the heirs.

If a person who is not a member of the same band as the deceased becomes entitled to inherit some or all of the deceased's reserve land, the Superintendent of Indian Affairs must offer the non-member's interest in land for sale, with the sale being open only to members of the band. The proceeds of the sale must be given to the non-member **heir(s)** or **beneficiary(ies)**.

Note: A person who is not entitled to reside on a reserve cannot inherit a right to possess or occupy reserve land. A person becomes entitled to reside on a reserve when they become a member of the band that holds that particular reserve.

This sale can be avoided if the non-members sign an "Absolute Disclaimer of Possessory Interest in Reserve Land" after the deceased's death, allowing the reserve land to be distributed among any band member heir(s) or beneficiary(ies) without the land being sold. A sale may also be avoided in cases where the estate has significant other assets as well as the interest in reserve land. In these cases, the administrator or executor of the estate may be able to reallocate some or all of the gifts made by the deceased (while still giving each heir or beneficiary their appropriate share of the value of the estate), so that band members inherit the reserve land and non-members inherit other assets.

If there are no valid offers to buy the right to possess or occupy the land within six months after it is offered for sale, the right reverts to the band, but the beneficiary is compensated for improvements to the land, such as buildings, fencing, or infrastructure.

Nisga'a cultural property

In their treaty, the Nisga'a negotiated for law-making authority over the transfer of cultural property in the possession of a person who dies intestate (without a will). These Nisga'a laws, and not federal or BC law, determine how cultural property on Nisga'a lands is dealt with upon death when there is no will.

Resources

For more information about writing a will or settling an estate on reserve, see the following resources:

- Clicklaw website at www.clicklaw.bc.ca
- AANDC's Decedent Estates Program at www.aadnc-aandc.gc.ca (click Benefits and Rights — Estates)
- *Estate Administration On-Reserve: A Guide for Executors and Administrators in British Columbia* (AANDC BC Region, Estates Unit) at www.legalaid.bc.ca/aboriginal/pubs.asp
- *Estate Administration On-Reserve: Templates Package* (AANDC BC Region, Estates Unit) at www.legalaid.bc.ca/aboriginal/pubs.asp
- *Indian Act,* sections 4 and 42 to 50.1
- *Chapter 16 "Wills and Estates,"* of the LSLAP Manual (UBC Law Students' Legal Advice Program) at www.lslap.bc.ca (click LSLAP Manual)
- *Write Your Legal Will in 3 Easy Steps* (Self-Counsel Press) at www.self-counsel.com (click Law — Make a Will)
- *Writing Your Will* (People's Law School) at www.publiclegaled.bc.ca
- *Writing Your Own Will: A Guide for First Nations People Living On Reserve* (Aboriginal Financial Officers' Association of BC) at www.afoabc.org/downloads/writing-your-own-will-kit.pdf

Questions

For frequently asked questions, see the FAQ section of the Wills and estates on reserve web page on the LSS website at www.legalaid.bc.ca/aboriginal.

Glossary

Beneficiary(ies): The person or people named in a will to receive all or part of the deceased's estate.

Estate: The property that the deceased person owned at the time they died.

Executor: The person who will be responsible for carrying out instructions in someone's will after they die.

Heir(s): The person or people who receive the deceased's estate when there is no will.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Jurisdiction: The right and power to make law or interpret and apply the law.

Will-maker: The person who makes the will (who decides what it should say).

Legal Services Society

British Columbia
www.legalaid.bc.ca

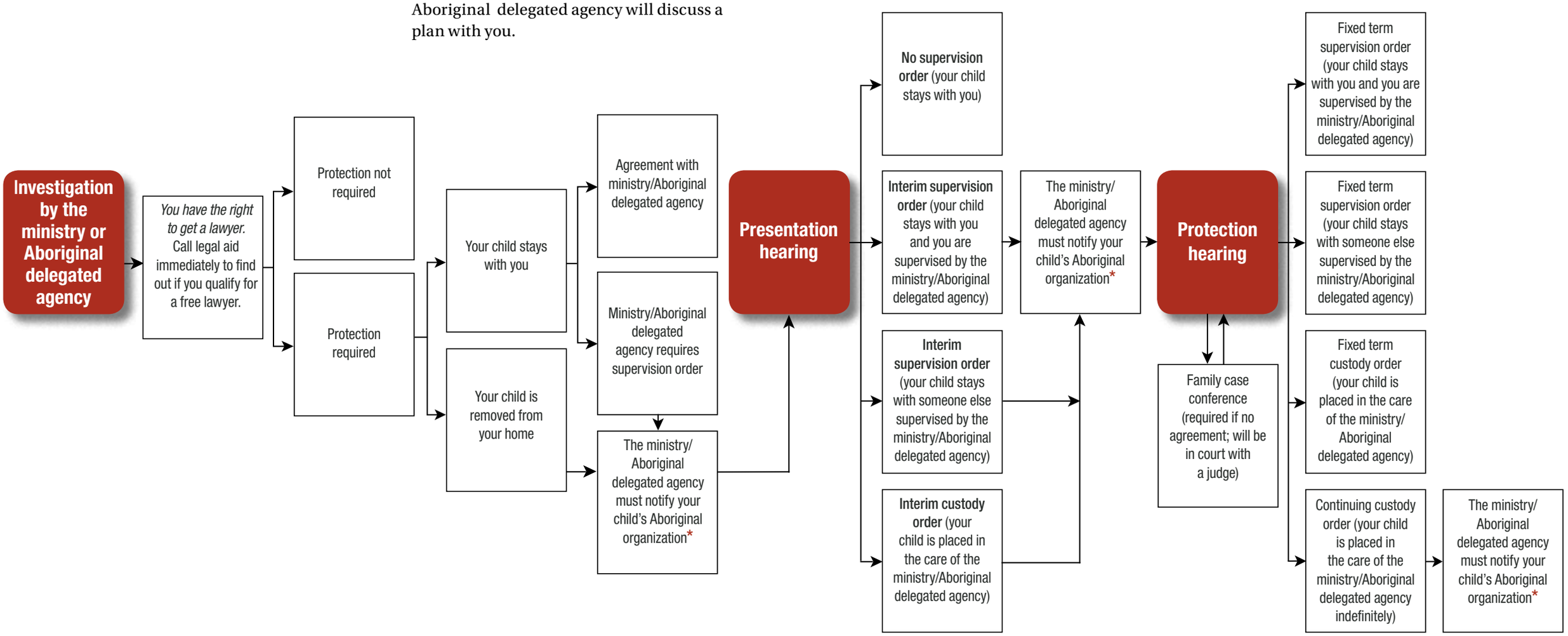
The Aboriginal child protection process: Information for Aboriginal parents and communities

Child protection laws and what they mean for Aboriginal families

It is very important for Aboriginal children to be able to spend time with their extended families and communities. Child protection laws in BC recognize the importance of Aboriginal family ties to Aboriginal children.

If the ministry or Aboriginal delegated agency decides that your child needs protection, you can:

- ask for a **family group conference**. A facilitator will organize the conference. The conference is *not* in court and a judge is *not* involved. Your family members, friends, and other people who help to care for your child can be involved, as well as your lawyer and advocate. At the conference, a social worker from the ministry or Aboriginal delegated agency will discuss a plan with you.
- ask the ministry or Aboriginal delegated agency to use **traditional decision making**. Your community leaders and family members can take part in working out a plan.
- ask for a **mediator** (someone who will help work out an agreement between you and the ministry/Aboriginal delegated agency).



* Note

Your child's Aboriginal organization may be a band, friendship centre, treaty first nation, Aboriginal community, Aboriginal organization as listed in the Child and Family Service Act regulations, or a Nisga'a Lisims government. *Talk to your lawyer to make sure the right people in your child's Aboriginal organization are informed at the appropriate time of decisions that affect your child.*

Legal aid

604-408-2172 (in the Lower Mainland)
1-866-577-2525 (no charge, outside the Lower Mainland)

Legal Services Society, www.legalaid.bc.ca

October 2009

Legal Services Society

Your right to get a lawyer: If you are an Aboriginal parent under investigation for a child protection/ removal matter

Legal Services Society

British Columbia
www.lss.bc.ca

Your important details

Date the investigation started: _____

Name of social worker: _____

Date you called legal aid: _____

Name of lawyer: _____

First Nation/Band contact: _____

Court dates

Access order application date: _____

Presentation Hearing date: _____

Protection Hearing date: _____

Adjournment date: _____

An access order says when you can visit your child.

If a social worker for the Ministry of Children and Family Development or an Aboriginal child protection agency tells you that you are being investigated, you have the right to get a lawyer. *Contact legal aid immediately to find out if you qualify for a free lawyer.*

Legal aid:
604-408-2172 (in the Lower Mainland)
1-866-577-2525 (no charge, outside the Lower Mainland)

If your child is removed from your home, you can:

1) Get a lawyer *before* the day of court.
2) Call legal aid.
3) Work out a plan with your band or community that supports your child's family ties and Aboriginal identity.
4) Ask to have your child placed with a relative or another Aboriginal family.
5) Ask for a mediator (someone who will help work out an agreement).
6) Ask for the Report to Court, which explains why your child was removed.
7) Ask for visits with your child.

If your child is removed from your home, the ministry or Aboriginal child protection agency must:

1) Notify your child's Aboriginal community representative (such as the First Nations band) that your child has been removed.
2) Take steps to protect your child's family ties and Aboriginal identity.
3) Consider your child's family ties and Aboriginal identity when choosing a foster home.
4) Allow a representative from your child's band or Aboriginal community to go to court.

Speak with your lawyer about your options.

Aboriginal harvesting rights

If you've been charged with a harvesting offence

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

This fact sheet is for Aboriginal people (status and non-status Indians, First Nations, Inuit, and Métis) who have been charged with a harvesting offence. In Canada, Aboriginal rights, including Aboriginal harvesting rights, are protected under the Constitution Act. These rights are based on the activities, practices, and traditions that are fundamental to the distinctive cultures of Canada's Aboriginal people.

What are Aboriginal rights?

Aboriginal rights give Aboriginal people the right to participate in their traditional activities on their ancestral lands. Aboriginal harvesting rights may include the right to hunt, fish, trap, gather plants, and harvest wood. Aboriginal rights may also include the right to trade, barter, or sell your harvest. Depending on your Aboriginal community, these rights may have been recognized through a treaty. **Métis rights** are the Aboriginal rights of Métis people. In general, Aboriginal rights only apply within the ancestral territory of your Aboriginal community. Aboriginal rights apply to status and non-status Indians, First Nations, Inuit, and Métis.

Getting legal help

Aboriginal rights cases can be complex — it's a good idea to get legal help. If you're not eligible for legal aid, depending on the circumstances of your offence and of your Aboriginal community, your Aboriginal community may be willing to help pay for a lawyer.

NOTE

If you've been charged with a harvesting offence, you have the right to get a lawyer. Contact legal aid immediately to find out if you qualify for a free lawyer.

Legal aid:

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

To find a lawyer who is experienced with Aboriginal rights cases, call the Lawyer Referral Service at **604-687-3221** (Greater Vancouver) or **1-800-663-1919** (elsewhere in BC). You will have to phone the lawyer to set up an appointment. You can meet with the lawyer for half an hour to see whether you have a case. The meeting costs $25 (plus taxes).

What does my lawyer need to know?

When you meet with your lawyer, bring the **particulars** (details) of your case and any other information the **Crown counsel** (government lawyer) gave you. Your lawyer will also need to know the following details:

- **Where are you from?** What is your address? Which Aboriginal community are you connected to? If you're connected to a First Nation, is your First Nation under treaty?
- **Where did the offence take place?** Is that area part of your Aboriginal community's traditional territory?
- **Did you have permission to hunt, fish, or harvest where the offence took place?** Does your First Nation have the authority to manage its own natural resources? If you weren't in your traditional territory, did another First Nation give you permission to hunt, fish, or harvest in its territory? Does your First Nation have an agreement with the First Nation whose land you were on that allows you to harvest there?

Continued over

- **Who can your lawyer contact in your Aboriginal community?** Your lawyer will need to meet with representatives from your Aboriginal community (the elected chief and council, hereditary chief, elders, etc.).
- **Do you have a record?** Have you been charged with a similar offence or any other crimes now or in the past?
- **Will you be available to attend court?** It's very important to attend court whenever your case is scheduled.

Restorative justice

If you're willing to take responsibility for your actions, you may be able to participate in an Aboriginal **restorative justice** program. Restorative justice focuses on repairing the harm done by your actions, and giving you and anyone affected opportunities to heal. In order to participate in a restorative justice program, the Crown counsel must agree to your participation in the program as a way to resolve the charges against you. Talk to your lawyer about what's best for you.

What happens if I plead guilty?

If you plead guilty, your case won't go to trial. Instead, the judge will **sentence** (punish) you for your offence. The usual sentence for a first-time harvesting rights offence is a fine.

However, your sentence could be more serious and could involve **probation** (you remain in the community while following certain conditions), a **conditional sentence** (a jail sentence served in the community while following strict conditions), or jail time. If you **breach** (don't follow) your conditional sentence order, you may have to go to jail for the rest of your sentence.

It's very important to get legal advice before you decide to plead guilty.

Ask about First Nations Court

If you're willing to plead guilty, you may be able to have your case heard in **First Nations Court** in New Westminster. First Nations Court takes a restorative approach to sentencing. This means that the judge, Crown counsel, Aboriginal community members, and your family will work with you and your lawyer to come up with a healing plan.

If you're interested in applying to have your case heard in First Nations Court, you or your lawyer can call the First Nations Court **duty counsel** at **1-877-601-6066** (no charge) for more information. (Duty counsel are lawyers who give free legal advice. If you don't have a lawyer, the duty counsel can give you legal advice on or before the day of court.)

Your important details

Name of lawyer: _____

Bail hearing: _____

Trial hearing: _____

Sentencing hearing: _____

For more information on Aboriginal harvesting rights, see the *Harvesting Rights* booklet at **www.legalaid.bc.ca/publications**.

Legal Services Society
www.legalaid.bc.ca

Aboriginal People and the Law in British Columbia

June 2006

Legal Services Society

British Columbia
www.lss.bc.ca

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Contents

Contents

Introduction **2**
Who this guide is for 2
How to use this guide 2
Why this guide is needed 2
Unique legal environment 2
A snapshot of Aboriginal people in BC 3
Social and economic conditions 4

1. Bankruptcy and Insolvency **8**
Common client problems 8
General law 8
Options for resolving debts 8
Aboriginal legal issues 10
Common client questions 10
For more information 13
Statutes and regulations 13
Case citations 13

2. Consumer Issues **16**
Common client problems 16
General law 16
Getting out of bad contracts: Defences 16
Getting out of bad contracts: Time limits 17
Other protections 19
Dealing with debt collectors 19
Business Practices and Consumer Protection Authority 20
Aboriginal legal issues 21
Common client questions 21
For more information 23
Statutes and regulations 23
Case citations 23

3. Criminal Law **26**
Common client problems 26
General law 26
Understanding the criminal prosecution process 27
Understanding court appearances 28
Provincial criminal court process 29
Aboriginal legal issues 30
Common client questions 30
For more information 34
Statutes and regulations 35
Case citations 35

4. Family Law **38**
Common client problems 38
General law 38
Jurisdiction of Provincial and Supreme Court in family matters 39
Separation and Divorce 39
Aboriginal legal issues 41
Separation and divorce 41

Child protection 42
Adoption 43
Family law services 44
Legal aid 44
Family duty counsel and advice lawyers 45
Family justice counsellors 46
Family Maintenance Enforcement Program 46
Family Law in BC website 46
For more information 47
Statutes and regulations 48
Case citations 48

5. Harvesting Rights: Hunting, Fishing, Trapping, & Gathering 50

Common client problems 50
Aboriginal rights 50
Treaty rights 50
Aboriginal legal issues 51
Common client questions 51
For more information 53
Statutes and regulations 53
Treaties 53
Case citations 54

6. Housing and Reserve Lands 56

Common client problems 56
General law 56
Legal rights of renters 56
Protection for homeowners 57
Aboriginal legal issues 57
Common client questions 57
For more information 61
Statutes and regulations 62
Case citations 62

7. Human Rights 64

Common client problems 64
General law 64
Canadian Human Rights Act 64
BC Human Rights Code 65
Making a human rights complaint 65
Discrimination and the Canadian Charter of Rights and Freedoms 66
Aboriginal legal issues 67
Common client questions 67
For more information 69
Statutes and regulations 69
Case citations 69

8. Immigration and Trans-Boundary Trade 72

Common client problems 72
General law 72
Aboriginal legal issues 73
Common client questions 73

For more information....75
Statutes and regulations 75
Case citations 75

9. Indian Status and Band Membership....78

Common client problems 78
Indian status under the Indian Act 78
Registration under the Indian Act.... 78
Registration before 1985 79
Registration after 1985 80
Adoption 81
Band membership 81
Indian Affairs controlled membership 81
Band controlled membership.... 81
Adoption 82
Voting rights.... 82
Indian Act elections 82
Custom leadership selection 82
Aboriginal legal issues.... 83
Common client questions.... 83
For more information.... 87
Statutes and regulations 87
Case citations 87

10. Law Enforcement Complaints....90

Common client problem 90
General law 90
Complaints against police officers.... 90
Complaints against provincial law enforcement officers 93
Complaints against federal enforcement officers.... 94
Taking a law enforcement officer to court.... 94
Finding out what's on a police record.... 94
Aboriginal legal issues.... 95
For more information.... 95
Statutes and regulations 96

11. Mental Health/Adult Guardianship....98

Common client problems 98
General law 98
Helping someone with mental capacity issues.... 99
Planning for the future.... 99
Consent to health care 101
Adult guardianship and abuse, neglect, and self-neglect 101
Aboriginal legal issues.... 102
Common client questions.... 103
For more information.... 104
Legal information 104
Mental health services 104
Aboriginal services.... 105
Statutes and regulations 105

12. Motor Vehicle/Traffi 108

Common client problems.... 108
General law 108

Aboriginal legal issues 108
Common client questions 108
For more information 112
Statutes and regulations 112
Case citations 112

13. Prisoners 114

Common client problems 114
General law 114
Earned remission 114
Parole 115
Prison discipline 116
Aboriginal legal issues 117
Common client questions 117
For more information 119
Statutes and regulations 120
Case citations 120

14. Residential School Abuse 122

Client problem 122
General law 122
Civil justice 122
Alternative dispute resolution 123
Independent assessment and "common experience" process 124
Criminal justice 126
Crime Victim Assistance Program 126
For more information 127
Statutes and regulations 127
Case citation 127

15. Schools 130

Common client problems 130
General law 130
Kindergarten to Grade 12 130
Funding for post-secondary education 131
Aboriginal legal issues 131
Common client questions 131
Statutes and regulations 134
Case citation 134

16. Social Assistance 136

Common client problems 136
General law 136
Off reserve 136
On reserve 136
Aboriginal legal issues 137
Common client questions 137
For more information 140
Statutes and regulations 140

17. Taxation 142

Common client problems 142
General law 142
What doesn't get taxed under the Indian Act 142

Taxes on Nisga'a Lands 143
Aboriginal legal issues 143
Common client questions 143
For more information 145
Statutes and regulations 145
Case citations 145

18. Wills and Estates 148

Common client problems 148
General law 148
Wills and estates under provincial law 148
Wills and estates under the Indian Act 149
Nisga'a cultural property 150
Aboriginal legal issues 150
Common client questions 150
For more information 153
Statutes and regulations 153
Case citation 153

19. Work 156

Common client problems 156
General law 156
WorkSafeBC 156
Employment Insurance 157
Aboriginal legal issues 157
Common client questions 157
For more information 162
Statutes and regulations 163
Case citations 163

To order publications 166

Glossary 170

Appendix A: Judicial Reviews and Charter Challenges 174

Appendix B: Legal Services Society 178

Appendix C: Freedom of Information 184

Index 186

Introduction

Introduction

Who this guide is for

This guide is for professionals who work with Aboriginal people, including legal advocates. It summarizes some of the common legal issues facing Aboriginal people in their daily lives. It is not intended to be a "stand-alone" reference. Each chapter includes suggested resources for more information.

How to use this guide

This guide summarizes the general law for each subject area, explains any areas of law that are different for Aboriginal people, describes some of the legal issues clients may face, and lists the relevant legislation, cases, and resources for that topic.

To find out if a chapter contains the legal information you need to help your client, read the beginning sections called "This chapter covers" and "Common client problems" as well as "Common client questions" under "Aboriginal legal issues." These sections should help you determine if the chapter has what you are looking for.

Some of the terms used in this guide are in bold type and defined on the first page of each chapter in which the terms are found. A glossary of terms relating specifically to Aboriginal people is on page 170.

To make the most effective use of this guide, you will need some or all of the following:

- Experience with the law in a particular topic area.
- Access to the *LSLAP Manual* of the UBC Law Students' Legal Advice Program. Ideally you will have a hard copy of the guide. It is available online at www.lslap.bc.ca.
- Access to a telephone to contact LawLINE for legal information and advice when necessary. See Appendix B for details about LawLINE.
- Access to online resources, such as LawLINK (www.lawlink.bc.ca).
- Access to key print resources on Aboriginal law, such as *Native Law* by Jack Woodward. See page 166 for publication details and how to order.

Why this guide is needed

Aboriginal people live in a unique legal environment. Most legal publications, however, ignore or gloss over aspects of the law specific to Aboriginal people.

Few resources are aimed at advocates and other professionals who work with Aboriginal people. We hope this guide can help to fill the gap.

Unique legal environment

The following subjects are some of the most important features of the legal environment for Aboriginal people.

Aboriginal rights: As the original inhabitants of this country, Aboriginal people have Aboriginal rights, including Aboriginal title and the right to govern themselves. These rights have been "recognized and affirmed" by the Constitution of Canada, but their *content* is subject to extensive and complicated litigation.

Treaty rights: Some, but by no means most, Aboriginal people in British Columbia are also "beneficiaries" of treaty rights. Most of these treaties were negotiated more than a century ago, but the Nisga'a people of the Nass Valley achieved the first modern-day treaty in the province in 2000. These treaties have replaced or modified Aboriginal rights.

Government's duties: The courts consider the Crown to be a "fiduciary" in many aspects of its relationship with Aboriginal people. A fiduciary is a trustee who owes the highest standard of good faith in its dealing with the trustor (in this case the trustor is Aboriginal people). Even in those aspects where the Crown is not a fiduciary, the "honour of the Crown" requires a very high standard when dealing with Aboriginal people.

Indian Act: The *Indian Act* is a key component of the legal environment for Aboriginal people. This antiquated legislation governs Indian reserves and Indian band governments. Although reserves are set aside for the use and benefit of Indian bands, special rules prohibit individuals from owning land on reserve and greatly affect the ability to obtain credit.

Effects of colonization, including residential schools: From the late 1800s to the late 1900s, generations of Aboriginal children were taken from their families and placed in "residential schools" — institutions operated by churches and later by government — in some cases for years. The residential school system and other results of colonization, such as disease and alcohol abuse, destroyed some Aboriginal communities; others are still in a period of recovery. To date, on average, Aboriginal people have worse health, less income, less education, and more involvement with the criminal legal system than other Canadians.

A snapshot of Aboriginal people in BC

Aboriginal people are diverse culturally, geographically, and historically. The following statistics provide some background on Aboriginal peoples who live in British Columbia.[1]

- Out of BC's total population, 5.4 percent are Aboriginal. Of the 65 Native dialects spoken in Canada, about 28 are spoken in BC.
- BC has one-third of Canada's Indian bands, and three-quarters of the total number of Indian reserves in Canada.
- When Bill C-31 came into force in 1985, more than 17,000 individuals regained their Indian status in British Columbia.
- It is estimated that half of BC's registered Indians live on reserve, while the other half live off reserve, in rural and in urban communities.

[1] These figures are based on the 2001 census.

- BC's total Métis population is approximately 44,000.
- The majority of Aboriginal people live in the Lower Mainland and on Vancouver Island. The North Coast, Nechako, Northeast, and Cariboo have the next highest concentrations of Aboriginal people.
- The Aboriginal population is younger and growing at a faster rate than the rest of the population in BC.

Social and economic conditions

The following statistics illustrate the social and economic conditions of BC's Aboriginal people:

- Although Aboriginal people represent about 5 percent of the population, they are overrepresented in both provincial and federal prisons (19 percent of provincial inmates and 17 percent of federal inmates, based on appearance only).
- National statistics indicate that Aboriginal people are 8 times more likely than non-Aboriginal people to become victims of homicide, and 10 times more likely to commit homicide.
- Aboriginal women and children (under the age of 15) suffer the highest rates of abuse. One in three Aboriginal women reports being abused by her partner. Of the children who are removed from parental custody by voluntary agreements, 13 percent are Aboriginal, and by court order, 53 percent are Aboriginal.
- Suicide rates are three to four times higher, with rates among young age groups being five to six times higher.

For more information

To find out more about Aboriginal culture, legal matters, and services, consult the following:

Indian and Northern Affairs Canada (INAC): The federal government department responsible for meeting the government's constitutional, treaty, political, and legal responsibilities to First Nations, Inuit, and Northerners.

Website: www.ainc-inac.gc.ca/bc/index_e.html

Telephone: (604) 775-5100; 1-800-665-9320 (toll free within BC)

E-mail: InfoPubs@ainc-inac.gc.ca

First Nations Profiles: This website provides current First Nation community profiles, including general information about the First Nation and its government, and information about Tribal Councils, representative First Nation and Inuit political organizations, and reserves.

Website: http://pse2-esd2.ainc-inac.gc.ca/FNProfiles/FNProfiles_home.htm

Services for First Nations People: An online guide to federal government services and programs for First Nations people.

Website: www.ainc-inac.gc.ca/sg

Your feedback, please

Much of the information and analysis contained in this guide is from government legislation, case law, legal texts, and articles. However, the topics and - situations covered are largely based on the collective personal experience of lawyers and others like you who work with Aboriginal people.

Help us keep this guide relevant and up to date. E-mail your suggestions and your experiences using this guide to **aboriginallaw@lss.bc.ca**.

I. Bankruptcy and Insolvency

1. Bankruptcy and Insolvency

This chapter covers:

- BC and Canadian laws for bankruptcy
- Ways of resolving debts:
  - Orderly Payment of Debts
  - Proposals
  - Bankruptcy
- Exceptions to BC and Canadian laws that apply to Aboriginal people:
  - What property is protected from seizure under a bankruptcy
  - What a discharge from bankruptcy means

Definitions

Assets: Generally any item of property (land or personal possessions) that has monetary value.

Discharge from bankruptcy: A court order following all legal steps in processing a bankrupt person's assets and debts, which cancels any remaining debts that cannot be paid.

Exempt: Something that is not included or that you are allowed to keep.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Insolvency: The inability of a person to pay their debts when they're due.

Jurisdiction: The right and power to make law or interpret and apply the law.

Trustee in bankruptcy: Court-appointed person who will administer the affairs of a bankrupt individual (the debtor). Acts on behalf of the debtor to ensure that both the creditor's and debtor's interests are protected under the law, and often negotiates between the two.

Seizure: When property is taken away by legal right.

Common client problems

- I am in debt and cannot make all of my payments.
- I have property on reserve and have decided to go bankrupt.

General law

In general, the laws of bankruptcy and debt described below apply to Aboriginal people living on or off reserve.

Jurisdiction for bankruptcy and **insolvency** issues is split between the federal parliament and provincial legislatures.

Federal parliament	Provincial legislature
Bankruptcy and Insolvency Act	*Court Order Enforcement Act*
The legislation that deals with bankruptcy.	The rules about which **assets** you can keep during a bankruptcy.

Options for resolving debts

Informal options for resolving debts include:

- budgeting;
- direct negotiations with the creditors (e.g., extending time for repayment, waiving interest charges, or settling for less than the amount owing); and
- debt consolidation loans.

Formal options for resolving debts are in the federal *Bankruptcy and Insolvency Act*. They include (and are explained below):

- Orderly Payment of Debts
- Proposals
- Bankruptcy

Orderly Payment of Debts

Orderly Payment of Debts is described in Part X of the *Bankruptcy and Insolvency Act*. It allows a debtor to consolidate most of their debts (meaning they join them together into one debt) and make a monthly payment directly to the court.

For help consolidating their debts, clients will have to rely on for-profit agencies or volunteer debt counselling services such as the Credit Counselling Society of BC (toll-free number: 1-888-527-8999).

Proposals

People who have the ability to pay some but not all of their debts may be eligible to make a Consumer Proposal for total debts of $75,000 or less, or an Ordinary Proposal for total debts over $75,000.

In this situation, the debtor "proposes" to pay part of the amount owed to creditors. If the majority (based on the amount of the debt) of creditors agree, the proposal is accepted, and the debtor is protected against legal action by the creditors as long as the proposal is in effect.

To make a proposal, your client (the debtor) will need the help of a **trustee in bankruptcy**. To find a trustee, see "For more information" at the end of this chapter.

Bankruptcy

Bankruptcy is the process by which a person in debt who cannot pay the bills can "assign" or surrender their **assets** to a **trustee in bankruptcy**. The trustee uses these assets to pay as many of the debts as possible.

To be eligible for bankruptcy, your client must be "insolvent." This means that they:

- owe at least $1,000,
- cannot make regular payments when they are due, and
- cannot pay all debts even if their assets are sold.

Exemptions from bankruptcy

In BC, the following **assets** are exempt from bankruptcy, meaning you can keep these things (see *Court Order Enforcement Act*, s. 71; *Court Order Enforcement Exemption Regulation*, s. 2):

- Necessary clothing and medical and dental aids for self and dependants
- Household furnishings and appliances of a value not exceeding $4,000
- A motor vehicle of a value not exceeding $5,000 ($2,000 if the client is a debtor under the *Family Maintenance Enforcement Act*)

- Tools and other personal property of a value not exceeding $10,000, where the tools and other personal property are used to make an income from the client's occupation
- Personal residence if the client has less than $9,000 ($12,000 if the residence is in the Capital Regional District or Greater Vancouver Regional District)

A debtor may also keep earnings reasonable for the number of people in their family and for their personal circumstances. Earnings above this reasonable amount will be collected by the trustee in bankruptcy and used to pay the creditors.

A debtor is usually eligible for **discharge from bankruptcy** nine months after the assignment. Once someone is discharged from bankruptcy, the debts subject to the bankruptcy are cancelled — meaning the person gets a fresh start.

Debts that won't be cancelled by bankruptcy

However, a bankruptcy does not cancel the following debts:

- Alimony or maintenance payments
- Court imposed fines or penalties
- Debt arising out of fraud or embezzlement
- Student loan debts where the bankruptcy occurs less than 10 years after the debtor is no longer a student

The bankruptcy process costs about $1,500. If possible, this money comes from the sale of your client's **assets**. Otherwise, they can arrange to pay over time.

Aboriginal legal issues

There are exceptions to the general laws of bankruptcy and debt relief that apply to Aboriginal people:

- the real and personal property of an "Indian," including cultural property situated on reserve, is protected from bankruptcy, and
- some forms of cultural or heritage property situated off reserve may also be protected from bankruptcy.

Common client questions

- If I declare bankruptcy, will I lose my property on reserve?
- Do I get to keep my cultural property?
- When do I get free of my debt?

If I declare bankruptcy, will I lose my property on reserve?

Your client's property on reserve may be protected from bankruptcy because of two provisions in the *Indian Act*:

- Section 29 of the *Indian Act* protects Indian reserve land from seizure, including seizure under bankruptcy.

- Section 89(1) of the *Indian Act* says that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band."

This means that on-reserve **assets** are generally protected from **seizure** under a bankruptcy (see *Sioui [Re]*).

However, the value of those assets, and the client's ability to earn income from them, can be taken into consideration in determining whether to **discharge** the client from bankruptcy (see *Davey [Re]*).

Property considered "situated on reserve"

If your client's personal property is situated on reserve, it may not be included in the bankruptcy process. If it is not situated on reserve, it is included in the bankruptcy process.

If the main location of someone's property is on reserve, the property is said to be "located on reserve" even though it is used off reserve (see *Leighton v. British Columbia [Gov't]*). For example, the location of a private vehicle is at the owner's residence on reserve — that is where it is kept when not in use and where the car is returned after use (see *Danes v. British Columbia*).

Similarly, a bus in for repairs at an off-reserve mechanic's shop is considered to be situated on reserve if it is usually used and stored on reserve (see *Wahpeton Dakota First Nation v. Lajeunesse*).

Personal property bought by the government with Indian money or money "appropriated by parliament for the use and benefit of Indians or bands, or given to Indians or to a band under a treaty or agreement" is also considered situated on reserve according to section 90 of the *Indian Act*.

If your client's wages are earned on reserve, they can't be garnished from an Indian Band employer. (Garnishing means there's a legal order to take someone's wages to pay off a debt.) However, once those wages are deposited in an off-reserve bank account, the contents of that account can be garnished or **seized** under bankruptcy.

Property not considered situated on reserve

Personal property is usually considered to be situated where it is *physically* located. That means a piece of jewelry in an off-reserve safety deposit box is subject to **seizure** under bankruptcy (see *Maracle v. Ontario [Minister of Revenue]*). The same is true of the contents of an off-reserve bank account.

> **Note:** Courts look at a variety of factors in determining where personal property is "situated." Advise your client to talk to a lawyer about this.

Do I get to keep my cultural property?

Your client's "cultural property" may be **exempt** from the bankruptcy process.

Cultural property includes objects that have sacred, ceremonial, historical, traditional, or cultural importance.

Unless an item has been manufactured *for sale* by "Indians," section 91 of the *Indian Act* makes it unlawful for any person to acquire title to:

- an Indian grave house,
- a carved grave pole,
- a totem pole,
- a carved house post, or
- a rock embellished with paintings or carvings.

These items cannot even be removed from the reserve without the permission of the Indian Affairs minister.

The federal *Cultural Property Export and Import Act* prohibits the removal from Canada of certain types of cultural property described on a Control List in section 4 of the act.

The BC *Heritage Conservation Act* also contains provisions about "heritage" objects. These objects cannot be removed from the province without a minister's permit according to section 13 of the act. Many of them cannot even be moved from their current location without such a permit.

Although neither the *Cultural Property Export and Import Act* nor the *Heritage Conservation Act* actually exempt cultural property from bankruptcy, these acts might affect how these items are dealt with in bankruptcy proceedings.

> **Note:** Cultural property may be held communally or in trust for the Aboriginal community. Such property is not subject to bankruptcy.

When do I get free of my debt?

A **discharge from bankruptcy** means you no longer have to pay certain debts. However, your client's personal circumstances may affect their discharge from bankruptcy (*Bankruptcy and Insolvency Act*, s. 172 and 173).

Generally, the court will consider if the bankrupt has been cooperative and financially responsible during the period of bankruptcy, but cultural factors such as family responsibility may be considered.

For example, in *Lemaigre (Re)*, a northern Aboriginal person was considered eligible for discharge from bankruptcy even though they continued to spend a lot because of their financial obligations to an extended family and the high cost of living in the community.

Although on-reserve property is **exempt** from the bankruptcy process, a court may consider the property's value and the ability of the bankrupt to benefit from it financially in determining whether to discharge them from bankruptcy (see *Davey [Re]*).

For more information

- *Consumer Law and Credit/Debt Law: A Guide for British Columbia* (Legal Services Society). Available at www.lss.bc.ca, or see "How to order publications."
- Chapter 10 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about bankruptcy and other forms of debtors' assistance. Available at www.lslap.bc.ca.
- To find a list of trustees in bankruptcy, look in the yellow pages of the phone book under "Bankruptcy Trustees."
- LawLINK: www.lawlink.bc.ca. Click the "Consumer and Debt" button.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button, then scroll down the page and choose "Credit, Debt and Bankruptcy."
- Office of the Superintendent of Bankruptcy Canada: http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/home
- Credit Counselling Society of BC: www.nomoredebts.org

Statutes and regulations

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2

Court Order Enforcement Act, R.S.B.C. 1996, c. 78

Court Order Enforcement Exemption Regulation, B.C. Reg. 28/98 [Court Order Enforcement Act]

Cultural Property Export and Import Act, R.S.C. 1985, c. C-51

Debtor Assistance Act, R.S.B.C. 1996, c. 93

Family Maintenance Enforcement Act, R.B.S.C. 1996, c. 127

Heritage Conservation Act, R.S.B.C. 1996, c. 187

Indian Act, R.S.C. 1985, c. I-5

Case citations

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

Davey (Re) [2000] 3 C.N.L.R. 48 (Ont. Sup. Ct. Jus.)

Leighton v. British Columbia (Gov't) (1989), 35 B.C.L.R. (2d) 216, [1989] 3 C.N.L.R. 136 (B.C.C.A.)

Lemaigre (Re) [1997] S.J. No. 130 (Q.L.) (Sask. Q.B.)

Maracle v. Ontario (Minister of Revenue) (1993), 1 GTC 6214 (Ont. Gen. Div.)

Sioui (Re) [2000] 3 C.N.L.R. 382 (Que. C.A.)

Wahpeton Dakota First Nation v. Lajeunesse, [2002] 3 C.N.L.R. 285 (Sask. C.A.)

2. Consumer Issues

2. Consumer Issues

This chapter covers:

- The law that deals with contracts
- The circumstances under which you can get out of a contract
- Dealing with debt collectors
- What salespeople and debt collectors can and cannot do on reserve

Definitions

Assets: Generally any item of property (land or personal possessions) that has monetary value.

Exempt/exemption: Something that is not included.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Seizure: When property is taken away by legal right.

Set aside: When the court says the contract does not apply.

Supplier: A person who provides goods or services in the course of their business.

Common client problems

- I was pressured by a door-to-door salesperson into buying an item I don't want.
- I am being harassed by a debt collector.

General law

Consumer contracts are made when you acquire goods from another person in the course of business. When you acquire goods you are called the "buyer" or "consumer." The other person is often called the "seller" or **supplier**. When you owe money for goods or a service, you are the "debtor" and the other party is the "creditor."

In general, consumer contracts fall under provincial law, but some aspects are covered by federal law. The main piece of provincial legislation dealing with consumer contracts is the *Business Practices and Consumer Protection Act*.

There are also elements of common law that apply to contracts. (Common law is law that has been created by judges when they decide on cases.) For example, common law identifies the elements that go into the making of a contract.

The general laws of consumer protection apply to Aboriginal people living on or off reserve.

Getting out of bad contracts: Defences

A consumer doesn't usually have the right to change their mind and get out of a contract unless the supplier agrees. However, there are the following exceptions:

Illegality

In general, a contract made for an illegal purpose (like committing a crime) is unenforceable (impossible to apply under the law).

The *Criminal Code of Canada* (s. 347) says that an agreement to collect interest at an annual rate of 60 percent or more is illegal. Processing fees charged on short-term or "payday" loans are considered to be interest for the purpose of this calculation (see *Kilroy v. A OK Payday Loans Inc.*).

Misrepresentation

If a seller makes a false statement to get a consumer to enter a contract, the consumer may be entitled to take the supplier to court. A consumer may be able to get the contract **set aside** or get compensation.

Section 4 of the *Business Practices and Consumer Protection Act* prohibits misrepresentation (saying things are a certain way when they really aren't) by a **supplier** about the availability, quality, price advantage, or prior history of a product.

Unfairness

Courts sometimes **set aside** contracts that are unfair because one of the parties was under undue influence (too much pressure) or duress (was forced).

A contract may also be set aside as "unconscionable" (not guided by conscience and therefore shockingly unfair) in cases where the parties have unequal bargaining power and the stronger one uses that power to gain an unfair advantage. In contract law, a contract that is unconscionable is not binding (legally enforceable) on the consumer.

Section 8 of the *Business Practices and Consumer Protection Act* requires a court, in determining whether a consumer transaction is unconscionable, to consider a number of factors, including:

- undue (too much) pressure;
- a consumer's infirmity (physical weakness), ignorance, illiteracy, or other factors that may have affected their understanding of the contract;
- excessive pricing relative to the market for value of similar goods or services;
- the improbability of the consumer being able to make payment in full given financial circumstances at the time of the transaction; or
- harsh or adverse terms to the contract (terms that are clearly not in the best interests of the consumer).

Mistake

If the buyer and seller did not understand a fundamental (basic) aspect of a contract, such as the nature or subject matter of the agreement, a court may **set it aside**.

A consumer usually can't get out of a contract if they didn't read the "fine print" unless it has an unfair effect on the relationship between the consumer and the seller (see *Tilden Rent-a-Car v. Clendenning*).

Getting out of bad contracts: Time limits

Direct sales (includes door-to-door sales)

Under the provincial *Business Practices and Consumer Protection Act*, a "direct sales contract" is one that takes place somewhere other than at the **supplier's** permanent place of business. Direct sales include door-to-door sales.

A consumer has 10 days to cancel a direct sales contract, such as a door-to-door contract. The 10 days starts when the consumer gets a copy of the contract (*Business Practices and Consumer Protection Act*, s. 21).

Under some circumstances, a direct sales contract may be cancelled within one year after the consumer receives a copy of the contract. This may apply in the following situations:

- the supplier was under a direct sales prohibition order at the time of the contract (meaning they were not legally allowed to sell),
- the goods or services weren't supplied within 30 days of the supply date, or
- the contract did not meet the content requirements set out in the legislation.

Distance (Internet and catalogue) sales

Under the *Business Practices and Consumer Protection Act*, a distance sales contract is one that a consumer does not enter into in person. In the case of goods, a distance sales contract is one where consumers did not have an opportunity to inspect the goods when they entered into the contract. Distance sales include Internet and catalogue sales.

A consumer may cancel a distance sales contract by giving notice of cancellation to the supplier. The time limits for giving notice are:

- not later than 7 days after the date that the consumer receives a copy of the contract if the contract doesn't include details required in the legislation,
- not later than 30 days after the date of the contract if the seller does not supply a copy of the contract within 15 days after making it, or
- at any time if the goods or services aren't delivered within 30 days of the supply date, or within 30 days after the contract if no supply date is specified.

Future performance contracts

A future performance contract is a contract for goods or services that are not supplied or paid for at the time the contract is made.

A consumer may cancel a future performance contract within a year of receiving the contract if the contract doesn't include details required in the legislation, such as the supply date and the amount of periodic payments required.

Continuing service contracts

A continuing service contract is a kind of future performance contract (described above) for services provided on a continuing basis. Consumer service contracts include music lessons and gym memberships.

A consumer may cancel a continuing services contract by giving notice of cancellation to the supplier not later than 10 days after the date that the consumer receives a copy of the contract. The contract may also be cancelled at any time if there is a material change in the circumstances of the consumer (such as death, disability, or relocation) or supplier (such as relocation or discontinuance of services).

Time share contracts, pre-need cemetery or funeral services contracts, and funeral or interment right contracts

The *Business Practices and Consumer Protection Act* deals specifically with a consumer's right to cancel time-share contracts, pre-need cemetery or funeral services contracts, and funeral or interment right contracts. All have time limits.

For information about cemetery and funeral services, go to the Business Practices and Consumer Protection Authority website at www.bpcpa.ca/Consumers/help/consumers-help-cemeteries.htm.

Other protections

Breach of condition

In common law, a buyer may be entitled to be compensated or have a contract **set aside** if the seller breaches (breaks) a material condition of the contract (meaning it destroys the value of the contract).

The provincial *Sale of Goods Act* provides some additional protection to buyers by implying certain conditions in almost all sales of goods. Implied conditions to almost all transactions include:

- the seller owns the goods they are attempting to sell, and
- the goods are free of encumbrance (a mortgage or other charge on property) unless otherwise stated.

Under the *Sale of Goods Act*, there is also an implied condition that new goods are reasonably durable.

Where the seller is selling goods in the usual course of business (such as a new or used car dealer), and the buyer is relying on the seller's judgment, there is an implied condition that the goods are reasonably fit for their intended purpose.

Unsolicited goods and services

If someone doesn't ask for a seller's goods or services, they can't be forced to buy them. When goods or services are supplied to someone who didn't ask for them it means they were "unsolicited."

Section 12 of the *Business Practices and Consumer Protection Act* says that "a consumer has no legal obligation in relation to unsolicited goods or services unless and until the consumer expressly acknowledges to the supplier in writing his or her intention to accept the goods or services." This means the consumer has to say they want the goods or services in writing, usually by signing a contract.

Dealing with debt collectors

Section 114 of the *Business Practices and Consumer Protection Act* prohibits (forbids) the harassment of:

- a debtor;
- a member of the debtor's family or household;
- a relative, neighbour, friend, or acquaintance of the debtor; or
- a debtor's employer.

Harassment includes:

- using threatening, profane, intimidating, or coercive language;
- using undue, excessive, or unreasonable pressure; and
- publishing or threatening to publish a debtor's failure to pay.

If a debt is being collected by a person other than the creditor, the debt collector must:

- contact the debtor in writing at least five days before verbal contact;
- contact the debtor only once at work;
- contact the debtor's employer only with the debtor's consent or for the purpose of confirming employment;
- communicate with the debtor only in writing if so requested;
- deal only with the debtor's lawyer if so requested;
- communicate with the debtor by phone or in person only between the hours of 7:00 a.m. and 9:00 p.m., Monday through Saturday, and 1:00 p.m. and 5:00 p.m. on Sundays; and
- act within the debt collection limitations set out in the *Business Practices and Consumer Protection Act, Business Practices and Consumer Protection Regulation*, and bulletins issued by the Business Practices and Consumer Protection Authority (see below).

Under Section 171 of the *Business Practices and Consumer Protection Act*, a debtor subjected to an unfair debt collection practice may sue in Small Claims Court. Awards for harassment can be up to $10,000 (see *Toban v. Total Credit Recovery*).

Business Practices and Consumer Protection Authority

The province has established the Business Practices and Consumer Protection Authority of BC to regulate business practices and consumer protection relating to:

- debt collection services,
- credit reporting agencies,
- travel agencies,
- funeral homes, and
- cemeteries.

A client who is facing an unfair practice by a debt collector can contact the authority at 1-888-564-9963 (toll free).

Under Section 172 of the *Business Practices and Consumer Protection Act*, a debtor or the director of the Business Practices and Consumer Protection Authority may apply to the Supreme Court for a temporary or permanent injunction (an order to stop a specific activity) against a supplier or debt collector. In such cases, the court may also make an order for the return of goods or money.

The website of the Business Practices and Consumer Protection Authority contains online information about unreasonable collection practices at www.bpcpa.ca/Industry/debt/industry-debt-unreasonable.htm.

Aboriginal legal issues

The general laws of consumer protection apply to Aboriginal people living on or off reserve; however the circumstances may be different, as described below.

Common client questions

- Can I get out of a purchase I made from a door-to-door salesperson on reserve?
- A creditor or debt collector is harassing me. What can I do?
- A creditor or debt collector is trying to seize the goods he sold me. What can I do?
- How can we keep door-to-door salespeople off our reserve?

Can I get out of a purchase I made from a door-to-door salesperson on reserve?

Your client can get out of a door-to-door sale at any time within 10 days after the transaction by giving notice of an intention to do so. After that time, your client's options are greatly diminished.

However, even if your client bought goods more than 10 days ago, they may still be able to get out of the deal with good advocacy, especially if your client is vulnerable and was exploited.

Find out all you can about the circumstances surrounding the transaction, including the age, literacy, and level of understanding of your client, and whether there was undue pressure, especially if the seller is a family member. If you are going to advocate on the client's behalf, you may want to talk to a lawyer or paralegal on LawLINE (see Appendix B).

A debt collector is harassing me. What can I do?

The *Business Practices and Consumer Protection Act* is a provincial law that applies on and off reserve.

Although the rules governing debt collection practices are the same on and off reserve, the tactics are sometimes different.

People on reserve are often surrounded by family members. Creditors and debt collectors sometimes try to use these family members or band staff to collect debts. This may amount to an unfair debt collection practice under the *Business Practices and Consumer Protection Act*.

Collection agencies must be licensed under the *Business Practices and Consumer Protection Act*. The Business Practices and Consumer Protection Authority (BPCPA) has the authority to cancel or suspend a licence.

The BPCPA accepts complaints about unfair debt collection practices by collection agencies. Your client may complain to the BPCPA by calling 1-888-564-9963 (toll free). It is important to have the name of the collection agency.

A creditor or debt collector is trying to seize the goods he sold me. What can I do?

Sometimes creditors try to seize (take) property instead of money from debtors in default of a contract (when the debtor fails to make payments). Creditors are usually only allowed to do so if they have a "security interest" in the property (when property is the creditor's guarantee against loss) or a court order.

Protected from seizure

Your client's property on reserve may be protected from seizure because of two provisions in the *Indian Act*:

- Section 29 of the *Indian Act* protects Indian reserve land from seizure.
- Section 89(1) of the *Indian Act* says that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band."

The effect of these *Indian Act* provisions is that the on-reserve assets of your client are generally exempt from seizure (see *Sioui, Re*). For a definition of "situated on reserve," see page 11 in Chapter 1.

Not protected from seizure

Protection under section 89(2) of the *Indian Act* does not apply to transactions where "the right of property or right of possession thereto remains wholly or in part in the seller." These transactions are often called "conditional sales agreements," and the seller keeps the right to seize the goods subject to the agreement.

Also note that goods situated on a reserve are not protected from seizure when the creditor is an Indian or an Indian band. A non-Indian can "assign" (transfer) a debt to an Indian debt collector and avoid the **exemption** under section 89 of the *Indian Act* — so long as the Indian gets all or most of the benefit of collecting the debt. This is not the case when the Indian debt collector has to pay most of the money collected to the non-Indian creditor.

Section 4(2) of the *Indian Act* allows the minister of Indian and Northern Affairs Canada to exempt individuals from the effect of section 89. However, the minister does not exercise this authority as a matter of policy.

How can we keep door-to-door salespeople off our reserve?

Exploitation by door-to-door salespeople is widespread on reserve. To fight it, some band councils use their authority under section 81 of the *Indian Act* to stop solicitors from trespassing on reserve.

A person who trespasses on reserve commits an offence (*Indian Act*, s. 30). Therefore, an on-reserve client may have the right to **set aside** a contract as illegal if it was made with a door-to-door salesperson. This is a difficult legal argument to make, however, and should be referred to a lawyer.

For more information

- *Consumer Law and Credit/Debt Law: A Guide for British Columbia* (Legal Services Society). Available at www.lss.bc.ca, or see "How to order publications."
- Chapter 9 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about consumer protection. Available at www.lslap.bc.ca.
- LawLINK: www.lawlink.bc.ca. Click the "Consumer and Debt" button.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button, then scroll down the page and choose "Credit, Debt and Bankruptcy."
- Business Practices and Consumer Protection Authority: www.bpcpa.ca. Website contains help for consumers.

Statutes and regulations

Criminal Code, R.S.C. 1985, c. C-46

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2

Business Practices and Consumer Protection Regulation, B.C. Reg. 294/2004 [Business Practices and Consumer Protection Act]

Court Order Enforcement Act, R.S.B.C. 1996, c. 78

Debt Collection Industry Regulation, B.C. Reg. 295/2005 [Business Practices and Consumer Protection Act]

Indian Act, R.S.C. 1985, c. I-5

Sale of Goods Act, R.S.B.C. 1996, c. 410

Case citations

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

Kilroy v. A OK Payday Loans Inc., 2006 B.C.S.C. 1213

Leighton v. British Columbia (Gov't) (1989), 35 B.C.L.R. (2d) 216; [1989] 3 C.N.L.R. 136 (B.C.C.A.)

Maracle v. Ontario (Minister of Revenue) (1993), 1 GTC 6214 (Ont. Gen. Div.)

Sioui, Re [2000] 3 C.N.L.R. 382 (Que. C.A.)

Tilden Rent-a-Car Co. v. Clendenning (1978) 18 O.R. (2d) 601; [1978] 1 A.C.W.S. 604 (Ont. C.A.)

Toban v. Total Credit Recovery (B.C) Ltd. [2001] B.C.J. No. 1921 (Sept. 5, 2001) (B.C. Prov. Ct.)

Wahpeton Dakota First Nation v. Lajeunesse [2002] 3 C.N.L.R. 285 (Sask. C.A.)

Williams v. Joe [1973] 5 W.W.R. 97; [1973] B.C.J. No. 734 (QL) (B.C. Co. Ct.)

3. Criminal Law

3. Criminal Law

This chapter covers:

- The criminal prosecution process
- The court process
- The options available outside of going to court
- The law regarding the possession of weapons
- The law regarding fishing and hunting gear
- What circle sentencing is
- What banishment is
- What legal aid coverage is available

Common client problems

- I want to know if I can get legal aid.
- I have been charged with a criminal offence and would like to deal with it outside the court system.
- I am facing a firearms prohibition but I need my gun to hunt for food for my family.
- A fisheries officer seized my fishing/hunting gear and I need it to catch fish/hunt for food for my family.
- I was convicted of a criminal offence and have been banished from my community.

Definitions

Adjournment: When a court hearing or trial is stopped until a later stated time.

Appeal: An examination by a higher court of the decision of a lower court. The higher court may affirm, vary, or reverse the original decision.

Arraignment: A court hearing when the accused's name is called, the charge is read, and the accused pleads guilty or not guilty. At this time, the accused may also elect to be tried by a judge or by a judge and jury in a higher court, or by a judge in a lower court.

Crown counsel: The court lawyer who represents the provincial or federal government.

Indictable offence: More serious offence.

Preliminary inquiry: A hearing before a Provincial Court judge to determine whether there is enough evidence of an offence to go to trial.

Prohibition/prohibiting: An order that doesn't allow something.

Seize/seizure: To take away by legal right.

Sentencing: The judge's decision about what penalty, if any, a person convicted of an offence should get.

Summary offence: Less serious offence; carries a lighter sentence.

Trial: When the court examines the evidence and applicable laws to decide upon the charges against an accused.

Warrant: A writ (written order) from a court commanding police to perform specified acts.

General law

Criminal law describes what happens when a person has been charged with an offence and is facing a fine or other form of penalty.

Most criminal law is covered by the *Criminal Code of Canada*, but offences and punishments are also described in other federal laws such as the *Youth Criminal Justice Act* (for people 12 years old and over but under 18 years old), the *Controlled Drugs and Substances Act*, and the *Fisheries Act*.

Provincial laws such as the *Motor Vehicle Act* and *Wildlife Act* also contain offences and penalties that are dealt with in much the same way as criminal offences.

Criminal offences are prosecuted by the government. The Attorney General of British Columbia usually prosecutes offences under provincial laws and the *Criminal*

Code of Canada. The Attorney General of Canada usually prosecutes offences under other federal laws such as the *Controlled Drugs and Substances Act* and *Fisheries Act*.

Understanding the criminal prosecution process

When someone is accused of a crime, the police start investigating to find out if there is enough evidence to charge that person.

Investigation stage

For minor offences by first-time or "unseasoned" offenders who take responsibility for their action, the police have the option of referring an accused to a community program instead of recommending criminal charges to **Crown counsel**. This process is referred to as "police diversion" or "restorative justice."

Under police diversion or restorative justice, the accused may be asked to agree to participate in some form of mediation or other process to find an appropriate remedy to restore their relationship with the victim and the community.

The remedy may include:

- a letter of apology,
- payment of restitution,
- community service work, and/or
- working for the victim.

If the police decide not to "divert" the accused, they will provide a report and recommendations to Crown counsel.

Charge approval stage

If police recommend that criminal charges be laid, **Crown counsel** has the option of laying the charge or considering "alternative measures." The *Criminal Code* (s. 717[1][a]) states that Crown counsel may refer an accused person to a "program of alternative measures authorized by the Attorney General" provided:

- it is not inconsistent with the protection of society;
- the accused person accepts responsibility for the "act or omission that forms the basis of the offence";
- it is appropriate to the needs of the accused and the interests of society (and, in the case of an adult accused, the interests of the victim);
- there is enough evidence and no other bar to proceeding with the prosecution; and
- the accused person gives informed consent to participate in alternative measures.

Provincial Crown counsel and federal Crown counsel take slightly different approaches to alternative measures. However, they will almost always be considered if the accused has:

- no criminal record,
- no history of previous diversions, and

- has committed a less serious offence such as theft under $5,000 or possession of a small quantity of marijuana.

In some circumstances, diversion may be considered for break-and-enter or possession of a controlled drug for the purposes of trafficking. Other offences will never be considered: murder, attempted murder, manslaughter, and trafficking drugs to youth.

If charges are laid, the accused will go to court as described below.

Understanding court appearances

When a person is charged with a criminal offence, the investigation officer will require them to attend court either by:

- keeping the person in custody until their first court appearance, or
- giving the person a document such as a "Summons" or "Promise to appear" stating the date and location of the first court appearance.

At their "first appearance," the accused is required to tell the judge what they intend to do with the charge, even if it is to ask for more time to speak with a lawyer or apply for legal aid. The judge will usually grant the accused an **adjournment** for a number of days for such purposes. Further adjournments are possible, but at the discretion of the judge.

The next court appearance after the first appearance (and any adjournments) is called the **arraignment** hearing. At this hearing, for most offences, the accused will be required to enter a plea — either guilty or not guilty. If the plea is guilty, a time will be set for **sentencing**, usually on the same day. If the plea is not guilty, the court will advise the accused how to "fix" (arrange) a trial date for a trial before a Provincial Court judge.

If the accused has been charged with a very serious offence (an **indictable offence**), they will usually have an opportunity at the arraignment hearing to choose the method of trial. The accused can choose a trial before:

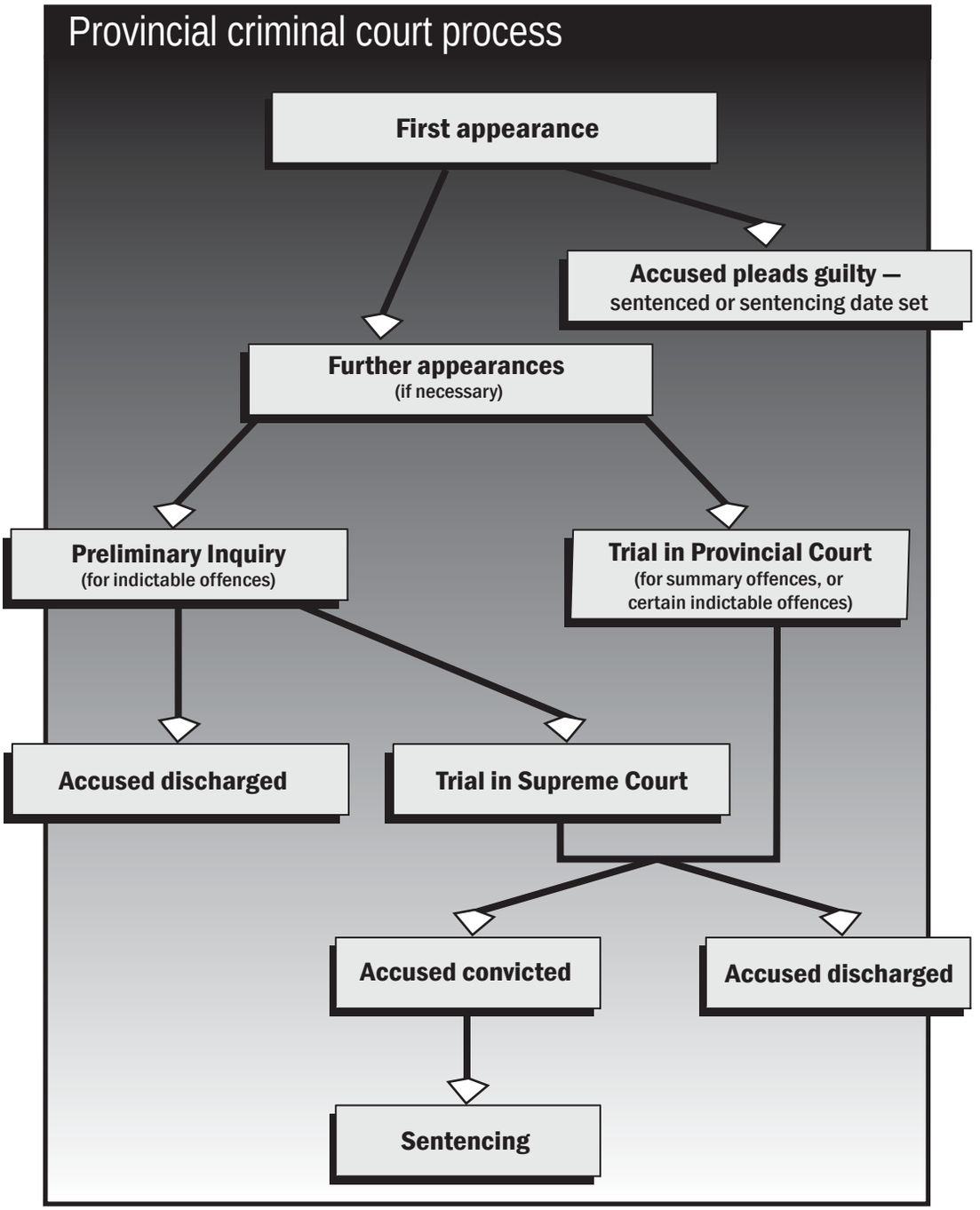
- a Provincial Court judge,
- a Supreme Court judge without a jury, or
- a Supreme Court judge with a jury.

If the accused chooses a trial by a Supreme Court judge, with or without a jury, they may have a **preliminary inquiry** into the charge before the actual **trial**.

At trial, the accused will be found either guilty or not guilty. If they are found guilty, a time will be set for sentencing.

Usually a trial or sentencing is the last court appearance an accused is required to make. However, both a finding of guilty or not guilty and the sentence imposed by the judge are subject to an **appeal** to a higher level of court on certain grounds.

Note: If an accused person misses a scheduled court appearance without making prior arrangements with the court, the judge may issue a **warrant** for the arrest of the accused. This authorizes the police to arrest the accused and hold them in custody, often until released by a judge. Clients who have missed court appearances or who cannot attend an upcoming court appearance should consult a lawyer right away.



This is a general guideline only. It has been adapted from a chart of the Law Courts Education Society of BC.

Aboriginal legal issues

A range of barriers can face Aboriginal clients in the Canadian criminal justice system, including:

- the Aboriginal cultural value of accepting responsibility,
- the absence of readily available criminal legal advice, and
- the desire to "get it over with" even when the person is not technically or actually guilty of an offence.

If your client has been charged with a crime, start by explaining how the Canadian criminal justice system works. The approach is different from the cultural values of many societies, including some Aboriginal communities, which places a high importance on accepting responsibility for one's actions.

Explain, for example, that your client has the right "to remain silent" until they get legal help. And if your client pleads not guilty to a crime, tell them that the Crown (counsel representing the government) must prove the offence "beyond a reasonable doubt."

Common client questions

- What happens if I'm accused of a crime?
- What happens if I'm found guilty of a crime?
- What is "circle sentencing"?
- What if I've had my fishing or hunting gear seized?
- What if I've been banished from my community?
- Can I get legal aid?

What happens if I'm accused of a crime?

When someone is accused of a crime, the police investigate to find out if there is enough evidence to charge that person. Start by finding out if your client is being investigated by police, or if the police have already recommended criminal charges to **Crown counsel**.

If your client's offence is minor, they may be recommended for "police diversion" or "restorative justice." A number of restorative justice programs throughout the province are provided by Aboriginal organizations. Contact the local police detachment for information about the services in your area. The community program will monitor the offender's performance of the remedy (the agreed actions to correct the offence).

If your client has already been charged with a criminal offence, their main decision is whether to plead guilty or not guilty. This decision should not be made until the client has reviewed the "information" (a document that sets out the formal charges) and "circumstances" (a copy of the report sent to Crown counsel by the police). These documents can be obtained from Crown counsel before or at your client's first appearance in court.

Your client may still be considered for alternative measures once the Crown has laid a charge, or at any time prior to or during a trial. For more on alternative measures, see "Charge approval stage" on page 27.

If you have experience dealing with police or Crown counsel, you may be able to intervene on your client's behalf early in the process. If not, consider referring the matter to a lawyer as soon as possible. See "Legal aid" later in this chapter for how to get a legal aid lawyer.

Note: Your Aboriginal client may have an "Aboriginal rights defence" to a criminal charge, especially if the charge is related to fishing, hunting, or gathering. For a more detailed discussion on Aboriginal rights defences, see Chapter 5, Harvesting Rights.

What happens if I'm found guilty of a crime?

A judge will sentence someone if they plead guilty to an offence at any stage of the proceedings or if they are found guilty following a trial.

Section 718.2(e) of the *Criminal Code of Canada* states that, in sentencing:

> . . . all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders.

This provision is intended to address factors experienced by many Aboriginal people and the serious overrepresentation of Aboriginal people in the criminal justice system (see *R. v. Gladue*). However, sentencing is done individually, and s. 718.2(e) is not intended to necessarily result in an easier sentence, especially for violent offences (see *R. v. Wells*).

It is the responsibility of the accused or their counsel to tell the judge about any circumstances that apply to section 718.2(e). The court can consider any relevant evidence, including oral or written reports from professionals or community members familiar with those circumstances.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

What is "circle sentencing"?

One sentencing option available to Aboriginal clients is "circle sentencing."

Circle sentencing is when the sentencing judge and appropriate community members meet, usually outside the courtroom, to discuss an appropriate sentence for the accused person, usually emphasizing rehabilitation and restoration rather than punishment.

The group attempts to agree on a sentence, but the judge has the final authority to impose it. That way, the sentence becomes an order of the court.

Circle sentencing takes a lot of time and effort to prepare. The hearing itself can also take a long time, and the consent of the court is required. If your client is interested in a sentencing circle, arrangements need to be made well in advance.

Courts have found that circle sentencing may be appropriate when:

- the accused acknowledges guilt, and disputed facts are resolved prior to the circle;
- both the accused and the victim consent to the circle taking place;
- the accused has deep roots in the community where the circle is held and the participants are from;
- respected elders and non-political leaders are willing to participate; and
- appropriate support is available to the victim (see *R. v. Joseyounen*).

Even if a judge will not agree to participate in a sentencing circle, they will often welcome the advice of the community on sentencing options (see *R. v. Rich*).

Circle sentencing programs that would otherwise be considered discriminatory under section 15(1) of the *Charter of Rights* may be protected by section 15(2) as programs aimed at disadvantaged groups (see *R. v. Willocks*).

What if I've had my fishing or hunting gear seized?

Aboriginal people exercising their Aboriginal right to harvest fish and game often come into conflict with enforcement authorities.

Fisheries Act seizures

Section 51 of the *Fisheries Act* authorizes a fisheries officer or fisheries guardian to **seize** vessels, vehicles, fish, or other things that they believe were obtained by or used in an offence under the act. It doesn't matter whether the things seized actually belong to your client.

Unless Crown counsel decides not to proceed with charges, the only way your client can get seized items back before court proceedings are finally concluded is by giving security "to Her Majesty in a form and amount that is satisfactory to the Minister."

You can assist your client by demonstrating to the Crown how the **seizure** of goods has created a hardship for your client. This may reduce the amount of the security required. Otherwise, the court will decide at trial whether the items should be returned to your client or forfeited as part of a conviction (see *Fisheries Act*, ss. 71 and 72).

Wildlife Act seizures

Section 94(1) of the provincial *Wildlife Act* gives a conservation officer the authority to seize wildlife and other evidence of an offence.

A client who has had items, including wildlife, seized under the *Wildlife Act* may, with three days prior notice to the Ministry of Environment, apply to the provincial court for return of those items. The judge will consider hardship and other factors in deciding whether to return them.

What if I'm facing a firearms prohibition?

A person faces a *mandatory* weapons **prohibition** under section 109 of the *Criminal Code* if they have been convicted of any of the following:

- A violent crime for which they could be sentenced to 10 years or more in prison
- Serious offences involving weapons

- Other offences involving weapons if they are already under a weapons prohibition
- Trafficking, importing, or producing controlled drugs, or having possession for controlled drugs for those purposes

For other offences, a person may get a *discretionary* prohibition of up to 5 or 10 years (ss. 110 and 111 of the *Criminal Code*) if the judge feels the prohibition is in the interests of safety of the person or of another person.

If the circumstances which led to a section 111 prohibition end, a judge may cancel the order (see *Criminal Code*, s. 112).

Even in the case of mandatory prohibitions, a judge may, under section 113 of the *Criminal Code*, authorize a chief firearms officer or the registrar of firearms to issue a licence or registration certificate, with appropriate conditions, to allow the client to use weapons for sustenance or employment.

Alternatively, in very rare circumstances where the prohibition would create an injustice, the court may waive or reduce the client's prohibition through a "constitutional exemption." Such exemptions have been applied to Aboriginal sustenance hunters (see *R. v. Chief*).

What if I've been banished from my community?

Sometimes a sentencing court will make a probation order with a term **prohibiting** an individual from being within a certain geographic area for the period of probation. A restriction prohibiting your Aboriginal client from being in his or her home community amounts to "banishment."

Courts are reluctant to order banishment, especially in the absence of an agreement with another community to accept the offender (see *R. v. Malboeuf*).

However, banishment may be upheld where it is expected to have a positive effect on someone's behaviour (see *R. v. Taylor*).

Note: Regardless of what a court orders, band councils have authority under section 81(1)(p) of the *Indian Act* to declare a person — even a band member — a "trespasser" on an Indian reserve. However, this has the same effect as banishment, and will only be supported by the courts if the process was fair (see *Edgar v. Kitasoo Band*).

Can I get legal aid?

The consequences of a criminal conviction can be serious, and the assistance of a lawyer can be extremely important. The Legal Services Society (LSS) provides legal aid in BC. The guidelines for coverage and eligibility are described below.

Legal aid coverage for criminal matters

LSS will pay for a lawyer to represent your client if they are financially eligible and will, if convicted:

- go to jail,
- face a conditional sentence that would severely limit their liberty,
- lose their way of earning a living, or

- face an immigration proceeding that could lead to deportation from Canada.

Legal representation is also available to:

- youths charged with federal offences;
- people who, through mental or emotional illness, are unable to represent themselves; and
- Aboriginal people facing restrictions to a traditional livelihood, such as hunting or fishing.

Legal aid financial eligibility guidelines

People have to be financially eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available on the LSS website at www.lss.bc.ca under Legal aid > Legal aid offices.

Your client will be required to provide "proof of income," such as a pay stub or a letter from an employer.

If your client is facing the loss of a traditional livelihood such as fishing or hunting, you can help your client by preparing information on their fishing or hunting practices. (See Chapter 5, Harvesting Rights.)

For more information

- *Martin's Annual Criminal Code 2007* with annotations by Edward L. Greenspan, QC, and the Honourable Justice Marc Rosenberg (Canada Law Book, Inc). Authoritative resource on the *Criminal Code* and other federal criminal legislation. See "To order publications."
- Chapter 1 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about criminal matters. Available at www.lslap.bc.ca.
- For more about restorative justice, see the Justice Canada website, Community-based Justice Programs page at http://justice.gc.ca/en/ps/ajs/programs/bc.html.
- LawLINK: www.lawlink.bc.ca. Click "Crime" and follow the relevant links.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and follow the links for criminal matters.
- Legal Services Society website: www.lss.bc.ca. Click the "Legal aid" button to find information on legal aid coverage and eligibility.

Statutes and regulations

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Controlled Drugs and Substances Act, S.C. 1996, c. 19

Criminal Code, R.S.C. 1985, c. C-46

Firearms Act, S.C. 1995, c. 39

Fisheries Act, R.S.C. 1985, c. F-14

Motor Vehicle Act, R.S.B.C. 1996, c. 318

Wildlife Act, R.S.B.C. 1996, c. 488

Youth Criminal Justice Act, S.C. 2002, c. 1

Case citations

Edgar v. Kitasoo Band (Council), 2003 FCT 166; [2003] 2 C.N.L.R. 124 (Fed. Ct. Trial Div.)

R. v. Chief (1989), 74 C.R. (3d) 57; 51 C.C.C. (3d) 265 (Y.T.C.A.)

R. v. Gladue (1999), 133 C.C.C.(3d) 385; [1999] 1 S.C.R. 688 (S.C.C.)

R. v. Joseyounen [1996] 1. C.N.L.R. 182 (Sask. Prov. Ct.)

R. v. Malboeuf (1982), 68 C.C.C. (2d) 544 (Sask. C.A.)

R. v. Rich [1994] 4 C.N.L.R. 167 (Newfoundland S.C.) (alternate name R. v. S.R. (No. 1)

R. v. Taylor (1997), 122 C.C.C. (3d) 376 (Sask. C.A.)

R. v. Wells [2000] 1 S.C.R. 207 (S.C.C.)

R. v. Willocks (1992), [1994] 1 C.N.L.R. 167 (Ont. Prov. Div.), affirmed (1995), 22 O.R. (3d) 552 (Ont. Ct. Gen. Div.)

4. Family Law

4. Family Law

This chapter covers:

- Provincial and federal jurisdiction over family law
- What happens to children and property in a divorce or separation
- Where to get help if violence is involved
- The rights of parents if a child is taken from the home by the Ministry of Children and Family Development
- Custom adoptions
- The family law services that may be available to your clients

Definitions

Assets: Generally any item of property (land or personal possessions) that has monetary value.

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Jurisdiction: The right and power to make law or interpret and apply the law.

Maintenance: Also called "support" and in the case of divorce, "alimony." This is money paid by a spouse or parent to the other spouse or parent in a divorce or separation to help with living expenses.

Party/parties: Person who takes a role in legal proceedings.

Common client problems

- I am separating from my partner and need to know what the law says, especially about the children.
- I am separating from my partner and we have possession of a house on reserve.
- My partner is not paying child support.
- My children were removed by the Ministry of Children and Family Development. I want to know what my Aboriginal community and I can do.
- I was adopted by custom and want to know what rights I have.
- My partner is abusive. I want to know if legal aid can help me.

General law

Family law describes the following legal relationships within families:

- marriage,
- adoption, and
- child welfare.

Family law also regulates separation or family breakdown issues, such as:

- Custody and guardianship of children
- Access to children
- Maintenance: spousal support (alimony) and child support
- Division of family assets (BC Supreme Court only)
- Divorce (BC Supreme Court only)

Jurisdiction for family matters is divided between the federal parliament and provincial legislature (see table).

Jurisdiction of Provincial and Supreme Court in family matters			
	Divorce Act (federal) Applies to legal marriages only	**Family Relations Act (provincial)** Applies to legal marriages and common-law relationships	**Common Law** (The law that is created by judges when they decide on cases.)
BC Supreme Court	• Divorce • Child support • Spousal support • Custody and access	• Child support • Spousal support (alimony) • Guardianship • Custody and access • Occupancy of family residence and use of its contents • Judicial separation • Division of family assets (legal marriages only)	• Division of family assets in common-law relationships
Provincial Court of BC	• Enforcement of custody, access, and support orders	• Child support • Spousal support (alimony) • Guardianship • Custody and access	

Family law matters are also regulated by the *Federal Child Support Guidelines*, which are a set of rules that help parents determine how much child support should be paid in a divorce or separation (to find the guidelines online, see "For more information" at the end of this chapter).

The solemnization (performance) of marriage comes under the provincial *Marriage Act*; adoption is regulated by the provincial *Adoption Act*; and child welfare is covered by the provincial *Child, Family and Community Services Act*.

Separation and divorce

This section covers the general law on the following topics:

- Custody and access to children
- Division of property
- Violence in a relationship
- Family maintenance (support)

Custody and access to children

The regulations under the *Family Relations Act* and the *Divorce Act* regarding custody and access apply to all parents, including Aboriginal parents. In determining custody and access, the court will consider what's in the best interests of the child.

Custody, access, and guardianship may be granted to grandparents, stepparents, aunts, and other extended family members.

Division of property

The *Family Relations Act* applies to Aboriginal people living on or off reserve, except for property located on reserve (see "Aboriginal law issues" below). Family property consists of land, money, pensions, and business interests.

Married couples

Under the provincial *Family Relations Act*, family **assets** — both land and personal property — are divided between married spouses upon separation. When a married couple separates, the property accumulated during the marriage may be divided between the spouses.

Common-law couples

In the case of separating common-law couples, ownership of property is considered to lie with the person who possesses the property or is the registered owner (if ownership could be registered).

The BC Supreme Court has **jurisdiction** to redistribute property if it is unfair not to. Making a claim to property on the basis of fairness can be very difficult and time-consuming.

It is recommended that people consult a lawyer if they are accumulating property and are in a common-law relationship.

Violence in a relationship

If there is violence in your client's relationship, first make sure that they are safe. Your client should then contact a lawyer or the Legal Services Society (LSS) without delay. LSS provides legal aid to victims of domestic violence and/or their children for restraining orders (also called protection orders). See "Legal aid" on page 44.

There is extensive information about family violence on LawLINK and on the LSS Family Law website. See "For more information" on page 47.

Family maintenance (support)

The requirement to pay maintenance (support) is the same for Aboriginal people on or off reserve as it is for non-Aboriginal people (see *Potts v. Potts*).

When they separate, both parents are obligated to support the children of the relationship. The rules are set out in the provincial *Family Relations Act* and the federal *Divorce Act* and *Child Support Guidelines*. (Note that if the payer of child support is receiving tax-exempt income, the court may order higher payments than are set out in the *Federal Child Support Guidelines*.)

A spouse might also be responsible for supporting the other spouse for a period of time following separation.

What to do if the other person doesn't pay

If the other spouse/parent does not agree to pay adequate maintenance (support) after separation, your client can apply for a child support or spousal support order in either the Provincial Court (Family Division) or the BC Supreme Court. Clients may be able to get help with this; see "Family duty counsel and advice lawyers" on page 45.

Maintenance orders may be enforced by the spouse who obtained the order (with assistance from a lawyer, if necessary), or through the Family Maintenance Enforcement Program. The program is described under "Family law services" on page 46.

Aboriginal legal issues

This section covers common client questions about:

- Separation and divorce
- Child protection
- Custom adoption

Separation and divorce

- What will happen to my children?
- What will happen to my house on reserve?

What will happen to my children?

The regulations under the *Family Relations Act* and the *Divorce Act* regarding custody and access apply to all parents, including Aboriginal parents (see "Separation and divorce" under "General law"). However, Aboriginal parents may have access to services — such as an elder or leader in their community — to assist in making mutually satisfactory arrangements for the children.

If Aboriginal parents cannot agree, they may seek a court order for custody, access, and guardianship through standard court procedures (see the self-help guides on the Family Law website at www.familylaw.lss.bc.ca). The court may allow the band social worker to do a home study, and may take into consideration the support that either **party** has from their Aboriginal community.

What will happen to my house on reserve?

The **jurisdiction** for "Indians and Lands Reserved for the Indians" comes under the federal *Constitution Act*, 1867. That means that, upon separation, a client who does not have a recognized legal interest in a family home on reserve cannot get a court order for possession of the home through the provincial *Family Relations Act* (see *Derrickson v. Derrickson*). However, a court may order that the client be financially compensated in place of an order for possession (see *George v. George*).

Note that an Indian spouse (but not a non-Indian spouse) can enforce maintenance (support) orders against the on-reserve property of the other Indian spouse (see *Director of Support and Custody Enforcement v. Nowegejick; Indian Act,* s. 89[1]).

Some exceptions

A number of First Nations are taking control of their own reserve lands through the *First Nations Land Management Act*, S.C. 1999, c. 24. Section 6 of the act enables a First Nation to adopt a land code and establish "the general rules and procedures applicable to the use and occupancy of first nation land." Through this code, a First Nation can regulate how reserve land is distributed upon divorce or separation.

Nisga'a Lands are no longer "lands reserved for Indians," so provincial legislation applies to the division of real estate **assets** there.

> **Note:** The division of family **assets** is a highly technical legal matter. Advise your clients to speak with a lawyer.

Child protection

- What are my rights if my child is removed from the home?
- Who must be notified when an Aboriginal child is taken from the home?

What are my rights when my child is removed from the home?

The provincial Ministry of Children and Family Development has responsibility for both Aboriginal and non-Aboriginal children in need of protection. Children exposed to abuse, neglect, and harm or threat of harm are considered to be in need of protection. The safety and well-being of children is what's most important.

The *Child, Family and Community Services Act* applies to Aboriginal children, and contains special provisions for their protection:

- Preserving cultural identity is part of an Aboriginal child's safety and well-being (s. 2[f]), in the best interests of the child (s. 4[2]), and a necessary consideration in a plan of care for the child (s. 35[1][b]).
- Aboriginal communities should be involved in the planning and delivery of services to Aboriginal families and their children (s. 3[b]).
- Appropriate Aboriginal organizations must be notified of child protection proceedings involving Aboriginal children (ss. 33.1 and 36).
- Designated representatives of Indian bands, Aboriginal communities, and the Nisga'a Lisims government are entitled to be **parties** to a child protection hearing for a child from their community (s. 39).

Many Aboriginal organizations have been delegated to act as agents for the Minister of Children and Family Development in child protection hearings. The Spallumcheen Indian Band Council has direct authority for the protection of children who are members of the band and residing on reserve (see *Section [E.G.] v. Spallumcheen Band Council*).

The *Nisga'a Final Agreement* provides that the Nisga'a Lisims government may make laws comparable to provincial standards about the welfare of Nisga'a children. To date, the Nisga'a have not assumed this authority. For now, they operate a child protection agency with authority delegated from the provincial government.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Who must be notified when an Aboriginal child is taken from the home?

By authority of the *Child, Family and Community Service Act*, if a child is apprehended (removed from the home), the Ministry of Children and Family Development is obliged to notify a representative of the child's Aboriginal community, band council, or tribal organization.

If the representative decides to participate, they are a **party** to the action (the legal proceeding) and have a right to:

- Receive all records and information
- Speak at the hearing
- Call witnesses and question other witnesses
- Participate in any mediation
- Propose support for the child's parents or suggest another culturally appropriate plan for the care of the child

Adoption

- What is the effect of custom adoption?
- What if my child is placed for adoption?

What is the effect of a custom adoption?

Many Aboriginal communities have traditions of adoption by custom that pre-date federal and provincial law-making. The courts have recognized these custom adoptions as legal (see *Re Adoption of Katie*).

Where they are an "integral part of the distinct culture" of the community, custom adoption is an Aboriginal right protected by section 35(1) of the *Constitution Act, 1982* (see *Casimel v. Insurance Corporation of British Columbia*).

A valid custom adoption requires that:

- the natural and adopting parents, and where appropriate, the child, consent (agree) to the adoption;
- the adoptive parents are Aboriginal and entitled to rely on the Aboriginal custom;
- if the child is able, they consent voluntarily to be placed with the adopting parents;
- there is a rationale for custom adoption in the case (see *Re Tagornak Adoption Petition*); and
- the parties understand that the relationship created is fundamentally that of adoption under the *Adoption Act* (see *Re B.C. Birth Registration No. 1994-09-04399*).

Adoptions in British Columbia are regulated by the provincial *Adoption Act*. The act provides that a court may recognize a custom adoption as having the same effect as an adoption under the act (s.46).

What if my child is placed for adoption?

The *Adoption Act* provides that a designated representative of the child's Aboriginal community must be consulted before the child is placed for adoption (s. 7). An adoption order does not affect any Aboriginal rights the child has (s. 37[7]).

The adoption of an Aboriginal child by non-Aboriginal parents does not affect the child's entitlement to band membership where that membership is under the Ministry of Indian and Northern Affair's control (see *G. [C.L.] v. Smith*). However, it is open to a band that controls its own membership to deny membership to such a child (see *G [J.-G.], Re*).

Family law services

The following services may be available to clients who need help with family law matters:

- Legal aid
- Family duty counsel and advice lawyers
- Family justice counsellors
- The Family Maintenance Enforcement Program
- Family Law in BC website

Legal aid

The Legal Services Society (LSS) provides legal aid in BC. The guidelines for coverage and eligibility are described below.

Legal aid coverage for family matters

LSS will pay for a lawyer to represent financially eligible clients who:

- need a restraining order or change to a custody or access order because they or their children are at risk of physical violence,
- need a supervised access order because their children are at risk,
- face threats from the other parent to take their child out of the province permanently, or
- have had children removed or threatened to be removed by the Ministry of Children and Family Development.

Under certain circumstances, a person may qualify for exceptional coverage. LSS provides legal representation to financially eligible clients who:

- cannot represent themselves because of a serious condition or disability and face a family matter that may result in further harm if not resolved;
- have documented experience of sexual, physical, or emotional abuse from a partner or other parent who is back in the community;

- have a court order for custody of a child kidnapped by the other parent;
- are a respondent (other **party**) to a maintenance enforcement hearing that may result in the client's imprisonment;
- have access through a court order or separation agreement, but have been refused access for three months or more; or
- face other unusual or extenuating circumstances.

Legal aid clients who are at risk because there is a high level of conflict in their case may qualify for additional services if the case goes to trial. Clients should ask their legal aid lawyer if their situation might qualify them for extended family services.

Legal aid financial eligibility guidelines

People have to be financially eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca under Legal aid > Legal aid offices.

Your client will be required to provide "proof of income," such as a pay stub or a letter from an employer.

> **Note:** If your client is financially eligible for legal aid and has a family problem, consider helping them with the legal aid application. Many clients are hesitant to discuss the details of their family problems and don't make their "best case" on the legal aid application. This can result in denial of legal aid and huge and lasting problems for the client. Your help in identifying all of the relevant issues may make the difference.

Family duty counsel and advice lawyers

Family duty counsel and family advice lawyers are located in many supreme courts and most provincial courts to help low-income people deal with legal issues related to separation and divorce.

Family duty counsel can give legal advice, assist with documents, appear in court to request an adjournment to get an order, help with straightforward uncontested hearings, and attend case conferences.

Family advice lawyers can help people prepare their case and follow up on what takes place during the proceedings.

Both family duty counsel and family advice lawyers can give advice and speak in court on simple matters even if a client is not financially eligible for legal aid. However, they will not take on an entire case or represent a client at trial.

There is no charge for family court duty counsel and family advice lawyer services.

To find out when duty counsel and advice lawyers are available, go to the LSS website at www.lss.bc.ca and look under Legal aid > Legal advice.

Family justice counsellors

Family justice counsellors are trained mediators who can assist your client with:

- coming to an agreement with the former spouse about custody, guardianship, access, or spousal or child support;
- changing a custody, guardianship, access, or support order in provincial court;
- emotional support and short-term counselling;
- court-ordered custody and access assessments;
- learning about separation, divorce, the court process and available services for family matters; and
- referrals to legal, emergency, and community services.

> **Note:** Family justice counsellors cannot assist with Supreme Court orders or changes to them. Your client would need to get help from a family duty counsel or family advice lawyer.

For further information on family justice counsellors, see www.ag.gov.bc.ca/family-justice/help/counsellors/index.htm.

A list of family justice centres can be found at www.ag.gov.bc.ca/family-justice/resources/brochures_booklets/counsellors/FJCentres.pdf.

There is no charge for family justice counsellor services.

Family Maintenance Enforcement Program

If your client lives in BC and is having difficulty collecting on an existing court order or agreement dealing with child support or spousal support, they can enroll with the provincial government's Family Maintenance Enforcement Program (FMEP). Once enrolled, the program's staff will help your client to monitor and enforce the agreement. They will try to get voluntary payments from the other **party**.

However, if the other party does not pay, the program can take enforcement action that is not otherwise available to individuals.

FMEP can be very effective, but clients sometimes find the process quite slow. A client can get a copy of the enrollment application and other information online at www.fmep.gov.bc.ca or by calling 1-800-668-3637.

Family Law in BC website (www.familylaw.lss.bc.ca)

Use this site to find helpful information about family law. The site contains:

- Publications, videos, links to websites, and online self-help materials
- Self-help guides for anyone who has to go to court without a lawyer to get an uncontested divorce or to get or change an order for custody, access, guardianship, and/or child or spousal support
- Information about and links to people and services who can help with family law issues

For more information

- Chapter 3, "Family Law" and Chapter 5, "Children and the Law" of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) have general information about family law and child welfare. Available online at www.lslap.bc.ca.
- Legal Information for Battered Women fact sheet *5. Can You Stay in the Family Home on Reserve*? (Legal Services Society). Available at www.lss.bc.ca or see "To order publications."
- *Speaking of Abuse: Violence against Aboriginal Women in Relationships*, booklet (Legal Services Society). Available at www.lss.bc.ca or see "To order publications."
- *If Your Child Is Taken by the Ministry of Children and Family Development*, brochure (Legal Services Society). Available at www.lss.bc.ca or see "To order publications."
- *Parents' Rights, Kids' Rights: A Parents' Guide to Child Protection Law in BC*, booklet (Legal Services Society). Available at www.lss.bc.ca or see "To order publications."
- *For the Sake of Our Children: A Video Guide to Child Protection Law in BC* (Legal Services Society). Listen to the video online at www.lss.bc.ca (go to Resources > Publications > Publications by title > F), or see "To order publications" in this guide. Single copies are free for non-profit organizations; contact LSS for bulk orders.
- Family Law in British Columbia website: www.familylaw.lss.bc.ca. Extensive help on family law matters, including self-help guides, fact sheets, videos, and detailed information on the child protection process.
- LawLINK: www.lawlink.bc.ca. Click "Family" and follow the relevant links.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and follow the links to "Adoption," "Child Support and Custody," "Divorce and Separation," "Family Law," or "Marriage (legal and common law)."
- The Federal Child Support Guidelines can be found at www.justice.gc.ca/en/ps/sup/grl/glp.html.
- Adoption website of the Ministry of Children and Family Development (includes a fact sheet on custom adoptions): www.mcf.gov.bc.ca/adoption.

Statutes and regulations

Adoption Act, R.S.B.C. 1996, c. 5

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) reprinted R.S.C. 1985, App. II, No. 5

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11]

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127

Family Relations Act, R.S.B.C. 1996, c. 128

Federal Child Support Guidelines SOR/97-175

First Nations Land Management Act, S.C. 1999, c. 24

Indian Act, R.S.C. 1985, c. I-5

Marriage Act, R.S.B.C. 1996, c. 282

Nisga'a Final Agreement Act, S.B.C. 1999, c. 2

Nisga'a Final Agreement Act, S.C. 2000, c. 7

Case citations

Casimel v. Insurance Corporation of British Columbia, [1994] 2 C.N.L.R. 22; 82 B.C.L.R. (2d) 387 (B.C.C.A.)

Derrickson v. Derrickson, [1986] 2 C.N.L.R. 45; [1986] 1 S.C.R. 285 (S.C.C.)

Director of Support and Custody Enforcement v. Nowegejick, [1989] 2 C.N.L.R. 27 (Ont.Fam.Ct.)

G. (C.L.) v. Smith, [1985] 2 W.W.R. 155 (B.C. Co. Ct.)

G. (J.-G.), Re, [2000] 4 C.N.L.R. 104 (C.Q.), affirmed (2001), 2001 Carswell Que 3112 (Que. C.A.)

George v. George (1992), 95 D.L.R.(4th) 333; [1993] 2 C.N.L.R. 112 (B.C.S.C.); affirmed [1997] 2 C.L.N.R. 62; 139 D.L.R.(4th) 53 (B.C.C.A.); additional reasons at (1997) 30 B.C.L.R.(3d) 107 (B.C.C.A.)

Potts v. Potts, [1992] 1 C.N.L.R. 182; 77 D.L.R. (4th) 369 (Alta.C.A.)

Re Adoption of Katie (1961) 38 W.W.R. 100; 32 D.L.R. (2d) 686 (N.W.T.Terr.Ct.)

B.C. Birth Registration No.1994-09-040399 (Re), [1998] 4 C.N.L.R. 7; 45 R.F.L. (4th) 458 (B.C.S.C.)

Re Tagornak Adoption Petition, [1984] 1 C.N.L.R. 185 (N.W.T.S.C.)

Section (E.G.) v. Spallumcheen Band Council, [1999] 2 C.N.L.R. 318 (B.C.S.C.)

5. Harvesting Rights: Hunting, Fishing, Trapping, & Gathering

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5. Harvesting Rights: Hunting, Fishing, Trapping, & Gathering

This chapter has been replaced by the *Aboriginal Harvesting Rights: If You've Been Charged with a Harvesting Offence* fact sheet and *A Guide to Aboriginal Harvesting Rights*. Please refer to these resources — and the Aboriginal section of the Legal Services Society website — for up-to-date information.

6. Housing and Reserve Lands

6. Housing and Reserve Lands

Definitions

Crown: Canadian government.

Exempt: Something that is not included.

Interest: Legal right or title, as in property.

Jurisdiction: The right and power to make law or interpret and apply the law.

Seizure: When property is taken away by legal right.

This chapter covers:

- The law that protects renters on and off reserve
- What parts of the law don't apply on reserve
- The legal issues regarding land ownership on reserve
- Certificates of Possession
- Traditional ownership
- What are surrendered and designated lands
- What authority bands have over land
- What housing programs are available to Aboriginal people

Common client problems

- My band doesn't agree that I own land on reserve.
- I have been evicted from my residence on reserve without cause or notice.
- I am Aboriginal and would like to get housing on or off reserve.

General law

Jurisdiction over housing issues is divided between the federal parliament and the provincial legislature.

The provincial legislature has jurisdiction over lands, land ownership, and tenancy relations, except on Indian reserves and other federal lands in the province.

The federal parliament has jurisdiction over reserve lands and deals with them mainly through the *Indian Act*.

Legal rights of renters

The most important law for people who rent is the provincial *Residential Tenancy Act* of British Columbia. Under this act:

- Tenants cannot be evicted from their residence without reason or notice.
- Landlords must maintain residential premises in accordance with health, safety, and housing standards required by law.
- Tenants must maintain reasonable health, cleanliness, and sanitary conditions.
- Restrictions are placed on the landlord's right to enter the residence without reason or notice.
- Landlords cannot raise the rent more than once a year.
- A tenant who has a dispute with a landlord, including a dispute concerning eviction, may refer the matter for binding arbitration.

The *Manufactured Home Park Tenancy Act* has similar, but not identical, provisions that apply to the rental of manufactured homes.

Protection for homeowners

Of importance to people who own their home is the provincial *Land Title Act*. This act establishes a "land registry" system. Registration of an **interest** in land is conclusive evidence of that interest, as long as the interest remains in place (the owner doesn't lose or sell their house).

People who own their home can lose it through a process called foreclosure. If someone has a mortgage and is behind in payments, the lender can ask the BC Supreme Court for an order of foreclosure. In most cases, the person has a period (usually six months) to "redeem" the mortgage by paying it off together with related costs.

Aboriginal legal issues

Common client questions

- Do I own my house on reserve?
- Does the *Residential Tenancy Act* apply on reserve?
- What rights do bands have over land?
- How can I find housing?

Do I own my house on reserve?

Under the federal *Indian Act*, Indians cannot "own" land on reserve. Title to reserve land is held by the federal government, which holds it for the use and benefit of the band (s. 18).

The highest **interest** an Indian can hold in reserve land is the "right to possess" it. A Certificate of Possession is evidence of this right (s. 20).

Certificates of Possession

A Certificate of Possession requires:

- an "allotment" by the band council by way of a valid band council resolution (see *Leonard and the Kamloops Indian Band v. Gottfriedson*), and
- approval by the Minister of Indian and Northern Affairs Canada (INAC).

The holder of a "location ticket" as of September 4, 1951, is said to hold a "Certificate of Possession."

A Certificate of Possession entitles the holder, with the approval of the INAC minister, to:

- Transfer the right to possession of the land to the band or another band member (s. 24).
- Give the right to possession of the land to band members (or others entitled to reside on the reserve) by will.

- Have the right to possession of the land pass to next-of-kin band members (or others entitled to reside on the reserve) if the holder dies without a will.

A Certificate of Possession does not necessarily entitle the holder to decide how the land will be used, even with the consent of the minister, if that use is contrary to the interests of the band generally (see *Tsartlip Indian Band v. Canada*).

A person who has not been approved by the INAC minister for a Certificate of Possession may be entitled to a Certificate of Occupancy for up to two years.

Traditional ownership vs. "the right to possess"

The main problem with the *Indian Act* arrangement for the possession of land on reserve is that it often conflicts with the way that Aboriginal communities have traditionally understood their land holdings.

As a result, the *Indian Act* is not uniformly used by Indian bands for a variety of reasons, including the following:

- A Certificate of Possession requires a land survey. Most reserve land parcels are unsurveyed. Surveys are costly and time-consuming.
- Many band councils recognize "traditional ownership" of some, if not all, of their reserve lands. They do not encourage land holders to obtain Certificates of Possession.

The result is that on some reserves no one holds a Certificate of Possession. On other reserves, only a few people have certificates.

Claiming a traditional right to land

If you have a client who is claiming a traditional right to possess land on reserve and the band council disagrees, the client will need to collect the best possible evidence of their traditional holding. This may include band records, records of band council proceedings, and affidavits from knowledgeable elders. (Affidavits are formal sworn written statements of fact witnessed by a taker of oaths.)

Courts are reluctant to uphold a traditional holding over the objection of a band council in the absence of a Certificate of Possession because "the recognition of traditional or customary use of land cannot create a legal interest in the land that would defeat or conflict with the provisions of the act" (see *Lower Nicola Indian Band v. Trans-Canada Displays Ltd*).

Sometimes, however, lawful possession can be concluded from circumstances other than a Certificate of Possession, such as when a band council and INAC approve a loan document that refers to an individual's "right of possession" of a parcel of reserve land (see *George v. George*).

The client may also be able to argue that "traditional ownership" is an Aboriginal right protected by section 35 of the *Constitution Act, 1982*.

People, including band members, in possession of reserve land without proper authority are considered trespassers (see *Joe v. Findlay*).

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Does the Residential Tenancy Act apply on reserve?

Under section 91(24) of the *Constitution Act, 1867*, only the federal parliament can make laws about "Indians and lands reserved for the Indians."

Under section 92(13) of the same act, the provinces have the **jurisdiction** to make laws about "property and civil rights," such as the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*.

Courts have found that where a provision of the *Residential Tenancy Act* (RTA) affects the "use and occupation" of reserve lands, it *does not apply* on reserve (see *Anderson v. Triple Creek Estates; Matsqui Indian Band v. Bird*).

Provisions that do not apply on reserve

The following sections of the *Residential Tenancy Act* deal with the "use and occupation" of land and therefore do not apply on reserve:

- Order respecting a service or facility (s. 27): This section deals with the landlord's ability to eliminate or restrict a service or facility that is not essential to the tenant's use of the residence (e.g. cablevision).
- Notice to end a tenancy agreement (s. 44): This section describes the various ways in which tenancy can end.
- Order of possession (ss. 54 and 55): These sections describe how a tenant or a landlord can apply to arbitration for an order of possession.

Similar provisions in the *Manufactured Home Park Tenancy Act* are:

- Order respecting a service or facility (s. 21)
- Notice to end a tenancy agreement (s. 37)
- Order of possession (ss. 47 and 48)

(See *Residential Tenancy Policy Guideline #27 — Jurisdiction*, January 2004.)

If a client has a tenancy problem that is not covered by the *Residential Tenancy Act*, find out if there is a written tenancy agreement with the landlord. If not, common law rules apply to tenancy. (Common law is the law that has been created by judges when they decide on cases.)

What this means is that under common law, both a landlord and a tenant may terminate the tenancy with reasonable notice. In a month-to-month tenancy, a month's notice is often considered to be appropriate.

Tenancy on Nisga'a Lands

Since May 11, 2000, there are no more Indian reserves within Nisga'a Lands. Therefore, the provincial *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* apply throughout Nisga'a Lands.

What rights do bands have over land?

A band council has the authority to make bylaws regulating various uses of land on reserve (s. 81) and may obtain overall authority for the management of reserve lands through the *First Nations Land Management Act* and section 60 of the *Indian Act*.

The council may use its authority under section 81 to prohibit non-band members from residing on reserve (see *Six Nations of the Grand River Band v. Henderson*).

However, such a bylaw cannot limit the right of band members to live on reserve with their dependent children or children of whom they have custody, whether or not those children are band members themselves (see *Indian Act,* s. 18.1).

Surrendered and designated lands

Under sections 37 – 41 of the *Indian Act*, a band may surrender to the **Crown** some or all of its rights and **interests** in reserve land. This surrender may be conditional or unconditional; it may be absolute or not absolute.

A surrender that is not absolute is called a "designation," and is used by bands to allow for the creation of leases and other interests in the land by non-band members. Designated lands are still part of the reserve (s. 2[1]). An Indian's interest in designated lands is **exempt** from taxation under section 87 of the *Indian Act* (see *Mission [District] v. British Columbia*).

Surrenders must be made to the Crown only, and must be assented to by the majority of band electors and accepted by the federal cabinet. Designated lands are managed by the Minister of Indian and Northern Affairs Canada, though the minister may delegate the management to the band or other person.

Unlike other land interests, which are still exempt from **seizure** under sections 29 and 89(1) of the *Indian Act*, leasehold interests in designated lands are subject to charge, pledge, mortgage, attachment, levy, seizure, distress, and execution (see *Indian Act,* s. 89[1.1]).

How can I find housing?

There are a variety of programs for Aboriginal clients seeking housing on or off reserve.

On-reserve programs

Indian and Northern Affairs Canada (INAC) and the Canada Mortgage and Housing Corporation operate a variety of programs to reduce the cost of construction, operation, and maintenance of housing on reserve. These programs are usually administered by the band council, which may delegate some of its authority to a housing committee.

You can find a summary of current programs on the INAC website at www.ainc-inac.gc.ca/ch/rcap/sg/si38_e.html.

Off-reserve programs

Several housing units were constructed for Aboriginal clients in British Columbia under the now-defunct Urban Native Housing Program and the Rural and Native Housing Program. These units currently house about 85,000 Aboriginal people across Canada, and have different eligibility criteria.

A good source of information about off-reserve Aboriginal housing in BC is the Aboriginal Housing Management Association. Its website is www.ahma-bc.org.

For more information

- Chapter 13 of the *LSLAP Manual* (by UBC's Law Students' Legal Advice Program) has general information about landlord and tenant law. Chapter 10 deals in part with foreclosure. Available at www.lslap.bc.ca.
- *Tenant Survival Guide and Fact Sheets* (Tenants Rights Action Coalition — TRAC). Available at www.tenants.bc.ca. TRAC also has a hotline for tenants: 1-800-665-1185.
- *Residential Tenancy Act: A Guide for Landlords & Tenants in British Columbia* (Residential Tenancy Office: www.rto.gov.bc.ca). Available at www.rto.gov.bc.ca/content/publications/guides.aspx.
- *Manufactured Home Park Tenancy Act: A Guide for Manufactured Home Park Landlords & Tenants in British Columbia* (Residential Tenancy Office: www.rto.gov.bc.ca). Available at www.rto.gov.bc.ca/content/publications/guides.aspx.
- Aboriginal Housing Management Association: www.ahma-bc.org
- LawLINK: www.lawlink.bc.ca. Click the "Aboriginal" or "Housing" button.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button, then the links for "Housing" or "Real Estate."
- Continuing Legal Education Society: www.cle.bc.ca. Click the "Practice Points" button, then the link for "Aboriginal Practice Points."

Statutes and regulations

Access to Information Act, R.S.C. 1985, c. A-1

Constitution Act, 1867, 30 & 31 Victoria, c. 3, (U.K.) reprinted R.S.C. 1985, App. II, No.5

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.]

First Nations Land Management Act, S.C. 1999, c. 24

Indian Act, R.S.C. 1985, c. I-5

Land Title Act, R.S.B.C. 1996, c. 250

Manufactured Home Park Tenancy Act, S.B.C. 2002, c. 77

National Housing Act, R.S.C. 1985, c. N-11

Privacy Act, R.S.B.C. 1996, c. 373

Privacy Act, R.S.C. 1985, c. P-21

Residential Tenancy Act, S.B.C. 2002, c. 78

Case citations

Anderson v. Triple Creek Estates, [1990] B.C.J. No. 1754 (Q.L.) (B.C.S.C.)

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

George v. George (1992), 95 D.L.R. (4th) 333; [1993] 2 C.N.L.R. 112 (B.C.S.C.); affirmed [1997] 2 C.L.N.R. 62; 139 D.L.R. (4th) 53 (B.C.C.A.); additional reasons at (1997) 30 B.C.L.R. (3d) 107 (B.C.C.A.)

Joe v. Findlay (1981), 26 B.C.L.R. 376; [1981] 3 C.N.L.R. 58 (B.C.C.A.)

Lower Nicola Indian Band v. Trans-Canada Displays Ltd., [2000] 4 C.N.L.R. 185 (B.C.S.C.)

Leonard and the Kamloops Indian Band v. Gottfriedson (1980), 21 B.C.L.R. 326; [1982] 1 C.N.L.R. 60 (B.C.S.C.)

Matsqui Indian Band v. Bird, [1993] 3 C.N.L.R. 80 (B.C.S.C.)

Mission (District) v. British Columbia (Assessor of Area No. 13 — Dewdney/ Alouette), [1993] 1 C.N.L.R. 66 (B.C.S.C.)

Six Nations of the Grand River Band v. Henderson, [1997] 1 C.N.L.R. 202 (Ont.Gen. Div.)

Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development) (1999), 181 D.L.R. (4th) 730; [2000] 2 F.C. 314 (Fed. C.A.)

7. Human Rights

7. Human Rights

This chapter covers:

- What's considered discrimination
- Which laws deal with human rights
- How to make a human rights complaint
- Which the Charter of Rights says that might affect Aboriginal organizations
- What to do about discrimination by an Indian band

Definitions

Discrimination: Unfavourable treatment based on prejudice.

Jurisdiction: The right and power to make law or interpret and apply the law.

Prohibits: Doesn't allow.

Systemic discrimination: Widespread attitudes in laws, policies, or programs that firmly establish inequality and disadvantage for certain groups in society.

Common client problems

- I was denied a benefit/service because I am Aboriginal.
- I was discriminated against by an Indian band.

General law

Human rights law **prohibits discrimination** in employment and the provision of goods and services based on such grounds as:

- race,
- national or ethnic origin,
- colour,
- religion,
- age,
- sex,
- sexual orientation,
- marital status,
- family status,
- disability,
- criminal record, or
- conviction for an offence for which a pardon has been granted.

Jurisdiction over human rights is divided between the federal parliament and the provincial legislatures.

Canadian Human Rights Act

The *Canadian Human Rights Act* **prohibits discrimination** by:

- federal regulated employers or service providers such as federal departments, agencies, and Crown corporations;

- chartered banks;
- television and radio stations;
- interprovincial telephone, communications, bus, and railway companies; and
- Indian bands.

Examples of areas regulated by the federal government and governed by the *Canadian Human Rights Act* would include employment and services of:

- the federal government and all its ministries;
- all arms of the federal government, such as the RCMP, the Employment Insurance Commission, or Canada Post;
- Indian bands and tribal councils;
- telecommunications, which are regulated by the CRTC and all inter-provincial transportation, such as Air Canada and VIA Rail;
- chartered banks, but not credit unions; and
- all unions attached to any of the above.

BC Human Rights Code

The provincial *Human Rights Code* applies to employers, service providers, and all other provincially regulated businesses and agencies. The BC code also applies to the purchase of property and rental accommodations. Examples of provincially regulated areas include:

- all provincial, local, and municipal government departments, services, and programs;
- schools and universities;
- hospitals and medical clinics;
- all private businesses and services, such as stores, restaurants, and movie theatres;
- credit unions;
- non-profit organizations and some of the services they provide;
- rental accommodations, including hotels and rental property; and
- the purchase of either residential or commercial property.

Making a human rights complaint

To help a client who believes they were a victim of **discrimination**, you will need to find out where the action took place and which level of government regulates that area.

If the employer or service provider is federally regulated

If your client believes they were **discriminated** against by a federally regulated employer or service provider, they should contact the Canadian Human Rights

Commission (CHRC) by telephone, e-mail, fax, or mail. An officer will determine if a complaint can be filed and, if so, send a complaint kit to the complainant (the person making the complaint). If not, the office will make a referral to an alternative agency.

Your client will generally have to make the complaint to the CHRC within *one year* of the last alleged discriminatory act.

The CHRC can approve settlements achieved through mediation, conciliation, or even during investigation. The commission can also dismiss complaints for insufficient evidence, appoint a conciliator, or refer the matter to the Canadian Human Rights Tribunal.

Canadian Human Rights Tribunal

The Canadian Human Rights Tribunal holds public hearings into complaints. It can dismiss the complaint, or where it makes a finding of discrimination, it can order:

- that the employer or service provider cease and desist from discriminating;
- financial compensation for lost wages or other benefits; and
- general damages for loss of dignity, hurt feelings, and loss of respect.

The Canadian Human Rights Tribunal can also make orders concerning discriminatory policies and procedures, and even order the establishment of a special program to correct **systemic discrimination**.

If the employer or service provider is provincially regulated

If your client believes they were **discriminated** against by a provincially regulated employer or service provider, they can file a complaint online. Go to the BC Human Rights Coalition website at www.bchrcoalition.org/index.html. Click on "Process" and then click on "Filing Your Complaint." Or go to the website of the BC Human Rights Tribunal at www.bchrt.bc.ca. Click on "Forms," then click on "Complaint Form."

Your client will generally have to make the complaint to the BC Human Rights Tribunal within *six months*.

BC Human Rights Tribunal

The BC Human Rights Tribunal has similar powers to the Canadian Human Rights Tribunal (see above). People wishing to file a complaint can do so directly with the tribunal. Throughout the processing of their complaint, your client may be able to get help from a human rights legal clinic provided by the BC Human Rights Coalition and the Community Legal Assistance Society (see "For more information" at the end of this chapter).

Discrimination and the Canadian Charter of Rights and Freedoms

Section 15(1) of the *Canadian Charter of Rights and Freedoms* also **prohibits discrimination** by government action or legislation based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. However, the charter also contains provisions that give Aboriginal organizations some elbowroom:

- Section 1 allows for otherwise discriminatory laws and actions, provided there are reasonable limits set down in law that can be "demonstrably justified in a free and democratic society."
- Section 15(2) allows for otherwise discriminatory laws, programs, and activities that are aimed at making the conditions of disadvantaged individuals or groups better.
- Section 25 says that the other charter rights (including the right to not be discriminated against under section 15[1]) are not intended to "abrogate" (cancel) or "derogate" (take away) from any Aboriginal, treaty, or other rights or freedoms that pertain to the Aboriginal people of Canada.

Section 35(1) of the *Constitution Act*, 1982, also recognizes and supports existing Aboriginal and treaty rights of the Aboriginal people of Canada.

Therefore, if an Aboriginal government passes an otherwise discriminatory law, it may argue that:

- it is doing so in accordance with an Aboriginal or treaty right,
- the discriminatory practice is intended to improve the conditions in their disadvantaged community, or
- the discrimination is justifiable in a free and democratic society.

The combined effect of sections 1, 15(1), 15(2), 25, and 35(1) of the *Constitution Act* can create a dilemma for courts. The Supreme Court of Canada was asked to look at the combined effect of these sections in *Corbiere v. Canada*. In that case, the Batchewana Indian Band argued that off-reserve members did not have the right to vote in band elections.

The Supreme Court of Canada found that this denial of voting rights was contrary to section 15(1) of the charter. They acknowledged that sections 25 and 35(1) may provide a defence under different circumstances, but had not been "triggered" in the Corbiere case. That left section 1, and the court found that the restriction of voting rights was not justified under that section.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Common client questions

- Who can I complain to?
- What can I do about discrimination by an Indian band?

Who can I complain to?

Most human rights complaints come under provincial **jurisdiction**, unless the discrimination is by a federally regulated employer or service provider, such as an Indian band (see below).

Other Aboriginal organizations, such as band schools and tribal councils, may also come under federal regulation. (For a more detailed discussion of the types of organizations that may come under federal jurisdiction, see Chapter 19, Work.)

For information on how to make a complaint, see "Making a human rights complaint" above, or check the websites listed in "For more information" at the end of this chapter.

What can I do about discrimination by an Indian band?

A client's complaint of **discrimination** against an Indian band is complicated by section 67 of the *Canadian Human Rights Act*, which says:

> Nothing in this act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.

The courts have interpreted this to mean that where the discrimination results from an act or decision of a band council that is within its authority under the *Indian Act* — such as the allocation of band housing under section 20 of the act — there is no jurisdiction for a complaint under the *Canadian Human Rights Act* (see *Canada [Human Rights Commission] v. Gordon Band Council [re Laslo]*).

However, if the band is acting outside of its *Indian Act* authority by, for example, denying welfare to non-band members living on reserve, they are subject to a complaint under the *Canadian Human Rights Act*.

Note: If your client is subjected to discrimination by an Indian band or its employees that is not covered by the *Canadian Human Rights Act*, they may still have a remedy in court through section 15 of the *Canadian Charter of Rights and Freedoms* (see *Canada [Human Rights Commission] v. Gordon Band Council [re. Laslo]*).

Encourage your client to talk to a lawyer about this. There is brief information about charter cases in Appendix A.

Human rights authority for the Nisga'a Nation

Since May 11, 2000, the Nisga'a Nation and Nisga'a Village governments are no longer federal employers. Most aspects of the *Indian Act* do not apply to them or to other Nisga'a organizations. Therefore, alleged **discrimination** in employment with the Nisga'a Lisims government or a Nisga'a Village government falls under provincial human rights authority. However, a chartered bank or post office on Nisga'a lands still comes under federal jurisdiction.

Note: Staff at the Canadian Human Rights Commission are very helpful when deciding whether the commission has the **jurisdiction** to hear a human rights complaint. However, their opinion is not the final word. If commission staff say the complaint is not covered, advise your client to talk to a lawyer.

For more information

- Chapter 19 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about human rights. Available at www.lslap.bc.ca.
- *Human Rights, Your Rights to Know* (BC Human Rights Coalition): www.bchrcoalition.org. To get the PDF, go to www.bchrcoalition.org/files/RightsToKnow.pdf.
- BC Human Rights Coalition: www.bchrcoalition.org
- Community Legal Assistance Society Human Rights Clinic: www2.povnet.org/hr_clinic_clas
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then the link for "Human Rights."
- Canadian Human Rights Commission: www.chrc-ccdp.ca
- BC Human Rights Tribunal: www.bchrt.bc.ca

Statutes and regulations

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.) 1982, c.11]

Criminal Code, R.S.C. 1985, c. C-46

Human Rights Code, R.S.B.C. 1996, c. 210

Indian Act, R.S.C. 1985, c. I-5

Case citations

Canada (Human Rights Commission) v. Gordon Band Council (re Laslo), [2001] 1 C.N.L.R. 1 (Fed. C.A.), reversing (1997) 140 F.T.R. 230 (F.C.T.D.)

Corbiere v. Canada (Minister of Indian Affairs and Northern Development) [1999] 3 C.N.L.R. 19; [1999] 2 S.C.R. 203 (S.C.C.)

8. Immigration and Trans-Boundary Trade

8. Immigration and Trans-Boundary Trade

This chapter covers:

- The legal categories of people who can enter Canada
- Aboriginal rights to work, live, or study in the U.S.
- Customs and duties for cross-border trade
- Deportation rules
- What legal aid coverage is available

Common client problems

- I am Aboriginal and want to work in the U.S.
- I was born in the U.S. and want to obtain Canadian Indian status.
- I want to import goods from the U.S. and don't believe I should have to pay taxes or duties.
- I am Aboriginal and facing criminal charges in the U.S. Can I be extradited?
- Am I eligible for legal aid?

General law

Immigration law covers who can enter Canada and for how long. There are different categories of individuals under this area of law:

- **Canadian citizens:** Canadian citizens are people born in Canada and successful applicants for citizenship under the federal Citizenship Act.
- **Permanent residents:** A permanent resident (or "landed immigrant") is a person who has been admitted to Canada as an immigrant, but who does not yet have Canadian citizenship. Permanent residents have many of the rights and benefits of citizens, but are still subject to deportation.
- **Foreign nationals:** Foreign nationals are citizens of other countries who are in Canada as visitors, students, workers, temporary residents, or Convention Refugee applicants. Foreign national students, workers, temporary residents, and Convention Refugee applicants require special permission to stay in Canada. So do visitors wishing to stay in Canada for more than six months.
- **Convention refugees:** Refugees are entitled to protection in Canada from persecution or danger in their home country. Refugees must establish the need for this protection, either to a visa officer outside Canada or to the Immigration and Refugee Board if they are inside Canada.

Aboriginal legal issues

Common client questions

- What rights do I have to work, live, or study in the U.S.?
- Can an American Aboriginal live, work, or study in Canada?
- Do I have to pay customs taxes and duties?
- Are there special rules for an Aboriginal who faces deportation?
- Can I get legal aid?

What rights do I have to work, live, or study in the U.S.?

Article 3 of the 1794 *Jay Treaty* between Britain and the U.S. says:

> (At) all times be free … to Indians dwelling on either side of the … boundary line freely to pass and repass by land, or inland navigation, into the respective territories and countries of the two parties on the continent of America … and freely to carry on trade and commerce with each other.

The U.S. Congress codified this part of the *Jay Treaty* in section 289 of the *Immigration and Naturalization Act*, which says:

> Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

Here is some information you can give your client:

- If they have at least one-half Indian blood — Canadian or American — they may live, work, and study in the U.S. without going through the usual immigration process. They may also be eligible for many benefits, including Native American scholarships.
- U.S. immigration officials will require your client to provide proof of blood quantum (amount) through birth and baptism records, band records, and other documents. A Canadian certificate of Indian status (status card) is not sufficient.
- If your client intends to work or live permanently in the United States, they will have to file a Memorandum of Creation of Record of Lawful Permanent Residence (Form 1-181) at the port of entry.
- Even though a person with the required amount of Indian blood doesn't need a U.S. permanent resident card (green card), having one will make it much easier to travel, work, and obtain benefits in the United States.

If your client has questions about crossing the border or getting a green card, they may find additional information online at www.ptla.org/wabanaki/jaytreaty.htm#Cross%20Border.

Can an American Aboriginal live, work, and study in Canada?

Canadian courts and immigration officials have interpreted the *Jay Treaty* much more narrowly than their American counterparts. Some Canadian courts have found that the *Jay Treaty* is not a treaty as defined in section 35(1) of the *Constitution Act, 1982*, and that it therefore doesn't grant Aboriginal rights (see *R. v. Vincent*).

Even so, it is still open for an Aboriginal person with some "nexus" (connection) to a tribe in Canada to argue a right to free passage into Canada because the *Immigration Act* has not completely put an end to such a right (see *Watt v. Liebelt*).

If your client wants to avoid regular *Immigration Act* procedures, tell them to talk to a lawyer.

Do I have to pay customs taxes and duties?

Aboriginal people have been unsuccessful in relying on the *Jay Treaty* and Aboriginal rights for a general right to cross-border trade.

In *Mitchell v. Canada* (*Minister of National Revenue*), a Mohawk tribal member claimed immunity from customs duties. Five of the Supreme Court of Canada judges found that the Mohawks had not proven an Aboriginal right to trans-boundary trade. The other two judges said that any right to trans-boundary trade was incompatible with Canadian sovereignty and would have been extinguished even if it existed.

Because of the division in the court in the *Mitchell* case, any claim to an Aboriginal right to trans-boundary trade would be a very difficult legal argument and your client would definitely need legal counsel.

Also see Chapter 17, Taxation.

Are there special rules for an Aboriginal who faces deportation?

Relying on the *Jay Treaty* and section 289 of the U.S. *Immigration and Naturalization Act*, American courts have refused to deport a Canadian Indian for heroin possession — normally an offence resulting in deportation (see *Matter of Yellowquill*).

Because of Canada's different treatment of the *Jay Treaty*, an American Indian is unlikely to get the same protection in Canada.

Can I get legal aid?

The Legal Services Society (LSS) provides legal aid in BC. The guidelines for coverage and eligibility are described below.

LSS will pay for a lawyer to represent financially eligible clients who are:

- facing an immigration proceeding that may result in their deportation from Canada, or
- claiming refugee status.

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide "proof of income," such as a pay stub or a letter from an employer.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

For more information

- Chapters 17 and 18 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) have general information about immigration and citizenship, respectively. Available at www.lslap.bc.ca.
- LawLINK: www.lawlink.bc.ca. Click the "Immigration and Refugee" button and follow the relevant links.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then the link for "Citizenship and Immigration."

Statutes and regulations

Citizenship Act, R.S.C. 1985, c. C-29

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.), reprinted R.S.C. 1985, App. II, No.5

Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Immigration and Naturalization Act, 8 U.S.C. § 1359 (1999)

Indian Act, R.S.C. 1985, c. I-5

Jay Treaty, (1794) 12 Bevans 13, art. III

Case citations

Matter of Yellowquill, 16 I. & N. Decisions at 576

Mitchell v. Canada (Minister of National Revenue) [2001] 1 S.C.R. 911; [2001] 3 C.N.L.R. 122 (S.C.C.)

R. v. Vincent [1993], 2 C.N.L.R. 165; 80 C.C.C. (3d) 256 (Ont. C.A.)

Watt v. Liebelt [1999] 2 C.N.L.R. 326; 169 D.L.R. (4th) 336 (alternate name: Watt v. Canada), (Fed. C.A.)

9. Indian Status and Band Membership

9. Indian Status and Band Membership

Definitions

Affidavit: A formal, sworn written statement of fact witnessed by a taker of oaths.

This chapter covers:

- Who can register under the *Indian Act*
- The historical consequences of registration
- How to apply for registration
- How to appeal a decision regarding registration
- Who is entitled to band membership
- How to appeal a decision regarding band membership
- Who is entitled to vote in band elections
- How to appeal the results of an election

Common client problems

- I want to apply for Indian status.
- I want to apply for membership in an Indian band.
- I have been denied the right to vote in a band election.

Indian status under the Indian Act

Section 35(2) of the *Constitution Act, 1982*, defines Aboriginal peoples as the "Indian, Inuit and Métis peoples of Canada." Of these three Aboriginal groups, only Indians are subject to legislation providing for their registration (see *Indian Act,* ss. 5 – 7).

An Indian registered under the *Indian Act* is known as a "status Indian." A person of Indian ancestry who is not registered under the *Indian Act* is sometimes known as a "non-status Indian."

Registration under the Indian Act

The *Indian Act* has a complex set of rules governing who is entitled to be registered as an Indian. In the 19th century, legislators presumed that most Indians wanted to be assimilated into mainstream culture and provided opportunities such as "enfranchisement" and "scrip" for Indians who wanted to vote, own property, and exercise other rights of Canadians.

Prior to 1985, the rules for registration were also highly sexist: Indian women who married non-Indians lost their Indian status and non-Indian women who married Indians attained status, whereas men's status did not change upon marriage.

Most, but not all, discriminatory provisions of the *Indian Act* were amended in 1985 through Bill C-31.

In assessing a person's eligibility for Indian status today, it is often necessary to understand the rules for registration prior to 1985.

Registration before 1985

Before Bill C-31 was passed by the federal parliament in 1985, the following people were entitled to be registered under the *Indian Act*:

- A member of an Indian band or a person entitled to registration under 1874 legislation.
- A legitimate or illegitimate child of an Indian male.
- An illegitimate child of an Indian female, unless the father was a non-Indian.
- A wife or widow of an Indian male (s. 11).

The following people were not entitled to registration:

- A person who took "scrip," (explained below) or a descendant of that person.
- A person who was "enfranchised" (explained below) (s. 12).

Those who lost entitlement to registration at the age of 21 years were:

- People whose mother and paternal grandmother were both not entitled to registration (s. 12). This was called the "double mother rule."

Enfranchisement

Enfranchisement was a process whereby an Indian person could lose their right to registration by choice or by operation of law.

An Indian person was eligible for enfranchisement if he was 21 years of age and capable of "supporting himself and his dependants" and "assuming the duties and responsibilities of citizenship."

Enfranchisement meant that:

- If an Indian male was enfranchised, his wife and minor unmarried children were automatically enfranchised with him.
- A woman who married a non-Indian male was automatically enfranchised, and her children born prior to her marriage were also subject to enfranchisement.

Entire bands could also choose enfranchisement, but enfranchisement was compulsory for an Indian who became a doctor, lawyer, Christian minister, or university graduate.

Enfranchisement was abolished in 1985 (see *Indian Act,* s. 6[1][d]).

Scrip

Scrip is a form of payment in either money or cash that was offered by the federal government, primarily to Métis people, instead of treaty benefits. However, because of the difficulty of establishing the presence of European ancestry, scrip was offered to other Aboriginal people to opt out of treaty benefits. Many Indian people in the prairie provinces and the territories took scrip.

A person who took scrip and their descendants were not entitled to registration under the *Indian Act*.

Registration after 1985

In 1985, responding to pressure from the courts, Aboriginal women's groups, and the requirements of the *Charter of Rights and Freedoms*, the federal parliament passed Bill C-31 to amend the registration sections of the *Indian Act*.

Registration under subsection 6(1)

Under the amended *Indian Act*, persons registered as Indians prior to 1985 continue to be entitled to registration under s. 6(1).

In addition, the following people are entitled to reinstatement as registered Indians under s. 6(1):

- women who lost their entitlement through marriage to a non-Indian,
- children who were enfranchised as a result of their mother's marriage,
- people who were not registered because of the "double mother rule" (see below), and
- the illegitimate children of Indian women born prior to 14 August 1956.

The "double mother rule" meant that a person whose parents married on or after September 4, 1951, and whose mother and paternal grandmother were non-Indians before marriage would lose their Indian status and band membership on their 21st birthday.

A person whose parents are or were both entitled to registration is also entitled to registration under s. 6(1).

Registration under subsection 6(2)

A person who has or had only one parent entitled to registration under section 6(1) is entitled to registration under subsection 6(2) of the *Indian Act*.

The child of a person who is registered under subsection 6(2) is not entitled to registration unless their other parent is also entitled to registration.

The effect of subsection 6(2) is that the entitlement to registration ends after two successive generations of intermarriage between Indians and non-Indians.

Continuing discriminatory provisions

The *Indian Act* registration provisions continue to discriminate on the basis of gender. For example:

- the children of Indian women who lost status through a pre-1985 marriage are only entitled to registration under subsection 6(2), but the children of Indian men who married non-Indian women prior to 1985 are entitled to registration under subsection 6(1); and
- if an Indian male had children with a non-Indian female between September 4, 1951, and April 17, 1985, the male children are entitled to registration under subsection 6(1), but the female children are only entitled to registration under subsection 6(2).

Adoption

Adoption of an Indian child by non-Indian parents does not affect the child's entitlement to registration under the *Indian Act* (see *Natural Parents v. British Columbia [Supt. of Child Welfare]*).

Children adopted by an Indian parent or parents, either by custom or under the provincial *Adoption Act*, are entitled to registration as if they were the biological children of their adoptive parents (see *Indian Act*, s. 2[1]).

For more information on custom adoptions, see Chapter 5, Family Law.

Band membership

Section 8 of the *Indian Act* says that each band must maintain a band list with the name of each member.

Section 10 says that a band may assume control over its own membership and establish its own membership rules.

Indian Affairs controlled membership

Under section 11 of the *Indian Act*, when membership is controlled by Indian and Northern Affairs Canada, a person is entitled to membership if they:

- were entitled to be on the band list before April 17, 1985;
- are entitled to be registered as an Indian under s. 6(1)(c) or (d), and ceased to be a band member due to the prior discriminatory and enfranchisement provisions of the *Indian Act*; or
- are the child of parents who are both entitled to have their names entered onto the band list.

Band controlled membership

A band that has assumed control of its membership may establish its own membership rules, but those rules cannot deny membership to a person who:

- regained Indian status under the 1985 amendments to the *Indian Act* (see *Scrimbitt v. Sakimay Indian Band Council*)
- was entitled to band membership immediately before the membership rules came into effect (see *Indian Act*, s. 11)

The application of the *Canadian Charter of Rights and Freedoms* to band membership is still somewhat uncertain. Even under the charter, a court may uphold a practice that would otherwise be contrary to the charter if the band can demonstrate that the practice is:

- "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" (see *Constitution Act, 1982*, s. 1)
- an expression of an Aboriginal or treaty right or a right under the *Royal Proclamation of 1763* or a land claim agreement (see *Constitution Act, 1982*, s. 25)

These practices may still be disallowed if they discriminate based on gender (see *Constitution Act*, s. 28).

Adoption

The adoption of an Indian child by non-Indian parents does not affect the child's entitlement to band membership where that membership is under INAC control (see *G. [C.L.] v. Smith*).

However, it is open to a band that controls its own membership to deny membership to such a child (see *G [J.-G.], Re*).

Voting rights

Indian bands are governed by an elected chief and council with delegated federal authority described in sections 81, 83, and 85.1 of the *Indian Act*.

Band councils are elected according to either:

- rules set out in the *Indian Act* and *Indian Band Election Regulations*, or
- a custom election code agreed to by the band members.

Indian Act elections

Band councils elected under the *Indian Act* and *Indian Band Election Regulations* are composed of 1 chief and from 2 to 12 councillors, depending on the size of the band (s. 74[2]).

All band members of at least 18 years are entitled to vote regardless of whether they ordinarily reside on or off reserve (see *Corbiere v. Canada [Minister of Indian Affairs and Northern Development]*).

A person may run for chief, regardless of whether they live on or off reserve, or whether or not they are a band member. Non-Aboriginals may run for chief under the *Indian Act* regulations. On the other hand, a person running for the position of councillor must be a band member ordinarily resident on reserve.

The results of an election may be appealed within 45 days on any of the following grounds:

- There was a corrupt election practice.
- There was a violation of the *Indian Act* or *Indian Band Election Regulations* that may have affected the result of the election.
- A nominee was ineligible to be a candidate.

The appeal must be submitted in **affidavit** form (see *Indian Band Election Regulations,* s. 12).

Custom leadership selection

Section 2(1) of the *Indian Act* says that a band may "choose" its council "according to the custom of the band." About one-third of the bands in Canada have done so to date.

The choice of band leadership by custom may be made "unimpeded by the act" and "does not necessarily require an election" (see *Crow v. Blood Band Indian Council*).

The establishment of custom leadership selection rules requires the "broad general consensus" of the band members, and may be changed over time (see *McLeod Lake Indian Band v. Chingee*).

Custom Leadership Selection Codes may provide for elections quite similar to those under *Indian Act* regulations, or they may follow traditional or hereditary practices of the community.

The application of the *Canadian Charter of Rights and Freedoms* to custom election practices is still somewhat uncertain. Even under the charter, a court may uphold a practice that would otherwise be contrary to the charter if the band can demonstrate that the practice is:

- "… a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" (see *Constitution Act, 1982*, s. 1), and
- an expression of an Aboriginal or treaty right or a right under the *Royal Proclamation of 1763* or a land claim agreement (see *Constitution Act, 1982*, s. 25).

These practices may still be disallowed if they discriminate based on gender (see *Constitution Act, 1982*, s. 28).

People who have had their membership reinstated under Bill C-31 cannot be denied the right to vote in band elections (see *Scrimbitt v. Sakimay Indian Band Council*).

Some custom leadership selection practices do not provide for an election appeal process. However, a council elected by custom is still considered to be a "federal board, commission or other tribunal" and therefore subject to judicial review by the Federal Court of Appeal (see *Frank v. Bottle*). (See Appendix A for information on judicial reviews.)

Aboriginal legal issues

Common client questions

- How do I apply for registration under the *Indian Act*?
- What if I am turned down for registration?
- How do I apply for band membership?
- What if I am turned down for band membership?
- What if I have been denied the right to vote in a band election?
- Can I appeal the results of an election?

How do I apply for registration under the Indian Act?

Your client can register (including children) by completing the appropriate form — either an "Application for Registration of Children under the *Indian Act*" or an "Application for Registration of an Adult under the *Indian Act*."

These forms are available from Indian and Northern Affairs Canada, or online at www.ainc-inac.gc.ca/frm/rrb_e.html. Band offices and tribal council offices sometimes have applications as well.

Your client should be sure the form is completed as fully and accurately as possible. It should include:

- information about their Aboriginal status and ancestors;
- the names and Indian status numbers of registered relatives;
- the names of adoptive parents and proof of adoption, if any;
- birth certificates; and
- two passport photos.

If there is any question about your client's entitlement to registration, they should include all relevant supporting records, including those of their ancestors, such as birth and baptismal records, genealogical charts, and **affidavits** from people familiar with the family.

Your client should send the completed application and supporting documents to the Registrar of Indian Registration and Band Lists, Indian and Northern Affairs Canada, Ottawa, Ontario, K1A 0H4.

> **Note:** There are many print and web-based resources for tracing genealogy. Many Christian church dioceses or archdioceses have extensive archives with records of the births, deaths, and marriages of Aboriginal people.

What if I am turned down for registration?

Indian and Northern Affairs Canada (INAC) considers applications for registration and compares the evidence with its own records.

If INAC says it is unable to conclude that your client is entitled to registration, your client may "protest" under section 14.2 of the *Indian Act* by notifying the Registrar in writing with a brief statement of the grounds for the protest.

The protest must occur within *three years* after the application for registration was turned down.

If the protest is turned down, your client may appeal to the BC Supreme Court. They have to file the appeal within *six months* after the Registrar's decision on the protest (see *Indian Act*, s. 14.3).

How do I apply for band membership?

The first step is to determine whether your client's band has assumed control of its own membership under section 10 of the *Indian Act*. This can be done by contacting INAC or the band.

If the band controls its own membership, your client should obtain a copy of the membership code. Your client has the right to access the code under the federal *Access to Information Act* (see *Twinn v. Canada [Minister of Indian Affairs and Northern Development]*). They must follow the application process established in the code.

If band membership is under INAC control, band membership should be automatic upon registration.

What if I am turned down for band membership?

If the band has control of membership

If the band has assumed control of its own membership, its membership code must contain a "mechanism for reviewing decisions on membership" (see *Indian Act*, s. 10[2][b]). Your client should use this mechanism.

If your client feels the mechanism is not followed, or the decision made is unfair, they may apply for judicial review to the Federal Court of Appeal. This application must be made within *30 days* after the review decision. (See Appendix A for information about judicial reviews.)

If INAC has control of membership

If band membership is under INAC control, and your client has been denied membership, they may "protest" under section 14.2 of the *Indian Act* by notifying the registrar in writing with a brief statement of the grounds for the protest. Write to: Registrar of Indian Registration and Band Lists, Indian and Northern Affairs Canada, Ottawa, Ontario, K1A 0H4.

The protest must occur within *three years* after the application for registration was turned down.

If your client's protest is turned down, they may appeal to the BC Supreme Court. Your client has to file the appeal within *six months* after the Registrar's decision on the protest (see *Indian Act,* s. 14.3).

What if I have been denied the right to vote in a band election?

The first step is to find out whether the band selects its council under the *Indian Band Election Regulations* or by a custom selection process. Contact INAC or the band to find out.

Custom election code

A custom election code may set out a process for appealing the voter's list. Your client should follow this process. If your client feels the appeal process is not followed or the decision made is unfair, they may apply for judicial review to the Federal Court of Appeal. This application must be made *within 30 days* after the review decision. (See Appendix A for information about judicial reviews.)

Indian Band Election Regulations

If your client's band runs its elections according to the *Indian Band Election Regulations* (IBER), it must post the voters' list in at least one conspicuous place on reserve at least *30 days before* the election (see *IBER,* s. 4.2).

If your client's name is not on this voters' list, they can demonstrate to the Registrar that it should be by showing that they are:

- on the band list or entitled to be on the band list;
- at least 18 years of age; and
- qualified to vote at band elections.

The voter's list should be revised accordingly (see *Indian Band Election Regulations*, s. 4[5]).

Write to: Registrar of Indian Registration and Band Lists, Indian and Northern Affairs Canada, Ottawa, Ontario, K1A 0H4.

If the Registrar doesn't add your client to the list, they may apply for a judicial review to the Federal Court of Appeal. This application must be made *within 30 days* after the review decision. (See Appendix A for information about judicial reviews.)

Can I appeal the results of an election?

First find out whether the band selects its council under the *Indian Band Election Regulations* or by a custom selection process. This can be done by contacting INAC or the band.

Custom election code

A custom election code may set out a process for appealing the results of an election. Your client should follow this process. If your client feels the appeal process is not followed or the appeal decision is unfair, they may apply for a judicial review to the Federal Court of Appeal. This application must be made *within 30 days* after the review decision. (See Appendix A for information about judicial reviews.)

Indian Band Election Regulations

If your client's band runs its elections according to the *Indian Band Election Regulations,* they may lodge an appeal under section 12(1) on the grounds that:

- there was a corrupt election practice,
- there was a violation of the act or regulations that might have affected the results of the election, or
- a nominated person was ineligible to be a candidate.

Your client must lodge the appeal in writing *within 45 days* after the election, and give the facts in an **affidavit**.

The Minister of INAC will consider the appeal and may investigate. If it appears to INAC that any of the above practices occurred, it will report the matter to the Governor in Council (see *Indian Band Election Regulations*, s. 14).

If INAC rejects the election appeal, your client can't ask for a judicial review without first applying for reconsideration by Cabinet. Cabinet's decision is subject to judicial review (see *Charles v. Semiahmoo Band Council*). (See Appendix A for information on judicial reviews.)

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

For more information

- *Entitlement to Indian Status and Membership Codes in Canada* by Larry Gilbert (Carswell). See "How to order publications."
- *2006 Annotated Indian Act and Aboriginal Constitutional Provisions* by Shin Imai (Carswell). See "How to order publications."
- *Native Law* by Jack Woodward (Carswell). See "How to order publications."
- The Congress of Aboriginal Peoples has a website with good information on Bill C-31 and registration under the *Indian Act* at www.abo-peoples.org.

Statutes and regulations

Access to Information Act, R.S.C. 1985, c. A-1

Adoption Act, R.S.B.C. 1996, c. 5

Canadian Charter of Rights and Freedoms, Being Part 1 of the Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Federal Courts Act, R.S.C. 1985, c. F-7

Indian Act, R.S.C. 1985, c. I-5

Indian Band Council Election Order SOR/97-138. [Indian Act]

Indian Band Council Procedure Regulations, C.R.C. 1978, C. 950. [Indian Act]

Indian Band Election Regulations, C.R.C. 1978, c. 952. [Indian Act]

Case citations

Assu v. Chickite, [1999] 1 C.N.L.R. 14 (B.C.S.C.)

Charles v. Semiahmoo Band Council, (1998) 140 F.T.R. 300 (Fed. Ct. Trial Div.)

Corbiere v. Canada (Minister of Indian Affairs and Northern Development) [1999] 3 C.N.L.R. 19; [1999] 2 S.C.R. 203 (S.C.C.)

Crow v. Blood Band Indian Council (1996) 107 F.T.R. 270 (Fed. Ct. Trial Div.)

Frank v. Bottle [1994] 2 C.N.L.R. 45 (Fed. Ct. Trial Div.)

G. (C.L.) v. Smith, [1985] 2 W.W.R. 155 (B.C. Co. Ct.)

G. (J.-G.), Re, [2000] 4 C.N.L.R. 104 (C.Q.), affirmed (2001), 2001 CarswellQue 3112 (Que. C.A.)

McLeod Lake Indian Band v. Chingee, 165 D.L.R. (4th) 358; [1999] 1 C.N.L.R. 159 (Fed. Ct. Trial Div.)

Natural Parents v. British Columbia (Supt. of Child Welfare), [1976] 2 S.C.R. 751; 60 D.L.R.(3d) 148 (S.C.C.)

Scrimbitt v. Sakimay Indian Band Council, [2000] 1 C.N.L.R. 205; [2000] 1 F.C. 513 (Fed.Ct.Trial.Div.)

Twinn v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 F.C. 368; [1998] 1 C.N.L.R. 159 (Fed.Ct.Trial.Div.)

10. Law Enforcement Complaints

10. Law Enforcement Complaints

This chapter covers:

How to make a complaint against:

- a municipal police officer
- the RCMP
- a provincial enforcement officer
- a federal law enforcement officer

Definitions

Complainant: A person who files a complaint.

Jurisdiction: The right and power to make law or interpret and apply the law.

Seize: To take away by legal right.

Statutory: Required or created by statute. A statute is a formal, written law of Canada or the provinces, written and enacted by its legislative authority.

Summarily dismissed: When something is dealt with quickly and no longer investigated.

Common client problem

I am Aboriginal and was badly treated by a law enforcement officer, such as a:

- Police officer
- Bylaw enforcement officer working for an Indian Band
- Fisheries or conservation officer

General law

Law enforcement officers have special federal, provincial, or band powers to enforce certain laws. These special powers often include the authority to arrest, search, and charge individuals and to seize goods in their possession. However, law enforcement officers must exercise their authority reasonably and lawfully.

Law enforcement officers who exceed their authority or use excessive force may be subject to a criminal charge or a civil lawsuit for assault, negligence, or trespass.

Some law enforcement officers, such as RCMP and municipal police officers, are subject to statutory complaint procedures.

Provincial officers, such as conservation officers, may be subject to investigation by the provincial ombudsman.

Others, such as federal fisheries officers, don't come under statutory complaints procedures. However, they may face internal disciplinary measures by their government employer.

The following complaints procedures apply to both Aboriginal and non-Aboriginal people.

Complaints against police officers

The complaint procedures are different for RCMP and municipal police. If your client wants to file a complaint, they should follow the steps outlined below for each force.

RCMP officers

RCMP officers and staff are governed by the federal *Royal Canadian Mounted Police Act*. The RCMP has **jurisdiction** throughout British Columbia and is the sole police force in most parts of the province.

Filing a complaint

Your client can make a complaint about the on-duty conduct of any RCMP member by contacting either the officer-in-charge of the local RCMP detachment or the Commission for Public Complaints (CPC) against the RCMP. Contact the CPC at:

E-mail: complaints@cpc-cpp.gc.ca

Telephone: (604) 501-4080 or toll free at 1-800-665-6878

Fax: (604) 501-4095.

Your client will be asked to complete a complaint form. This form is available online at www.cpc-cpp.gc.ca.

The complaint will be resolved in one of three ways:

1. Investigation

   Whether someone makes the complaint to the RCMP detachment or to the CPC, the officer in charge of the RCMP detachment will attempt to resolve the matter informally. If this is not possible, the RCMP will investigate the complaint further. They will provide the **complainant** with a report setting out the results of the investigation and any steps taken.

2. Review

   If your client is not satisfied with the RCMP's report, they can ask the CPC to review the handling of the complaint by completing a "Request for Complaint Review" form. The form is online at www.cpc-cpp.gc.ca. Follow the links under "Make a Complaint."

   The chair of the CPC may:

   - investigate the complaint further,
   - ask the RCMP to investigate the complaint further, or
   - order a public hearing.

   Public hearings are rare, and usually only for very serious complaints.

3. Report and recommendations

   In its review, the CPC will either agree with the RCMP's handling of the complaint or make further recommendations in an interim report. Your client will receive a copy of the final report.

Municipal police officers

A number of municipalities, such as Abbotsford, Central Saanich, Delta, Nelson, New Westminster, Oak Bay, Port Moody, Saanich, Vancouver, Victoria, and West Vancouver operate their own police departments. These forces come under the jurisdiction of the provincial *Police Act*.

Filing a complaint

Your client may complain about the conduct of a police officer under provincial **jurisdiction** by mailing, faxing, or delivering a "Form 1 Record of Complaint" to the municipal police station or the Office of the Police Complaint Commissioner. The form is available online at www.opcc.bc.ca. Follow the links to "Making a Complaint."

Your client should file the complaint *within 12 months* of the incident or the complaint may be **summarily dismissed**.

A complaint will be resolved in one of three ways:

1. Informal resolution

   This process may involve face-to-face meetings or mediation between the **complainant** and the police officer. Nothing said or written by either party can later be used as evidence in civil, criminal, or administrative proceedings. The matter is considered resolved when the complainant and the officer sign an agreement. After 10 days, if neither party changes their mind, the complaint is officially closed.

2. Summary dismissal

   Following a preliminary review of the complaint, the investigating police department may decide to dismiss the complaint on the basis that it:

   - has no air of reality (is "frivolous or vexatious"),
   - there is no reasonable likelihood that further investigation will produce evidence of misconduct, or
   - the event occurred more than 12 months ago.

   If your client is unhappy that their complaint was **summarily dismissed**, they may, *within 30 days*, ask for a review of their file by the Office of the Police Complaint Commissioner. Find contact information on its website at www.opcc.bc.ca

3. Investigation and conclusion

   If the complaint cannot be resolved by informal resolution or is not summarily dismissed, a full investigation is conducted. The investigation is usually assigned to an officer with the department's Internal Investigation Section, or by a senior member specially assigned by the chief constable.

   The **complainant** will receive updates during the investigation, advising them of the steps that have been taken. In some cases, the chief constable may request another department to conduct the investigation or, if necessary, the Police Complaint Commissioner may order another department to investigate.

   Once the investigation is completed, a report is given to the chief constable (the "Discipline Authority"), who decides whether the allegations against the officer have been substantiated (proved to be true). If the complaint is substantiated, they must then decide on the appropriate corrective or disciplinary measures, which can range from a verbal reprimand right up to dismissal.

Your client will be advised of the results of the investigation and the decision of the chief constable by registered letter. If they are not satisfied with either the investigation or the decision, they can write to the Office of the Police Complaint Commissioner and request a public hearing into the complaint. The client must do this *within 30 days* of receiving the decision. Find contact information on the office website at www.opcc.bc.ca.

Public hearings

To determine whether to order a public hearing, the commissioner will consider a number of factors, including the seriousness of the complaint and the need to ensure public confidence in the police and the complaint process itself.

At a public hearing, all the evidence is heard by an adjudicator (a retired judge) who then either confirms the Discipline Authority's decision or rules as they see fit. Your client may by required to testify at a public hearing and, if they choose, can also make written submissions to the adjudicator on what they think is appropriate.

The decision of the adjudicator is final and the only appeal available is to the BC Court of Appeal on questions of law.

For more information, visit the Office of the Police Complaint Commissioner's website at www.opcc.bc.ca.

Complaints against provincial law enforcement officers

If your client has a complaint against a provincial law enforcement officer, such as a conservation officer, they can take it to the provincial ombudsman. The Ombudsman of British Columbia investigates complaints of unfair actions or decisions by provincial public servants, including provincial and municipal enforcement officers. Unfair actions include delay, rudeness, negligence, arbitrariness, oppressive behaviour, and unlawfulness.

Before you suggest that your client make a complaint to the ombudsman, check to see if there is an internal review or appeal process the client can use.

To make a complaint to the ombudsman, your client must complete a complaint form. It is available online at www.ombudsman.bc.ca. Follow the link to "Complaint Forms." Your client may also obtain the form and other information by contacting the Office of the Ombudsman by telephone at 1-800-567-3247 (toll free from anywhere in BC), or (250) 387-5855 in the Victoria area.

Once the ombudsman has received the complaint, an ombudsman officer will contact your client. If the officer determines that an investigation is necessary, they will contact the public agency named in the complaint.

If the agency responds with appropriate action, the ombudsman may close the file. If not, the investigation will continue as follows:

- The ombudsman may make recommendations to the public agency to remedy the unfairness (see *Ombudsman Act*, s. 23[2]).
- If the public agency still does not take suitable action, the ombudsman may make a report on the investigation to cabinet or the legislative assembly (see *Ombudsman Act*, s. 25).

or

- As part of the investigation, the ombudsman may decide to hold a hearing (see *Ombudsman Act,* ss. 15 – 27).

It is an offence for a public agency or anyone else to penalize a person for making a complaint to the ombudsman (see *Ombudsman Act,* s. 16).

Complaints against federal enforcement officers

There are no **statutory** processes for complaints against many federal enforcement officers, such as fisheries officers.

You can assist your client by contacting the law enforcement agency involved to see if it has a policy in place to deal with public complaints. If it does, your client should use that process. Even if the agency has no public complaint policy, the behaviour of the enforcement officer may still be a matter for disciplinary action.

Taking a law enforcement officer to court

There are two ways to take a law enforcement officer to court:

1. Ask for a judicial review

   If your client has exhausted all other options, they may be able to ask for a judicial review. The decisions and actions of bodies that come under federal **jurisdiction**, such as the Department of Fisheries and Oceans, may be judicially reviewed in the Federal Court of Appeal. The decisions and actions of provincial agencies, such as municipalities and wildlife conservation officers, may be judicially reviewed in the Supreme Court of British Columbia.

   See Appendix A for more information about judicial reviews.

2. By suing

   If your client has been assaulted, unlawfully imprisoned, defamed, or has had property damaged by a law enforcement officer, they may be able to sue the officer and the officer's employer in court.

   Keep in mind that there are sometimes very short time limits for suing, and that such lawsuits are usually strongly fought against. Advise your client to speak with a lawyer as soon as possible.

Finding out what's on a police record

If your client wants to know what's on their police record — or any law enforcement agency record — they have a right to access that information under provincial and federal laws. For more information, see Appendix C: Freedom of Information.

Aboriginal legal issues

The complaint procedures listed under "General law" apply to both Aboriginal and non-Aboriginal people. However, please note the following:

- Some tribal police forces come under the provincial *Police Act*. These include the Stl'atl'imx Tribal Police (Lillooet) and Kitasoo Xaixais Police Service (Klemtu).

- Many Aboriginal organizations, including Indian bands, do not have formal complaint processes. If the complaint involves an employee or agent of an Indian band or other Aboriginal employer, your client may wish to ask to meet with the council of the band or the board of directors of the Aboriginal employer.
- If your client is unhappy with the decisions or actions of bodies that come under federal **jurisdiction**, such as band councils, they may be able to get a judicial review in the Federal Court of Appeal. See Appendix A for more about judicial reviews.
- If the decision or action of a public law enforcement officer is discriminatory, your client may be able to deal with it through a Charter challenge in court or a human rights complaint. See Chapter 8, Human Rights and Appendix A: Judicial Reviews and Charter Challenges.

For more information

- Chapter 20, "Public Complaint Procedures," of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about complaints against law enforcement officers. Find it online at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then the link for "Police."
- Commission for Public Complaints against the RCMP website: www.cpc-cpp.gc.ca. Complaint form available online.
- Office of the Police Complaint Commissioner (provincial) website: www.opcc.bc.ca. Complaint form available online.
- Office of the Ombudsman (British Columbia) website: www.ombud.gov.bc.ca. Complaint form available online.
- Pivot Legal Society website: www.pivotlegal.org. Follow the link to "Policing." The Pivot Legal Society in a not-for-profit organization that focuses on the rights of residents in the Downtown Eastside of Vancouver.

Statutes and regulations

Employment and Assistance Act, S.B.C. 2002, c. 40

Employment and Assistance Regulation, B.C. Reg. 263/2002 [Employment and Assistance Act]

Ombudsman Act, R.S.B.C. 1996, c. 340

Police Act, R.S.B.C. 1996, c. 367

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10

11. Mental Health/Adult Guardianship

11. Mental Health/Adult Guardianship

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

What this chapter covers:

- The laws that govern mental health
- Committee
- Enduring power of attorney
- Involuntary admission
- Representation agreements
- Consent to health care
- Adult guardianship and abuse, neglect, and self-neglect

What this chapter doesn't cover

Some of your Aboriginal clients may have mental health challenges that will affect your ability to help them with their legal problems. However, this chapter does not focus on the social aspects of mental health and capacity, but rather on the laws that deal with those issues. For a list of resources that may help, see "For more information" at the end of this chapter.

Common client problems

- I have an Aboriginal relative who is not capable of making their own decisions or managing their financial affairs.
- I know an Aboriginal adult who is being abused/neglected and cannot get help and support on their own.

General law

In general, mental health laws come under provincial **jurisdiction**.

There are three main provincial laws dealing with mental health issues:

- *Patients Property Act*
- *Power of Attorney Act*
- *Mental Health Act*

These laws use the terms "mental incapacity" and "mental incompetence," meaning a person can't make decisions on their own behalf.

In 2000, a group of provincial laws was passed that are described as the "adult guardianship legislation." These newer laws recognize that even though people may not be capable of managing all of their affairs, they may have the ability to participate to some extent in the management of their affairs.

There are four acts that comprise the "adult guardianship" legislation:

- *Representation Agreement Act*

- *Health Care (Consent) and Care Facility (Admission) Act*
- *Adult Guardianship Act*
- *Public Guardian and Trustee Act*

To date, some parts of this legislation have not been proclaimed.

Helping someone with mental capacity issues

Committee

A committee (pronounced com-mit-TEE) is someone who is appointed by the BC Supreme Court under the *Patients Property Act* to act on behalf of people who are not mentally capable of managing their own affairs.

When someone applies to have a committee appointed, they need a lawyer to prepare the documents and present the facts in court. The opinion of two doctors is required for the application.

The application declaring a person incapable and the application to appoint a committee can be filed in the court at the same time.

If the judge finds the person incapable, they will then appoint a committee. The judge can say who must be notified about the application, including the person who is the subject of it.

The court can appoint a committee to take care of "the estate" (financial matters) and/or take care of "the person" (health care and personal care matters). A committee can be one or more people or an institution (such as the Public Guardian and Trustee's office).

Involuntary admission

Anyone who wants psychiatric help can ask to be admitted to hospital for treatment. The *Mental Health Act* also allows authorities to send people to hospital even if they don't want to go. A doctor can sign a medical certificate stating that a person has a mental disorder and needs to be hospitalized:

- to prevent the person's substantial mental or physical deterioration, or
- for the person's protection or the protection of others.

When a doctor does that, the person can be admitted involuntarily for up to 48 hours. That period can be increased with a similar medical certificate from a second doctor.

A person who has been hospitalized has the right to have the hospitalization reviewed. A review panel must be appointed if the person (or someone acting on their behalf) asks for it. The person has the right to have a lawyer, friend, or advocate speak for them at the review panel hearing. To find out more about review panels, see "For more information."

Planning for the future

People in BC often make an enduring power of attorney for their legal and financial affairs and a representation agreement for their health and personal care.

Enduring power of attorney

An enduring power of attorney allows a person to give someone power to make decisions about one's legal and financial affairs even if they become incapable of making decisions. All powers of attorney are limited to legal and financial affairs only. They do not cover health and personal care decisions.

In a power of attorney, you give someone (the "attorney") power to make financial and legal decisions on your behalf. You can limit the scope of the decisions the attorney can make, and say when they are to take effect. However, an ordinary power of attorney ceases to have effect if you become mentally incapable.

An enduring power of attorney includes a sentence that says that the attorney can continue to act for you if you become mentally incapable (see *Power of Attorney Act*, s. 8).

Information about enduring power of attorney can be found on the Representation Agreement Resource Centre site at www.rarc.ca.

Representation agreements

When people are incapable of making a contract or managing their health care, personal care, legal matters, financial affairs, business or assets, they may still be able to:

- communicate a desire for another person to make decisions on their behalf,
- demonstrate choices and preferences and express feelings of approval or disapproval of others,
- be aware when another person is making decisions on their behalf, and
- have relationships characterized by trust.

A person with some or all of these abilities is able to make a representation agreement. A representation agreement authorizes another person (a "representative") to handle routine finances, make health care and personal care decisions, and hire a lawyer to assist with, for example, accident claims (see *Representation Agreement Act*, ss. 7 – 8).

Adults who authorize their representative to handle financial affairs must usually appoint another person to "monitor" the handling of those affairs (see *Representation Agreement Act*, s. 12).

If an adult is capable of understanding the powers they are giving to the representative and what effect that may have, they may give the representative additional powers. For example, they can give their representative the power to:

- override their denial for help when ill,
- consent to treatment they agreed to when they were well (some examples of conditions where this might be useful include a mood disorder, dementia, anorexia, and addiction), or
- give or refuse consent to being physically restrained.

The representative with additional powers may also sell real estate and make care arrangements for the adult's minor children (see *Representation Agreement Act*, s. 9).

Information about representation agreements can be found on the Representation Agreement Resource Centre site at www.rarc.ca. They also have representation agreement kits for a modest fee, available online.

Note: Your client may ask about a "living will," which is a document that contains instructions to a doctor to discontinue life-saving medical treatment under certain conditions. Living wills are not recognized in British Columbia unless their terms are contained in a representation agreement, though they may be useful to help family members and doctors make important decisions.

Consent to health care

The provincial *Health Care (Consent) and Care Facility (Admission) Act* only applies to health-care consent (the part of the act dealing with admission to care facilities is not yet in force).

This act confirms the right of all adults over the age of 19 to make their own health-care decisions. If an adult cannot make a health-care decision, the act recognizes the role of family and friends in supporting adults who may need assistance with health-care decisions.

Under sections 7 and 8 of this act, a mentally capable adult has the right to choose or refuse health care. In this case, adults are considered capable if they demonstrate an understanding of:

- what condition the doctors will be treating,
- what health care the doctors want to give,
- what the benefits and risks are, and
- what other health care might be used (alternatives).

The health-care provider must explain these matters to the adult in a way they can understand. If the adult is unable to give consent, the act sets out who can make decisions as follows:

- A committee (described on page 99)
- A representative named in a representation agreement (described on page 100)
- A temporary substitute decision-maker (the health-care provider must choose the nearest relative)
- If there is no one else, the Public Guardian and Trustee

Adult guardianship and abuse, neglect, and self-neglect

Part 3 of the *Adult Guardianship Act* deals with the protection of adults from abuse, neglect, and self-neglect. Some adults are unable to seek the help they need because they are not capable of making decisions. This law gives the authority to intervene to "a designated agency."

A report of abuse or neglect of an adult can be made to the following designated agencies:

- The regional provincial Health Authority (Northern, Interior, Vancouver Island, Vancouver Coastal, and Fraser regions)
- Community Living British Columbia (for people with developmental disabilities)

You can get the telephone number of a designated agency by calling the Health Information Line at 1-800-465-4911 (toll free).

The telephone numbers of designated agencies are listed on the website of the Public Guardian and Trustee. See "For more information" at the end of this chapter.

What to do if someone is being abused

If your client knows someone who is being abused or neglected, give them the following general information:

- Make notes of all the evidence of abuse or neglect.
- Get some information about what options are available. A good place to start is the website of the Office of the Public Guardian and Trustee (www.trustee.bc.ca/pdfs/STA/abuseneglect.htm). Look for its information on what to do in cases of abuse and neglect.
- Where appropriate and safe to do so, tell the abused/neglected person about the possible options and ask them what they want to do.
- Contact the designated agency responsible for investigating abuse and neglect of vulnerable adults (see above).
- The designated agency cannot reveal the name of a person who makes a report of abuse or neglect under the *Adult Guardianship Act*.

If your client makes a report of abuse or neglect, someone from the designated agency must look into it. If the adult is in need of support and assistance, the designated agency can offer services. If the adult refuses the support and assistance offered, the designated agency's role is to determine whether the adult is capable of accepting or refusing the service. The designated agency must report criminal offences to the police.

It is helpful to know the exact name and telephone number of the individual at the designated agency in your community. It can take time to track down who to talk to, so it's a good idea to do this before a client needs the information.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Section 51 of the federal *Indian Act* gives the Minister of Indian and Northern Affairs authority over "mentally incompetent Indians." This authority usually applies only to Indians on reserve.

Common client questions

- How can I help my mentally incapable Aboriginal relative with his financial affairs?
- Can I get legal aid?

How can I help my mentally incapable Aboriginal relative with his financial affairs?

Ask your client if their relative can still make some choices and participate even to a limited extent in managing their own affairs. If so, your client can help their relative make a representation agreement. See "Representation agreements" on page 100.

If your client's relative lives on reserve, the Minister of Indian and Northern Affairs Canada (INAC) will have to approve the representation agreement. To contact INAC, see "For more information" at the end of this chapter.

If your client's relative is completely incapable of participating in managing their own affairs or choosing someone to do so, your client may need to obtain an order appointing someone to administer the relative's affairs.

If the relative lives on reserve, your client should apply to the Minister of INAC. See "For more information."

If the relative lives off reserve, your client may want to contact the Office of the Public Guardian and Trustee for information. Either the Public Guardian and Trustee or another person has to apply to the court to appoint a "committee" (described on page 99). See "For more information" to contact the Office of the Public Guardian and Trustee.

Even if the Aboriginal person lives on reserve, INAC prefers that their off-reserve property be dealt with through provincial laws. As a general rule, INAC will appoint people to administer the "estate" of a mentally incapable Indian. However, they will not appoint someone to handle issues related to personal or health care. These need to be dealt with through the provincial system, often involving the Public Guardian and Trustee.

Can I get legal aid?

The Legal Services Society (LSS) provides legal aid in BC. LSS will pay for a lawyer to help financially eligible clients if they are:

- facing a review panel hearing under the *Mental Health Act*, or
- facing a criminal charge and have a mental or emotional illness that makes it impossible for them to represent themselves, or
- unable to represent themselves in a family matter due to a serious condition or disability, and the family matter must be resolved to avoid further harm (requires special approval).

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide "proof of income," such as a pay stub or a letter from an employer.

For more information

Legal information

- Chapter 14 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about Mental Health Law. Available at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and follow the links to "Mental Health" and "Representation Agreements."
- LawLINK: www.lawlink.bc.ca. Click "Wills and Trusts" for information on committees, powers of attorney, and representation agreements.
- Indian and Northern Affairs Canada: Call (604) 775-5100 or toll free within BC at 1-800-665-9320. Address: 600 – 1138 Melville Street, Vancouver, BC, V6E 4S3. E-mail: bcinfo@ainc-inac.gc.ca. Website: www.ainc-inac.gc.ca/index_e.html.
- Office of the Public Guardian and Trustee: www.trustee.bc.ca. Click "Reports and Publications" and then "Adult Guardianship." This section contains information about representation agreements, including a check list. There is also useful information about abuse and neglect on the site.

  To report cases of abuse or neglect, contact one of the designated agencies listed on the site under Services > Assessment and Investigations, then click "Designated agencies contact list."
- Representation Agreement Resource Centre (RARC): www.rarc.ca. The RARC has information about power of attorney and representation agreements. Booklets and some documents are online.

Mental health services

- Ministry of Health: www.healthservices.gov.bc.ca/mhd. Information on mental health services in BC.
- BC Mental Health Information Line: Free information about mental health and mental illness, 24 hours a day. Call (604) 669-7600 in the Lower Mainland, or 1-800-661-2121 elsewhere in BC.
- BC Alcohol and Drug Information and Referral Service: Provides information and referral services for people across BC who need help with any kind of substance abuse. Includes information and referral to education, prevention, and treatment services and regulatory agencies.

Call (604) 660-9382 in the Lower Mainland, or 1-800-663-1441 elsewhere in BC.

- Health Authorities in BC: www.healthservices.gov.bc.ca/socsec. Use this site to find the closest health authority.
- For information on review panels, contact the Mental Health Law Program at the Community Legal Assistance Society at (604) 685-3425, or toll free at 1-888-685-6222. The society's website is www.clasbc.net.
- BC Health Information Line: 1-800-465-4911 (toll free)

Aboriginal services

If a client has mental health or capacity challenges, one of the following services may be able to help them:

Aboriginal Health Services
Vancouver Coastal Health Authority
2nd Floor, 520 W. 6th Avenue
Vancouver, BC V5Z 4H5
(604) 714-3796

Native Mental Health Association of Canada
800 Wellington Avenue, P.O. Box 242
Chilliwack, BC V2P 6J7
(604) 793-1983

Statutes and regulations

Adult Guardianship Act, R.S.B.C. 1996, c. 6

Designated Agencies Regulation, B.C. Reg. 19/2002 [Adult Guardianship Act]

Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181

Indian Act, R.S.C. 1985, c. I-5

Indian Estates Regulations, C.R.C. 1978, c. 954 [Indian Act]

Mental Health Act, R.S.B.C. 1996, c. 288

Patients Property Act, R.S.B.C. 1996, c. 349

Power of Attorney Act, R.S.B.C. 1996, c. 370

Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383

Representation Agreement Act, R.S.B.C. 1996, c. 405

12. Motor Vehicle/Traffic

12. Motor Vehicle/Traffi

This chapter covers:

- The motor vehicle laws that apply on and off reserve
- Exceptions to the *Motor Vehicle Act* for Aboriginal people on reserve
- What to do if you're in a motor vehicle accident
- When it's a good idea to get a lawyer
- When you can get a legal aid lawyer

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

Settlement: An agreement regarding a lawsuit or legal dispute without going forward to a final court judgment. Most settlements are achieved by negotiation.

Common client problems

- I was charged with a motor vehicle offence when I was driving on reserve.
- I was in a motor vehicle accident on reserve.

General law

The province has **jurisdiction** over motor vehicles. Provincial laws, such as the driving offences described in BC's *Motor Vehicle Act,* generally apply to Aboriginal people operating a vehicle on roads both on and off reserve.

Provincial law also covers the licensing, registration, and insurance of vehicles on or off reserve. The BC *Insurance (Motor Vehicle) Act* states that everyone who drives on or off reserve must have a licence and that all vehicles must be registered and insured.

Despite the province's general authority over motor vehicle law, the federal parliament has jurisdiction over criminal offences — such as impaired or dangerous driving — committed with a motor vehicle.

Section 73(1)(c) of the *Indian Act* also gives the federal government the authority to regulate the speed, operation, and parking of vehicles on roads within reserves. The *Indian Act* authorizes Indian bands to make bylaws for the regulation of traffic on reserve.

Aboriginal legal issues

Common client questions

- Does an offence under the *Motor Vehicle Act* apply to me when I'm driving on reserve?
- Do I need a driver's licence and do I have to register and insure a vehicle to drive on reserve?
- What if I am in a car accident on reserve?
- Can I get legal aid for a motor vehicle offence or if I've had a car accident?

Does an offence under the Motor Vehicle Act apply to me when I'm driving on reserve?

Although the federal parliament has the authority to regulate the speed, operation, and parking of vehicles on roads within reserves under s. 73(1)(c) of the *Indian Act*, it has not done so to any great extent. The *Indian Reserve Traffic Regulations* are very general.

Instead, the federal parliament has adopted provincial motor vehicle laws. Section 6 of the *Indian Reserve Traffic Regulations* reads:

> "The driver of any vehicle shall comply with all laws and regulations relating to motor vehicles, which are in force from time to time in the province in which the Indian reserve is situated, except where such laws or regulations are inconsistent with these regulations."

Note: If your client wants to dispute the application of provincial laws on reserve, they should talk with a lawyer.

Band traffic bylaws

If your client wants to argue against a provincial motor vehicle offence on a road on reserve, they will probably have to produce a valid traffic bylaw made by the Indian band. Very few bands have such bylaws. Even if the band has a traffic bylaw, your client will face an argument that the provincial law should apply anyway. Your client should talk to a lawyer.

Roads for the use of band members

The provincial *Motor Vehicle Act* defines a "highway" as including roads and streets meant for general public use. Some roads on reserve are intended for the use of band members, not the "general public." If your client was driving on such a road, they may be able to argue that the *Motor Vehicle Act* should not apply.

A similar defence may apply to a *Motor Vehicle Act* charge of driving while prohibited on a "highway" or "industrial road," or a federal *Criminal Code* charge of driving while prohibited on "a street, road, highway or other public place" (see *R. v. Bigeagle*). For any of these cases, your client should talk to a lawyer.

Penalties

Even if a court finds that a provincial motor vehicle offence applies on reserve, it may find that the provincial *penalties* do not. Section 9 of the *Indian Reserve Traffic Regulations* says that a person who violates the regulations is liable to a penalty of "not less than $1 and not more than $50, or to imprisonment for a term not exceeding two months."

Courts have found that these federal penalty provisions apply even when a person is convicted of a provincial motor vehicle offence on reserve (see *R. v. Francis*).

Do I need a driver's licence and do I have to register and insure a vehicle to drive on reserve?

In general, provincial law applies. Courts have consistently found that licensing, registration, and insurance of vehicles are administrative matters that come solely under provincial **jurisdiction**. Likewise, provincial penalties apply to motor vehicle licensing, registration, and insurance offences (see *R. v Bellegarde*).

Under provincial law, a person who is driving on a "highway" without a valid driver's licence or without vehicle registration or insurance commits an offence. You may be able to avoid this requirement if you are driving on a part of the reserve that is not a "highway" (see *Galligos v. Louis*).

What if I am in a car accident on reserve?

Clients who are injured in an accident on reserve while in a motor vehicle licensed and insured in BC, or (in some circumstances) while on foot or on a bicycle, are entitled to "no-fault benefits" from the Insurance Corporation of British Columbia (ICBC).

Give your clients the following general information:

- No-fault ICBC benefits cover basic medical and rehabilitation expenses, wage loss, and homemaker benefits, funeral expenses, and death benefits. If another person caused the accident (in whole or in part), your client may be entitled to other compensation for injury or damages in addition to the "no-fault" benefits.
- "No-fault" death benefits are payable to spouses, common-law partners, or dependants of a deceased motor vehicle accident victim. Aboriginal people frequently have dependants outside of their "nuclear" family. In one court decision, an insurance benefit was paid to dependent grandparents (see *Casimel v Insurance Corporation of British Columbia*).
- Homemaker services are covered only where a non-family member provides them. Aboriginal accident victims living in rural or remote areas may have difficulty finding a "non-family member" to act as a homemaker. ICBC may take some convincing to provide these benefits.
- If you were in an accident in a place on an Indian reserve that does not fit the provincial definition of "highway" or the federal definition of "road," some aspects of insurance coverage, such as uninsured motorist protection, may not apply.
- If ICBC or another insurer is involved, its agents may settle the claim. But if you are not satisfied with the **settlement** offer, you may sue the person responsible for the accident. This lawsuit must be started within a certain period of time, usually *(but not always)* two years from the date of the accident.

Should I refer my client to a lawyer?

If your client is in a motor vehicle accident, they have a number of obligations, such as reporting the accident in a timely manner. There may also be other limitation periods involved, some of them very short.

If your client was involved in a motor vehicle accident and suffered injury or loss, or could be held even partly at fault for the accident, refer them directly to a lawyer. Urge the client to speak with a lawyer as soon as possible, to make sure that all deadlines and limitation periods are met.

Injured clients who are not 100 percent at fault for an accident can often retain a lawyer on a "contingency fee" basis. That means they don't pay the lawyer's fees unless they get a **settlement** of their claim. The lawyer will then recover fees at an agreed-upon fixed percentage and take expenses out of the settlement.

If your client was in an accident, and is *clearly* 100 percent responsible for it, and *clearly* not in breach of the insurance policy (hasn't broken a condition of the policy), they could contact the insurer (usually ICBC) directly. However, your client should talk to a lawyer before doing this.

The insurer will settle the claim or appoint a lawyer to act on the client's behalf. However, the job of motor vehicle insurers is to keep down the cost of claims. Agents have techniques for limiting the amount of money they pay to clients. There are many lawyers in private practice who are experts in dealing with ICBC and willing to speak with a client in an initial interview for free.

Can I get legal aid for a motor vehicle offence or if I've had a car accident?

Some provincial and federal driving offences call for mandatory imprisonment. If so, a financially eligible client is entitled to legal aid from the Legal Services Society.

Legal aid is also available to financially eligible people if a conviction is likely to cause them to go to jail or lose a means of earning a living, or they are youths (12 to 17 years old) facing federal offences.

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available online at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide "proof of income," such as a pay stub or a letter from an employer.

For more information

- Chapter 11, "Motor Vehicle Law," and Chapter 12, "Automobile Insurance" of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) have general information about motor vehicle and traffic law. Available online at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button, then the link for "Motor Vehicles."
- Insurance Corporation of British Columbia (ICBC) (Head Office): 151 West Esplanade, North Vancouver, BC, V7M 3H9. For general information, call (604) 661-2800.
- ICBC Dial-a-Claim: (604) 520-8222 in the Lower Mainland, and 1-800-910-4222 (toll free) outside the Lower Mainland.

Statutes and regulations

Criminal Code, R.S.C. 1985, c. C-46

Indian Act, R.S.C. 1985, c. I-5

Indian Reserve Traffic Regulations, C.R.C. 1978, c. 959 [Indian Act]

Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231

Motor Vehicle Act, R.S.B.C. 1996, c. 318

Revised Regulation (1984) under the Insurance (Motor Vehicle) Act, B.C. Reg. 447/83

Transportation Act, S.B.C. 2004, c. 44

Case citations

Casimel v Insurance Corporation of BC, [1994] C.N.L.R. 22; 82 B.C.L.R. (2d) 387 (B.C.C.A.)

Danes v. British Columbia (1985), 61 B.C.L.R. 257; 18 D.L.R. (4th) 253; [1985] 2 C.N.L.R. 19 (B.C.C.A.) (alternate name: Watts v. British Columbia)

Galligos v. Louis (1986) 46 M.V.R. 288; 33 D.L.R. (4th) 638 (B.C.C.A.)

R. v. Bellegarde [1984] 1 C.N.L.R. 98 (Sask.Q.B.)

R. v. Bigeagle, (1978) 43 C.C.C. (2d) 528 (Sask. C.A.)

R. v. Francis, [1988] 1 S.C.R. 1025; [1988] 4 C.N.L.R. 98 (S.C.C.)

13. Prisoners

13. Prisoners

This chapter covers:

- The rights of convicted prisoners serving a sentence in federal or provincial prison
- How to apply for parole
- What happens if an inmate doesn't follow prison rules
- What support is available for Aboriginal prisoners
- Legal aid help

Definitions

Earned remission: When an inmate earns a credit of one day for each full two days served in prison.

Jurisdiction: The right and power to make law or interpret and apply the law.

Sanctions: Penalties for not following rules.

Segregation: Being separated from the other prisoners.

What this chapter doesn't cover

This chapter does not deal with the rights of people in jail who have been accused of a crime but not yet convicted of it. Such prisoners are often said to be "on remand" and are usually held separately and treated differently from sentenced prisoners.

Common client problems

- I am facing a disciplinary hearing in prison.
- I want to apply for parole or conditional release from prison.
- I am Aboriginal and need access to culturally appropriate support in prison.

General law

Jurisdiction for prisons is divided between the federal parliament and the provinces. The federal government operates correctional facilities (formerly called penitentiaries) for people who have been sentenced to at least two years in prison. The province operates correctional facilities for people awaiting sentencing or serving sentences of less than two years.

Federal correctional facilities are operated by the Correctional Service of Canada and regulated under the *Corrections and Conditional Release Act* and *Corrections and Conditional Release Regulations*.

BC correctional centres are operated by the BC Corrections Branch of the Ministry of Public Safety and Solicitor General, and regulated under the provincial *Correction Act* and *Correction Act Regulation*.

Earned remission

Under both federal and provincial law, prisoners who comply with institutional rules and participate in programs are entitled to **earned remission**, which means they are released after serving two-thirds of their sentence.

Earned remission can be taken away by breaking prison disciplinary rules (see "Prison discipline" below) or by breaching a condition of parole (see "Denial or loss of parole" below).

Parole

Under both federal and provincial law, a prisoner is entitled to apply for day parole or full parole after serving a portion of their sentence.

Day parole

Most federal and provincial prisoners are eligible to apply for day parole after one-sixth of their sentence. However, day parole is generally limited to prisoners attending treatment or programs not available in prison. Day parole requires 24-hour supervision or electronic monitoring.

Full parole

Full parole enables prisoners to complete a portion of their sentence in the community, as long as they comply with certain conditions. The purpose of parole is to assist the prisoner's re-integration into society.

Most prisoners are eligible for full parole after one-third of their sentence or seven years, whichever is less. Some first-time federal prisoners are eligible for parole after a shorter period (see *Corrections and Conditional Release Act*, s. 125). The *Criminal Code* sets out longer minimum parole eligibility periods for very serious offences.

To apply for parole

A prisoner who is serving a sentence in a federal prison applies for parole to the National Parole Board. A prisoner who is serving a sentence in a provincial prison applies to the Board of Parole for the Province of British Columbia. Prison officials will facilitate the application process.

The application should be started well in advance of the eligibility date. Parole boards will consider the applicant's criminal record, institutional record, a community risk assessment from corrections officials, the nature of the offence, and the impact it had on the victims. The applicant will have the opportunity to review these materials before the hearing, and the right to attend the hearing.

Under the *Corrections and Conditional Release Act*, s. 102, before it grants parole, the parole panel must be satisfied that:

- the offender will not present an undue risk of re-offending during the remainder of the sentence, and
- the release of the offender will contribute to the re-integration of the offender into society.

Denial or loss of parole

A parolee will be required to report to a parole supervisor and abide by such conditions as a curfew or electronic monitoring. A parolee who violates one of these conditions will be returned to prison, with a loss of **earned remission**.

A federal prisoner who is denied parole may, within two months after the decision, appeal to the Appeal Division of the National Parole Board (see *Corrections and Conditional Release Regulations*, s. 168).

A provincial prisoner who is denied parole may, within 30 days after the decision, apply to the chair of BC's Board of Parole to re-examine the decision on the grounds that the board:

- exceeded or failed to exercise its jurisdiction,
- didn't follow proper or prescribed procedures or policies, or
- erred in law.

The prisoner may re-apply for parole after 60 days.

Prison discipline

Prisoners who do not follow prison rules or do not participate in programs aimed at their rehabilitation and reintegration into society may be subject to discipline.

Disciplinary offences in federal prisons are listed in section 40 of the federal *Corrections and Conditional Release Act*. Disciplinary offences in provincial prisons are listed in section 20 of the *Correction Act Regulation*.

Federal and provincial prison staff are required to attempt to resolve minor disciplinary matters informally. If this is not possible, or if the offence is more serious, there will be a disciplinary hearing before another prison official or an independent panel.

A prisoner has the right to be present at the hearing under most circumstances (see *Corrections and Conditional Release Act*, s. 43, *Correction Act Regulation*, s. 26). Offences must be proved beyond a reasonable doubt.

Disciplinary **sanctions** are listed in section 44 of the *Corrections and Conditional Release Act* and section 27 of the *Correction Act Regulation*. Possible sanctions include a reprimand, fine, restitution order (which requires the offender to pay an amount directly to the victim of the offence), loss of privileges and **earned remission**, and **segregation**. Segregation is only used in the most serious cases.

Disciplinary review

There is no appeal or review procedure for disciplinary **sanctions** in federal prisons.

A provincial prisoner may apply (within seven days after the decision) to the prison director for a review of the decision (see *Correction Act Regulation*, s. 29).

A prisoner has the right to have counsel if a disciplinary hearing is likely to lead to a loss of liberty such as **segregation** or loss of **earned remission** (see *Howard v. Stony Mountain Institution*). However, this does not mean that they are necessarily entitled to legal aid (see *Winters v. Legal Services Society*).

A person who is dissatisfied with the results of a disciplinary review or appeal may apply for judicial review. See Appendix A for more information about judicial reviews.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Common client questions

- I am facing discipline in prison; what can I do?
- How do I apply for parole?
- What support is available to help my relative with healing while they are in prison?
- Can I get legal aid?

I am facing discipline in prison; what can I do?

Your client has the right to a hearing and the right to be present at that hearing. The alleged disciplinary offence must be proved beyond a reasonable doubt before a **sanction** is imposed.

If your client is facing a loss of liberty, such as **segregation** or loss of **earned remission**, they are entitled to counsel. Some prisons have inmate advocates who can assist them.

Disciplining an Aboriginal prisoner for spiritual practices, such as tobacco use or the possession of spiritual items, such as a prayer bundle, may be contrary to the *Canadian Charter of Rights and Freedoms* (see *Regina Correctional Centre v. Saskatchewan* and *Bearshirt v. The Queen*).

Sections 100 and 101 of the federal *Corrections and Conditional Release Regulations* protect the right to express one's spirituality in a federal prison.

How do I apply for parole?

Most prisoners are eligible for full parole after serving one-third of their sentence. Your client should begin preparing for a parole application several weeks before their eligibility date.

The parole board's main concerns are whether:

- someone will commit another offence while on parole, or otherwise violate their parole conditions; and
- parole will help reintegrate the prisoner into society.

The board is also concerned about the environment the prisoner will enter while on parole. Many Aboriginal clients come from a home community (often an Indian reserve) where they have a large number of family and friends. Returning to this community may provide excellent support. However, the parole board will be wary if this environment contributed to the original offense.

What support is available to help my relative with healing while they are in prison?

The Correctional Service of Canada has established an Aboriginal Initiatives Branch to deliver culturally appropriate services and programs to Aboriginal people in federal prisons. This branch also assists Aboriginal communities in developing community corrections programs.

There is no equivalent in the provincial prison system, though most institutions offer native brotherhood, elders' visits, sweat lodges, and programs aimed at Aboriginal prisoners.

The Correctional Service of Canada operates the Kwìkwèxwelhp Institution near Mission, British Columbia. It focuses on Aboriginal offenders and facilitates spiritual and cultural teachings.

Part of the process for any offender sentenced to prison is an assessment of which institution is most appropriate. Factors in this assessment include the nature of the offence, the security risk of the offender, and the programs and services offered in the various institutions.

To get some help for someone in prison who needs healing, start with the nearest probation (community corrections) office. To find a community corrections office, look under "Corrections" in the British Columbia section of the blue pages of the phone book.

If a client has a relative who is applying for federal parole or is already on federal parole, contact the federal parole office. Look under "Correctional Facilities, Institutions and Programs" in the Government of Canada section of the blue pages of the phone book.

Remember that prison officials, probation officers, and parole supervisors are generally very receptive to support from the family and friends of a prisoner. For Aboriginal prisoners, the importance of being close to their family and home community has been recognized by the courts as a right under the *Canadian Charter of Rights and Freedoms* (see *R. v. Daniels*).

Can I get legal aid?

Even though prisoners may be entitled to a legal aid lawyer for disciplinary hearings and parole hearings, your client's situation may not be covered by legal aid. The Supreme Court of Canada's decision in *Winters v. Legal Services Society* acknowledged the right to a lawyer but found that the extent of legal support was limited by the *Legal Services Society Act* and available funding.

Legal aid services are delivered in British Columbia through the Legal Services Society (LSS) and the West Coast Prison Justice Society (WCPJS). Your client should contact the LSS Call Centre first, which will make a referral to the WCPJS. Services range from legal advice to representation by a lawyer.

If your client is in prison, they can contact the LSS Call Centre at the following numbers:

- Federal prisons: 1-888-839-8889 (toll free)
- Provincial prisons: (604) 681-9736

The Legal Services Society generally approves representation for prisoners who are facing:

- internal disciplinary hearings,
- involuntary transfers to higher security,
- detention hearings at the point of statutory release,
- segregation, and
- parole suspension or revocation.

The West Coast Prison Justice Society can also advise prisoners on a range of other legal matters. Its number is (604) 853-3114.

Legal aid financial eligibility guidelines

People have to be financial eligible to get legal aid. The financial eligibility guidelines are online at www.lss.bc.ca. Look under Legal aid > Legal representation.

Help your client by getting them in touch with a legal aid office. A list of legal aid offices is available on the LSS website at www.lss.bc.ca. Look under Legal aid > Legal aid offices.

Your client will be required to provide proof of income, such as a pay stub or a letter from an employer.

For more information

- *Planning for Success* (John Howard Society). An excellent guide for provincial prisoners applying for parole. Available online at www.jhslmbc.ca/publications.html.
- *Provincial Inmate Guide to Parole* (Board of Parole for the Province of BC). Available at www.gov.bc.ca/bcparole. Click "Brochures."
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then"Parole."
- LawLINK: www.lawlink.bc.ca. Click the "Crime" button, then look for information on corrections and parole.

Statutes and regulations

Canadian Charter of Rights and Freedoms, Being Part 1 of the Constitution Act, 1982 [being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11]

Correction Act, S.B.C. 2004, c. 46

Correction Act Regulation, B.C. Reg. 58/2005 [Correction Act]

Corrections and Conditional Release Act, S.C. 1992, c. 20

Corrections and Conditional Release Regulations SOR/92-620 [Corrections and Conditional Release Act]

Criminal Code, R.S.C. 1985, c. C-46

Legal Services Society Act, S.B.C. 2002, c. 30

Case citations

Bearshirt v. The Queen, [1987] 2 C.N.L.R. 55 (Alta. Q.B.)

Howard v. Stony Mountain Institution, [1984] 2 F.C. 642 (Fed. C.A.)

R. v. Daniels, [1990] 4 C.N.L.R. 51 (Sask. Q.B.)

Regina Correctional Centre v. Saskatchewan (Department of Justice) (1995), 133 Sask. R. 61; (1995) 30 C.R.R. (2d) 371 (Sask. Q.B.)

Winters v. Legal Services Society (1999), 73 B.C.L.R. (3d) 193; [1999] 3 S.C.R. 160 (S.C.C.)

14. Residential School Abuse

14. Residential School Abuse

July 2011

This chapter has been replaced by the *Indian Residential Schools Settlement: The Independent Assessment Process and the Common Experience Payment* fact sheet and *A Guide to the Indian Residential Schools Settlement*. Please refer to these resources — and the Aboriginal section of the Legal Services Society website — for up-to-date information.

15. Schools

15. Schools

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

This chapter covers:

- Who has **jurisdiction** over schools
- The process for challenging school disciplinary decisions
- The process for challenging post-secondary education funding decisions

Common client problems

- My child has been unfairly disciplined at school.
- I have been turned down or limited by my band or Aboriginal organization for post-secondary funding.

General law

Kindergarten to Grade 12

The province has **jurisdiction** over education in the province, including preschool, kindergarten to Grade 12 (K–12), community colleges, and universities.

However, under the *Indian Act (*ss. 4, 114 – 122*)*, the federal government has jurisdiction over education for Indian children who live on reserve. At the K–12 level, the federal government:

- provides funding to the province on a per capita basis for Indian students enrolled in provincial schools; or
- establishes, operates, and maintains schools for Indian children (often known as "Indian Band schools").

Public schools

Public schools in British Columbia are governed by the provincial *School Act*. Under this law:

- Students of school age (generally 5 – 19 years old) have access to a public school education (*School Act,* s. 2).
- Parents have opportunities to consult with school staff and participate in Parent Advisory Councils (*School Act,* s. 7[2]).
- The school board of trustees sets up a code of conduct for students, and the school principal authorizes school rules (*School Act,* s. 6).
- The principal of the school has primary responsibility for the discipline of students under policies of the school board of trustees (*School Regulation,* s. 7).
- Agreements are made with local Indian band councils for the education of Indian children (*School Act,* s. 86[3]), including the teaching of an Indian language in the school (*School Regulation,* s. 14).

Independent schools

Some Indian Band schools are registered as independent schools and come under provincial jurisdiction (*Independent School Act*). These schools are certified by the province and must meet provincial standards. They are entitled to receive, free of charge, standard provincial school textbooks and curriculum materials.

The principal of an independent school is responsible for administering and supervising the school, and this responsibility includes disciplining students.

Other Indian Band schools

Other Indian Band schools are not registered as independent schools and come under federal jurisdiction. Although the Minister of Indian and Northern Affairs has the authority under section 115 of the *Indian Act* to provide for and make regulations about standards for buildings, equipment, teaching, education, inspection, and discipline in connection with Indian Band schools, there are no regulations in place. Instead, these matters are left to the school.

> **Note:** The Nisga'a people have effective control of the K–12 schools in their territory. However, they operate these schools through the provincial public school system as School District 92.

Funding for post-secondary education

Through Indian and Northern Affairs Canada, the federal government also provides some funding for post-secondary Indian and Inuit students through the Post-Secondary Student Support Program. Funding is available to support:

- tuition,
- travel, and
- living expenses.

Post-Secondary Student Support Program funds are usually provided to the Indian band for distribution. Bands have considerable freedom in setting priorities for the funding.

For more information, go to the website of Indian and Northern Affairs Canada at www.ainc-inac.gc.ca. Click the "A – Z Index" button and look under "Post-secondary education."

Aboriginal legal issues

Common client questions

- I feel my child has been unfairly disciplined at school. What can I do?
- I was turned down by my band for post-secondary education funding. What can I do?

I feel my Aboriginal child has been unfairly disciplined at school. What can I do?

What the client should do to address this problem depends on what kind of school the child attends. You can give your client the following general information:

If the child is in public school

The principal of a public school is ultimately responsible for discipline under school rules established by the principal and a code of conduct established by the school board and enforced by the principal (*School Act*, s. 6; *School Regulation*, s. 7).

The first step in addressing a school disciplinary issue is to make sure that your client has all the facts. A parent is entitled to meet with school staff to establish those facts (*School Act*, s. 7[2]).

Your client should get a copy of the school rules and the code of conduct and follow the process it describes for voicing concerns. Most codes of conduct contain a procedure for the process. For serious issues, the code of conduct may say there must be a formal hearing and an appeal, usually to the school board.

If the child is in an independent school

Discipline in independent schools is the responsibility of the principal. Although the *Independent School Act* does not set out requirements for school rules and a code of conduct, independent schools are regulated by the province.

These schools can and should have standards and procedures for disciplinary matters that are similar to those in the public schools. Your client should follow the same steps as for a public school.

If the child is in a federally regulated school

The principal of a federally regulated school is likely the person responsible for discipline. It is also likely that the school has a set of rules and a code of conduct.

Suggest that your client ask the principal for a copy of any rules that may be in place and follow the procedures set out there.

If no formal procedures are in place, your client may have recourse to the band council.

Judicial review

Even if there are no formal school rules dealing with your child's disciplinary issue, the "principles of natural justice" apply to school discipline. This means your client should be entitled to:

- information about what happened,
- a fair opportunity to respond, and
- reasons for the decision.

If these principles are not followed or if the final decision is unreasonable, your client may be able to go to judicial review (see *Skyrme v. Board of School Trustees of School District No. 89 [Shuswap]*). However, the procedure is complicated. There are time limits and technical and legal issues. If your client wants a judicial review, they

need to talk to a lawyer as soon as possible. See Appendix A of this guide for more about judicial reviews.

> **Note:** Judicial reviews of decisions made by a provincially regulated school go to the Supreme Court of British Columbia. Judicial reviews of decisions made by federally regulated schools go to the Federal Court. For more on judicial reviews, see Appendix A.

I was turned down by my band for post-secondary education funding. What can I do?

Post-secondary education for status Indians and Inuit people is currently funded in part through the Indian and Northern Affairs Post-Secondary Student Support Program. The distribution of the funds is generally administered for status Indians by their band.

Many bands will have written guidelines and an education committee that makes funding decisions. If your client has been turned down for necessary funding for tuition support, travel support, or living expenses, they should ask the band education staff or band administrator for a copy of the band's guidelines for post-secondary education funding. They should then follow any procedures the band has in place to review or appeal its funding decision. If no formal procedures are in place, your client may want to bring it up with the band council.

Judicial review

Even if there are no procedures in place for your client to challenge the band's funding decision, the "principles of natural justice" apply to school funding, and your client should be entitled to:

- information about the application criteria,
- a fair and unbiased opportunity to meet the application criteria, and
- reasons for being turned down for funding.

If these principles are not followed or if the final decision is unreasonable, your client may be able to go to judicial review. But time limits and technical legal issues can make court procedures complicated. If your client wants a judicial review, they should talk to a lawyer as soon as possible. See Appendix A of this guide for more information about judicial reviews.

> **Note:** If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Statutes and regulations

Independent School Act, R.S.B.C. 1996, c. 216

Indian Act, R.S.C. 1985, c. I-5

School Act, R.S.B.C. 1996, c. 412

School Regulation, B.C. Reg. 265/89 [School Act]

Case citation

Skyrme v. Board of School Trustees of School District No. 89 (Shuswap), 1993 CanLII

16. Social Assistance

16. Social Assistance

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

This chapter covers:

- The kinds of social assistance benefits available in BC
- How to apply for social assistance on and off reserve
- How to appeal a benefits decision on and off reserve

Common client problems

- I need to apply for social assistance and don't know where to go.
- I have been turned down for social assistance/my social assistance benefit has been cut off, and I need to know how to appeal.

General law

Social assistance is also called welfare. It consists of funds and services provided to people who don't have enough money from any other source to meet their basic needs.

Social assistance benefits on and off reserve in British Columbia include:

- Regular benefits for shelter (rent, phone, utilities) and support (food and other living expenses)
- Disability benefits for shelter and support (rates are higher than for regular benefits)
- Hardship assistance for people in temporary need to pay for basic needs
- Guardian financial assistance for people caring for children other than their own
- Various allowances for specific needs such as diet, work clothes, school start-up, natal expenses, relocation expenses, and burial and cremation expenses

To get social assistance, the applicant and any dependant adult must be a Canadian citizen, a landed immigrant, an approved refugee, or a sponsored immigrant who the sponsor cannot support.

Off reserve

The province has **jurisdiction** over social assistance off reserve. It administers its programs through the Ministry of Employment and Income Assistance.

A person who lives off reserve applies for social assistance at the nearest office of the provincial Ministry of Employment and Income Assistance.

On reserve

A person who lives on reserve applies for social assistance through the social development worker of the "administering authority." The administering authority

is usually the reserve's Indian band, but could be a tribal council or other First Nations administrative entity.

The federal government has jurisdiction over welfare provided on reserve. It administers its program through a policy of Indian and Northern Affairs Canada (INAC). This policy is set out in INAC's *Social Development Policy and Procedure Guide*.

The federal government has agreed to harmonize social assistance on reserve with social assistance elsewhere in the province. For that reason, social assistance on and off reserve in BC are similar. However, sometimes changes to social assistance benefits on reserve lag behind those in the rest of the province by several months.

Note: Nisga'a Lands are no longer Indian reserves, so INAC's Social Development Policy and Procedures no longer apply to those areas. Although the Nisga'a negotiated law-making authority over the delivery of social services to Nisga'a citizens, to date, the Nisga'a government is applying provincial social assistance law and standards.

Aboriginal legal issues

Common client questions

- Where do I apply for social assistance?
- How do I appeal a decision turning me down or cutting me off social assistance?

Where do I apply for social assistance?

If your clients have questions about social assistance, refer them to the Legal Services Society booklets listed under "For more information" at the end of this chapter. You can also give them the following general information.

Where your client applies for welfare depends on where they live:

- Off reserve: Apply to the nearest office of the provincial Ministry of Employment and Income Assistance.
- On reserve: Apply to the Indian band or "administering authority." Contact the band office to find out how to make an application for social assistance.

Appointments are usually required.

When your client makes the appointment, they must be sure to ask what documents to bring. Your client will probably need:

- two pieces of identification (one with picture) for self and spouse;
- one piece of identification for each dependant child;
- an up-to-date bank book or statement;
- recent receipts for shelter, fuel, and utilities;

- pay stubs for any recent family income, including WorkSafeBC or Employment Insurance benefits; and
- documents about assets (e.g., car, boat, house).

How do I appeal a decision turning me down or cutting me off social assistance?

Refer your clients to the Legal Services Society booklets listed under "For more information" at the end of this chapter. You can also give your clients the following general information.

On reserve

Make sure your client knows who the reserve's administering authority is. Provide them with the following steps in the appeal process:

Administrative review

Your client has the right to get a review of a social development worker's decision to either:

- turn down their application for benefits, or
- reduce, suspend, or cancel their allowance or service.

If your client is already getting benefits and the decision is made to discontinue or reduce them, your client has a right to continue to receive benefits until the matter is resolved.

Your client will have to ask the social development worker for a Request for Administrative Review form. They must complete the form and mail it back or deliver it *within 20 business days* after they got the initial decision.

Indian and Northern Affairs Canada (INAC) will appoint a person to review the Request for Administrative Review. It might take another 20 business days to do this. INAC will then write its decision on an Administrative Review Decision and Request for Appeals Committee form.

Appeal hearing

If your client disagrees with the decision, they can complete Part 3 of the Administrative Review Decision and Request for Appeals Committee form explaining why they do not agree with the review decision. Your client must return this form *within seven business days* after they got the review decision.

There will be an appeal committee of three people. Your client chooses one person, INAC chooses one person, and those two choose a chairperson. The committee will schedule an appeal hearing.

Your client must attend the appeal hearing and take any relevant documents and witnesses. You may accompany your client to the hearing.

The appeal committee will decide by majority vote whether to accept or reject the social development worker's initial decision.

Note: Although the *Social Development Policies and Procedures Guide* says that the appeal committee can consider any "relevant information," it also says that it can only consider information, records, or testimony submitted for Administrative Review. It is therefore important to make a complete and thorough submission at the Administrative Review stage.

INAC review

The manager of INAC's Social Development Unit will review the appeal committee's decision. The manger will endorse the decision if they feel it is consistent with INAC policy. If not, the manager will meet with the chairperson to try to reach an agreement as to how to proceed. They will tell the administering authority.

Judicial review

If your client disagrees with the decision, they may be able to apply to the Federal Court for judicial review. This is a complicated process involving time limits and technical and legal issues. Your client needs to speak to a lawyer as soon as possible. See Appendix A of this guide for more information about judicial reviews.

Off reserve

Help your client by printing out the Legal Services Society fact sheets on appeals (see "For more information" to find them online). Depending on what stage of appeal your client is at, give them fact sheet 8a: *Welfare and Appeals: Step 1: Reconsideration*, or fact sheet 8b: *Welfare and Appeals: Step 2: Tribunal Hearing*.

Go through the information with your client. *Point out the time limits* and check to see that your client understands them. With minor differences, the process and timeframes for reconsideration and appeal are similar to those for on-reserve appeals (above).

Give your client the following general information:

- The process begins by completing the Request for Reconsideration form with all relevant documents.
- If your client is not satisfied with the Reconsideration decision, they can ask for a Tribunal Hearing.

Note: It is extremely important that your client include all relevant documentation at the Request for Reconsideration stage. If the matter goes to an appeal hearing, your client may only rely on supporting information submitted with the Request for Reconsideration.

Note: If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

For more information

The following booklets and fact sheets on this topic are essential:

- For information about welfare **on reserve:** *Social Assistance on Reserve in British Columbia*
- For information about welfare **off reserve:** *Your Welfare Rights* and the *Welfare fact sheets* series

These publications are free from the Legal Services Society. To obtain copies for your office, see "To order publications" at the end of this guide. They are also available online at www.lss.bc.ca. Go to Resources > Publications > Publications by subject > Welfare.

- Chapter 21 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about social assistance. Available online at www.lslap.bc.ca.
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then the link to "Income Support."
- LawLINK: www.lawlink.bc.ca. Click the "Welfare" button.
- PovNet: www.povnet.org. Click "Find an Advocate" to find a local advocate who has expertise in welfare issues. Most welfare advocates deal with off-reserve welfare, but phone the advocate and find out.

Statutes and regulations

Employment and Assistance Act, S.B.C. 2002, c. 40

Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41

Employment and Assistance Regulation, B.C. Reg. 263/2002 [Employment and Assistance Act]

Employment and Assistance for Persons with Disabilities Regulation, B.C. Reg. 265/2002 [Employment and Assistance for Persons with Disabilities Act]

Employment and Assistance Act and Employment and Assistance for Persons with Disabilities Act Forms Regulation, B.C. Reg. 315/2005

17. Taxation

17. Taxation

Definitions

Indian: A person who is registered or entitled to be registered as an Indian under the *Indian Act*.

Exempt/Exemptions: Things that aren't included; in this chapter, things that aren't taxable.

This chapter covers:

- The different kinds of taxes
- Which taxes **Indians** on reserve don't have to pay
- Which taxes Aboriginal people off reserve have to pay

Common client problems

- I am Aboriginal and want to know if I have to pay PST, GST, excise tax, and customs duties on my purchases.
- I am Aboriginal and want to know if I have to pay income tax on my earnings or Employment Insurance benefits.

General law

Both the federal government and the provincial government have the authority to tax and impose royalties and duties on income and commercial transactions.

The different kinds of taxes include:

- Income tax: Both the federal and the provincial government impose taxes on the income of individuals and the income and capital of corporations.
- Sales tax: The federal government imposes a Goods and Services Tax on most consumer transactions. BC also imposes a provincial sales tax on most consumer transactions.
- Property tax: Municipalities, including regional districts, impose property taxes on residential, industrial, and commercial real estate in BC. (Municipalities come under provincial authority.)
- Excise tax: Both the federal and provincial government impose taxes on certain goods such as gasoline, cigarettes, and alcohol.
- Other taxes: From time to time, the federal and provincial governments impose taxes on other consumer items. For example, BC has an 8 percent tax on hotel accommodation.

What doesn't get taxed under the Indian Act

Section 87(1) of the *Indian Act* says the following property of an **Indian** or an Indian band isn't taxable:

- an interest in reserve or surrendered lands, and
- personal property situated on a reserve.

Section 90(1) of the *Indian Act* says that the following personal property is "situated on reserve" and therefore isn't taxable:

- personal property purchased by the government with Indian money or money allocated by Parliament for the use and benefit of Indians or bands; and
- money from a treaty or other agreement between the government and a band.

Taxes on Nisga'a Lands

Nisga'a Lands are no longer Indian reserves, so sections 87 and 90 of the *Indian Act* no longer apply there. However, in their treaty, the Nisga'a negotiated to keep the tax **exemptions** under those sections for 8 years (in the case of sales taxes) and 12 years (in the case of personal income tax). This means that for the next few years, the Nisga'a get the same *Indian Act* tax exemptions as other Indians. After that, they will have to pay federal and provincial taxes.

Aboriginal legal issues

Common client questions

- Do I have to pay GST, PST, and other transaction taxes?
- Do I have to pay customs duties?
- Do I have to pay tax on my earned income or Employment Insurance benefits?
- When is income "situated on reserve"?

Do I have to pay GST, PST and other transaction taxes?

If a client wants to dispute a tax issue, they should talk to a lawyer. However, give your client the following general information.

The *Indian Act* tax **exemptions** apply only to **Indians** and Indian bands. They do not apply to other Aboriginal people, such as Inuit and Métis. They also don't apply to corporations owned and operated by Indians (see *Kinookimaw Beach Association v. HMTQ [Saskatchewan]*).

Whether or not these taxes are payable depends on the "point of sale" — meaning where the sales transaction takes place. If it is on reserve, the *Indian Act* exemptions apply. If it is off reserve, the *Indian Act* exemptions don't apply.

There can be a dispute over where the "point of sale" is. For example, if the product is delivered by the seller to the reserve, the point of sale may be considered "on reserve."

If your Indian client buys a motor vehicle on reserve, it is exempt from tax even if they intend to move it off reserve almost immediately (see *Danes v. British Columbia*). This exemption applies to Indians even if they don't live on reserve but buy the motor vehicle on reserve.

On the other hand, if you buy goods off reserve, they are taxable even if the goods will be consumed entirely on reserve (see *Union of New Brunswick Indians v. New Brunswick [Minister of Finance]*).

Do I have to pay customs duties?

Customs duties are taxes that the government charges an importer or exporter who brings goods into the country or takes them out of the country. Aboriginal people have been unsuccessful in arguing that the *Indian Act* exemptions apply to customs duties, even if the point of entry to the country is on an Indian reserve (see *Mitchell v. Minister of National Revenue*).

However, it might be possible to argue that cross-border trade is an important feature of a tribe's identity, and therefore an Aboriginal right protected by section 35 of the *Constitution Act, 1982*. This is a complex legal argument. A client who has a dispute about cross-border trade should talk to a lawyer.

Do I have to pay tax on my earned income or Employment Insurance benefits?

Income is "personal property," so the income of an **Indian** or a band situated on reserve is **exempt** from taxation under section 87 of the *Indian Act* (see *Nowegijick v. R.*)

This **exemption** also applies to Employment Insurance benefits, where the income that generated the benefits was situated on reserve (see *Williams v. Canada*).

> **Note:** Even if your client is not required to pay income tax, they may still be required to file an income tax return (see *R. v. Point*).

When is income "situated on reserve"?

The courts look at a number of factors to determine whether or not your client's income is situated on or off reserve. These include:

- the location of the employer,
- the residence of the client,
- the place from which the cheques are issued, and
- the location where the work was performed (*Williams v. Canada*).

The courts will also consider the amount of benefit to the reserve of the work performed by your client (see *Shilling v. Canada [Minister of National Revenue]*).

Analyzing income tax exemptions can get complicated, as in these two cases:

- The income of an **Indian** living on reserve and performing 50 percent of his work on reserve, but whose office, place of payment, and bank are off reserve, was found to be **exempt** from taxation (see *Clarke v. Minister of National Revenue*).
- The income of an Indian living on reserve and working in a factory partially on reserve and partially off reserve was found to be exempt from taxation, even though the person performed the majority of his duties in the off-reserve part of the factory. The court put weight on the fact that the land lease from the band to the factory required the hiring of band members (see *Amos v. R.*).

Note: The Canada Revenue Agency sets out its view of the income tax exemptions in its *Indian Act Exemption for Employment Income Guidelines*. A person could rely on these guidelines, but still argue that income should be exempt if it falls outside the guidelines. However, this would be a technical legal argument and your client would need to talk to a lawyer.

For more information

- *Native Law* by Jack Woodward (Carswell). See "To order publications" at the end of this guide.

Statutes and regulations

Employment Insurance Act, S.C. 1996, c. 23

Excise Tax Act, R.S.C. 1985, c. E-5

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Indian Act, R.S.C. 1985, c. I-5

Social Service Tax Act, R.S.B.C. 1986, c. 431

Tobacco Tax Act, R.S.B.C. 1996, c. 452

Case citations

Amos v. Canada, [1999] 1 C.N.L.R. 7; (1998) 98 D.T.C. 1740 (T.C.C.)

Clarke v. Minister of National Revenue, (1997) 148 D.L.R. (4th) 314;[1997] 3 F.C. 269 (Fed. C.A.) (alternate name: Folster v. R.)

Kinookimaw Beach Association v. HMTQ (Saskatchewan), [1979] 6 WWR 84; [1979] 4 C.N.L.R. 101 (Sask. C.A.)

Mitchell v. Minister of National Revenue, [2001] 3 C.N.L.R. 122 (S.C.C.)

Nowegijick v. R., [1983] 1 S.C.R. 29; [1983] 2 C.N.L.R. 89 (S.C.C.)

R. v. Point (1957), 22 W.W.R. 527; (1957) 119 C.C.C. 117 (B.C.C.A.)

Shilling v. Canada (Minister of National Revenue) (1999) 176 D.L.R. (4th) 226; [1999] 4 F.C. 178 (F.C.T.D.); (2001) 201 D.L.R.(4th) 523; [2001] 3 C.N.L.R. 332 (Fed.C.A.)

Union of New Brunswick Indians v. New Brunswick (Minister of Finance), [1998] 3 C.N.L.R. 295; [1998] 1 S.C.R. 1161 (S.C.C.)

Williams v. Canada (Minister of National Revenue), [1992] 1 S.C.R. 877; [1992] 3 C.N.L.R. 181 (S.C.C.)

18. Wills and Estates

18. Wills and Estates

This chapter has been replaced by *A Guide to Wills and Estates on Reserve.* Please refer to this resource — and the Aboriginal section of the Legal Services Society website — for up-to-date information.

19. Work

19. Work

Definitions

Jurisdiction: The right and power to make law or interpret and apply the law.

Exempt/Exemptions: Things that aren't included; in this chapter, things that aren't taxable.

This chapter covers:

- The laws that apply to employment
- Which laws apply to Aboriginal employees and employers
- How to get Workers' Compensation
- What to do if you've been fired
- What to do if you've been discriminated against

Common client problems

- My employer didn't give me benefits.
- I've been fired from my job with an Aboriginal organization.
- I've been discriminated against in the workplace.
- Deductions for Workers' Compensation have been taken out of my honorarium cheque.
- I've been denied Employment Insurance benefits.

General law

Employment law describes the legal relationship between an employer and an employee.

Jurisdiction for employment law is split between the federal parliament and the provinces. The federal government regulates the employment relationship in "federal works, undertakings or businesses." The province legislates in other areas.

The *Canada Labour Code* is the main piece of federal legislation about employment in "federal works, undertakings or businesses" for both union and non-union workers. In general, it regulates employment by band councils and employment activities specific to Aboriginal people.

The BC *Employment Standards Act* sets out minimum standards for employment under provincial jurisdiction. The *Industrial Relations Act* of British Columbia regulates unionized employment and collective bargaining.

The common law is also important in employment law, especially in the area of wrongful dismissal.

WorkSafeBC

WorkSafeBC is the new name for the Workers' Compensation Board.

Regulations under the provincial *Workers' Compensation Act* set the safety standards for the workplace in British Columbia. The act also provides benefits to workers in "compulsory industries" (most workplaces) who are injured on the job. These benefits include:

- compensation for lost wages,

- rehabilitation support, and
- pensions for permanent injuries.

Workers' Compensation benefits are paid to workers regardless of whether they, their employer, or a third party are at fault for the injury. In exchange for coverage under the act, the injured worker loses the right to sue a negligent employer in court. However, WorkSafeBC, which administers the *Workers' Compensation Act*, can sue a negligent third party in the worker's name.

A worker who is unhappy with a decision of WorkSafeBC can usually request a review by the review board. The time limit for doing so is 90 days after the decision.

Most review board decisions can be appealed to the Workers' Compensation Appeal Tribunal. The time limit for doing so is 30 days after the review board decision.

Employment Insurance

Employment Insurance (EI) is a federally regulated program that provides benefits to workers who find themselves out of work for a period of time through no fault of their own.

Employment Insurance is funded through payments made by the employer and deductions taken from workers' paycheques.

Pregnant women, new parents, people who take care of the very ill, and workers upgrading their skills may also be eligible for EI benefits. There are special benefits for out-of-work fishers.

To qualify for regular EI benefits, an employee must have worked a minimum number of hours (often 600) during a qualifying period (often the previous 12 months).

Information on applying for EI benefits can be found at the Human Resources and Skills Development Canada website at www.hrsdc.gc.ca. Use the drop-down box entitled, "How do I…," and click on "apply for Employment Insurance?"

Employment Insurance Appeals

A worker may appeal most decisions of the Employment Insurance Commission to a "board of referees." The time limit for appealing is *30 days*.

Some decisions of the board of referees may be appealed to the "umpire." The time limit for appealing to the umpire is *60 days*.

> **Note:** If your client wants to find out what's contained about them in the records of a public agency, they have a right to access that information under provincial and federal laws. For more information, see Appendix C of this guide.

Aboriginal legal issues

Common client questions

- Which law applies to me?
- What can I do about my grievance with my employer?

- What can I do if I've been fired?
- Can my income be taxed?
- What can I do if I've been discriminated against?
- Does Workers' Compensation apply to Aboriginal employers?
- Does Employment Insurance apply to Aboriginal employers?

Which law applies to me?

When thinking about how employment law applies to an Aboriginal client, first ask yourself whether the employer comes under federal or provincial **jurisdiction**.

Whether it is federal or provincial law that applies depends on whether your client has a federal or a provincial *employer*. It does not depend on whether an *employee* is Aboriginal or not. This means that a non-Aboriginal person employed by an Indian band comes under the federal *Canada Labour Code* and an Aboriginal employee of a private business on or off reserve comes under provincial legislation.

Indian bands and closely related employers are considered to be "federal works, undertakings or businesses." They therefore fall under the *Canada Labour Code* (see *Public Service Alliance of Canada v. Francis; Paul Band v. R.*)

> **Note:** Since their treaty came into effect on May 11, 2000, the Nisga'a Nation and Nisga'a village governments are no longer Indian bands or "federal works, undertakings or businesses." They now come under provincial employment law jurisdiction.

Canada Labour Code

The courts have found that the *Canada Labour Code* applies to Indian bands, band councils, and tribal councils (see *Pierre v. Roseau River Tribal Council*).

The courts have also found that the *Canada Labour Code* applies to school boards operating schools on reserve (see *Manitoba Teachers' Society v. Fort Alexander Indian Band, Chief and Council*).

Businesses that operate on Indian reserves are generally not "federal works, undertakings or businesses," and therefore fall under provincial legislation. However, it isn't always easy to determine. For example:

- An extended care home that is controlled and operated by the band council and gives priority to Aboriginal people may come under provincial employment **jurisdiction** if many of its residents are non-Aboriginal (see *Westbank First Nation v. British Columbia* [Labour Relations Board]).
- Where a business is closely tied to the administration and operation of the band and has characteristics of "Indianness," it may come under federal jurisdiction and the *Canada Labour Code* (see *Four B Manufacturing Ltd. v. United Garment Workers of America*).

The *Canada Labour Code* governs industrial relations (Part I), occupational health and safety (Part II), and labour standards (Part III).

The labour standards provisions of the code give more protection for non-union employees than provincial legislation, especially in the area of wrongful dismissal (getting fired without just cause).

What can I do about my grievance with my employer?

Both the federal *Canada Labour Code* and the BC *Employment Standards Act* set out minimum standards for such things as wages, hours of work, vacations, and holidays.

For more on the *Canada Labour Code*, see the pamphlets on the website of Human Resources and Skills Development Canada at www.sdc.gc.ca/en/gateways/topics/lxn-pup.shtml.

For more on provincial labour standards, see the guide on the Ministry of Labour and Citizens' Services website at www.labour.gov.bc.ca/esb/igm.

To help a client who has a grievance with their employer, determine who the employer is, then under which legislation the employer falls. If the employer is a "federal work, undertaking or business," the *Canada Labour Code* applies. If not, provincial legislation probably applies.

A unionized employee may want to file a grievance against their employer through the union. A non-unionized employee should start by writing a formal complaint to their employer.

Here are some general questions you can ask your client to determine the exact nature of the grievance:

- Who is the employer?
- What was the nature of the job?
- How long did you work there?
- What were your duties?
- What were the hours of work?
- What was the salary?
- What does the contract of employment (if any) say?
- What can we find out about the employer's policies, procedures, and guidelines about employees (if any)?

What can I do if I've been fired?

If your client has been fired, gather all the information you can about their employment (as outlined above for grievances).

If your client has worked for an employer covered by the *Canada Labour Code* for 12 continuous months, they may file a complaint for unjust dismissal. Outline for your client the complaint procedure. For details, see pamphlet 8: *Unjust Dismissal*, a publication available from Human Resources and Skills Development Canada, listed under "For more information."

Your client has *90 days* from the date of the dismissal to file a complaint with the labour program of Human Resources and Skills Development Canada. An

inspector looks into the complaint to see if it has merit. If the inspector is unable to resolve the complaint, the matter goes to an adjudicator (a person experienced in dispute resolution), who holds a hearing.

The adjudicator may order an employer to:

- Reinstate the employee (give them back their previous position).
- Compensate the employee for lost wages with or without reinstatement.
- Take other appropriate measures, such as deleting any reference to the dismissal from the employee's personal record.

Reinstatement is not a common remedy. It will only be ordered where there has not been "a breakdown in the relationship between employer and employee such as would make reinstatement an impossibility" (see *Atomic Energy of Canada Ltd. v. Sheikholeslami*).

> **Note:** Whether or not an employment relationship has broken down is often complicated in an Aboriginal setting. Your client may be a member of the band or community that employs them. Your client might even be related to a supervisor or co-worker. In such cases, there will be a continuing relationship even if the employment ends, making it difficult for the employer to argue that reinstatement is "an impossibility."

An employee or employer who is unhappy with the adjudicator's decision may apply for a judicial review to the Federal Court of Appeal *within 30 days of the decision*. The grounds for review are set out in section 18.1 of the *Federal Courts Act*.

Your client should talk to a lawyer before making a decision to go to judicial review. See Appendix A for more information about judicial reviews.

Other remedies for wrongful dismissal

A client who is wrongfully dismissed may also sue in court for damages. They could bring an action in the provincial Small Claims Court for damages up to $25,000, or Supreme Court for damages exceeding $25,000 (see *Brougham v. Carrier-Sekani Tribal Council*).

Advise the client to talk to a lawyer before making a decision to go to court.

Can my income be taxed?

Under section 87 of the *Indian Act*, Indians, regardless of whether they live on or off reserve, are **exempt** from taxation on real and personal property located on reserve. This also applies to the Indian bands themselves, but does not apply to Inuit or Métis people.

Income is personal property, so if your client's income is "situated" on reserve, it is exempt from taxation. So are Employment Insurance benefits.

In determining whether income is situated on reserve, courts look at a number of "connecting factors," such as the location of the actual work, the residence of the employer and employee, and the place where the employee is paid.

For a more detailed discussion on taxation, see Chapter 17, Taxation.

What can I do if I've been discriminated against?

Aboriginal people often face discrimination in the workplace. Discrimination on the basis of such things as race, religion, or national or ethnic origin is against human rights laws.

Who your client should make a complaint of discrimination to depends on where they work. The *Canadian Human Rights Act* applies to the federal government and federal businesses. The BC *Human Rights Code* applies to the provincial government and businesses under provincial **jurisdiction**. Most businesses are under provincial jurisdiction. See Chapter 7, Human Rights for how to make a complaint.

In general terms, Indian bands come under federal human rights jurisdiction. However, section 67 of the *Canadian Human Rights Act* states that:

> "Nothing in this act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

Courts have interpreted section 67 to mean that Indian bands and other *Indian Act* entities are subject to the *Canadian Human Rights Act* when they act in a manner that takes them outside of their *Indian Act* authority.

For a more detailed discussion on discrimination in employment, see Chapter 7, Human Rights.

Does Workers' Compensation apply to Aboriginal employers?

The *Workers' Compensation Act* applies to employers throughout the province, whether or not they are Aboriginal, and whether or not they are located on reserve.

Workers employed in Aboriginal operations on reserve have the same right to Workers' Compensation coverage as all other workers in the province. If their employer is operating in a compulsory industry under the *Workers' Compensation Act,* workers are entitled to Workers' Compensation benefits regardless of whether their employer has registered with WorkSafeBC or paid assessments (see *Isaac v. British Columbia [Workers' Compensation Board]*).

If the employer is not covered by the *Workers' Compensation Act*, an employee who is injured on the job may be able to sue the employer in court.

How to get Workers' Compensation

Workers' Compensation can be quite complicated and involve a lot of medical evidence. Unless you have experience with the process, it may be best to refer your client to the office of the Workers' Advisers (under the Ministry of Labour and Citizens' Services). It provides general assistance with applying for reviews and appeals, and occasionally provides representation at review board and appeal hearings.

The Workers' Advisers office can be reached at (250) 387-6121 in Victoria, (604) 660-2421 in Vancouver, or toll free at 1-800-663-7867 elsewhere in BC. Its website is at www.labour.gov.bc.ca/wab.

The Community Legal Assistance Society in Vancouver takes on test cases dealing with Workers' Compensation through its Workers' Compensation Program.

Call (604) 685-3425 in Vancouver, or toll free at 1-888-685-6222 elsewhere in BC. Its website is at www2.povnet.org/clas.

Note: Many Aboriginal communities pay honoraria to elders and other community members for attending meetings and providing traditional knowledge. Workers' Compensation Assessment Policy AP1-38-2(b) says that all "wages, salaries, commissions, holiday pay, bonuses, and piecework, as well as any other means or manner by which a worker is paid for services" are subject to Workers' Compensation deductions. In this interpretation, this includes honoraria.

Does Employment Insurance apply to Aboriginal employers?

Employment Insurance law applies to Aboriginal employers on and off reserve.

If clients have questions about Employment Insurance (EI), suggest they try LawLINK (see "For more information"). The site contains links for both general and specific information, such as how to apply for benefits, including compassionate care benefits, and how to appeal EI decisions. Your clients may find *Employment Insurance*, listed under "Community Legal Education Ontario Publications," particularly useful.

The Community Legal Assistance Society in Vancouver takes on test cases dealing with Employment Insurance through its Employment Insurance Program. Call (604) 685-3425 in Vancouver, or toll free at 1-888-685-6222 elsewhere in BC. Its website is at www2.povnet.org/clas.

For more information

- Chapter 6 of the *LSLAP Manual* (UBC's Law Students' Legal Advice Program) has general information about employment law, focusing on provincial legislation. Chapter 7 deals with Workers' Compensation, and Chapter 8 deals with Employment Insurance. Available online at www.lslap.bc.ca.
- *Native Law* by Jack Woodward (Carswell). See "To order publications."
- *Consolidated Federal Employment and Labour Statutes and Regulations 2006* (Carswell). See "To order publications."
- LawLINK: www.lawlink.bc.ca. Click "Work," and follow the relevant links, such as "Employment Insurance."
- Electronic Law Library: www.bcpl.gov.bc.ca/ell. Click the "Law by Subject" button and then the link for "Employment."
- Labour standards publications: information pamphlets on the Canada Labour Code. Available from Human Resources and Skills Development Canada at www.sdc.gc.ca/en/gateways/topics/lxn-pup.shtml.
- Information about Workers' Compensation and appeals of WorkSafeBC decisions can be found on the Workers' Advisers website at www.labour.gov.bc.ca/wab.

Statutes and regulations

Canada Labour Code, R.S.C. 1985, c. L-2

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Canadian Human Rights Act, R.S.C. 1985, c. H-6

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) reprinted R.S.C.1985, App. II, No.5

Criminal Code, R.S.C. 1985, c. C-46

Employment Insurance Act, S.C. 1996, c. 23

Employment Standards Act, R.S.B.C. 1996, c. 113

Federal Courts Act, R.S.C. 1985, c. F-7

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165

Human Rights Code, R.S.B.C. 1996, c. 210

Indian Act, R.S.C. 1985, c. I-5

Labour Relations Code, R.S.B.C. 1996, c. 244

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Case citations

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Isaac v. British Columbia (Workers Compensation Board), [1995] 1 C.N.L.R. 26; 93 B.C.L.R. (2d) 273 (B.C.C.A.)

Brougham v. Carrier-Sekani Tribal Council, [1998] B.C.J. No. 2319 (QL) (B.C.S.C.)

Four B Manufacturing Ltd. v. United Garment Workers of America, [1980] 1 S.C.R. 1031; [1979], 4 C.N.L.R. 21 (S.C.C.)

Manitoba Teachers' Society v. Fort Alexander Indian Band, Chief and Council, [1985] 1 C.N.L.R. 172 (F.C.T.D.)

Paul Band v. R., [1984] 2 W.W.R. 540; [1984] 1 C.N.L.R. 87 (Alta.C.A.)

Pierre v. Roseau River Tribal Council (T.D.), [1993] 3 F.C. 756 (F.C.T.D.)

Public Service Alliance of Canada v. Francis, [1982] 4 C.N.L.R. 94; [1982] 2 S.C.R. 72 (S.C.C.)

Roseau River Tribal Council v. James and Nelson, [1989] 4 C.N.L.R. 149 (Can.Adj. L.R.B.]

Westbank First Nation v. British Columbia (Labour Relations Board), [1997] .C.J. No. 2410 (B.C.S.C.) affirmed 2000 BCCA 163; (2000) 95 A.C.W.S. (3d) 302 (B.C.C.A.)

To order publications

To order publications

Legal Services Society

The Legal Services Society publishes brochures and booklets on a range of legal topics, including the ones mentioned in this guide. Most of these publications are available online at www.lss.bc.ca (look under Resources > Publications).

To order publications or find out more, contact:

Legal Services Society
400 – 510 Burrard Street
Vancouver, BC V6C 3A8

Telephone: (604) 601-6075
Fax: (604) 682-0965
E-mail: distribution@lss.bc.ca

Carswell

Carswell publishes several of the books mentioned in this guide:

- *Native Law* by Jack Woodward

  Clearly written coverage on virtually every topic relating to the law as it applies to Canada's Indian, Inuit, and Métis people and their lands.

  Note: It is a loose-leaf text service, requiring the purchase of several updates each year, by subscription.

  Cost: $225; annual updates: $200

- *Consolidated Federal Employment and Labour Statutes and Regulations 2006*
- *Entitlement to Indian Status and Membership Codes in Canada* by Larry Gilbert
- *2006 Annotated Indian Act and Aboriginal Constitutional Provisions* by Shin Imai

To order publications or find out more, contact:

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2075 Kennedy Road
Scarborough, ON M1T 3V4

Telephone: 1-800-387-5164
Fax: (416) 298-5082
E-mail: carswell.customerrelations@thompson.com

Website: www.carswell.com
Online catalogue: www.carswell.com/customersupport/order

Canada Law Book Inc.

Canada Law Book publishes *Martin's Annual Criminal Code 2007* by Edward L. Greenspan and Marc Rosenberg.

This book sets out the Criminal Code and other federal criminal legislation, annotated with decisions from all court levels, both reported and unreported. Includes more than 4,300 decisions as well as supplements (including statutory updates and recent amendments), Forms of Charges, and an Offence Grid.

Cost: $84; hardcover

To order, check the publisher's website at www.canadalawbook.ca.

Glossary

Glossary

Aboriginal people

In Canada, this term refers to the descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people — Indians (including non-status Indians), Métis, and Inuit. These are three separate peoples with unique heritages, languages, cultural practices, and spiritual beliefs (see below for definitions).

The term Aboriginal is also used in other countries to refer to the indigenous people or first inhabitants of a given area.

Band

A body of "Indians" who collectively use and benefit from lands or money held by the Crown. Also refers to a body of Indians declared to be a band for the purposes of the *Indian Act*. Each band has its own governing council, usually consisting of one chief and several councillors. Community members choose the chief and councillors by election or, sometimes, through custom. The members of a band generally share common values, traditions, and practices rooted in their ancestral heritage. Today, many bands prefer to be known as First Nations.

Band council

A body elected according to provisions of the *Indian Act* or a Custom Election Code to be responsible for "the good government of the band" and delegated the authority to pass bylaws on reserve lands. Also known as chief and council.

Chief and council

See Band council

Department of Indian and Northern Affairs

The federal department responsible for meeting the government's constitutional, treaty, political, and legal responsibilities to First Nations, Inuit, and others in the North. Referred to as Indian and Northern Affairs Canada or INAC. The department provides a range of programs and services to support First Nations and Inuit communities. Some people call this department "DIA."

First Nation

A term that came into common use in the 1970s to replace the word "Indian." Although it is widely used, no legal definition of First Nation exists. It refers to both status and non-status Indians, and some bands have chosen to replace the word "band" with First Nation in the name of their community.

Indian

A term used historically to describe the first inhabitants of the "New World," and a legal term defined in the *Indian Act*. Under section 2(1) of the act, Indian is defined as "a person who … is registered as an Indian or is entitled to be registered as an Indian."

Although some people still refer to themselves as Indians, the term has been generally replaced by Aboriginal people (as defined in the *Constitution Act, 1982*) or First Nations. First Nations people are also referred to as status Indians, non-status Indians, and treaty Indians (see definitions below).

Indian Act

Canadian federal legislation first passed in 1876 and amended several times since. It sets out certain federal government obligations and regulates the management of Indian reserve lands, money, and other resources.

Indian and Northern Affairs Canada

See Department of Indian and Northern Affairs

Indian reserve

Initially created by colonial governors, and later by the Canadian government, Indian reserves are defined in section 2 of the *Indian Act* as parcels or tracts of land that have been set apart by the federal government for the use and benefit of an Indian band. The legal title to Indian reserve land is vested in the federal government.

Indian status

Refers to an individual's legal status as an Indian, as defined by the *Indian Act*.

Inuit

Indian and Northern Affairs Canada defines the Inuit as "an Aboriginal people in Northern Canada, who live in Nunavut, Northwest Territories, Northern Quebec and Northern Labrador." The singular of Inuit is Inuk.

Métis

Métis are people with both Aboriginal and European (usually French or Scottish) heritage. The Métis have been recognized as a "distinct people with their own customs, way of life and recognizable group identity separate from their Indian, Inuit and European forebears" (*R. v. Powley*).

Mixed ancestry

Many people of mixed ancestry identify themselves as Indian or Inuit. For example, people with some Indian heritage self-identify as Indians even if they are not registered or entitled to registration under the *Indian Act*. Métis people, by definition, have mixed ancestry.

A person of mixed ancestry may claim Aboriginal rights, depending on a number of indicators, including self-identification, ancestral connection, and community acceptance.

Non-status Indian

An "Indian" who is not registered as an Indian under the *Indian Act*. They are not a member of a band and not entitled to any of the rights and benefits specified in the *Indian Act*.

Off reserve

A term used to describe services or objects that are not part of a reserve but relate to Aboriginal people.

Registered Indian

A person who is defined as an Indian under the *Indian Act* and who is registered under the act.

Status Indian

A person who is registered as an Indian under the *Indian Act*. The term is often used interchangeably with Registered Indian.

Treaty Indian

A status Indian who belongs to a First Nation that signed a treaty with the Crown.

Tribal council

A regional group of First Nations members that delivers common services to a group of First Nations.

Parts of this glossary were adapted from terminology listed on the Indian and Northern Affairs Canada website at www.ainc-inac.gc.ca/pr/info/tln_e.html.

Appendix A: Judicial Reviews and Charter Challenges

Appendix A: Judicial Reviews and Charter Challenges

The following information provides more detail on two court procedures referred to in this guide: judicial reviews and Charter challenges.

Judicial reviews

If a client is unhappy with the decision of a public body, they may be able to challenge the decision by going to judicial review. Judicial review means that you apply to the court to have a judge review the decision.

A person generally goes to judicial review to argue that the court's decision was reached unfairly or unreasonably. For example:

- They did not get an impartial hearing or a reasonable opportunity to present their case.
- The body acted outside its jurisdiction.
- The body based its decision on a misinterpretation of the facts.
- The body made a mistake in law in its decision.

Judicial review can be applied for in relation to any public body, including government departments, local authorities, the police, and any organization exercising a public function. The usual remedy if a case succeeds is that the public body will be ordered by the court to reconsider or change its decision.

You can only go to judicial review after you have exhausted all of the appeal procedures for that particular public body.

BC Supreme Court

You go to BC Supreme Court for a judicial review of a decision by a body that comes under provincial jurisdiction. In most cases this is a tribunal. There are different kinds of tribunals. An abitrator under the *Residential Tenancy Act* is one example. Other tribunals include the Human Rights Tribunal and the Labour Relations Board.

For more information about judicial review in BC Supreme Court, see the publications on the Community Legal Assistance Society website at: www2.povnet.org/publications_clas.

Federal Court

You go to the Federal Court for a judicial review of a decision by a body that comes under federal jurisdiction. In most cases this is a tribunal. A Band council is considered a federal tribunal under the *Federal Courts Act*.

The Federal Court has two divisions, the Trial Division and the Appeal Division. Each has authority for judicial review in certain areas.

For more information about judicial review in the Federal Court, contact the Community Legal Assistance Society: (604) 685-3425 or 1-888-685-6222 (toll free).

Note: There are always time limits to applying for judicial review. It is a complicated procedure and your client will need legal advice.

Charter challenges

The *Canadian Charter of Rights and Freedoms* was adopted as part of the constitution in 1982. The Charter protects rights of free speech, free expression, individual liberty and security, and free assembly; guarantees the right to participate in democratic elections and to have a fair and prompt trial; and acknowledges the rights of minority groups.

The federal and provincial governments cannot pass laws that infringe on the freedoms set down in the Charter. Canadian courts interpret and enforce the Charter.

If your client thinks a provincial or federal law or action denies their Charter rights, they can ask a court to rule that the law is invalid or ask the court to order the government to uphold the right that's being denied. When someone does this, they are making "a Charter challenge."

A Charter challenge is a complicated process. First, a person has to show the court that a Charter right was denied. But even if someone can show that, Charter rights are not unlimited or absolute. They are balanced against the rights of others and the interests of the rest of society.

If a court finds a government has denied someone's rights, the court must then decide if the government had a good reason to deny the rights. In other words, the court must decide whether the denial of a Charter right is reasonable and justified in a free and democratic society.

To determine if an action is reasonable and justified, the Supreme Court of Canada must ask three questions:

- Is the law likely to achieve or at least partly achieve its intended purpose?
- Was there some other way the government could have achieved the same purpose without violating anyone's rights or freedoms, or violating them to a lesser degree?
- Is the government's purpose important enough and are the benefits of the law significant enough to justify violating a Charter right?

The more severe the violation of rights, the more difficult it is for government to show that it was justified in denying the rights.

If a court decides that a law discriminates and violates the Charter, it can "strike down" the law. Once a law is struck down, it can no longer be used. The government usually writes a new law that does not discriminate to replace the old one. Challenging a law in court is often the last choice, because going to court is very expensive and takes a long time.

Appendix B: Legal Services Society

Appendix B: Legal Services Society

If your client has a legal problem and a limited income, the Legal Services Society (LSS) can provide help through its legal information, advice, and representation services. The service provided will depend on whether your client's legal problem is covered by legal aid rules and if your client meets the legal aid financial guidelines.

Legal representation

LSS may pay for a lawyer to represent financially eligible people if they have a serious family issue, a child protection matter, or face criminal charges. LSS also covers some mental health and prison issues.

Financial eligibility

To qualify financially for legal representation, a person must have very few assets and a net household income (after allowable deductions) at or below LSS guidelines. The guidelines are online at www.lss.bc.ca (look under Legal aid > Legal representation, "Do I qualify?").

To find out if they qualify, your clients should contact the nearest legal aid office or the LSS Call Centre. They will need to have proof of their income, proof of the value of their assets, and any papers about their case (see "How to apply" under Legal aid > Legal representation). To contact the LSS Call Centre, call:

In the Lower Mainland: 604-408-2172

Outside the Lower Mainland: 1-866-577-2525 (call no charge)

Legal advice

LSS provides a variety of legal advice services including duty counsel, family advice lawyers, Brydges Line, and advice counsel (see below).

Financial eligibility

For some LSS advice services, your client will need to be financially eligible. To qualify, a person's net household income must be at or below LSS guidelines. The guidelines are online at www.lss.bc.ca (look under Legal aid > Legal advice, "Do I qualify for legal advice?").

Your clients should contact the nearest legal aid office or the LSS Call Centre. They should be prepared to answer a few questions about their income when they request advice services. Even if their net income is higher than LSS eligibility limits, they can still get legal information and may qualify for some advice services.

Duty counsel

Duty counsel are lawyers located at courthouses who can provide people with legal advice and assistance. See the LSS website www.lss.bc.ca under Legal aid> Legal advice for full information about the extent and availability of duty counsel services, or call the LSS Call Centre.

Criminal and youth court duty counsel can help if your client is charged with a crime but does not have a lawyer. They will give advice about the charges against your client, court procedures, and your client's legal rights.

Family duty counsel are in most Provincial Courts and in many Supreme Courts to help unrepresented people deal with family law and child protection problems.

Family advice lawyers

In some locations, family advice lawyers are available to give free legal advice to parents with low incomes who are trying to reach an agreement in a separation or divorce. See the LSS website www.lss.bc.ca (Legal Aid > Legal Advice) for available times and locations, or call the LSS Call Centre.

Brydges Line

Lawyers provide emergency legal advice on criminal matters to people who have been arrested or detained and are being investigated by a law enforcement agency. The service is available 24 hours a day, BC-wide.

1-866-458-5500 (call no charge)

Advice counsel

People in custody at a police lock-up awaiting a bail hearing can get legal advice over the telephone during the evenings and on weekends and holidays.

1-888-595-5677 (call no charge)

LawLINE

The LawLINE phone service is discontinued (as of March 26, 2010).

Legal information

LSS provides the following free legal information services to all British Columbians.

Publications

LSS produces legal information and self-help materials in plain language to help people identify, avoid, or resolve common legal problems. Our publications are online in PDF on the LSS website at www.lss.bc.ca (look under "Our publications"). You can find the LSS Aboriginal publications grouped together (click "Our publications" and then "Aboriginal people and the law"). All our publications are also available at legal aid offices.

You can also order LSS publications:

Order online: www.crownpub.bc.ca (click the Legal Services Society image)

Phone: 1-800-663-6105 (call no charge)
250-387-6409 (Victoria)
Fax: 250-387-1120
Mail: Crown Publications
PO Box 9452 Stn Prov Govt
Victoria, BC V8W 9V7

Websites

The Family Law in British Columbia website (www.familylaw.lss.bc.ca) contains general legal information and self-help guides about family law problems. It contains links to LSS family law publications and videos that you can view online, and also links to other resources.

The LSS website (www.lss.bc.ca) contains information about legal aid services, as well as all LSS publications.

Appendix C: Freedom of Information

Appendix C: Freedom of Information

BC's Freedom of Information and Protection of Privacy Act

The purpose of BC's *Freedom of Information and Protection of Privacy Act* is to make public bodies more accountable to the public and to protect personal privacy. The act says that a "public body" is:

(a) a ministry of the government of British Columbia,

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or

(c) a local public body,

but does not include

(d) the office of a person who is a member or officer of the Legislative Assembly, or

(e) the Court of Appeal, Supreme Court or Provincial Court.

Under the act, the public has a right to access records about themselves. However, the act does not apply to some materials, for example certain judicial and legislative documents.

To request access to information, write to the information and privacy office of the public body that you think has the records you want. Describe the records as clearly and completely as possible.

For more information, go to the website of the Office of the Information and Privacy Commissioner (OIPC) at www.oipcbc.org. The Office of the Information and Privacy Commissioner is independent from government and monitors and enforces British Columbia's *Freedom of Information and Protection of Privacy Act*.

Canada's Access to Information Act

The purpose of Canada's *Access to Information Act* is to provide a right of access to information in records under the control of federal government institutions. These institutions are listed in Schedule 1 of the act, and include federal government ministries, the Correctional Service of Canada, the RCMP, the Office of Indian Residential Schools Resolution of Canada, the Canadian Human Rights Commission and many other federal agencies.

The act does *not* include Indian bands or Nisga'a government, though many band documents can be obtained from Indian and Northern Affairs Canada.

To request access to a record under the act, write to the government institution that has control of the record. Describe the records as clearly as possible.

To find out which records government institutions hold, go to the Info Source website at infosource.gc.ca/index_e.asp. Info Source contains a series of publications about the Government of Canada, how it's organized, and what's in its information holdings.

Index

Index

A

Aboriginal Housing Management Association, 61
Aboriginal Initiatives Branch, 118
Aboriginal people
  definition of, 78
  government duty toward, 3
  history of, 3
  social and economic conditions of, 4
  statistics about, 3, 4
Aboriginal rights
  and adoption, 44
  and band membership, 81
  and cross-border trade, 74, 144
  and custom leadership selection, 82
  and discrimination, 66, 67
  and moving from US, 74
  and moving to US, 73
  and "scrip," 52
  and traditional ownership, 58
  claiming, 51, 52
  defense of, 31, 52
  definition of, 3, 50
  infringement of, 52
  of Indians, 51
  of Inuit, 51
  of Métis, 51, 52
  to harvest fish and game, 32, 50–52
Aboriginal title, 3, 50, 51
Abuse and adult guardianship, 101–102
  domestic, 4, 40
  in residential schools. *See* Residential School Abuse
Access and custody for children, 40, 41
Access to Information Act, 84, 184
Adjournments, 28
Administration of will, 148, 151, 152
Admittance to hospital (involuntary), 99
Adoption
  and band membership, 44, 82
  and Indian Act registration, 81
  custom, 43, 44, 81
  provincial, 44, 81
  special provisions for Aboriginal, 44
Adoption Act, 39, 43, 44
Adult Guardianship. *See* Mental Health
Adult Guardianship Act, 99, 101, 102
Alternative dispute resolution (ADR), 123–126
Apprehension of children, 4, 42, 43
Arraignment hearings, 28
Assets
  division upon separation, 40–42
  seizure of, 10–12, 22
  exempt from bankruptcy, 9–12

B

Band council elections. *See* Election of band council (custom); Election of band council (Indian Act)
Band membership
  and aboriginal rights, 81
  and adoption, 82
  and children, 81, 82, 152
  and discrimination, 81
  and judicial review, 85
  and right to reside on reserve, 57–60, 152
  and treaty rights, 81
  entitlement to, 81, 82
  how to apply for, 84
  how to protest if denied, 85
  under band control, 81, 82
  under government control, 81
Banishment from community, 33
Bankruptcy
  alternatives to, 8, 9
  and cultural property, 10–12
  and heritage objects, 12
  and personal property, 9, 11
  and real property, 10, 11
  and reserve land, 10
  and seizure of property, 10–12
  and wages, 10, 11
  assets exempt from, 9–12
  debts not cancelled by, 10
  definition of, 9
  discharge from, 10–12
  eligibility for, 9
  government jurisdiction over, 8
  trustee, 9
    See also Debts
Bankruptcy and Insolvency Act, 8, 9, 12
BC Treaty Process, 51
Beneficiaries
  of treaty rights, 51
  of wills, 57, 148, 150, 152
Benefits. *See* Social Assistance
Bill C-31, 78–80, 83

Board of Parole for BC, 115–117
British Columbia Human Rights Coalition, 66
British Columbia Human Rights Code, 65, 161
British Columbia Human Rights Tribunal, 66, 174
British Columbia Supreme Court, 174
Brydges line, 179, 181
Business Practices and Consumer Protection Act, 16–21
Business Practices and Consumer Protection Authority (BPCPA), 20–21
Business Practices and Consumer Protection Regulation, 20

C

Canada Labour Code, 156, 158, 159
Canada Law Book, 167
Canada Mortgage and Housing Corporation, 60
Canadian Charter of Rights and Freedoms
- and band membership, 81
- and circle sentencing, 32
- and custom election practices, 83
- and discrimination by a law enforcement officer, 95
- and discrimination by an Indian band, 66–68
- and spiritual practices in prison, 117
- overview of Charter challenges, 175

Canadian citizenship, 72
Canadian Human Rights Act, 64, 65, 68, 161
Canadian Human Rights Commission (CHRC), 65, 66, 68, 184
Canadian Human Rights Tribunal, 66
Cancelling consumer contracts. *See* Consumer contracts
Car accidents, 110, 111
Carswell, 166
Certificate of Possession, 57, 58, 151
Charges, criminal. *See* Criminal charges
Charter challenges, 175
- *See also* Canadian Charter of Rights and Freedoms

Child. *See* Children
Child, Family and Community Services Act, 39, 42, 43
Children
- adoption of, 43, 44, 81, 82
- custody and access to, 40, 41
- government responsibility towards, 42, 43
- in wills, 149, 151
- protection of, 42, 43
- removal from home of, 4, 42, 43
- special provisions for Aboriginals, 42, 43
- support/maintenance for, 40, 41, 149

Circle sentencing, 31, 32
Class actions, residential school abuse, 123
Commission for Public Complaints (CPC), 91
Committee (mental health), 99, 101, 103
"Common experience process," 124, 125
Community Legal Assistance Society, 161, 162, 174
Community Living BC, 102
Compensation for residential school abuse, 122–126
Complaints
- about band councils, 84–85
- about human rights, 65–68, 95, 161
- about law enforcement officers, 90–95
  - *See also* Law enforcement complaints

Conditional release (parole), 115–117
Consolidating debts, 9
Constitution Act (1867), 41, 59
Constitution Act (1982)
- and band membership, 81
- and custom elections, 83
- and definition of Aboriginal peoples, 78
- and protection of Aboriginal rights, 50, 67, 144
- and right to custom adoption, 43
- and traditional ownership, 58
- and treaties, 74

Consumer contracts
- breach of conditions of, 19
- cancelling, 16–19, 21
- cemetery, 19
- conditional sales agreements, 22
- continuing service, 18
- definition of, 16
- direct sales, 17–18
- distance sales, 18
- door-to-door sales, 17, 18, 21, 22
- funeral services, 19
- future performance, 18
- illegal, 16
- implied conditions of, 19
- misrepresentation in, 17
- mistake in, 17
- time limits for, 17–19, 21
- time share, 19
- unfair, 17
- unsolicited goods and services, 19

Contracts, consumer. *See* Consumer contracts
Controlled Drugs and Substances Act, 26, 27
Convention refugees, 72
Correction Act, 114
Correction Act Regulation, 114, 116
Correctional facilities/centres, 4, 114, 118
Correctional Service of Canada, 114, 118, 184
Corrections and Conditional Release Act, 114–116
Corrections and Conditional Release Regulations, 114, 116, 117
Council elections. *See* Election of band council (custom); Election of band council (Indian Act)
Court Order Enforcement Act, 8, 9
Court Order Enforcement Exemption Regulation, 9
Court process. *See* Criminal court process
Creditors. *See* Debt collectors
Crime Victim Assistance Program, 126
Criminal charges
  against law enforcement officers, 90
  against residential school abusers, 126
  alternative measures to, 27, 28, 31
  and Aboriginal rights, 31, 32
  and deportation, 74
  for driving offenses, 108, 109
  for first-time offenders, 27
  government jurisdiction over, 26–27
  investigation before, 27, 30
  legal aid for, 28, 31, 33, 34, 178, 179
  options to, 27–28
  police diversion, instead of, 27, 30
  restorative justice, instead of, 27, 30
Criminal Code of Canada
  and illegal contracts, 16
  and options to laying charges, 27
  and parole, 115
  and prohibitions of weapons, 32–33
  driving offenses, 109
  prosecution under, 26, 27
  sentencing under, 31
Criminal court process
  adjournments, 28
  appeals, 28
  arraignment hearings, 28
  circle sentencing, 31, 32
  entering a plea, 28, 30
  first appearance, 28
  going to trial, 28
  missing a court appearance, 29
  overview of, 29
  preliminary inquiry, 28
  sentencing, 28, 31–32
Criminal duty counsel, 179
Criminal Injuries Compensation. *See* Crime Victim Assistance Program
Criminal justice system
  aboriginal barriers to, 30
  aboriginal experience of, 31
  experience of victim in, 126
  explaining to client about, 30
  government jurisdiction over, 26
Cross-border trade, 74, 144
Cultural Property Export and Import Act, 12
Custody and access to children, 40, 41
Custom adoption, 43, 44
Custom leadership selection. *See* Election of band council (custom); Election of band council (Indian Act)
Customs taxes and duties, 74, 144

D

Debt collectors
  and conditional sales agreements, 22
  behaviour of, 20
  harassment by, 19–21
  Indian, 22
  protection from, 20–22
  seizure of property by, 22
Debts
  consolidating, 9
  getting free of, 12
  not cancelled by bankruptcy, 10
  orderly payments for, 9
  proposals to pay part of, 9
  resolving informally, 8
  See also Bankruptcy
Deportation, 74
Designated lands, 60
Discharge from bankruptcy, 10–12
Discipline
  in school system, 130–132
  of prisoners, 116, 117
Disciplinary review, 116, 117
Discrimination
  and band membership, 81
  and Canadian Charter of Rights and Freedoms, 66, 67, 95, 175
  by Indian band, 68
  by law enforcement officer, 95
  in workplace, 161
  in registration under the Indian Act, 78–80

making a complaint about, 65, 66, 68
systemic, 66
See also Human rights
Dismissal (firing), 159, 160
Divorce
and custody and access to children, 40, 41
and family maintenance (support), 40, 41
and property division, 40–42
Divorce Act, 39–41
Domestic violence, 4, 40
Door-to-door sales, 17, 18, 21, 22
Double mother rule, 79, 80
Driving
accidents, 110, 111
licensing, registration, and insurance, 108, 110
offenses, 108–111
See also Motor vehicle laws
Duty counsel, 179

E

Earned remission, 114–117
Education. *See* Schools
Election of band council (custom)
and Bill C-31, 83
and Canadian Charter of Rights and Freedoms, 83
and discrimination, 83
appealing results of, 83, 86
denied right to vote in, 85
judicial reviews of, 83, 85, 86
rules for, 82, 83
Election of band council (Indian Act)
appealing results of, 82, 86
denied right to vote in, 85, 86
eligibility to vote in, 82
eligibility to run in, 82
judicial reviews of, 86
Eligibility
for bankruptcy, 9
for legal aid. *See* Legal aid eligibility
for social assistance, 136
Emigration
from United States, 74
to United States, 73
Employment Insurance (EI)
benefits, 144, 157, 160, 162
Employment Insurance
Commission, 65, 157
Employment law
Canada Labour Code, 156, 158, 159
discrimination, 161
Employment Insurance (EI), 144, 157, 160, 162
firing (dismissal), 159, 160
grievance against employer, 159
honoraria, 162
human rights complaints, 161
income tax, 160
judicial review for job dismissal, 160
jurisdiction over, 156, 158, 159, 161
Nisga'a, 158
provincial labour standards, 159
remedies for wrongful dismissal, 159, 160
safety standards, 156
WorkSafeBC benefits, 156, 157, 161, 162
WorkSafeBC deductions, 162
Employment Standards Act, 156, 159
Enduring power of attorney, 99, 100
Enfranchisement, 78–80
Estate Administration Act, 149
Estates. *See* Wills (and estates)
Evictions, 56
Executor of will, 148, 151, 152
Exemptions
from bankruptcy, 9–12
from customs taxes and duties, 74, 144
from taxation, 60, 142–145, 160
Exporting goods, 74, 144
Extradition, 74

F

Family advice lawyers, 45, 180
Family duty counsel 45, 179
Family justice counsellors, 46, 180
Family law
adoption, 43, 44
child protection, 42, 43
custody and access to children, 40, 41
division of property, 40, 41
family maintenance, 40
government jurisdiction over, 39
legal aid for, 44–46, 178–180
services, 44–46, 178–182
violence in a relationship, 40
Family Law in BC website, 40, 46, 181
Family law services, 44–46, 178–182
Family Maintenance Enforcement Act, 9
Family Maintenance Enforcement Program (FMEP), 41, 46
Family maintenance (support), 40, 41
Family Relations Act, 39–41
Family violence, 40

Federal Child Support Guidelines, 39, 40
Federal Courts Act, 160, 174
Firearms prohibition, 32, 33
Firing (dismissal), 159, 160
First appearance in court, 28
First Nations
  and Independent Assessment Process, 124
  and regulation of reserve lands upon separation, 42
  and treaty negotiations, 51
  websites about, 4, 5
  See also Band membership
First Nations Land Management Act, 42, 60
Fisheries Act offenses, 26, 27, 32, 52
Fishing rights, 31, 32, 50–52
Foreclosure, 57
Foreign nationals, 72
Freedom of information, 184
Freedom of Information and Protection of Privacy Act, 184
Funding for post-secondary students, 131, 133

G

Goods and Services Tax (GST), 142, 143
Green card (US), 73
Group actions, residential school abuse, 123
Guardianship, adult. *See* Mental health

H

Harvesting rights, 31, 32, 50–52
Health Care Consent and Care Facility (Admission) Act, 98, 101
Health Information Line, 102
Health, mental. *See* Mental health
Health-care decisions, 98–101, 103
Heritage Conservation Act, 12
Heritage objects, 12
Homeowners' rights, 57, 58
Homeownership, 57, 58
Hospitalization, involuntary, 99
Housing
  and Certificate of Possession, 57, 58
  and designated lands, 60
  and homeowners' rights, 57, 58
  and ownership on reserve lands, 57, 58
  and "right to possess," 57, 58
  and tenants' rights, 56, 59
  and traditional ownership on reserves, 58
  band authority over, 60
  finding, off reserve, 61
  finding, on reserve, 60
  First Nations control of, 42
  government jurisdiction over, 56, 59
  in bankruptcy, 10
  in debt collection, 22
  on Nisga'a lands, 60
  on surrendered lands, 60
  upon separation, 41, 42
Human rights
  and Aboriginal and treaty rights, 67
  and Canadian Charter of Rights and Freedoms, 66, 67
  and discrimination, 64–68
  and systemic discrimination, 66
  government jurisdiction over, 64, 65, 68
  making a complaint about, 65, 66, 68, 95, 161
Human Rights Code, 65, 161
Hunting rights, 31, 32, 50–52

I

ICBC claims, 110, 111
Immigration
  from United States, 74
  general law, 72
  to United States, 73
Immigration Act, 74
Immigration and Naturalization Act (US), 73, 74
Importing goods, 74, 144
Income taxes, 142, 144, 145, 160
Independent Assessment Process (IAP), 124–126
Independent School Act, 131, 132
Independent schools, 131, 132
Indian Act
  Aboriginal rights, 51
  adoption, 81
  band membership, 81, 85
  bankruptcy, 10–12
  debt collection, 22
  definition of, 3
  discrimination, 68, 161
  education, 130, 131
  enfranchisement, 78, 79
  Indian status, 78
  land ownership, 56–58, 60
  mental health, 102
  protection of property, 10–12, 22
  registration under, 78–81, 83, 84

scrip, 78
separation and divorce, 41
taxation, 142–144
tenancy, 56
traffic regulations, 108, 109
voting rights (band leadership), 82, 83
wills, 148–152
Indian Act Exemption for Employment Income Guidelines, 145
Indian and Northern Affairs Canada (INAC), contacting, 4
Indian Band Election Regulations, 82, 85, 86
Indian band schools, 130–132
See also Schools
Indian Reserve Traffic Regulations, 109
Indian Residential School Resolution Canada (IRSRC), 123–125, 184
Indian status, 3, 78
See also Registration under the Indian Act
Indictable offenses, 28
Industrial Relations Act, 156
Information and Privacy Commissioner, 184
Injuries in workplace, 156, 157, 161
Insolvency, 8, 9
Insurance Corporation of BC, 110, 111
Insurance (Motor Vehicle) Act, 108
Inuit people, 50, 78, 131, 143, 160
See also Registration under the Indian Act
Involuntary admission to hospital, 99

J

Jay Treaty (US), 73, 74
Judicial reviews
in BC Supreme Court, 174
in Federal Court, 174
of actions of law enforcement officers, 94
of band council decisions, 95
of decision about social assistance benefits, 139
of decision on band membership, 85
of dismissal from job, 160
of elections of band councils, 83, 86
of federal bodies, 95
of prison disciplinary review or appeal, 116
of school discipline, 132, 133
of voters' list, 85, 86
overview of, 174, 175
reasons for, 174

L

Labour. *See* Employment law
Labour Relations Board, 174
Land. *See* Reserve lands
Land Title Act, 57
Landed immigrants, 72
Law enforcement complaints
against Aboriginal employer, 95
against band council, 95
against employee of Indian band, 95
against conservation officers, 90, 93, 94
against federal enforcement officers, 90, 94, 95
against fisheries enforcement officers, 90, 94
against municipal police officers, 90–93
against provincial enforcement, officers, 90, 93, 94
against RCMP officers, 90, 91
government jurisdiction over, 90
judicial reviews of, 94, 95
LawLINE, 2, 21, 180, 182
LawLINK, 2, 40, 181
Lawsuits
against law enforcement officers, 94
for car accidents, 110
for injuries in the workplace, 161
for residential school abuse, 122 123, 126
for wrongful dismissal, 160
Lawyer Referral Service, 123
Leadership selection. *See* Election of band council (custom); Election of band council (Indian Act)
Legal action. *See* Lawsuits
Legal aid contact information, 181
Legal aid eligibility
and deportation, 74, 75
and refugee status, 74, 75
financial, 179, 180
for family law matters, 44–46, 178–180
for harvesting offenses, 52, 53
for immigration issues, 74, 75
for mental health issues, 103, 178
for motor vehicle offenses/accidents, 111
for prisoners, 116, 118, 119
for victims of violence, 40, 178
if charged with criminal offense, 28, 31, 33, 34, 178, 179

Legal information outreach workers (LIOWs), 180
Legal Services Society (LSS)
publications of, 166, 181, 182
services of, 178–182
website, 181
Legal Services Society Act, 118
Limitation Act, 122
Living will, 101

M

Maintenance (support), 40, 41, 149
Manufactured Home Park Tenancy Act, 57, 59, 60
Marriage Act, 39
Membership in band. *See* Band membership
Mental health
abuse or neglect (adult guardianship), 101, 102
and legal and financial affairs, 99–101, 103
and personal and health care, 99–101, 103
and planning for the future, 99–101, 103
and power of attorney, 99, 100
and writing wills, 149
committee, 99, 101, 103
consent to health care, 98–101, 103
government jurisdiction over, 98, 102
incompetency/incapacity, 98, 99, 102, 103, 149
involuntary admission to hospital, 99
legal aid, 103, 104, 178
Public Guardian and Trustee's, Office, 99, 101–103
representation agreement, 99–101, 103
Mental Health Act, 98, 99, 103, 178
Mental incompetency/incapacity, 98, 99, 102, 103, 149
Mètis people, 4, 50, 51, 78, 79, 143, 160
Ministry of Children and Family Development, 42
Motor Vehicle Act, 26, 108, 109
Motor vehicle laws
accidents, 110, 111
and ICBC claims, 110, 111
and legal aid, 111
and need for a lawyer, 109–111
exceptions for Aboriginals on reserve, 109, 110
general law, 108
government jurisdiction over, 108
licensing, registration, and insurance, 108, 110
offenses under, 108–111
penalties under, 109
roads for band members only, 109, 110
traffic regulations, 108, 109

N

National Parole Board, 115–117
Neglect (adult guardianship), 101–102
Nisga'a Final Agreement, 42, 51
Nisga'a
and access to information, 184
and human rights, 68
and child protection, 42
and division of real estate assets, 42
and employment law, 158
and harvesting rights, 51
and social assistance, 137
and taxation, 143
and tenancy on lands, 60
and transfer of cultural property when no will, 150
schools, 131
treaty of, 3
Nunavet Final Agreement, 51

O

Ombudsman Act, 93, 94
Ombudsman of BC, 90, 93, 94
Ordering Legal Services Society publications, 166, 181, 182
Ordinary power of attorney, 100

P

Parole
applying for, 115, 117
definition of, 115
denial of, 115, 116
Patients Property Act, 98, 99
Permanent resident card (US), 73
Permanent residents, 72
Personal injury law, 122
Pleas, entering, 28
Police Act, 91, 94
Police Complaint Commissioner, 92, 93
Police officers
complaints about, 90–93
tribal, 94
Police records, 94

Post-secondary funding for students, 131, 133
Post-Secondary Student Support Program, 131
Power of attorney, 99–100
Power of Attorney Act, 98, 100
Preliminary inquiry, 28
Prisoners
and Canadian Charter of Rights and Freedoms, 117, 118
and judicial reviews, 116
denial or loss of parole, 115, 116
disciplinary review, 116
discipline of, 116, 117
earned remission, 114–117
government jurisdiction over, 114
how to apply for parole, 115, 117
legal aid for, 116, 118, 119
overrepresentation of Aboriginal, 3, 4
sanctions, 116, 117
segregation, 116, 117
spiritual practices of, 117, 118
support for healing of, 118
Prohibition
from community, 33
of weapons, 32, 33
Property
and bankruptcy, 10–12
cultural, 11, 12, 150
protection under the Indian Act, 10–12, 22
taxation, 142–145, 160
See also Housing; Reserve lands
Property division
in separation/divorce, 40–42
when no will, 149, 150
Property seizure
by law enforcement officer, 90
fisheries, 32
in bankruptcy, 10–12
in debt collection, 22
of designated lands, 60
wildlife, 32
Proposals to pay debts, 9
Protection of children, 4, 42, 43
Provincial ombudsman, 90, 93, 94
Provincial sales tax (PST), 142, 143
Public Guardian and Trustee, 99, 101–103
Public Guardian and Trustee Act, 99
Public school system, 130, 132
Publications of Legal Services Society, 166, 181, 182

R

RCMP, 65, 90, 91, 184
Refugees, 72
Registration under the Indian Act
after 1985, 80, 81
and adoption, 81
and Canadian Charter of Rights and Freedoms, 80
and discrimination, 79, 80
and scrip, 78, 79
and sexism, 78–80
before 1985, 79
Bill C-31, 78–80, 83
double mother rule, 79, 80
enfranchisement, 78–80
how to apply for, 83, 84
how to protest if denied, 84
Removal of children from home, 4, 42, 43
Renters' rights, 56, 59
Representation agreement, 99–101, 103
Representation Agreement Act, 98, 100
Representation Agreement Resource Centre, 100, 101
Reserve lands
and homeowners' rights, 57, 58
and homeownership, 57, 58
and taxation, 142
and tenants' rights, 56, 59
and traditional ownership, 58
and wills, 150–152
band authority over, 60
Certificate of Possession for, 57, 58
designated lands, 60
First Nations control of, 42
government jurisdiction over, 56, 59
in bankruptcy, 10
in debt collection, 22
"right to possess", 57, 58
right to reside on, 57–60, 152
surrendered lands, 60
upon separation, 41, 42
Residential school abuse
alternative dispute resolution (ADR), 123–126
and Crime Victim Assistance Program, 126
and funeral expenses, 125
and wills, 125
claimants, senior, 124–126
"common experience claimants," 124, 125
compensation for, 122–126

criminal complaints against abuser, 126
group or class actions, 123
history of, 3
Independent Assessment Process for, 124–126
lawsuits, 122, 123, 126
lawyers for, 122, 123
30 percent holdback, 125
Residential Tenancy Act, 56, 57, 59, 60, 174
Resolving debts, 8, 9
Reviews, judicial, 174, 175
See also Judicial Reviews
"Right to possess," 57, 58
Rights. *See* Aboriginal rights; Human rights; Treaty rights
Royal Canadian Mounted Police (RCMP), 65, 90, 91, 184
Royal Canadian Mounted Police Act, 91
Royal Proclamation of 1763, 81, 83

S

Safety in workplace, 156, 157, 161
Sale of Goods Act, 19
Sales contracts. *See* Consumer contracts
Sales, door-to-door, 17, 18, 21, 22
Sales taxes, 142, 143
Sanctions of prisoners, 116, 117
School Act, 130, 132
School Regulation, 130, 132
Schools
abuse in residential. *See* Residential School Abuse
and "principles of natural justice," 132–133
challenging disciplinary decisions in, 132
denied post-secondary funding for, 133
discipline in, 130–132
federally regulated, 130–132
funding for post-secondary students, 131, 133
government jurisdiction over, 130, 131
independent, 131, 132
Indian band, 130–132
judicial reviews of school discipline, 132, 133
Nisga'a, 131
public, 130, 132
Scrip, 78, 79
Segregation of prisoners, 116, 117
Seizure of property
and designated lands, 60
by law enforcement officer, 90
due to fisheries offense, 32
due to wildlife offense, 32
in bankruptcy, 10–12
in debt collection, 22
Selection of band council. *See* Election of band council (custom); Election of band council (Indian Act)
Sentencing. *See* Criminal court process
Separation
and custody and access to children, 40, 41
and family maintenance (support) 40, 41
and property division, 40–42
Sexism, 78–80
Sexual abuse, residential schools, 122–126
Social assistance
and Nisga'a, 137
eligibility for, 136
government jurisdiction over, 136, 137
how to appeal a decision about, 138, 139
how to apply for, 136, 137
judicial reviews of benefits decisions, 139
kinds of benefits, 136
Social Development Policy and Procedure Guide, 137, 139
Spiritual practices, 117, 118
Spousal support, 40, 41
Status Indian, 3, 78
See also Registration under the Indian Act
Student funding (post-secondary), 131, 133
Students. *See* Schools
Suing. *See* Lawsuits
Support (maintenance), 40, 41, 149
Surrendered lands, 60, 142
Survivors. *See* Victims

T

Tax exemptions
of customs taxes and duties, 74, 144
of designated lands, 60
under Indian Act, 142–145, 160
Taxation
and Aboriginal rights, 144
and employment insurance benefits, 144
and Nisga'a lands, 143
and reserve lands, 142
custom duties, 74, 144

different kinds of, 142
filing tax returns, 144
government jurisdiction over, 142
income tax, 142, 144, 145
of "personal property," 142–144
on imported goods, 74, 144
on surrendered land, 142
sales taxes (GST, PST, and other), 142, 143
Taxes. *See* Taxation; Tax exemptions
Tenants' rights, 56, 59
30 percent holdback, 125
Title, Aboriginal, 50–51
Traditional ownership, 58
Traffic regulations. *See* Motor vehicle laws
Trans-boundary trade, 74, 144
Treaty rights
and band membership, 81
and custom leadership elections, 83
and discrimination, 67
defense of, 52
definition of, 3, 50, 51
infringement of, 52
Trials, 28
Tribal police forces, 94
Trustee in bankruptcy, 9

U

United States
deportation, 74
importing goods from, 74, 144
moving from, 74
moving to, 73

V

Victims
of domestic violence, 4, 40, 178
of residential school abuse, 122–126
of violence or personal crimes, 126
Violence in a relationship, 4, 40, 178
Voting rights (band elections), 82, 83, 85, 86

W

Wages (in bankruptcy), 10, 11
Weapons prohibition, 32–33
Welfare. *See* Social assistance
West Coast Prison Justice Society (WCPJS), 118, 119
Wildlife Act offenses, 26, 32, 52
Wills Act, 148, 149, 151
Wills (and estates)
and children, 149, 151
and reserve lands, 149–152
appealing decision about (Indian Act), 150
beneficiaries of, 148, 150, 152
challenging (provincial), 149
division of property when no will, 149, 150
executor and administration of, 148, 151, 152
jurisdiction over, 148, 149, 152
Nisga'a laws, 150
validity of, 148–150
writing of, 151
Wills Variation Act, 149
Work. *See* Employment law
Workers' Compensation Act, 156, 157, 161
Workers' Compensation Appeal Tribunal, 157
Workers' Compensation Board. *See* WorkSafeBC
WorkSafeBC, 156, 157, 161, 162

Y

Youth court duty counsel, 179
Youth Criminal Justice Act, 26
Yukon Umbrella Agreement, 51

Are you Aboriginal?

Do you have a bail hearing?

Are you being sentenced for a crime?

Do you know about First Nations Court?

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

If you self-identify as Aboriginal (meaning if you think of yourself as Aboriginal), you have rights under the Criminal Code, often called Gladue rights. These rights apply to all Aboriginal people, whether you're status or non-status Indian, First Nations, Métis, or Inuit, and whether you live on or off reserve. In addition to your Gladue rights, you may be able to have your bail or sentencing hearing in the First Nations Court of BC in New Westminster.

What is Gladue?

In 1999, an Aboriginal woman named Jamie Gladue had her case heard by the Supreme Court of Canada. As a result of this case, the court said that there are too many Aboriginal people being sent to jail. The court also said that Aboriginal people face racism in Canada and in the justice system.

Now the word Gladue refers to the special consideration that judges must give an Aboriginal person when sentencing or setting bail. When your lawyer informs the court of your Gladue rights, the judge must keep in mind that Aboriginal offenders face special circumstances. When the judge is sentencing you, he or she must consider *all options other than jail.*

Note: It's *your right* to have Gladue applied to your case. Your lawyer should do everything possible to make sure your Gladue rights are respected. More information on Gladue is available in the *Gladue Primer* (see www.legalaid.bc.ca/publications), or from the booklet *Are You Aboriginal?* (see www.cleonet.ca). If you don't have a lawyer, the judge must still apply Gladue.

NOTE

Contact legal aid immediately to find out if you qualify for a free lawyer.

Legal aid:

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

Will Gladue keep me out of jail?

Gladue does not automatically mean you won't get jail time. However, your sentence could involve participating in a program that would help you to address the issues that got you into trouble with the law in the first place. This is called a **community sentence**. A community sentence might involve participating in drug rehabilitation or counselling. If you do a community sentence, you may get less or no time in jail.

However, the judge may have no choice but to send you to jail. If this is the case, the judge must still apply Gladue when deciding how long your jail sentence will be.

What is a Gladue report?

In order to apply Gladue, the judge needs to understand your circumstances and to know what kinds of community sentences are available. To help the judge, your lawyer needs to provide the court with a **Gladue report**. A Gladue report gives the judge, the **Crown counsel** (the government lawyer), and your lawyer as much information as possible about you. The other side of this fact sheet has some questions that can help you and your lawyer get started on preparing your Gladue report.

Continued over

Do you know about First Nations Court?

You may be able to have your bail or sentencing hearing at First Nations Court. First Nations Court takes a **restorative** approach to sentencing. This means that the judge, Crown counsel, Aboriginal community members, and your family will work with you and your lawyer to come up with a healing plan.

First Nations Court sits once a month and hears criminal and related child protection matters. For more information, contact the First Nations Court expanded **duty counsel** at **1-877-601-6066** (call no charge from anywhere in BC).

Duty counsel are lawyers who give free legal advice. If you don't have a lawyer, the expanded duty counsel can give you legal advice on or *before* the day of court. He or she can also help you prepare your Gladue report.

Note: It's *your choice* whether you exercise your Gladue rights or apply to have your matter heard in First Nations Court. Talk to your lawyer about what's best for you. If you don't have a lawyer, contact the First Nations Court expanded duty counsel at **1-877-601-6066** (call no charge from anywhere in BC).

Some questions for preparing your Gladue report

Note: Some of this information may be private or sensitive for you and you may not like to talk about it. If you don't want this information discussed out loud in court, you can ask your lawyer to give this information in writing to the judge and the government lawyer.

- Where are you from? Do you live in a city or in a rural area? Do you live on reserve?
- Have you ever been in foster care? Have other members of your family been in foster care (your parents, brothers and sisters, or your children)?
- Did you or a family member attend an Indian residential school?
- Have you ever struggled with **substance abuse** (drug or alcohol abuse)? Have you been affected by someone else's substance abuse?
- What level of education do you have? What is your reading level?
- Did you or a family member have any issues that may have affected your opportunities to learn, such as trauma, Fetal Alcohol Spectrum Disorder (FASD), or learning disabilities?

Your important details

Name of lawyer: _____

Bail hearing: _____

Trial hearing: _____

Sentencing hearing: _____

Special thanks to Community Legal Education Ontario for use of the information in their booklet *Are you Aboriginal?* (2009).

Legal Services Society
www.legalaid.bc.ca

Benefits, Services, and Resources for Aboriginal Peoples

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Contents

What this booklet is about....1
Health Insurance BC benefits....2
Non-insured health benefits....6
How to appeal a decision on health benefits....22
Indian Residential Schools Settlement Agreement....25
Housing benefits on reserve....31
Housing benefits off reserve....35
Employment benefits....42
Seniors benefits....49
Taxation benefits....51
Immigration and residency in the USA....57
Post-secondary education benefits....60
Resources to help you get work....65
Indian status and band membership rights....70
Human rights....76
Legal aid....82

Important — Please read

We have tried to make the information in this booklet as accurate as possible. However, it is only a summary. Policies and procedures are always changing. Use this booklet as a guide, but please double-check the information with the appropriate agency or government department.

Please note that this booklet explains benefits, services, and resources in general. It isn't intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help.

This booklet includes the most recent information on benefits available from the organizations who provide them. The information is up to date as of October 2007.

In this booklet, the term "Aboriginal" applies to any Canadian Indian or member of a First Nation, Métis, or Inuit living in BC. Canadian Indians or members of a First Nation include treaty, status, or registered Indians, as well as non-status and non-registered Indians. The benefits, services, and resources described in this booklet may not be available to all Aboriginal people(s), non-residents, or citizens of countries other than Canada. Check the relevant section of the booklet to find out whether you are eligible for the benefit it refers to.

What this booklet is about

This booklet explains the benefits, services, and resources that may be available to registered Indians who live on or off reserve, and provides information on how to apply for these benefits. However, it presents general information only and is not intended as legal advice.

The benefits, services, and resources discussed in this booklet that may be available to you as a registered Indian include the following:

- Medical care
- Dental care
- Counselling services for Indian Residential School survivors
- Housing
- Employment benefits
- Immigration to the US
- Education benefits
- Resources to help you get work
- Status registration
- Human rights

Health Insurance BC benefits

The province of British Columbia provides health care programs, including a Medical Services Plan (MSP) for people who live in BC.

Who is eligible for the Medical Services Plan?

To be eligible, you must live in BC, have lived there for at least three months, and be enrolled with MSP. Status Indian and Inuit residents can have their MSP premiums covered for basic medical benefits through Health Canada's First Nations and Inuit Health Branch (FNIHB).

How do I apply for the Medical Services Plan?

To get an application for MSP, contact the Non-Insured Health Benefits program (NIHB) of Health Canada's FNIHB. NIHB can answer any questions you may have about benefits or the application.

Forward your completed application to:

Health Canada
First Nations and Inuit Health Branch
Non-Insured Health Benefits
540 – 757 W. Hastings Street
Vancouver, BC V6C 3E6
Phone: 1-800-317-7878 (call no charge)
Fax: 1-888-299-9222

NIHB will verify your registry or status number and authorize the payment of premiums on your behalf. MSP will then send you a CareCard. Newborn children are automatically covered for their first three months, allowing time for the parents to receive their child's birth certificate. Parents have up to one year to register their child with Indian and Northern Affairs Canada.

If you or your dependants aren't registered Indians or registered Inuit, you must enroll with MSP and arrange to pay the premiums yourself. Several payment options are available through MSP, including premium assistance. If you're getting income assistance, your employment and assistance worker may arrange to have these benefits paid on your behalf. If you're working, your employer may pay them for you. Note that if you don't enroll, MSP may still bill you for premiums and services.

What are the benefits of the BC Medical Services Plan?

MSP provides the following benefits:

- The services of a doctor or a specialist (for example, a surgeon or a psychiatrist) who is referred by a doctor
- Maternity care by a doctor, midwife, or a specialist (for example, a gynecologist) who is referred by a doctor

- X-ray and laboratory services that a doctor, midwife, podiatrist, dental surgeon, or oral surgeon orders
- Some dental and oral surgery that needs to be performed in a hospital
- Orthodontic services related to facial abnormalities

MSP provides the following additional benefits:

- Routine eye examinations for people 18 years of age and younger and 65 and older
- Medically necessary eye examinations for all people
- Surgical podiatry

You may also be entitled to the services of a chiropractor, massage therapist, naturopath, physical therapist, and non-surgical podiatrist who is referred by a doctor (subject to a patient visit charge and limit of 10 visits per year, split among the five services any way you choose).

How do I get Medical Services Plan benefits?

Show your CareCard to your doctor or other medical service provider. The card is free when you enrol with MSP for the first time. You're entitled to one free replacement card every five years. There is a $20 service fee for any additional replacement cards within the same five-year period. But if your CareCard is damaged through normal use, you may return the damaged card to MSP and get a replacement card for free.

For more information about MSP, see the website at **www.healthservices.gov.bc.ca/msp**.

Or call:

Health Insurance BC automated phone service
(604) 683-7151 (Lower Mainland)
1-800-663-7100 (call no charge, outside the Lower Mainland)

Non-insured health benefits

The NIHB program for eligible First Nations and Inuit people is administered by either the First Nations and Inuit Health Branch (FNIHB) of Health Canada or your Aboriginal community. See **www.hc-sc.gc.ca** (click on "First Nations & Inuit Health") for more information about NIHB. If you have questions, contact FNIHB at 1-800-317-7878 (call no charge).

Who is eligible for non-insured health benefits?

All status Indians, recognized Inuit, and infants less than one year old who have at least one parent who is an eligible recipient are eligible for non-insured health benefits.

How do I apply for non-insured health benefits?

To get non-insured health benefits, you need both a CareCard and a status card.

If you moved to British Columbia within the last three months and haven't yet received your CareCard, you may provide proof of other provincial health care coverage instead.

What does the Non-Insured Health Benefits Program cover?

Non-insured health benefits include:

- prescription drugs from an approved list
- non-prescription over-the-counter drugs from an approved list
- medical supplies and equipment from an approved list
- eyeglasses and the services of an optometrist or ophthalmologist every two years (more often if the patient has a chronic illness or disease such as diabetes)
- dental care that is approved before the work is done
- short-term crisis intervention mental health counselling
- patient transportation for medically necessary care

How do I get prescription drugs?

To get prescription drugs through NIHB, follow these steps:

1. Take your doctor or dentist's prescription to a pharmacy with a qualified pharmacist on duty.
2. Identify yourself as someone eligible for non-insured health benefits and show your CareCard and status card. The pharmacist

will then proceed with standard billing for NIHB clients.

3. If your prescription isn't on the list of authorized drugs, your pharmacist has to contact the Drug Exception Centre in Ottawa. If your pharmacist doesn't know how to do that, he or she will have to contact NIHB for assistance.

What non-prescription benefits can I get?

You can ask your doctor to give you a prescription for necessary non-prescription over-the-counter drugs, such as:

- Antihistamines
- Cough syrup
- Acetaminophen (like Tylenol)
- Non-steroidal anti-inflammatory drugs (like Ibuprofen)
- Antacids
- Laxatives
- Suntan/sunblock lotions
- Vitamins (but not multi-vitamins)

If you are not sure whether the non-prescription benefit you need is covered or not, ask your doctor to check for you. Health Canada provides a Drug Benefit List online at **www.hc-sc.gc.ca/index_e.html** (click on "First Nations & Inuit Health — Non-insured Health Benefits — Benefit Information — Drug Benefits"). This list is intended for licensed

health-care practitioners, and lists drugs by category (type of drug, such as antihistamines) or by name (there is also an online A – Z Index of Drug Products).

How do I get medical supplies and equipment?

If your doctor recommends treatment that requires supplies or equipment, you will need to get pre-authorization from NIHB. Take your doctor's prescription to the supplier you intend to use. The supplier will fill out a request form and fax it to NIHB.

If you have a doctor's prescription, the following items may be covered:

- Hearing aids and hearing aid supplies requested by an audiologist
- Dressings
- Bathing aids
- Prosthetics and orthotics
- Diabetic supplies
- IUDs (intrauterine devices) and condoms

The following items may be covered with special approval:

- Walkers
- Canes
- Wheelchairs

Note: For more information about pre-authorization, talk to your pharmacist or the community health representative or nurse at your band, or call Health Canada at 1-800-665-2289 (call no charge).

How can I get eyeglasses and the services of an eye-care practitioner?

To get an eye examination through NIHB, you will need prior approval (the approved rate for an eye examination in BC is currently $44.83). Once you get approval:

1. Visit a licensed eye-care practitioner (optometrist or ophthalmologist) for an eye examination.
2. If you need eyeglasses, take your prescription, CareCard, and status card to the product supplier.

The supplier will submit a request for approval to NIHB. It may take up to 10 working days to get approval, but then your supplier will be able to fill your prescription.

If you have an eye-care practitioner's prescription, the following items may be covered:

- Eyeglasses
- Eyeglass repairs
- Eye prosthesis (artificial eye)
- Other vision benefits, depending on your specific medical needs

Note: Eyeglasses are covered once every two years. In general, NIHB will cover a percentage of the cost of your entire prescription. Depending on the type of frames or lenses you choose, you may have to pay part of the cost. To get details on the limits to program coverage, ask your optometrist, product supplier, or NIHB.

How can I get dental care?

The NIHB program for eligible First Nations and Inuit people includes dental care. This dental program is designed so that you get dental services when you need them. It takes your personal dental history into account.

Your licensed dentist, denturist, or dental specialist can submit a claim for most dental services up to $800 in the same 12-month period directly to NIHB.

When visiting your dentist, confirm with the dental assistant that the services you're about to receive are covered by NIHB. If the services aren't covered, ask the dental assistant to do a pre-determination (approval before treatment) request to NIHB.

Basic dental services include the following:

- Exams
- X-rays
- Fluoride treatment for children
- Preventative sealants for children
- Space maintenance for children

- Polishing (once a year)
- Scaling and root planing
- Fillings
- Servicing of dentures
- Emergency treatment for pain relief

Major dental services that require "pre-determination" (approval before treatment) include:

- Root canal treatment
- Crowns
- Bridges
- Dentures
- Gum treatment
- Removing teeth
- Straightening (orthodontics)
- Sedation

Basic dental treatment that exceeds $800 in a 12-month period requires NIHB approval. Your dentist may request this approval. Note, however, that the dental program doesn't cover some types of dental treatment.

NIHB currently pays 87 percent of covered dental services (based on the dental fee schedule for 2006). Most dentists accept this level of payment, but some may bill you for the difference that isn't covered. Find out what your dentist's policy is before you start treatment. If you choose a dentist who charges more than the amount covered by NIHB, you will be responsible for paying the difference.

Some dentists may ask you to pay directly for their services. If so, you must apply for reimbursement from NIHB. If the cost exceeds the approved amount, you will be reimbursed only for the NIHB amount.

You're entitled to ask your dentist questions about your choices for treatment, their cost, and the risks of both treatment and non-treatment. Getting answers to your questions means that you can make the decisions that are right for you.

In all cases, it's important for NIHB to review your planned treatment after your first checkup. After this review (usually within 10 working days), your dentist can tell you how much of the cost you'll have to cover yourself.

Note: Your dentist may recommend a treatment that is not covered. For example, a dentist may recommend a fixed partial denture (bridge), but NIHB may limit the amount it will provide for the bridge because a less expensive tooth replacement is an option. In this case, you're responsible for paying the difference in cost.

For any questions about the dental benefits available to you, call the Dental Predetermination Line at 1-888-321-5003 (call no charge). For orthodontic information, call 1-866-227-0943 or fax 1-866-227-0957 (no charge).

How can I get short-term crisis intervention counselling?

Short-term crisis intervention counselling when no other services are available is one of the benefits available to you under NIHB. You can get this counselling from Health Canada-approved therapists who are registered with either a clinical psychology or a clinical social work regulatory body or, in some cases, from other service providers. To find short-term crisis intervention counselling:

1. Contact your local FNIHB regional office to get the names of approved therapists in your area.
2. Contact a therapist to make an appointment.
3. At your first meeting, the therapist will provide a treatment plan that must be reviewed by NIHB to get approval for continued treatment.

   The services covered under NIHB are:

   - Initial assessment
   - Development of a treatment plan
   - Therapist's fees
   - Associated travel costs for the professional mental health therapist if it's considered cost-effective to provide such services in your community

NIHB covers up to 20 sessions with the therapist.

Note: If you apply for counselling and are turned down, you can appeal the decision.

Through MSP, you can see a psychiatrist for an unlimited amount of time as long as you were referred to this service by your doctor.

To get short-term crisis intervention counselling, call:

Mental Health Crisis Intervention
(604) 666-2358 (Lower Mainland)

OR

NIHB Medical Client Information
1-800-317-7878 (call no charge) and ask to speak to someone in the Mental Health Program

How can I get alcohol or drug treatment?

To get a referral to an in-patient residential treatment program, you need to have attended six sessions with a certified alcohol and drug counsellor or community social worker first. The worker will be familiar with the referral process for your area, and will do the necessary paperwork to get you the appropriate service.

Currently, clients can be referred to an approved list of treatment centres for BC. FNIHB clients are mainly referred to programs funded by the National Native Alcohol and Drug Abuse Program. Referrals to other programs are considered on a case-by-case basis and are

primarily for methadone maintenance clients, concurrent disorder clients (mental health/addictions), and youth, and when there are gaps in service.

National Native Alcohol and Drug Abuse Program

Phone: (613) 946-1961

For a list of programs, see:

www.hc-sc.gc.ca/index_e.html (click on "First Nations & Inuit Health — Substance Use and Treatment of Addictions," then click on the link under "What Information Is Available?")

For a detailed list of Aboriginal counselling agencies and treatment centres, see *A Guide to Aboriginal Organizations and Services in British Columbia*, published by the Ministry of Aboriginal Relations and Reconciliation. You can read this guide online at **www.gov.bc.ca/arr** (click on the link called "Guide to Aboriginal Organizations").

To get a copy, call Enquiry BC and ask for the Intergovernmental and Community Relations Branch:

Phone: (604) 660-2421 (Lower Mainland)

Phone: 1-800-663-7867 (call no charge, outside the Lower Mainland)

Or call the branch directly at (250) 387-2199 (Victoria).

The following are a few of the agencies that offer other Aboriginal counselling resources:

Hey-way'noqu' Healing Circle for Addictions Society
401 – 1638 E. Broadway
Vancouver, BC V5N 1W1
Phone: (604) 874-1831
Fax: (604) 874-5235
Website: **www.firstnationstreatment.org/heywaynoqu.htm**

Native Courtworker and Counselling Association of BC
50 Powell Street
Vancouver, BC V6A 1E9
Phone: (604) 687-0281
Phone: 1-877-771-9444 (Powell Street office, call no charge)
Phone: 1-877-811-1190 (head office, call no charge)
Fax: (604) 687-5119
E-mail: nccabc@nccabc.net
Website: **www.nccabc.ca**

Note: The Native Courtworker and Counselling Association has offices throughout BC. To find the office closest to you, contact the head office.

Can I apply for transportation and other costs for medically necessary care?

Transportation and other required services may be covered to get medically necessary care at the nearest appropriate medical/dental professional. Transportation services are either provided by FNIHB regional offices or by First Nations and Inuit organizations who get funding under contribution agreements made with Health Canada. For information and travel approval:

1. If you live on reserve, contact your local health or band office or local First Nations and Inuit Health Authority.

   If you live off reserve, contact your FNIHB regional office or the responsible First Nations and Inuit Health Authority.

2. Try to make all your appointments for the same day to avoid repeat trips.

3. After the appointment, get a confirmation of attendance slip or certification stamp from the medical/dental service provider.

4. Follow all the guidelines given to you by the authority/office that approved the transportation or other service.

If approved, the following services may be covered:

- Land and water transportation
- Scheduled and chartered airlines
- Road and air ambulance
- Meals and lodging
- Escort and/or interpreter services
- Travel to the nearest health clinic/hospital to receive health services not available in your home community

Note: If you're turned down for one of these benefits, you can ask for a Benefit Exception Review. If the Benefit Exception Review is also turned down, you can appeal that decision.

The Inter Tribal Health Authority administers its own vision care, medical supplies and equipment, mental health, and patient travel benefits. For information about this organization's health benefits, contact:

Inter Tribal Health Authority
534 Centre Street
Nanaimo, BC V9R 4Z3
Phone: (250) 753-3990
Phone: 1-877-777-4842 (call no charge)
Fax: (250) 753-5224
Fax: 1-877-778-4842 (fax no charge)
E-mail: itha@intertribalhealth.ca
Website: **www.intertribalhealth.ca**

For additional information, contact Health Canada at 1-800-317-7878 (call no charge).

What health benefits are there for the Nisga'a?

All registered Nisga'a people who live in Canada are entitled to non-insured health benefits administered by the Nisga'a Valley Health Authority. These benefits supplement the health services provided by BC's Medical Services Plan. These benefits currently include the following:

- Drugs
- Medical supplies and equipment
- Vision care
- Dental and orthodontic care
- Medical transportation
- Mental health services (on and off reserve)
- MSP premium payments (through the head office in New Aiyansh)

To get these benefits, Nisga'a people must hold a valid Nisga'a CareCard. Contact the Nisga'a Valley Health Authority office for your community:

Gitlax̲t'aamiks (New Aiyansh)
PO Box 234
4920 Tait Avenue
New Aiyansh, BC V0J 1A0
Phone: (250) 633-5000
Phone: 1-888-233-2212 (call no charge)
Fax: (250) 633-2512

Gingolx (Kincolith)
Phone: (250) 326-4258
Phone: 1-800-991-5671 (call no charge)
Fax: (250) 326-4276

Laxgalts'ap (Greenville)
Phone: (250) 621-3274
Phone: 1-800-991-5667 (call no charge)
Fax: (250) 621-3263

Gitwinksihlkw (Canyon)
Phone: (250) 633-2611
Phone: 1-800-993-3513 (call no charge)
Fax: (250) 633-2641

How to appeal a decision on health benefits

You have the right to appeal a decision that denies you coverage for non-insured health benefits administered by Health Canada. Three levels of appeal are available to you.

To start an appeal, write a letter that includes:

- information from your doctor or other health care provider that gives the medical reason why you need the benefit,
- the consequences to you of not getting the proposed treatment, and
- the results of your relevant medical tests.

Where you send your appeal letter depends on the type of benefit you're applying for. For denied drug benefits, send your letter to:

Director
NIHB Drug Exception Centre
First Nations and Inuit Health Branch
Health Canada
55 Metcalfe Street, 5th Floor
Address Locator 4005A
Ottawa, ON K1A 0K9

For denied medical supplies and equipment, vision care, dental, mental health, and medical transportation benefits, send your letter to:

Regional Manager
Non-Insured Health Benefits
First Nations and Inuit Health Branch
Health Canada
540 – 757 W. Hastings Street
Vancouver, BC V6C 3E6
Phone: (604) 666-3331
Phone: 1-800-317-7878 (call no charge)

If you don't agree with the first appeal decision, you can go to the second appeal level by contacting the regional director, Pacific Region, Medical Services Branch. The regional director will refer your appeal to a committee for a recommendation. If you don't agree with that committee's decision, you can go to the final level by appealing to the director general, Non-Insured Health Benefits.

If your band or tribal council administers non-insured health benefits, contact your community health representative for appeal procedures.

For more information about non-insured health benefits, contact the FNIHB at:

First Nations and Inuit Health Branch
540 – 757 W. Hastings Street
Vancouver, BC V6C 3E6
Phone: (604) 666-3331 (Lower Mainland)
Phone: 1-800-317-7878 (call no charge, outside the Lower Mainland)
Fax: (604) 666-3200 (Lower Mainland)
Website: **www.hc-sc.gc.ca/fnih-spni/index_e.html**

To find information about health and how to access health services in First Nations communities, consult the *BC First Nations Health Handbook*, published by the BC Ministry of Health Planning. It's available online at **www.bchealthguide.org** (click on "Aboriginal Health" and look for a link to the guide near the bottom of that page).

Indian Residential Schools Settlement Agreement

The Canadian federal government was involved in the development and administration of Indian Residential Schools (IRS) starting as early as 1874. The two main reasons for this involvement were to meet its legal obligations under the Indian Act and to integrate Aboriginal peoples into the broader Canadian society. Unfortunately, Canada's IRS system, at the hands of church representatives under the guidance of the federal government, more closely resembled institutes of coercion and cultural assimilation.

Litigation (court cases) addressing the sexual and physical abuse suffered in Canada's IRS was neither enough to address the volume of cases nor sensitive enough to deal respectfully with the issues at hand. In 2003, the alternative dispute resolution (ADR) process offered an alternative to court cases. The ADR model, however, did not effectively deal with all aspects of the IRS legacy and advocacy groups stressed the need for a farther-reaching resolution to the IRS system. In May 2005, Frank Iacobucci was appointed to work with the lawyers of survivors and churches to create a settlement agreement that would be a fair and lasting resolution to the damage suffered by IRS survivors and First Nations communities.

The resulting Indian Residential Schools Settlement Agreement contains five parts, two that specifically address IRS survivors' issues — the Common Experience Payment (CEP) and the Independent Assessment Process (IAP) — and three that address the First Nations family and community levels — Truth and Reconciliation, Commemoration, and Healing. The Indian Residential Schools Resolution Canada website (**www.irsr-rqpi.gc.ca/english/index.html**) provides complete information about the settlement agreement and a link to First Nations and Inuit health support services through Health Canada.

Eligible IRS survivors are entitled to apply for the CEP if they lived, even if only for one night, at a recognized IRS. For more information about the settlement agreement and its effects on survivors and families, contact:

Indian Residential School Survivors Society
911 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: (604) 925-4464
Phone: 1-800-721-0066 (call no charge, outside the Lower Mainland)
Survivors' 24-hour National Crisis Line: 1-866-925-4419 (call no charge)
Fax: (604) 925-0020
E-mail: reception@irsss.ca
Website: **www.irsss.ca**

Assembly of First Nations
Trebla Building
810 – 473 Albert Street
Ottawa, ON K1R 5B4
Phone: (613) 241-6789
Phone: 1-866-869-6789 (call no charge)
Fax: (613) 241-5808
Website: **www.afn.ca/residentialschools**

National Residential School Survivors' Society
2 – 450 Frontenac Street
Rankin Reserve
Sault Ste. Marie, ON P6A 5K9
Phone: (705) 942-9422
Phone: 1-866-575-0006 (call no charge)
Fax: (705) 942-8713
E-mail: info@nrsss.ca
Website: **www.nrsss.ca**

What is the Indian Residential Schools Mental Health Support Program?

If you attended an IRS, you may be eligible for mental health support services. Health Canada coordinates services for IRS survivors such as:

- mental health counselling
- transportation to get to mental health counselling or traditional healer services
- cultural support provided by Elders
- emotional support services provided by resolution health support workers

For a general description of the IRS Mental Health Support Program and the available services, see **www.hc-sc.gc.ca/index_e.html** (click on "First Nations & Inuit Health — Health Care Services — Indian Residential Schools").

Who is eligible for mental health support services?

All former IRS students (no matter what their status or place of residence is) are eligible for mental health support services if they:

- are eligible to receive or currently receiving CEP,
- have an active claim through IAP, ADR, or court process, or
- are participating in Truth and Reconciliation or Commemoration events.

How do I get these services?

You must be a registered IRS claimant in the process of resolving your IRS claim. To get these services:

1. Contact your Health Canada regional coordinator:

   BC Region
   5th Floor, Sinclair Centre
   Federal Tower
   540 – 757 W. Hastings Street
   Vancouver, BC V6C 3E6
   Phone: 1-877-477-0775 (call no charge)

2. Have your IRS case number ready when you call.

3. Make sure your mental health provider submits your treatment plan.
4. Get approval for treatment and transportation benefits from Health Canada before treatment begins.

The Inter Tribal Health Authority First Nations House of Healing delivers healing sessions for IRS survivors. For information on this organization's services, contact:

First Nations House of Healing
534 Centre Street
Nanaimo, BC V9R 4Z3
Phone: (250) 753-0590
Phone: 1-877-777-4842 (call no charge)
Fax: (250) 753-0570
Fax: 1-877-753-0573 (fax no charge)
E-mail: fnhh@intertribalhealth.ca
Website: **www.intertribalhealth.ca/healing.html**

What can I do if my request for services is denied?

Call the National Resolution Framework Help Desk (CEP Appeals Line) at 1-800-816-7293 (no charge) and ask about its appeal process. There are three levels of appeal, and, at each level, the appeal must be started by the IRS claimant. You must provide documents to support your appeal, which they will review. They base their decision on your needs and Health Canada's policy.

A **crisis line** is available to provide immediate emotional assistance 24 hours a day, seven days a week at 1-866-925-4419. For more information about the IRS Resolution Health Support Program, contact your regional coordinator or visit the Health Canada website at **www.healthcanada.gc.ca/irs**.

The Indian Residential School Survivors Society (IRSSS) provides support for IRS survivors and advocates for justice and healing. For more information on what the IRSSS can do for you, contact them at:

Indian Residential School Survivors Society
911 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: (604) 925-4464
Phone: 1-800-721-0066 (call no charge)
Fax: (604) 925-0020

Survivors' 24-hour National Crisis Line
Phone: 1-866-925-4419 (call no charge)
E-mail: reception@irsss.ca
Website: **www.irsss.ca**

Housing benefits on reserve

Who is eligible for housing benefits on reserve?

All registered Indians with band membership living on or off reserve are eligible, subject to availability, for housing built on reserve.

Whether or not such housing is available depends on whether:

- the band is eligible and has fulfilled all the requirements for getting funding for new and existing housing, and
- there are houses available on reserve.

What housing benefit programs am I eligible for?

You may be eligible for the following on-reserve housing programs. Indian and Northern Affairs Canada (INAC):

- grants ministerial loan guarantees (provides security to the lender) so people can get money from a financial institution to buy or renovate housing; and
- subsidizes building new houses and renovation or remediation of existing units. This funding is administered by a First Nation that puts together comprehensive, community-based

housing plans to meet the needs of its members.

The Canada Mortgage and Housing Corporation (CMHC):

- provides operating subsidies for non-profit rental housing;
- provides forgivable loans to bring existing homes up to minimum standards of health and safety, or to make an existing home more accessible for a person with disabilities;
- provides forgivable loans that help to build and renovate shelters for victims of family violence, and for minor improvements so seniors can continue to live in their homes independently; and
- provides financial support for an Aboriginal youth employment initiative related to housing activities.

For a complete list of programs and the roles and responsibilities of First Nations, CMHC, and INAC, see: **www.aboriginalhousing.bc.ca** (click on "Resources — Aboriginal On-Reserve Housing Programs: Roles and Responsibilities").

Note: Renovation subsidies aren't provided for strictly cosmetic improvements. Renovations must address health and safety problems, building code compliance, and/or structural or overcrowding issues. The renovations should also add to the life expectancy of the home.

In general, the INAC subsidy ranges from $19,000 to $40,000 and isn't intended to pay for all your construction costs. You must find additional funding, such as a bank mortgage, before you start to build or renovate. Talk to your band housing officer.

On-reserve lease properties don't qualify for subsidies or loan guarantees.

For more information about housing benefits on reserve, contact:

Canada Mortgage and Housing Corporation
Vancouver office
200 – 1111 W. Georgia Street
Vancouver, BC V6E 4S4
Phone: (604) 731-5733
Phone: 1-800-639-3938 (call no charge)
TTY: 1-800-309-3388 (national office)
Fax: (604) 737-4139
Website: **www.cmhc.ca**

Canada Mortgage and Housing Corporation
Victoria office
150 – 1675 Douglas Street
Victoria, BC V8W 2G5
Phone: (250) 363-8040
Fax: (250) 995-2640

Indian and Northern Affairs Canada
600 – 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: (604) 775-5100
Phone: 1-800-665-9320 (call no charge)
Fax: (604) 775-7149
Website: **www.inac.gc.ca**

Aboriginal Housing Committee for British Columbia
200 – 1111 W. Georgia Street
Vancouver, BC V6E 4S4
Phone: 1-800-639-3938 (call no charge)
Fax: (604) 737-4125
E-mail: info@aboriginalhousing.bc.ca
Website: **www.aboriginalhousing.bc.ca**

When can I apply for housing benefit programs?

Apply as soon as possible because most bands have long waiting lists for on-reserve housing.

Where do I apply for housing benefit programs?

Ask your band housing officer where to apply for housing benefit programs.

How do I apply for housing benefit programs?

It's best to apply in person at your band office, but you can also phone or write your band. Fill out an application form or make your request in writing. State what kind of housing you need and ask for a list of all housing programs the band offers. For information on how to appeal a band decision on your housing application, contact your band office and/or the band chief and council.

Note: Some bands may have their own housing policy.

Housing benefits off reserve

Here are some of the housing benefits available to Aboriginal people living off reserve.

Low-income rental units

Aboriginal housing agencies throughout British Columbia offer low-income rental units to families and individuals. Contact the Aboriginal Housing Management Association (AHMA) for information on off-reserve Aboriginal housing in BC:

Aboriginal Housing Management Association
605 – 100 Park Royal South
West Vancouver, BC V7T 1A2
Phone: (604) 921-2462
Fax: (604) 921-2463
E-mail: reception@ahma-bc.org
Website: **www.ahma-bc.org**

The following are member societies of the AHMA. Contact the agency in your area for more information about applying for housing:

Aqanttanam Housing Society
202 – 1113 Baker Street
Cranbrook, BC V1C 1A7
Phone: (250) 417-3774
Fax: (250) 417-3778
E-mail: ahs@shaw.ca

Cariboo Friendship Society
99 South 3rd Avenue
Williams Lake, BC V2G 1J1
Phone: (250) 398-6831
Fax: (250) 398-6115
E-mail: cariboo.fc@shawcable.com

Conayt Friendship Society
PO Box 1989
Merritt, BC V1K 1B8
Phone: (250) 378-5107
Fax: (250) 378-6676
E-mail: conayt@telus.net

Dawson Creek Native Housing Society
10421 10th Street
Dawson Creek, BC V1G 3T8
Phone: (250) 782-1598
Fax: (250) 782-1650
E-mail: dcnhs@pris.bc.ca

Fort St. John Native Housing
10233 100th Avenue
Fort St. John, BC V1J 1Y8
Phone: (250) 785-4900
Fax: (250) 785-4047

Kamloops Native Housing
101 – 1139 12th Street
Kamloops, BC V2B 7Z2
Phone: (250) 376-6332
Fax: (250) 376-0684
E-mail: knhs@telus.net

M'akola Housing
2009 Fernwood Road
Victoria, BC V8T 2Y8
Phone: (250) 384-1423
Fax: (250) 381-1438
Website: **www.makola.bc.ca**

Mission Native Housing Society
PO Box 3563
34110 Lougheed Highway
Mission, BC V2V 4L1
Phone: (604) 820-3324
Fax: (604) 820-2175
Website: **www.ahma-bc.org/mission.htm**

Muks-Kum-Ol Housing Society
3120 Braun Street
Terrace, BC V8G 5N9
Phone: (250) 638-8339
Fax: (250) 638-8228
E-mail: mukskumol@telus.net

Okanagan Métis & Aboriginal Housing Society
105 – 251 Lawrence Avenue
Kelowna, BC V1Y 6L2
Phone: (250) 763-7747
Fax: (250) 763-0112
E-mail: omahs@shaw.ca

Prince George Métis Housing Society
1224 Houston Lane
Prince George, BC V2L 5G2
Phone: (250) 564-9794
Fax: (250) 564-9793

United Aboriginal Housing Society
358 Vaughan Street
Quesnel, BC V2J 2T2
Phone: (250) 992-3306
Fax: (250) 992-3316
E-mail: uahs@shaw.ca

Vancouver Native Housing Society
1726 E. Hastings Street
Vancouver, BC V5L 1S9
Phone: (604) 320-3312
Fax: (604) 320-3317
E-mail: vahs@shaw.ca
Website: **www.vnhs.ca**

Vernon Native Housing
108 – 3334 30th Avenue
Vernon, BC V1T 2C8
Phone: (250) 542-2834
Fax: (250) 542-4544
E-mail: nativehousing@vernon.com

Note: *A Guide to Aboriginal Organizations and Services in British Columbia* lists other housing agencies. You can read this guide online at **www.gov.bc.ca/arr** (click on the link called "Guide to Aboriginal Organizations").

Housing programs of the BC Native Housing Corporation

Who is eligible for Native housing programs?

The BC Native Housing Corporation (BCNHC) runs housing benefit programs for people of Aboriginal ancestry. Eligibility is based on income and need. Each application is considered individually. To find out if you qualify, contact the BCNHC (see page 40).

What Native housing programs am I eligible for?

You can apply for the following three programs.

Rural and Native Housing Program

If you live outside of a city, in a place with fewer than 2,500 people, you can apply for housing under the Rural and Native Housing Program. This program is designed to help eligible families with low incomes, Native and non-Native, in rural areas to get adequate, suitable, and affordable housing. Rent is based on 25 percent of gross household income, and for tenants on social assistance, the Maximum Shelter Allowance is used to calculate rent amounts.

The Vancouver office handles units in the Fraser Valley and the Sunshine Coast, while the Prince George office handles units in the Bulkley Valley, Queen Charlottes, Fort Nelson, and other rural areas.

Residential Rehabilitation Assistance Program

You can get a loan to repair your house if it's at least five years old and needs repairs in one or more of the following categories:

- Structural
- Electrical
- Plumbing
- Heating
- Fire safety

Note: For this program, where you live doesn't matter (though the program doesn't cover all areas of the province), but you must prove you own your house.

Emergency Repair Program

This program offers grants to repair a house that, because it's so run down, threatens your health or safety. The program applies to rural areas only.

How do I apply for Native housing programs?

To apply for one of the three housing programs, contact the BCNHC office nearest you:

BC Native Housing Corporation
Vancouver head office
2nd Floor, 678 E. Hastings Street
Vancouver, BC V6A 1R1
Phone: (604) 688-1821
Fax: (604) 688-1823
Website: **www.unns.bc.ca/BCNHC/bcnhs.htm**

BC Native Housing Corporation
Prince George office
318 – 1600 3rd Avenue
Prince George, BC V2L 3G6
Phone: (250) 562-9106
Fax: (250) 562-0360

Employment benefits

You may be eligible for several employment benefits, including Canada Pension Plan, Employment Insurance, and workers' compensation benefits.

Canada Pension Plan benefits

The Canada Pension Plan (CPP) pays a monthly retirement pension to those who are eligible. It also acts as an insurance plan, providing disability, death, and survivor benefits for those who qualify.

Who is eligible for CPP benefits?

Everyone who has worked and contributed to the plan is eligible for CPP retirement benefits. Eligibility requirements for CPP disability, death, and survivor's pension benefits are discussed on pages 44 and 45.

Contributions to CPP are based on your annual earnings between a minimum and maximum amount. You don't have to contribute to CPP at all if you earn less than the CPP minimum amount in a year, and you can't be asked to contribute more if you earn more than the maximum amount. These minimum and maximum amounts are set each year by the federal government, based on changes in average weekly wages. In 2007, the minimum level was $3,500 and the maximum level was $43,700.

The benefit rate you get from CPP depends on the amount of your CPP contributions, the type of benefit you're claiming, and your age.

How do I contribute to CPP?

Aboriginal people who are employed off reserve have had to make CPP contributions since CPP was introduced in 1966. In this situation, you automatically contribute to CPP through paycheque deductions based on a percentage of your annual income. Your employer contributes an equal amount.

Since 1988, registered status Indians who don't pay income tax have been able to choose to contribute to CPP. Until then, registered status Indians who didn't pay income tax (e.g., because they were working on reserve) couldn't make CPP contributions.

If you work on reserve and your employer doesn't participate in CPP or you're self-employed, you can choose to contribute to CPP by filing a CPT20 form (Election to Pay CPP Contributions) and a Schedule 8 (CPP Contributions on Self-Employment and Other Earnings) with your tax return. Call the Canada Revenue Agency at 1-800-959-2221 (no charge) to ask for these forms. When you participate independently in CPP, you must pay the full amount that would otherwise be shared between you and an employer.

Note: Filing a tax return doesn't mean that you need to pay income tax. Contributing to CPP does not affect your tax status. You may still be eligible for tax exemption under section 87 of the Indian Act.

What are my CPP benefits?

The following benefits may be available to you.

Retirement pension

You're eligible for a retirement pension if you've contributed to CPP and are at least 65 years old.

You're eligible for an early retirement pension if you've contributed to CPP, are between 60 and 64, and have either stopped working or still work but earn less than a certain amount.

Note: If you get early retirement benefits from CPP, you will get less money each month than if you wait until age 65 to apply for CPP retirement benefits. The CPP retirement benefit rate is decreased by 6 percent for each year before your 65th birthday that you get early retirement benefits. For example, if you start to get early retirement benefits when you are 60, your CPP benefit rate will be 30 percent lower than if you had waited until your 65th birthday to apply for retirement benefits.

Disability benefit

You may be eligible to get a monthly disability benefit from CPP if you have a severe and prolonged disability that prevents you from working regularly, and you contributed to CPP in four out of the six years before the date you became disabled. If you qualify for this benefit, your dependent children can also get monthly benefits. A dependent child can continue to get these monthly benefits after the age of 18 if he or she remains a full-time student (to a maximum of age 25).

Survivor's pension

If a person who has contributed to CPP dies, their survivor (legal spouse or common-law partner) and dependent children may be eligible for monthly benefits. A dependent child can continue to get these monthly benefits after the age of 18 if he or she remains a full-time student (to a maximum of age 25).

Death benefit

CPP will pay up to $2,500 towards the funeral costs of a person who has contributed to CPP.

What are the CPP benefit rates?

The amount of these CPP benefits depends on your age, the kind of benefit you qualify for, and the amount and length of time you've contributed to CPP. Benefit rates differ for each person and each benefit.

Every year, you should get a Statement of Contributions, which will show you how much you've contributed to CPP. If you are at least 30 years old, your Statement of Contributions should show an estimate of what your CPP retirement pension would be at age 65, if your earnings remain stable until then. It should also contain an estimate of your CPP disability and survivors' benefit rates. You can also request a copy of your Statement of Contributions online at **www1.servicecanada.gc.ca/en/isp/cpp/soc/proceed.shtml**, or call the Service Canada Centre at 1-800-277-9914 (no charge).

How do I apply for CPP benefits?

CPP benefits aren't provided automatically. You must apply for each CPP benefit separately.

To apply online for a CPP retirement, or early retirement, pension, go to **www1.servicecanada.gc.ca/en/isp/common/rtrinfo.shtml**. To apply for CPP survivor's pension (including children's benefits) or CPP disability benefits, you can find the application forms at **www.servicecanada.gc.ca/en/home.shtml** (click on "On-line Services and Forms — Forms Site," then choose one of the links on the "Service Canada Forms" page, and look for the appropriate form).

How do I get more information about CPP benefits?

For more information about CPP, including copies of application forms, you can:

- go in person to your local Service Canada Centre (call 1-800-277-9914, no charge, if you need to find out where that is);
- look online at **www.servicecanada.gc.ca/en/home.shtml** (click on "Income Assistance"); or

- write or call the BC regional office of Human Resources Development Canada at:

  Service Canada Centre
  PO Box 1177
  Victoria, BC V8W 2V2
  Phone: 1-800-277-9914 (call no charge)
  TTY/TTD (if you are hearing impaired):
  1-800-255-4786
  Website: **www.servicecanada.gc.ca**

Service Canada also has a fact sheet called "First Nations Workers and the Canada Pension Plan" at **www1.servicecanada.gc.ca/en/isp/pub/factsheets/firstnation.shtml**.

Employment Insurance benefits

Employment Insurance (EI) provides temporary financial help to unemployed people while they look for work or upgrade their skills, while they're pregnant or caring for newborn or adopted children, or while they're sick or caring for seriously ill family members or friends.

As an employee working on or off reserve, you must contribute to EI based on your income. Your employer deducts premiums from your earnings and provides you with a record of employment when you leave.

If your income is tax exempt under section 87 of the Indian Act, your EI benefits may also be tax exempt. Ask for the tax exemption when you apply for these benefits.

You can apply for EI online at **www.servicecanada.gc.ca/en/home.shtml** (click on "Income Assistance — Employment Insurance Regular Benefits," then "Apply for Employment Insurance Benefits" [under "On-line Services and Forms"]), or at your nearest Service Canada Centre (listed online at **www.servicecanada.gc.ca/en/home.shtml** — click on "Find a Service Canada Centre Near You"). To find the office nearest you in the blue pages of your phone book, look under "Government – Federal — Employment — Service Canada Centres." For general inquiries about EI, call 1-800-206-7218 (no charge).

Workers' compensation benefits

As an employee working on or off reserve, you're eligible for workers' compensation benefits. You can apply for compensation from WorkSafeBC if you were injured while you were working. Workers' compensation benefits are tax exempt for everyone.

For workplace safety and health inquiries, contact:

WorkSafeBC
Phone: (604) 231-8888 (Lower Mainland)
Phone: 1-888-967-5377 (call no charge, outside the Lower Mainland)
Website: **www.worksafebc.com**

Seniors benefits

There are several pension benefits available to Aboriginal seniors with low incomes that are not based on work history. If you live on reserve, you don't have to pay income tax on these benefits.

What is the Old Age Security Program?

The Old Age Security Program (OAS) provides benefits to eligible seniors with low incomes. The following benefits may be available to you:

Old Age Security pension

You may be eligible for an OAS pension if you meet the Canadian residence requirements and are 65 or older. Apply for this benefit six months before you want the pension to begin. It does not start automatically. You can complete this form on your computer, print it, and mail it. You can find the form online at **www.servicecanada.gc.ca/en/home.shtml** (scroll down to "Seniors" and click on "Old Age Security (OAS) Pension" and look under "Forms") or you can call the Service Canada Centre at 1-800-277-9914 (no charge) for assistance.

Guaranteed Income Supplement

This supplement provides additional money on top of the OAS pension to seniors with low incomes in Canada. You must be receiving the OAS pension and meet some other requirements to receive this supplement. You must re-apply

for this benefit every year by filing your income tax return before April 30 or by requesting an application form in the mail from a Service Canada Centre.

Allowance

This program provides money to seniors with low incomes who are between 60 and 64 years of age, whose legal spouse or common-law partner receives the OAS pension and the Guaranteed Income Supplement, and who meet the residency requirements. To get an application kit for this program, contact a Service Canada Centre.

Allowance for the Survivor

This program provides money to seniors with low incomes whose legal spouse or common-law partner has died. To get an application kit for this program, contact a Service Canada Centre.

For more information about OAS or any other supplements listed above, please contact the Service Canada Centre at 1-800-277-9914 (no charge) for assistance. Or see the LSS booklets *When I'm 64: A Guide to Benefits and Services for People Aged 60 and Over* or *Benefits and Services for Seniors*. See page 86 to find out how to get these booklets.

Taxation benefits

Who is eligible for tax exemption?

You're eligible for tax exemption (not having to pay taxes) if you are a registered status Indian.

What is tax exempt?

For status Indians, tax exemption applies to:

- goods and services you buy on reserve;
- your employment income, under certain circumstances;
- your EI and pension benefits; and
- other employment-related income.

Tax exemption for goods and services

You may buy goods and services for personal use without paying the Provincial Sales Tax (PST) or the federal Goods and Services Tax (GST). For tax exemption to apply, the goods and services must be:

- bought from retail outlets located on reserve land or on designated reserve land, or
- delivered to you at an address on a reserve.

Designated reserve land means that the members of a band have voted to give up some of their rights to the reserve for a period of time.

Retail stores on reserve are often located on designated reserve land. A retailer on designated reserve land must have written authorization from the provincial Consumer Taxation Branch to process tax-exempt sales from that location.

The following are examples of goods and services on which a status Indian does not have to pay GST:

- Basic telephone service and equipment
- Long-distance and cellular phone service
- Equipment and vehicle leases
- Tobacco, if the amount bought is reasonable for personal use
- Motor fuel
- Motor vehicles
- Cable and pay television

How do I get tax exemption for goods and services?

To ensure that your purchases are tax exempt, either make your purchases on reserve lands or designated reserve lands, or have them delivered to you at a reserve address. Tell the retailer (seller) that you aren't required to pay GST or PST on your purchase. Your retailer must then ask to see your Indian Status Card and record your name and registration number. The retailer may also ask for your signature.

For large purchases, such as appliances or vehicles, your retailer must arrange for their delivery to the reserve.

For these purchases to be tax exempt, however, title to the purchases (official ownership) must not pass to you until the goods are on reserve. Therefore, the delivery must be FOB (freight on board) to a reserve address. When the goods are delivered to you on reserve, you take title to them on a tax-exempt basis.

Tax exemption for employment income

In certain situations, status Indians aren't required to pay income tax on their employment income. Under the Indian Act, personal property on reserve is tax exempt.

The courts have decided that, for the purposes of the Indian Act, employment income is personal property. When the Canada Revenue Agency (CRA) decides whether employment income is tax exempt, it's mainly interested in the location of your work.

CRA will consider your employment income tax exempt if one of the following situations applies:

- You live on reserve and your employer is located on reserve.
- You perform at least 90 percent of your employment duties on reserve.
- You perform more than 50 percent of your employment duties on reserve and you live on reserve or your employer is located on reserve.

- Your employment duties relate to your employer's non-commercial activities intended for the benefit of Aboriginal people who live mostly on reserve, your employer is located on reserve, and your employer is one of the following:
  - a band that has a reserve,
  - a tribal council that represents one or more bands that have a reserve, or
  - an Aboriginal organization controlled by a band or tribal council and dedicated exclusively to the social, cultural, or economic development of Aboriginal people who live mostly on reserve.

CRA may still consider part of your employment income tax exempt if you perform less than 90 percent of your employment duties on reserve and your employment income isn't tax exempt under any of the situations described above.

CRA has applied the above guidelines to some employment situations since January 1, 1995. However, these guidelines don't cover all forms of income and some income may not be tax exempt. For more information, see "Indian Act Exemption for Employment Income Guidelines," online at **www.cra-arc.gc.ca/menu-e.html** (click on "Aboriginal Peoples — Indian Act Exemption for Employment Income Guidelines"). If you don't have access to the Internet, call the CRA general inquiries line at 1-800-959-8281 (no charge) and ask for a copy to be mailed to you.

To get benefits like the GST Credit, the British Columbia Sales Tax Credit, the Canada Child Tax Benefit, and the British Columbia Family Bonus, you have to apply for them and you have to file an income tax and benefit return, whether or not you are tax exempt.

CRA offers a Volunteer Income Tax Program where they provide training to volunteers who in turn can help you prepare your income tax return. The Vancouver Aboriginal Friendship Centre provides a place where people with low incomes who live in Vancouver can go to get help with their tax returns. Contact the Friendship Centre about this program at (604) 251-4844.

If you lived, on a permanent basis, in certain areas of the province (a prescribed northern or intermediate zone) for a *continuous* period of at least *six consecutive months*, you may qualify for the northern residents' deduction. For more information about this tax deduction, see **www.cra-arc.gc.ca/menu-e.html** (click on "Aboriginal Peoples —Northern residents" [under "Information for…"]) or call CRA at 1-800-959-8281 (no charge).

For a list of tax services offices, look in the blue pages of your phone book under "Government – Federal — Taxes."

Note: CRA guidelines and policies aren't the law and may be overturned by a court.

Tax exemption for employment-related income

Benefits from EI and CPP, as well as other employment-related income, are usually tax exempt when they're based on tax-exempt income. For example, if the employment income on which you paid EI premiums was fully tax exempt, you don't have to pay income tax on your EI benefits. If you apply for EI, and you have earned tax-exempt or partially tax-exempt income, identify yourself on the EI application form as falling under one of these categories. For information about EI, call the Service Canada Centre at 1-800-206-7218 (no charge).

For more information on taxation benefits, contact CRA at the following phone numbers (call no charge):

General inquiries: 1-800-959-8281
Business inquiries: 1-800-959-5525
Website: **www.cra-arc.gc.ca**

Note: Tax exemptions may not apply to members of First Nations that have negotiated modern treaty agreements that eliminate those exemptions (usually after a certain period of time). If you are a member of a First Nation that has finalized a modern treaty agreement, see the taxation provisions in your treaty to find out if you are still tax exempt.

Immigration and residency in the USA

Who is eligible for US residency?

Under section 289 of the US Immigration and Nationality Act, you are eligible for US residency if you have at least 50 percent American Indian blood.

What am I eligible for?

You can apply for a Green Card (work visa) that allows you to live and work in the US. Green Cards have expiry periods, so remember to check when your card expires. You can also apply for a Social Security number, which you need if you work in the US.

When can I move or go to work in the US?

You can move to the US or work in the US when you have all the required information to give to a US Customs and Border Protection office.

Where and how do I apply for US residency?

You can go to any border crossing in Canada with a US Customs and Border Protection office to apply for residency. Bring the following documents with you:

- Your long-form birth certificate
- Your passport
- Two recent photos
- Your status card (if you don't have a status card, picture identification from a well-known Aboriginal organization may be accepted)
- A letter stating your Aboriginal ancestry, including your parents' percentage of Indian blood, your tribal group, your birth date, and your parents' birth dates (your band or a well-known organization such as the United Native Nations can write the letter)

When you apply for US residency, US Customs and Border Protection will fill out an i181 form for you. Bring this form to a US social services office at a port of entry and apply for a Social Security number. A Social Security number will give you access to US government services.

You aren't required to have a Green Card to work in the US. However, by applying for a Green Card when you apply for residency, you may avoid problems with employers. At the time that you

apply, you will be issued a temporary card until you get your Green Card.

If you're refused resident alien status by a US Customs and Border Protection officer, you have the right to a hearing before a US immigration judge. You must ask to speak to the judge.

For more information, contact:

Consulate General of the United States of America
1095 W. Pender Street
Vancouver, BC V6E 2M6
Phone: (604) 685-4311
Fax: (604) 685-5285

You can also find information at **www.usimmigrationsupport.org/index.html** or contact the following office at the Blaine border crossing:

US Customs and Border Protection
9901 Pacific Highway
Blaine, WA 98230
Phone: (360) 332-5771
Fax: (360) 332-4701

Post-secondary education benefits

Indian and Northern Affairs Canada (INAC) provides funding to help eligible students pursue a college or university education. INAC sets the limits for these education benefits every year, but your band or tribal council administers the benefits.

Who is eligible for education benefits?

To be eligible for education benefits from INAC, you must:

- be a registered status Indian or registered Inuit, living on or off reserve, and usually a resident of Canada;
- be accepted for enrollment at an eligible college or university, or in a college or university entrance preparation program; and
- maintain satisfactory academic standing (school marks).

What types of education assistance are available?

Full-time and part-time students may have their tuition, travel, and book costs covered. Full-time students may also have their living costs covered. Incentives may also be available for students to pursue studies that will contribute to achieving

First Nations self-government and economic self-reliance, or that recognize academic achievement.

Other options for education assistance are:

- The economic development branch of your band may reserve funds for its band members for post-secondary education.
- The Native Education Centre may be able to help you if your band can't fund you.
- The University and College Entrance Program may provide support to First Nation and Inuit students who need pre-requisite courses to reach the academic level required for entrance to a degree or diploma credit program.

Note: In addition to INAC's rules for education benefits, your band or tribal council may have its own post-secondary education policy. Ask your band's education coordinator for more information on their post-secondary education policy and programs.

When can I apply for education assistance?

Contact your band or tribal council office to find out about any deadlines that they may have set and what information is required to process your application. In general, the principle is first come, first served.

Where do I apply for education assistance?

If you have band membership, apply at your band or tribal council office. Contact the Native Education Centre if you fall under the following categories:

- you are a Northwest Territory band member who does not meet residency criteria and you now live in BC,
- you are a BC registered member who does not have an affiliated band (you are on the General List), or
- you are a non-band member who is affiliated with a BC First Nation.

The centre's address and phone number are on page 69 of this booklet.

How do I apply for education assistance?

Here is a list of what you will need to apply for education assistance:

- Your status card or a copy of your reinstatement letter from your registrar
- A copy of your acceptance letter from your university or college
- A copy of your course outline and tuition fee form
- A price list of books and supplies
- A copy of your most recent school transcript (list of marks)

Contact your band or tribal council to confirm what you need to apply.

What can I do if I'm turned down for education assistance?

Contact your band or tribal council to discuss your concerns about getting education funds, and ask about its appeal process.

What other education assistance is available?

Many scholarships and bursaries are available to Aboriginal students. The University of British Columbia's First Nations House of Learning (**www.longhouse.ubc.ca/awards.htm**) provides a comprehensive list of scholarships and bursaries, as well as other education resources. INAC has a Scholarships, Bursaries and Awards Guide for Aboriginal Students on its website at **pse-esd.ainc-inac.gc.ca/abs**.

The Department of Justice offers a bursary program for non-status Indian and Métis people interested in pursing studies in law. For more information, see **www.canada.justice.gc.ca/en/ps/pb/index.html** and click on "Funding Programs," then "Legal Studies for Aboriginal People (LSAP) Program." Also, the BC branch of the Canadian Bar Association has recently announced the availability of a partial scholarship for two Aboriginal people to study law at the University of British Columbia and the University of Victoria.

For more information, see **www.cba.org/BC/Home/main/default.aspx** and click on "Initiatives — CBABC Aboriginal Law Student Scholarship Trust."

Resources to help you get work

Employability programs for Aboriginal people help to develop work skills and create work opportunities. Participants in the Aboriginal Human Resources Development Contribution Agreement administer funds from Aboriginal Human Resources and Social Development Canada for the following programs:

- Wage subsidies that support employers who offer long-term employment, direct job experience, or training
- Self-employment training and services that support self-employment
- Job creation partnerships that support new long-term employment and opportunities that lead to long-term employment
- Labour market partnerships that link community partners who address local market and employee needs
- Youth programs that support initiatives for Aboriginal youth employment

To find out more about the Aboriginal Human Resources Development Strategy, see **srv119.services.gc.ca/AHRDSInternet/general/public/HomePage1_e.asp** (click on "The Strategy"). For more program information, contact the agreement holder nearest to you listed on the next four pages.

Aboriginal Community Career and Employment Services Society (ACCESS)
110 – 1607 E. Hastings Street
Vancouver, BC V5L 1S7
Phone: (604) 251-7955
Fax: (604) 251-7954
Website: **www.buildingfuturestoday.com**

390 Main Street
Vancouver, BC V6A 2T1
Phone: (604) 687-7480
Fax: (604) 687-7481

108 – 100 Park Royal
West Vancouver, BC V7T 1A2
Phone: (604) 913-7933
Fax: (604) 913-7938
E-mail: adminassist@buildingfuturestoday.com

Coast Salish Employment & Training Society
201 – 5462 Trans Canada Highway
Duncan, BC V9L 6W4
Phone: (250) 746-0183
Phone: 1-888-811-3919 (call no charge)
Fax: (250) 746-0189
E-mail: reception@csets.com
Website: **www.coastsalishemployment.com**

First Nations Employment Society
101A – 440 Cambie Street
Vancouver, BC V4B 2N5
Phone: (604) 605-7194
Fax: (604) 605-7195
Website: **www.fnes.ca**

Métis Provincial Council of BC
905 – 1130 W. Pender Street
Vancouver, BC V6E 4A4
Phone: (604) 801-5853
Fax: (604) 801-5097
Website: **www.mpcbc.bc.ca**

North East Native Advancing Society
10328 101st Avenue
Fort St. John, BC V1J 2B5
Phone: (250) 785-0887
Fax: (250) 785-0876
E-mail: nenas@nenas.org
Website: **www.nenas.org**

Okanagan/Ktunaxa Aboriginal Management Society
101 – 1865 Dilworth Drive, Suite 339
Kelowna, BC V1Y 9T1
Phone: (250) 769-1977 or (250) 489-4563
Fax: (250) 769-1866 or (250) 489-4585

Sub Agreement — Okanagan Training and Development Council
101 – 1865 Dilworth Drive, Suite 339
Kelowna, BC V1Y 9T1
Phone: (250) 769-1977 or (250) 542-0045
Fax: (250) 769-1866 or (250) 549 7175
Website: **www.otdc.org**

Sub Agreement — Ktunaxa Kinbasket Aboriginal Training Council
7468 Mission Road
Cranbrook, BC V1C 7E5
Phone: (250) 489-4563
Phone: 1-888-489-4563 (call no charge)
Fax: (250) 489-4585
Website: **www.ktunaxa.org**

Prince George Nechako Aboriginal Employment & Training Association
1591 4th Avenue
Prince George, BC V2L 3K1
Phone: (250) 561-1199
Phone: 1-800-510-0515 (call no charge)
Fax (250) 561-1149
E-mail: pgnaeta@pgnaeta.bc.ca
Website: **www.pgnaeta.bc.ca**

Shuswap Nations Tribal Council Society
304 – 355 Yellowhead Hwy
Kamloops, BC V2H 1H1
Phone: (250) 828-9789
Fax: (250) 374-6331
Website: **www.cipahrd.org**

Skeena Native Development Society
PO Box 418
Terrace, BC V8G 4B1
Phone: (250) 635-1500
Phone: 1-800-721-1333 (call no charge)
Fax: (250) 635-1414
Website: **www.snds.bc.ca**

Stó:lō Nation Human Resource Development
Bldg. #8A – 7201 Vedder Road
Chilliwack, BC V2R 4G5
Phone: (604) 858-3691
Phone: 1-888-845-4455 (call no charge)
Fax: (604) 858-3528
E-mail: snhrd@stolonation.bc.ca
Website: **www.snhrd.ca**

To access programs in Vancouver, visit one of the organizations listed below. Ask for an appointment with an employment counsellor.

Native Education Centre
Urban Native Indian Education Society
285 E. 5th Avenue
Vancouver, BC V5T 1H2
Phone: (604) 873-3772
Fax: (604) 873-9152
Website: **www.necvancouver.org**

United Native Nations Society
2nd Floor – 678 E. Hastings Street
Vancouver, BC V6A 1R1
Phone: (604) 688-1821
Phone: 1-800-555-9756 (call no charge)
Fax: (604) 688-1823
Website: **www.unns.bc.ca**

Vancouver Aboriginal Friendship Centre Society
1607 E. Hastings Street
Vancouver, BC V5L 1S7
Phone: (604) 251-4844
Fax: (604) 251-1986
Website: **www.vafcs.org**

Indian status and band membership rights

Important changes were made to the Indian Act in 1985, when Parliament passed Bill C-31 and changed the rules for deciding who is eligible for registration.

Registration (or status) under the Indian Act is different from membership in an Indian band.

The Indian Act sets out rules about who is eligible to be registered and receive benefits as a status Indian. Status or registration under the Indian Act is not the same as band membership. There are some status Indians who are not members of a band, and there are some band members who do not have status under the Indian Act. If you meet the Indian Act guidelines but do not meet a band's membership guidelines, you will be registered on the General List maintained by INAC, but you will not be considered a member of a particular band. For people who are registered on INAC's General List, all services and programs are administered directly by INAC.

Who is eligible for registration as an Indian under the Indian Act?

You're eligible for registration as an Indian if:

- you were eligible before the Indian Act was changed in 1985,
- you are a woman who lost her status by marrying a non-Indian,

- you lost your status because your father was not an Indian,
- you lost your status because you or your parents applied to give up registration and First Nation membership (known as "enfranchisement"), or
- both of your parents are eligible for registration for any reason.

Note: You may also be eligible for registration if only one of your parents is eligible.

How do I apply for registration as an Indian under the Indian Act?

Registration procedures for you and your children depend on birth dates.

If you or your children were born on or after April 17, 1985, and both parents are registered Indians or one parent is registered under section 6(1) of the Indian Act:

1. Get a long-form birth certificate from the Vital Statistics Agency of the BC government.

   Vital Statistics Agency
   Vancouver office
   250 – 605 Robson Street
   Phone: (604) 660-2937
   Fax: (604) 660-2645

   Victoria office
   818 Fort Street
   Phone: (250) 952-2681
   Fax: (250) 952-2527

Kelowna office
101 – 1475 Ellis Street
Fax: (250) 712-7598

Prince George office
433 Queensway Street
Fax: (250) 565-7106

2. Complete the Parental Consent form that you can get through the INAC Regional Office or your band office.

3. Send the Parental Consent form and long-form birth certificate to the registration clerk at your nearest INAC Regional Office or band office.

If you or your children were born before April 17, 1985:

1. Fill out either the Application for Registration of an Adult under the Indian Act or the Application for Registration of Children under the Indian Act.

2. Include as much information as you can about the applicant's Aboriginal background, along with the name or location of the First Nation to which the applicant's ancestors belonged, and the names and status numbers of relatives registered as Indians.

3. Send the completed form and birth certificate to this address:

The Registrar
Indian Registration and Band Lists
Indian and Northern Affairs Canada
Ottawa, ON K1A 0H4

If they need additional information, INAC staff will contact you.

Note: Send only photocopies of any additional documents you include with your application for registration.

Once you're registered, you may apply for a status card (also called a Certificate of Indian Status) by visiting an INAC Regional Office or band office with two pieces of valid ID and a passport-size photo. If you are a parent applying for a child, bring two pieces of ID for you, one piece of ID for the child, and a passport-size photo of the child.

In June 2007, the BC Supreme Court ruled in a case called *McIvor v. Canada* that the present Indian Act breached the equality provision in the Canadian Charter of Rights and Freedoms. This is a ground-breaking judgment that may affect the Indian status of many Aboriginal women and their descendants. The decision applies to those Aboriginal people who were born before April 1985 and denied status because their mother or grandmother had married a non-status man. The federal government has appealed this decision to the Court of Appeal, and the issue will probably not be settled until it is decided by the Supreme Court of Canada.

Aboriginal people who were born after April 1985 are not eligible for registration or status under the Indian Act if only one of their parents has status under 6(2) of the Indian Act. Aboriginal groups are currently challenging this decision, claiming that it is also discrimination under the Charter of Rights and Freedoms.

Who is eligible for band membership?

You will automatically receive band membership if you were registered or entitled to be registered as an Indian before April 17, 1985.

Between April 17, 1985, and June 28, 1987, bands had the option of assuming control of their membership. If the band in which you or your children want to be registered didn't assume control of its membership, then you will be enrolled as a band member by INAC once you've registered. If, on the other hand, your band did assume control of membership, you must meet the requirements of your band's membership code. Most codes provide automatic membership for children of band members. Contact your First Nation for a copy of its membership code.

Note: You can appeal decisions about registration and band membership (the appeal process should be in the band's membership code).

For more information about registration or band membership, contact your band membership administrator or the following federal agency:

Indian and Northern Affairs Canada
600 – 1138 Melville Street
Vancouver, BC V6E 4S3
Phone: (604) 775-7114
Phone: 1-888-917-9977 (call no charge)
Fax: (604) 775-7149
Website: **www.ainc-inac.gc.ca/index-eng.asp**

Human rights

What are human rights?

Human rights are basic rights that belong to everyone. There are two human rights laws to protect people against discrimination in this province: the BC Human Rights Code and the Canadian Human Rights Act.

The BC Human Rights Tribunal (BCHRT), created by the BC Human Rights Code, deals with complaints of discrimination by someone in the province, or a BC agency or employer. For more information, contact the BCHRT at:

BC Human Rights Tribunal
1170 – 605 Robson Street
Vancouver, BC V6B 5J3
Phone: (604) 775-2000
Phone: 1-888-440-8844 (call no charge)
TTY (if you are hearing impaired):
(604) 775 2021
Fax: (604) 775-2020
Website: **www.bchrt.bc.ca**

The Canadian Human Rights Commission (CHRC), under the authority of the Canadian Human Rights Act, investigates and tries to resolve complaints of discrimination against employers who are regulated by the federal government (for example, the Canada Post Corporation), unions, and service providers. The mandate of the CHRC includes:

- helping people resolve complaints of discrimination in their place of employment based on grounds such as race, colour, sex, disability, etc.; and
- developing and conducting information and discrimination-prevention programs.

For more information, contact the CHRC at:

Canadian Human Rights Commission
301 – 1095 W. Pender Street
Vancouver, BC V6E 2M6
Phone: (604) 666-2251
Phone: 1-800-999-6899 (call no charge)
TTY (if you are hearing impaired):
1-888-643-3304
Website: **www.chrc-ccdp.ca**

What is discrimination?

Discrimination takes place when someone treats you differently from others because of your:

- Race or colour
- National or ethnic origin
- Place of ancestry (BC Code only)
- Political belief (BC Code only)
- Religion
- Age
- Sex (including sexual harassment and discrimination because of pregnancy and childbirth)
- Sexual orientation

- Marital or family status (for example, if you are a single parent)
- Mental or physical disability (including discrimination because of AIDS or HIV, or drug or alcohol addiction)
- Criminal conviction for which a pardon has been granted (Canadian Human Rights Act only)
- Criminal conviction or summary conviction charge that is unrelated to employment (BC Code only)
- Source of income when looking for rental accommodation (BC Code only)

The law also protects you if someone publicly writes or sends hate messages, or uses a phone to repeatedly communicate hate messages about you for any of the reasons listed above, including being an Aboriginal person.

Discrimination can happen:

- when you are at work or at school,
- when you are looking for a job,
- when you are looking for a place to live (renting or buying a property), and
- when you are denied service (for example, at a hotel, bar, or store).

People and agencies are not allowed to discriminate against you. This includes:

- employers, unions, and employee organizations;
- hotels, restaurants, and stores;
- airlines, buses, and taxis;
- banks, trust companies, and credit unions;
- governments, police, and hospitals;
- tribal councils, band councils, and friendship centres; and
- landlords or people selling property.

What can I do if I have been discriminated against?

If you feel that someone has discriminated against you, take the following action:

1. Remember what the person said and did.
2. Write down what happened to you, including the place, names, and dates, or have a friend write it out for you.
3. Tell a friend, fellow employee, or union representative about what happened.
4. Talk to a legal advocate about your complaint.
5. File a human rights complaint. See the "Who can help?" section, on the next page.

Note: The time limit for filing complaints is six months under the BC Human Rights Code, and one year under the Canadian Human Rights Act.

Who can help?

Contact one of the following agencies for help and more information. If you aren't sure which one to call, the staff at any of these agencies can tell you who to contact.

BC Human Rights Coalition (BCHRC)
1202 – 510 W. Hastings Street
Vancouver, BC V6B 1L8
Phone: (604) 689-8474
Phone: 1-877-689-8474 (call no charge)
Fax: (604) 689-7511
Website: **www.bchrcoalition.org**

Community Legal Assistance Society (CLAS)
300 – 1140 W. Pender Street
Vancouver, BC V6E 4G1
Phone: (604) 685-3425
Phone: 1-888-685-6222 (call no charge)
Fax: (604) 685-7611
Website: **www2.povnet.org/clas**

Note: The BCHRC, along with CLAS, runs a human rights clinic (held at the BCHRT office) that may be able to help you pursue a complaint under the BC Human Rights Code. For more information, call either of the above phone numbers.

What can I expect if I file a complaint?

You or your legal advocate must fill out a complaint form and file it with either the CHRC or the BCHRT.

If your complaint is accepted by the CHRC, the commission will get a response from the person or

agency you believe discriminated against you. The CHRC may set up a pre-complaint process to see if you and the other party can mediate the matter. If mediation fails or isn't appropriate, the CHRC will investigate the complaint. If this process is unsuccessful, the CHRC may recommend that a tribunal be appointed or dismiss the complaint. If your complaint is rejected by the CHRC, you can appeal the decision. For information on how to appeal a decision, contact the CHRC or the BCHRT.

If your complaint is accepted by the BCHRT, the tribunal will send it to the person you complained about, and may either arrange an early settlement meeting or seek a written response. The person you're complaining about may ask the tribunal to dismiss your complaint. If this is the case, you will be given a chance to respond before the tribunal makes a decision. The tribunal process also allows for alternate resolution options, such as mediation. If these options fail to resolve your complaint, the tribunal will arrange a formal hearing. All tribunal decisions are open to judicial review (that is, they may be appealed).

Legal aid

The Legal Services Society (LSS) provides many free legal aid services in British Columbia. Legal aid may include legal information, legal advice, and/or a lawyer to represent you.

What are legal information and advice services?

Legal aid provides legal advice services such as duty counsel lawyers or LawLINE (phone) advice, and legal information in the form of publications and websites. Some of these services are described below. For more details, see **www.lss.bc.ca**.

Duty counsel services

Legal aid provides lawyers (called duty counsel) at Provincial Courts, some Supreme Courts, and the Vancouver Citizenship and Immigration Canada enforcement office. They help any person who does not have a lawyer with criminal and family court appearances and immigration matters. Duty counsel gives brief legal advice about rights and options, as well as information about court procedures. They may also speak in court for you on some matters. To find out what services are available, call the LSS Call Centre (see page 87 for the phone numbers) or go to **www.lss.bc.ca** and click on "Legal aid — Legal advice."

Family advice lawyers

If you are a parent with a low income experiencing separation or divorce, you may be eligible for up

to three hours of free legal advice from the LSS Family Advice Lawyer Project.

Project lawyers can provide advice about custody, access, guardianship, and child support; property (limited); tentative settlement agreements; and court procedures.

The Family Advice Lawyer Project is a joint project of LSS and the Ministry of Attorney General's Family Justice Services Division. This service is available in family justice counsellors' offices in Kamloops, Kelowna, Prince George, Surrey, Vancouver, and Victoria. You must be referred to the service by a family justice counsellor or a child support officer. For more information about this project, call LawLINE.

LawLINE

LawLINE is a free phone service that provides general legal information and referrals to other services. It also provides free legal advice (given by a lawyer or paralegal) to people with low incomes.

If you can't speak English, ask for an interpreter as soon as someone answers your call by saying the name of your language.

Phone: (604) 408-2172 (in the Lower Mainland)
Phone: 1-866-577-2525 (call no charge, outside the Lower Mainland)

After dialling the phone number, press "7" to connect to LawLINE.
Hours: 9:00 a.m. to 4:00 p.m., Monday, Tuesday, Thursday, and Friday
9:00 a.m. to 2:30 p.m., Wednesday

Fieldworkers

Fieldworkers at the LSS Vancouver Regional Centre carry out community outreach and develop public legal education resources for BC. Because they work closely with a variety of Aboriginal communities, they are familiar with the issues that affect those communities. They work with agencies and organizations in many areas, including poverty, family, immigration/settlement, child protection, and Aboriginal law issues.

Legal information outreach workers

Legal information outreach workers (LIOWs) are staff members at offices in Kamloops, Kelowna, Nanaimo, Prince George, Surrey, Terrace, Vancouver, and Victoria. They help people find legal information and self-help materials on the Internet. LIOWs can also give you free printed material to answer your questions. And they can tell you where else to go for legal information, legal advice, and other help.

Family Law in British Columbia website

www.familylaw.lss.bc.ca

The Family Law in BC website provides legal information and self-help materials to help you solve family law problems (divorce, custody, access, support) or deal with the Ministry of Children and Family Development if your child is (or may be) taken away from you. The website includes some information specifically for Aboriginal peoples. See **www.familylaw.lss.bc.ca/legal_issues/aboriginal_issues.asp.**

LSS website

www.lss.bc.ca

The LSS website contains information about legal aid in BC and about LSS, as well as publications and videos about the law, and links to other legal information sites.

LawLINK

www.lawlink.bc.ca

LawLINK is a website that helps people find legal information on the Internet written for the average person, not for experts. It provides links to information on legal topics, including Aboriginal law, consumer protection and debt, welfare, wills and trusts, and housing. You can see this website from your home computer, at a public library, or on the public access computers available in some legal aid offices and courthouses across the province.

LSS publications

In addition to websites, LSS also produces brochures, booklets, and other materials on many legal topics. Many of these publications are available online at **www.lss.bc.ca**. Aboriginal materials include:

- *How to Make a Will and Settle an Estate: A Guide for First Nations People Living on Reserve*
- *Aboriginal People and the Law in British Columbia*
- *Social Assistance on Reserve in British Columbia*
- *Aboriginal Restorative Justice* (CD/ROM)

To place an order or find out more about what is available, contact:

Legal Services Society
400 – 510 Burrard Street
Vancouver, BC V6C 3A8
Phone: (604) 601-6075
Fax: (604) 682-0965
E-mail: distribution@lss.bc.ca
Website: **www.lss.bc.ca**

How can I apply for a lawyer to represent me? (LSS Call Centre)

People who have serious criminal or family law problems and can't afford to pay a lawyer may be able to get free representation from legal aid. Your income must be below a certain amount. To find out if you can get a lawyer to help you, phone the LSS Call Centre:

Phone: (604) 408-2172 (Lower Mainland)
Phone: 1-866-577-2525 (call no charge, outside the Lower Mainland)

You can ask for an interpreter as soon as a person picks up the phone by saying the name of your language. You may have to wait for a few minutes for the interpreter to join the call.

If you are hearing impaired, call:

TTY: (604) 601-6236 (Lower Mainland)
TTY: 1-877-991-2299 (call no charge, outside the Lower Mainland)

Comments please

We would like to hear from you if you have any comments about this booklet. Contact us at:

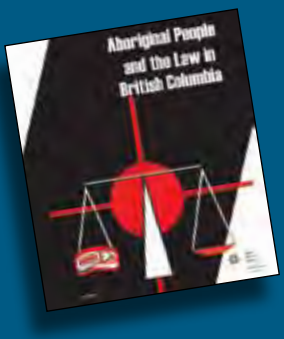
Phone: (604) 601-6000 (ask to speak to a fieldworker in Public Information and Community Liaison)
Fax: (604) 682-0965
E-mail: **aboriginallaw@lss.bc.ca**

See page 86 for how to order the publications shown below.

How to Make a Will and Settle an Estate: A Guide for First Nations People Living on Reserve

This booklet describes how a registered Indian living on reserve can make a will, and how to settle the estate of a registered Indian living on reserve. ■

Aboriginal People and the Law in British Columbia



This comprehensive guide for legal advocates and community workers updates the former *Aboriginal Poverty Law Manual* and identifies Aboriginal issues in 19 subject areas, including consumer, criminal, and family law, as well as residential schools, wills and estates, harvesting rights, and housing. ■

Social Assistance on Reserve in British Columbia

This booklet is for people who live on reserve in BC. It explains how social assistance on reserve works; what social assistance benefits people can get on reserve; how to get social assistance on reserve; what applicants can do if they are turned down; and how to get more information or help. ■

Indian Residential Schools Settlement

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

The Independent Assessment Process and the Common Experience Payment

This fact sheet is for Indian residential school survivors who want to know what their options are under the Indian Residential Schools Settlement Agreement. The settlement agreement is the result of a class action lawsuit that was started by a number of Indian residential school survivors against the Government of Canada and the churches that ran the Indian residential schools. The settlement agreement is an effort to address the damage caused by Indian residential schools. Under the settlement agreement, the government will compensate (pay) survivors for their experiences while they were at an Indian residential school. For more information on the settlement agreement, see the Indian Residential Schools Settlement website at www.residentialschoolsettlement.ca.

Who is covered by the settlement agreement?

If you're an Indian residential school survivor and you didn't opt out of the class action by August 19, 2007, you're covered by the settlement agreement. However, the settlement agreement only applies to eligible schools (see the Indian Residential Schools Settlement website for a list). The settlement agreement also doesn't apply to day school students unless they were abused on school property, or to students who were boarded out.

Under the settlement agreement, if you were seriously physically abused or sexually abused at an eligible school, you can make an **Independent Assessment Process** application (see the next section). Also, all students who lived at an eligible school were entitled to apply for the **Common Experience Payment**. The deadline for the Common Experience Payment has passed; however, depending on your circumstances, you may still be able to apply (see over).

NOTE

The information in this fact sheet may bring back painful and traumatic memories. If you become upset, call the Indian Residential Schools 24-Hour National Crisis Line immediately at:

1-866-925-4419 (no charge)

The crisis line will help you get emotional and crisis services.

Independent Assessment Process

The deadline to apply to the Independent Assessment Process is September 19, 2012.

The Independent Assessment Process (sometimes called **IAP**) is for Indian residential school survivors who were seriously physically abused or sexually abused by staff members or other students while they attended an eligible school. (For more information, see Schedule D of the settlement agreement on the Indian Residential Schools Settlement website.)

Indian residential school survivors who have come together to support each other can proceed with their abuse claims through the **Group Independent Assessment Process**. Funding of up to $3,500 per group member is available to manage Group Independent Assessment Process initiatives.

To apply to the Independent Assessment Process, you need to fill out an Independent Assessment Process Application Form (see the Independent Assessment Process website at **www.iap-pei.ca**). Applying to the Independent Assessment Process is complex and can be difficult; it's a good idea to get a lawyer to help you. For more information on the Independent Assessment Process and how to apply, call **1-866-879-4913** (no charge), or visit the Independent Assessment Process website. If your application is successful, compensation for the Independent Assessment Process is based on a number of factors, and ranges from $5,000 to $275,000.

Continued over

Common Experience Payment

The deadline to apply for the Common Experience Payment has passed. However, if you were unable to apply due to a disability, undue hardship, or other exceptional circumstances, you have until **September 19, 2012** to apply. You will need to provide in writing your reason for applying late. **Talk to a lawyer or advocate right away to find out what your options are**

The Common Experience Payment (sometimes called **CEP**) was for anyone who lived at one or more eligible schools. You didn't have to attend the school(s) for the full school year to be eligible. To apply for the Common Experience Payment, you need to fill out a Common Experience Payment (CEP) application form. (See Service Canada's website at **www.servicecanada.gc.ca**. Under Aboriginal Peoples, click Common Experience Payment.) For more information on the Common Experience Payment and how you can apply, call **1-866-699-1742** (no charge) or visit Service Canada's website. If you have difficulty with your hearing or speech, call **1-800-926-9105** (TTY, no charge).

Getting help — Indian Residential School Survivor's Society

The Indian Residential School Survivor's Society provides support for Indian residential school survivors. The society has support workers you can talk to to find out what your options are for healing or justice. For more information, call **604-925-4464** (Greater Vancouver) or **1-800-721-0066** (no charge, elsewhere in BC). You can also visit the society's website at **www.irsss.ca**.

Getting legal help

Getting a lawyer to help with your Independent Assessment Process application is highly recommended. Indian residential school abuse claims fall under personal injury law. Some law firms specialize in Indian residential school abuse claims. To get the names of these firms, call the Lawyer Referral Service at **604-687-3221** (Greater Vancouver) or **1-800-663-1919** (no charge, elsewhere in BC). You will have to phone the lawyer to set up an appointment. For $25 (plus taxes), you can meet with the lawyer for half an hour to see if you have a case.

The Government of Canada will pay any reasonable expenses your lawyer takes on while handling your claim. If your claim is successful, the government will contribute an additional 15 percent of your compensation towards your legal fees. Some lawyers may charge 15 percent in addition to the amount paid for by the government. These additional charges will come out of your compensation. Before you hire a lawyer, ask what percentage or what fees (if any) he or she will charge.

Where to get more information

For more information on the settlement agreement and who can help you, see the booklet *A Guide to the Indian Residential Schools Settlement* on the Legal Services Society website at **www.legalaid.bc.ca** (under Aboriginal, click Aboriginal publications).

Staying in the Family Home on Reserve

Who this is for

This fact sheet is for you if:

- You have left an abusive relationship, or are thinking of leaving.
- You have shared (or are sharing) a home on reserve with your partner.
- You have questions about your right to stay in the family home on reserve.

In this fact sheet, the word **partner** means husband, wife, common-law partner, or ex-partner.

Who can stay in the family home

Whether or not you can stay in the family home after separating from your partner depends on:

- If you have the right to live on the reserve
- Who has rights to the land your home is on
- The kind of housing you live in
- The band's policies on the reserve where you live

Who has the right to live on reserve

To stay in the family home, it is helpful to have the right to live on reserve.

- If you are a band member, you have the right to live on reserve.
- If you are not a band member, but have signed a rental agreement with the band, you have the right to live on reserve.

If you do not have the right to live on reserve, it is unlikely that you can stay in the family home. But if you live in **capital** or **social housing** (see "Types of housing on reserve"), you may be able to go to court to get money from your partner for your share of the house. This is called **compensation**.

Who has rights to the land

Your right to stay in the family home on reserve also depends on who has rights to the land your home is on. There are different kinds of land rights on reserve.

- **Indian Act land** is reserve land that a band does not own, but has the right to use under the federal Indian Act. For this reason, the band cannot sell land to band members, but can allow a band member to live on and use the land and/or live in a house on the land. The band member who has this right gets a Certificate of Possession, or Certificate of Occupation.

  If you live on Indian Act land, find out whose name is on the Certificate of Possession or Occupation. Ask your band housing officer or chief and council, or call the Indian Lands Registry at Indian and Northern Affairs Canada at 1-800-567-9604 (no charge) or TTY at 1-866-553-0554 (no charge).

  If your partner's name is on a Certificate of Possession, he or she can sell his or her interest without your agreement. This means that even if you are a band member, you may not have the right to stay on the land and/or live in the family home.
- **Traditional land** is reserve land that belongs to a particular family through tradition or custom recognized by the band. Ask your band chief or council if there is a written record of who the band gave the right to live on traditional land.
- **General band land** is held by the band for all band members. If you do not live on Indian Act or traditional land, you probably live on general band land. In this case, your right to stay in your home on reserve depends on band policies and the type of housing you live in — capital, social, or rental housing. If you are not sure what type of housing you live in, ask your band.

Types of housing on reserve

- **Capital housing** is housing that you and/or your partner pay for with a loan or a subsidy from the band. Although you and/or your partner own the house, you may have a rental agreement with the band to live on general band land.

  If you are an **individual tenant** (you alone have a rental agreement with the band), you can probably stay in the family home.

  You *may* be able to stay in the home if you are a **joint tenant** with your partner (both your names are on the rental agreement with the band). You probably cannot stay in the family home if you are not an individual or joint tenant.

  Even if you cannot stay in the family home, you may have the right to get compensation for a share of the home. You will need to talk to a lawyer who knows about family and property law on reserve.
- **Social housing** is paid for by the band through Canada Mortgage and Housing. While you live in the house, you and/or your partner pay the mortgage to the band. When the house is paid for in full, the band transfers possession to you and/or your partner.

  If the band has transferred possession to you and/or your partner, you have the same rights as someone who has capital housing (see above).

  If you are still paying the mortgage to the band, or you do not have a rent-to-own agreement with the band, you have the same rights as someone in band-owned rental housing (see below).
- **Band-owned rental housing** is housing that you and your partner rent from the band.

  If you signed a rental agreement with the band, find out what it says will happen if you and your partner separate. Also find out what band policy says will happen if partners in rental or social housing separate. For example, the band's policy may say that if the children live with you, you can stay in the home and have it put in your name.

Some First Nations are taking control of their own reserve lands under a BC law called the First Nations Land Management Act. This law says a band can decide how reserve land is distributed when partners divorce or separate. Find out if your band is using this law.

Help from BC courts

Under BC law, the courts cannot decide who can stay in the family home on reserve. Federal law (the Indian Act) and band policies decide this.

Even if you do not have the right to stay in capital or social housing, you can go to court and ask the judge to order that you get compensation for a share of the home's value (either sale or rental value). The judge may order this to make sure that family property is divided fairly. These orders do not affect the title or ownership rights of individual pieces of reserve land.

Get legal advice from a lawyer who knows about family and property law on reserve.

Other help

- If you are leaving an abusive partner, it is important to have a personal safety plan (see the fact sheet "Safety Planning"). A transition house worker or Native courtworker can help you make a safety plan. For information about how to contact them, call **VictimLink BC** at 1-800-563-0808 (no charge, 24 hours a day, seven days a week).
- Talk to your band housing officer, or chief and council. They may help you keep or get back your home if your children are living with you.

Legal help

- If you cannot pay for a lawyer, the **Legal Services Society (legal aid)** may provide a free lawyer. Call the Provincial Call Centre at 604-408-2172 (in Greater Vancouver) or 1-866-577-2525 (no charge, elsewhere in BC). Legal aid also offers free, brief legal advice through its Family LawLINE (same phone numbers) and family duty counsel (lawyers) at courts. See the legal aid website at www.legalaid.bc.ca or, for family law information, see www.familylaw.lss.bc.ca.
- If you can pay for a lawyer, call the **Lawyer Referral Service** at 604-687-3221 (in Greater Vancouver) or 1-800-663-1919 (no charge, elsewhere in BC) to get the name of a lawyer you can meet with to discuss your legal problem for $25 plus taxes for the first half hour. This might be good to do if you do not have possession of a capital or social home and want information about getting compensation for a share of the home's value.
- You may be able to get legal help from your local friendship centre, your band's social development office, and/or your nation's child and family services office. Call **VictimLink BC** for the name of a Native courtworker near where you live to help you.

More information

For more information about getting legal and other help, see the Legal Services Society booklet *Surviving Relationship Violence and Abuse* at www.legalaid.bc.ca/publications (click "Family violence").

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

Order online: www.crownpub.bc.ca (click the Legal Services Society image)

January 2011

Understanding Aboriginal Child Protection / Removal Matters

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

BC law says that if the safety of a child is at risk, the Ministry of Children and Family Development must investigate and, if necessary, remove the child from the home.

BC law also says that Aboriginal cultural ties are very important to the well-being of Aboriginal children. It says that when the ministry makes plans for an Aboriginal child's care, the ministry should respect the child's family ties and Aboriginal identity.

Parents

If the ministry removes your child from your home, you can:

- Get a lawyer *before* the day of court
- Call legal aid
- Work out a plan with your band or community that supports your child's family ties and Aboriginal identity
- Ask to have your child placed with another Aboriginal family
- Ask for a mediator (someone who will help work out an agreement)
- Ask for the Report to Court, which explains why your child was removed
- Ask for visits with your child

NOTE

If the ministry tells you that you are being investigated, you have the right to get a lawyer. *Contact legal aid immediately to find out if you qualify for a free lawyer.*

Legal aid:

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

Aboriginal Community/Band

If the ministry removes your child from your home, it must:

- Notify your child's Aboriginal community representative (such as the First Nations band) that your child has been removed
- Take steps to protect your child's family ties and Aboriginal identity
- Consider your child's family ties and Aboriginal identity when choosing a foster home
- In many cases, allow a representative (someone who is chosen to speak for others) from your child's band or Aboriginal community to go to court

The Aboriginal representative has the right to:

- Receive all records and information
- Speak at the child protection hearing
- Call witnesses and question other witnesses
- Take part in any mediation
- Ask about ways to get you help

Continued over

Your important details

Date the ministry started investigating: _____

Name of ministry social worker: _____

Date you called legal aid for lawyer: _____

Name of lawyer: _____

First Nation/Band or friendship centre contact: _____

Court dates

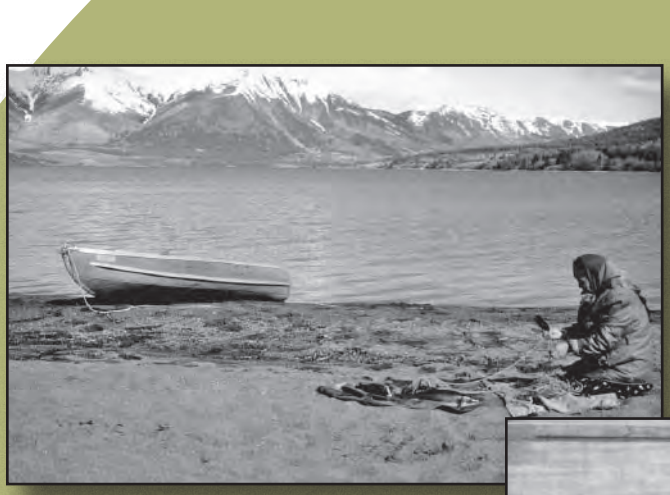
Access order application date: _____

Presentation hearing date: _____

Protection hearing date: _____

Adjournment date: _____

Social Assistance on Reserve in British Columbia



Legal Services Society

British Columbia
www.lss.bc.ca

Social assistance benefits | Disability benefits | Other benefits

September 2005

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Important — Please read

This is an updated edition of the booklet formerly called *Welfare Rights on Indian Reserves in British Columbia*. It includes the most recent information on social assistance rights on reserve available from Indian and Northern Affairs Canada (INAC) as of September 2005. However, social assistance policies and benefits change. For more information or to check the accuracy of this booklet, please read the INAC *Social Development Program Policy and Procedures Manual*. (You can find this manual at INAC offices and all band offices, or on the website of the Social Development Resource Centre at www.resourcecentre.org.)

Please note that this booklet explains social development policy in general. It is not intended to give you legal advice on your particular problem. Because each person's case is different, you may need to get legal help.

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Updated social assistance benefit rates as of February 2008

Page 11

Table 3 Social assistance benefit and PPMB rates

Family size	Basic needs (support) allowance*	Shelter allowance maximum**	Total payment
Employable single person under 65	$235.00	$375.00	$610.00
Single person 65 or over	531.42	375.00	906.42
Single person under 65 on PPMB	282.92	375.00	657.92
Employable single parent under 65 and 1 child	375.58	570.00	945.58
Single parent 65 or over, and 1 child	672.08	570.00	1,242.08
Single parent on PPMB and 1 child	423.58	570.00	993.58
Employable couple under 65	307.22	570.00	877.22
Couple, both 65 or over	949.06	570.00	1,516.06
Couple, 1 person under 65, 1 over 65	700.56	570.00	1,276.56
Couple both under 65, and on PPMB	452.06	570.00	1,022.06
Employable couple under 65 and 1 child	401.06	660.00	1061.06
Couple, both on PPMB and 1 child	546.06	660.00	1,206.06

Note: A minimum shelter allowance of $75 per month is guaranteed to recipients who are 60 to 64 years old or who are receiving PWD benefits.
*The basic needs (support) allowance does not increase if you have more than one child.
**Shelter rates go up $35 per month for each additional person in your family (beyond 2 people).

Page 15

Table 4 PWD rates

Family size and composition	Basic needs (support) allowance*	Shelter allowance maximum**	Total payment
Single person on PWD	$531.42	$375.00	$906.42
Single parent on PWD and 1 child	672.08	570.00	1,242.08
Single parent on PWD and 2 children	672.08	660.00	1,332.08
Couple, one on PWD	700.56	570.00	1,270.56
Couple, both on PWD	949.06	570.00	1,519.06
Couple, both on PWD and 1 child	1,043.06	660.00	1,703.06
Couple, one on PWD, the other over 65	946.06	570.00	1,516.06
Couple, one on PWD, the other over 65, and 1 child	1043.06	660.00	1,703.06

Note: A minimum shelter allowance of $75 per month is guaranteed to recipients who are 60 to 64 years old or who are receiving PWD benefits.
*The basic needs (support) allowance does not increase if you have more than one child.
**The PWD shelter rate increases by $90 for the third person, $40 for the fourth person, $50 for the fifth person, and $35 for each additional person.

Table 5 Hardship assistance rates

Family size	Basic needs (support) allowance*	Shelter allowance maximum**	Total payment
Single person under 65	$235.00	$375.00	$610.00
Single person over 65 or on PWD	531.42	375.00	906.42
Single person on PPMB	282.92	570.00	852.92
Single parent under 65 and 1 child	375.58	570.00	945.58
Single parent on PPMB	423.58	570.00	993.58
Single parent 65 or over, or on PWD, and 1 child	672.08	570.00	1,242.08
Couple, both under 65	307.22	570.00	877.22
Couple, both under 65, both on PPMB	452.06	570.00	1,022.06
Couple, 1 65 or over, or on PWD	700.56	570.00	1, 270.56
Couple, 1 65 or over or on PWD, and 1 child	794.56	660.00	1,454.56
Couple, both under 65 and 1 child	401.06	660.00	1,061.06
Couple, 1 on PPMB	396.22	570.00	956.22
Couple, both on PWD	949.06	570.00	1,519.06
Couple, both on PWD, and 1 child	1043.06	660.00	1,703.06
Couple, 1 on PPMB, and 1 child	490.06	660.00	1,150.06
Couple, both on PPMB, and 1 child	546.06	660.00	1,206.06

*The basic needs (support) allowance does not increase if you have more than one child.
**Shelter rates go up $35 per month for each additional person in your family (beyond 2 people).

Shelter rates at a glance

Family size	Maximum shelter allowance
1	$375.00
2	570.00
3	660.00
4	700.00
5	750.00
6	785.00
7	820.00

Note: Add up to $35 per month for each family member (beyond 7 people).

Increases to other allowances

Page #	Description	
20	Guide animal allowance	$95.00 per month
22	Natal allowance	$45.00 per month
		$90.00 per month for multiple births
22	School start up allowance	$84.00 for children aged 5–11
		$116.00 for children aged 12–18

Contents

Part 1: Introduction 1

Who is this booklet for? 1

What is social assistance on reserve? 2

Part 2: Applying for social assistance 4

Where do I apply for social assistance? 4

What do I bring to my first appointment? 4

What if I move off reserve? 5

What are my responsibilities while on social assistance? 5

What if I disagree with a decision about my case? 6

Part 3: Monthly benefits 7

How do I qualify for monthly benefits? 7

What is the social assistance benefit? 10

What are Persons with Persistent Multiple Barriers (PPMB) benefits? 12

What are Persons with Disabilities (PWD) benefits? 13

What is hardship assistance? 16

Part 4: Other benefits 19

Special allowances 19

Additional benefits, allowances, and services 24

Part 5: Appeals and complaints 29

How do I ask for an appeal? 29

What is an administrative review? 29

What if I don't like the results of the administrative review? 30

What happens at an appeal hearing? 30

What happens after the appeal hearing? 31

What if I don't like the appeal committee's decision? 31

What can I do if the appeal procedure is not followed? 31
How do I make a complaint about my worker? 31

Part 6: Protecting your rights 32

Who can help me with social assistance on reserve? 33
What if I need legal aid? 35

Glossary 36

Part 1

Introduction

This booklet describes what you can do if you need financial help and you live on reserve in British Columbia. It explains the following:

- How social assistance on reserve works
- How social assistance on reserve is different from assistance off reserve
- What social assistance benefits you can get on reserve
- Who can get social assistance on reserve
- How to get social assistance on reserve
- What to do if you're turned down for social assistance benefits

Earlier editions of this booklet were called *Welfare Rights on Indian Reserves in British Columbia.*

Who is this booklet for?

This booklet is for you if you live on reserve in British Columbia and you need financial help — even if you are not a First Nations person. It will help you even if you're staying on a reserve for a short time only.

This booklet does not describe the rules about social assistance off reserve (known as income assistance or welfare) — even if you are a First Nations person. If you live off reserve, you can apply for assistance at the nearest office of the BC Ministry of Employment and Income Assistance (MEIA), formerly called the Ministry of Human Resources. If you need help with your application off reserve, please see the Legal Services Society (LSS) publication *Your Welfare Rights: A User's Guide to BC Employment and Assistance*. LSS also publishes a series of fact sheets describing welfare off reserve.

This booklet and other LSS publications are available for free at your nearest legal aid office. You can also read them online at www.lss.bc.ca or order printed copies from:

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E-mail: distribution@lss.bc.ca

What is social assistance on reserve?

Social assistance is money and other benefits for people who need financial help and have no other reasonable way of getting money. Social assistance on reserve is also known as welfare.

Social assistance benefits

Social assistance benefits for people living on reserve include regular monthly benefits and Persons with Disabilities (PWD) benefits, as well as a range of other benefits. Each type of monthly benefit consists of a shelter allowance and a basic needs allowance (also called a support allowance), and has its own eligibility criteria. For more information about monthly benefits, turn to Part 3: Monthly benefits, on page 7.

Even if you are not eligible for monthly benefits, you may apply for some other benefits, such as guardian financial assistance. For more information about these benefits, turn to Part 4: Other benefits, on page 19.

Social assistance on reserve versus off reserve

Social assistance money for people living on reserve comes from the Government of Canada through Indian and Northern Affairs Canada (INAC). Assistance for people living off reserve in BC, known as income assistance or welfare, comes from the BC provincial government through the Ministry of Employment and Income Assistance.

INAC tries to make its social assistance rules on reserve the same as those off reserve in each province (note that when BC makes a change to off-reserve assistance, it sometimes takes INAC several months to update its policies). Right now, rules about assets and income, the requirement to look for work while receiving benefits, shelter and basic needs rates, and almost all other social assistance benefits are the same on and off reserve in British Columbia. However, some social assistance services and benefits are different on and off reserve. The major differences are shown in table 1 on the next page.

Table 1 Differences between social assistance on and off reserve in BC

Social assistance on reserve	Income assistance off reserve
Administered by social development workers working for an "administering authority" (usually an Indian band or tribal council), according to federal INAC Social Development policy.	Administered by employment and assistance workers working for the BC Ministry of Employment and Income Assistance, according to provincial Employment and Assistance legislation, regulation, and policy.
Simple, immediate application process.	Job search and waiting period before application processed.
PPMB eligibility based only on medical condition.	PPMB eligibility often based on a combination of medical and employability criteria.
Health benefits available to all social assistance recipients.	Health benefits only available to PWD and PPMB recipients.
Guardian financial assistance benefits available to members of extended family.	Child in the Home of a Relative benefits available only to immediate family members.
Daycare subsidy not part of INAC Social Development Program. However, applicants may apply to the BC Ministry of Employment and Income Assistance.	Daycare subsidy administered under BC Employment and Assistance legislation.
Special needs budget is limited — allowances granted if client is eligible AND money is in the budget.	Crisis grants are available to all clients who meet eligibility criteria.
Client can chose a person to sit on the appeal panel.	Client has no input into who is on the appeal panel.

Part 2

Applying for social assistance

Apply for social assistance when you or your family is short of money. Don't wait until you have no money left or until you've sold your possessions.

Where do I apply for social assistance?

You can apply for social assistance with the band social development worker for the reserve you live on. You can reach the worker by calling the band office for your reserve. It is a good idea to make an appointment with your worker in advance.

What band social development workers do

Band social development workers make decisions about social assistance on reserve. They are employed by an "administering authority" of the INAC Social Development Program. The administering authority is usually the Indian band whose reserve you live on. It may also be a tribal council or other First Nations organization in your area.

Band social development workers must follow INAC policy when they make social assistance decisions. This policy is set out in the INAC manual called the *Social Development Policy and Procedures Manual*. It is important to remember that band social development workers don't make social assistance policy; they just follow it.

What do I bring to my first appointment?

When you call the worker to make an appointment, ask what you need to bring with you. Before giving you social assistance, the worker will want to see a lot of your papers proving your identity and your financial situation, including the following:

- One piece of photo ID for both you and your spouse (for example, driver's license)
- A second piece of ID for both you and your spouse (for example, Native status card, birth certificate, BC CareCard, credit card, original citizenship papers)
- One piece of ID for each dependent child (for example, birth certificate or CareCard)
- Social Insurance Number card
- An up-to-date bank book or bank statement
- Recent rent, fuel, and utilities receipts
- Statements showing recent income (pay stubs)
- Documents about your Workers' Compensation or Employment Insurance benefits
- Documents about your assets (car, house, boat)

It is important to take as many of these documents as possible with you to your appointment. If you can't find all of them before your appointment, apply anyway, but be aware that eventually you may need to produce them.

You'll be eligible for social assistance only after the information you give your worker is checked. Tell your worker if you need money immediately — for example, if you have no food or face eviction. Your worker can sometimes provide assistance while checking your information.

If your worker asks you for information that doesn't exist or that you can't reasonably get, tell your worker right away to avoid delays in getting your benefits. If you're denied social assistance because you couldn't provide this information, you can appeal.

What if I move off reserve?

If you're receiving benefits on reserve and move off reserve, you'll have to re-apply for these benefits at a Ministry of Employment and Income Assistance (MEIA) office. When you first go to the office to apply, you'll be given an appointment to see a worker in three weeks time. During those three weeks, you'll be expected to complete an orientation session and look for a job. If you face eviction or need food or medicine right away, you may be able to get an earlier appointment. Before you move, speak with your band social development worker or contact MEIA or an advocate for information on current rules about social assistance off reserve.

Note: If you're on PPMB or PWD and are planning to move off reserve, please see pages 13 and 15.

What are my responsibilities while on social assistance?

There are certain things you must do to make sure you keep receiving the social assistance benefits you're entitled to.

Looking for work

Under most circumstances, you and your adult dependants must actively look for work while you're on social assistance. You may be required to show your social development worker proof that you're looking for work, and you may have to participate in a training, education, or employment preparation program. If you don't, you can be cut off social assistance.

Exemptions to the requirement to look for work

You're not required to look for work if:

- You or a family member has PWD status
- You qualify for PPMB benefits

- You are a single parent with a child under three or a child who has a physical or mental condition that prevents you from leaving home
- You are an adult dependant who does not meet the residency requirements for working

INAC policy also states that if you are "employable" but you are unable to look for work for a short period of time because of medical reasons or personal circumstances, you may be temporarily excused from looking for work. Tell your worker right away if you feel you should be temporarily excused. You may need to provide proof of your medical condition.

Making monthly declarations

Each month you receive social assistance you'll need to fill out a form that lists all of your income and assets, and any change in your financial circumstances or living situation. You'll have to sign a form that says you agree that all the information you've given is correct to the best of your knowledge. These declarations are legal documents, and if you make a false declaration, you can be charged with fraud.

What if I disagree with a decision about my case?

Band social development workers must follow the *Social Development Program Policy and Procedures Manual* when making decisions about your case, such as whether or not you are eligible for a benefit and how much money you get. If your worker denies you a benefit, or reduces or discontinues a benefit, you may be able to appeal that decision. Turn to Part 5: Appeals and complaints, on page 29, for more information.

Monthly benefits

There are four categories of monthly benefits:

1. Social assistance benefit
2. Persons with Disabilities (PWD) benefits
3. Persons with Persistent Multiple Barriers (PPMB) benefits
4. Hardship assistance

Each benefit includes a shelter allowance and a basic needs allowance (also called a support allowance), and has its own eligibility criteria. (See sidebar below.)

How do I qualify for monthly benefits?

To get monthly benefits, you must be an adult (19 or over) living on reserve in BC and a:

- Canadian citizen,
- permanent resident,
- Convention refugee, or
- sponsored immigrant whose sponsor can't or won't provide support, as determined by INAC.

To get additional benefits for adult dependants, those adults must fit into one of the categories above or be:

- on a temporary resident's permit or a Minister's permit,
- waiting for a decision about an application for refugee status,
- subject to a deportation order that Canada Immigration hasn't carried out or can't carry out.

Shelter allowance and basic needs allowance

Your **shelter allowance** will be equal to your actual housing costs, up to a certain limit. Your costs may include:

- rent,
- mortgage or house loan payments,
- heating and utility costs (including wood for heating),
- basic phone services, and
- some forms of house and contents insurance.

Sometimes, water, sewage disposal, garbage pick-up, and other services may also be included.

The maximum amount of your shelter allowance depends on the number of people in your family. If you share custody of a child whose primary residence is with someone else but the child stays with you for more than 40 percent of the month, you may claim a shelter allowance for up to the maximum amount for a family unit size that includes the child. To get this increased shelter allowance, you must have a court order or legal document proving that the child lives with you for the specified time.

Your **basic needs (support) allowance** is for the basic things you need that aren't included in your shelter allowance, like food, clothes, and transportation. How much you get for a basic needs allowance depends on your age, family status, and whether or not adult members of your family have disabilities or other barriers to employment.

Assets and income

Your social development worker will also look at your assets and income. If your assets are worth too much or your monthly income is too high for your "family unit," you won't qualify for monthly benefits. Also, you may not qualify if you get rid of assets to make yourself eligible for social assistance.

Assets

Assets are things you own, such as money, trust property, a house or land, cattle, and other possessions that you could sell for cash.

Some assets are called "excluded assets." Examples of excluded assets are your family home, necessary household equipment, work clothes, commercial fishing boats (if you fish), farming equipment (if you farm), breeding stock, Canada Child Tax Benefits, the BC Family Bonus, and GST credits. Your social development worker shouldn't include these kinds of assets when deciding if you qualify for social assistance.

Other assets, including your bank accounts and non-essential possessions that can be sold, are counted. Your family won't qualify for social assistance if the total value of these assets is too high.

Your first family vehicle is considered an excluded asset if you have less than $5,000 of equity in it. If you have more than $5,000 of equity in your vehicle, you may be required to sell it to become eligible for assistance. (People applying for or receiving PWD benefits — see page 13 — may be allowed to have more than $5,000 of equity in their vehicle.)

Note: When you apply for social assistance, tell your band social development worker about all of your assets, whether you believe they are "excluded assets" or not. If your worker includes assets you believe should be excluded, you can appeal. See Part 5: Appeals and complaints, on page 29, for how to appeal.

Income

"Income" is money that comes into your household, but does not include:

- social assistance benefits,
- GST credits,
- federal sales tax credits,
- Child Tax Benefits, or
- post-adoption assistance payments.

Some income, such as wages and salaries, is considered "earned income." Other income, such as child support payments and Employment Insurance benefits, is considered "unearned income." Usually, unearned income will be deducted from your social assistance cheque, dollar-for-dollar. Some forms of earned income may be exempt for certain categories of people — meaning that this income won't be deducted from

your benefits. For example, if you have been receiving PWD benefits for more than three months, you can now keep $400 of earned income from employment each month without having it taken off your social assistance cheque. Ask your social development worker about other earned income exemptions.

Note that the Canada Child Tax Benefit (CCTB) won't be deducted from your monthly social assistance benefits as long as you receive the CCTB every month. However, if you don't receive your CCTB cheques for a period of time and then later get a lump sum back payment for the cheques you missed, this payment is not considered exempt income and will be deducted from your social assistance cheque. Be sure to tell your social development worker right away if your CCTB cheque doesn't come.

Note: When you apply for social assistance, tell your band social development worker about all of your income — earned, unearned, exempt, or non-exempt. If your worker includes income you believe should be exempt, you can appeal. See Part 5: Appeals and complaints, on page 29, for how to appeal.

Family unit

A family unit means a single person or a couple with or without dependent children under 19 years of age who live at home. If you live with another adult, you may be considered members of the same family unit if:

- you share household responsibilities,
- you share income or one of you supports the other, or
- you act like spouses (either same-sex or heterosexual)

Note: Only one person in a family can receive social assistance for the whole family. However, two or more people (who are the not the spouse or dependant of the other) or families can share a home and still be eligible for social assistance. The administering authority will divide the total shelter costs by the number of people living in the same dwelling. This is called "shared shelter." If you share a home with another adult who is not your spouse or dependant, and your worker decides to pay you as a family unit, you can appeal this decision.

If you are under 19

If you are under 19, you may qualify for assistance only in exceptional circumstances and only after every effort has been made to get your parents to assume financial responsibility for you. The social development worker will involve a child social assistance agency in your case if child protection concerns arise or if you live in a marriage-like relationship.

People under 19 have the right to appeal if they have been denied social assistance or their benefits have been cancelled or reduced. See Part 5: Appeals and complaints, on page 29, for how to appeal.

If you are a child-in-care

If you are a child-in-care (of the Ministry of Children and Family Development or a First Nations child and family services agency) and you have a baby, you may qualify for assistance to pay for your baby's needs.

What is the social assistance benefit?

The social assistance benefit is the monthly benefit most people get when they receive assistance on reserve.

What your assets can be worth

To be eligible for the social assistance benefit, your assets can't be worth more than a certain amount. The amount depends on the number of people in your family unit and their ages. Your worker will take into account the cash you have on hand as well as your other assets. See table 2 below for how much you can have in cash and total assets and still be eligible for social assistance.

Table 2 Allowable assets limits for applicants and recipients

Family size	Applicant — Total assets	Applicant — Cash assets*	Recipient	PWD or Person in Care Facilities
Single person	$1,500	Social assistance entitlement plus $150	$1,500	$3,000
Single parent and 1 child	2,500	Social assistance entitlement plus $250	2,500	5,000
Couple	2,500	Social assistance entitlement plus $250	2,500	5,000
Couple and 1 child	2,500	Social assistance entitlement plus $250	2,500	5,000

*Cash asset limits apply only in the month you apply for assistance. They don't apply to people applying for or receiving PWD benefits or their dependants.

How much you get each month

The shelter and basic needs allowances for most families are listed in table 3 on the next page.

Table 3 Social assistance benefit and PPMB rates			
Family size	**Basic needs (support) allowance***	**Shelter allowance maximum****	**Total payment**
Single person under 65	$185.00	$325.00	$510.00
Single person 65 or over	531.42	325.00	786.42
Single person under 65 on PPMB	282.92	325.00	607.92
Single parent under 65 and 1 child	325.58	520.00	845.58
Single parent 65 or over, and 1 child	625.08	520.00	1,078.08
Single parent on PPMB and 1 child	376.58	520.00	896.58
Couple under 65	307.22	520.00	827.22
Couple, both 65 or over	949.06	520.00	1,329.06
Couple, 1 person under 65, 1 over 65	700.56	520.00	1,220.56
Couple, both under 65 and on PPMB	452.06	520.00	972.06
Couple under 65 and 1 child	401.06	555.00	956.06
Couple, both on PPMB and 1 child	452.06	555.00	1,007.06

Note: A minimum shelter allowance of $75 per month is guaranteed to recipients who are 60 to 64 years old or who are receiving PWD benefits.
*The basic needs (support) allowance does not increase if you have more than one child.
**Shelter rates go up $35 per month for each additional person in your family (beyond 2 people).

If you are denied or cut off social assistance

The band social development worker may turn you down for or stop your social assistance benefit if you:

- don't have identification,
- quit a job without a good reason or were fired because of something you did,
- aren't looking for work,
- turned down a job you could do,
- are on strike or locked out from your job,
- haven't looked for other sources of money, or
- are waiting for other benefits such as Employment Insurance or Workers' Compensation.

If you're turned down for, or cut off, the social assistance benefit, you might still qualify for hardship assistance (see page 16) or other important benefits (see Part 4: Other benefits, on page 19).

If your band social development worker turns you down for social assistance or a particular benefit, you can appeal this decision. See Part 5: Appeals and complaints, on page 29, for how to appeal.

What are Persons with Persistent Multiple Barriers (PPMB) benefits?

PPMB benefits are for people who have a medical condition (other than an addiction) that seriously affects their ability to find or keep a job. PPMB is a temporary benefit, approved for up to two years at a time.

PPMB recipients don't have to look for work. If all adults in the family unit have the PPMB designation, the family can get higher rates and benefits than a family receiving social assistance.

How you qualify

You may qualify for PPMB benefits if:

- you have been on assistance (on or off reserve) for 12 out of the last 15 months, AND
- you have a medical condition (other than an addiction) that:
  - seriously affects your ability to look for, accept, or continue employment, AND
  - has lasted for at least a year and will likely last for two more years, OR
  - has occurred frequently in the last year and will likely continue for the next two years.

How you apply

If you think you may qualify for PPMB benefits, contact your worker. Your worker will probably want to meet with you to talk about your medical condition and the PPMB criteria.

Your worker will then give you a medical report form that must be completed by your doctor. Make sure to tell your doctor how your medical condition stops you from looking for or accepting work.

When the doctor has completed the form, return it to your worker. Your worker will look at it and decide if you qualify for PPMB benefits.

If you get approved for PPMB benefits, you will be given a review date. This is when your benefits will end. If you still require PPMB benefits after this date, you'll have to apply again.

What your assets can be worth

The amount of cash and assets you can have and still be eligible for PPMB benefits is the same as for social assistance benefit recipients. See table 2 on page 10.

How much you get each month

If all the adults in your family unit have PPMB status, your monthly basic needs (support) allowance will be higher than the allowance for people receiving social assistance. PPMB rates are set out in table 3 on page 11.

If you move off reserve

If you've been getting PPMB benefits on reserve and you then move off reserve, you'll have to re-apply for PPMB benefits through the provincial Ministry of Employment and Income Assistance (MEIA). This may be a problem because current provincial regulations say that a person must have been receiving provincial income assistance for 12 of the last 15 months before they can get PPMB benefits. MEIA may make you wait 12 months before you can get PPMB benefits. In the meantime, you would only get regular income assistance.

If you're collecting PPMB benefits on reserve and are planning to move off reserve, speak with an advocate immediately.

If you are denied PPMB benefits

If you're denied PPMB benefits, you can appeal. See Part 5: Appeals and complaints, on page 29.

What are Persons with Disabilities (PWD) benefits?

PWD benefits are monthly benefits for people with certain types of physical or mental disabilities. Families who qualify for PWD benefits receive a higher basic needs (support) allowance than families receiving the social assistance benefit.

How you qualify

You may be eligible for PWD benefits if you live in BC and you:

- are 18 years of age or older, AND
- have a severe mental or physical impairment that:
  - a doctor confirms will last for two years or longer, AND
  - a health professional says directly and significantly restricts your ability to perform daily living activities.

You also have to show that because of your disability, you need help from another person, an assistance animal, or an assistive device to manage daily living.

How you apply

Applying for PWD benefits can be quite complicated. It is a good idea to talk to an advocate before beginning the process. For information on contacting an advocate, turn to Part 6: Protecting Your Rights, on page 32.

To apply for PWD benefits, you need to get a PWD application form from your band social development worker. Your worker will sign the cover page. Applications without this signature won't be processed.

The PWD application form is about 35 pages long and asks for a lot of information from not only you, but also your doctor and a person known as an "assessor." Many people choose to use their doctor as their assessor, too. However, the PWD application form lists other people who can fill this role. If your band social development worker is a social worker, he or she may qualify as an assessor. Your advocate or your worker can help you choose an assessor.

Once you get the PWD application form from your worker, make an appointment to see your doctor and/or assessor. Be prepared to discuss how your disability affects you on your bad days and how much help you need because of it. Even if it is difficult, you need to give details.

Once you, your doctor, and your assessor have completed the application, take it back to your band social development worker, who will send it to INAC. INAC will look at it and decide if you qualify for PWD benefits. This may take several weeks.

If your application is approved, you will be sent a letter telling you when your benefits will start. The letter will also give you a date when your application will be reviewed. This will be between two years and five years from the time you start receiving PWD benefits.

What your assets can be worth

To be eligible for PWD benefits, you can have up to the following in assets, including cash:

- $3,000, if you are single person
- $5,000, if you have one or more dependants

PWD rates

The basic needs (support) allowances and maximum shelter allowances for PWD recipients are described in table 4 on the next page.

Table 4 PWD rates

Family size and composition	Basic needs (support) allowance*	Shelter allowance maximum**	Total payment
Single person on PWD	$531.42	$325.00	$856.42
Single parent on PWD and 1 child	625.08	520.00	1,145.08
Couple, one on PWD	700.56	520.00	1,220.56
Couple, both on PWD	949.06	520.00	1,469.06
Couple, both on PWD and 1 child	949.06	610.00	1,559.06
Couple, one on PWD, the other over 65	949.06	520.00	1,469.06
Couple, one on PWD, the other over 65, and 1 child	949.06	610.00	1,559.06

Note: A minimum shelter allowance of $75 per month is guaranteed to recipients who are 60 to 64 years old or who are receiving PWD benefits.
*The basic needs (support) allowance does not increase if you have more than one child.
**The PWD shelter rate increases by $90 for the third person, $40 for the fourth person, $50 for the fifth person, and $35 for each additional person.

If you move off reserve

If you've been getting PWD benefits on reserve and you then move off reserve, you may have to re-apply for PWD through the provincial Ministry of Employment and Income Assistance (MEIA). MEIA will check with INAC. If you've previously completed the PWD application form on reserve, you should get the benefits off reserve with no problem, but MEIA will want a copy of the application you gave to INAC.

However, if you had originally been collecting Disability Level 2 benefits and then got PWD benefits without completing the PWD application form, MEIA will require you to fill out the PWD application form. Until this form is completed, reviewed, and approved, you'll only get regular social assistance benefits. If this situation applies to you, speak to your social development worker or an advocate before you move off reserve.

If you are denied PWD benefits

If you're denied PWD benefits, you can appeal. See Part 5: Appeals and complaints, on page 29.

What is hardship assistance?

Hardship assistance is a monthly benefit for people who don't qualify for social assistance, PWD, or PPMB benefits, but who will suffer "undue hardship" without some financial help. Hardship assistance is intended to be short-term and only covers basic needs such as shelter and food.

Eligibility criteria

To qualify for hardship assistance, you must be ineligible for other monthly benefits and living on reserve when you apply. You must have no other source of money and be facing undue hardship if you don't get financial assistance.

You must also be:

- a Canadian citizen;
- a permanent resident;
- a Convention refugee;
- a sponsored immigrant whose sponsor can't or won't provide support, as determined by INAC; or
- a sponsored immigrant who is waiting for INAC to decide if the sponsor can or will provide support.

You may qualify for hardship assistance if you are:

- waiting for a Social Insurance Number or other documentation;
- waiting for money from other sources such as Employment Insurance;
- on strike or locked out and unable to support yourself; or
- supporting one or more dependent children and you have income or assets worth more than the allowable levels, but you can't use the income or assets to support yourself or your family.

You'll need to show that you:

- can't afford to pay for your own or your family's basic needs (like food, clothing, and housing);
- don't qualify for regular benefits;
- have tried unsuccessfully to get money elsewhere; and
- haven't recently spent money on unnecessary things.

How you apply

Apply for hardship assistance from your band social development worker as soon as you need financial help that you can't get elsewhere. You must reapply for hardship assistance each month you need it. In most cases, hardship benefits are limited to three consecutive months.

What your assets can be worth

The amount of cash and assets you can have and be eligible for hardship assistance is the same as for social assistance (see table 2, on page 10); however, you may still be eligible for hardship assistance if your income or assets are over these levels but you can't use the income or assets to support yourself, and you have dependent children.

How much you get each month

Like other monthly benefits, hardship assistance consists of a shelter allowance and a basic needs (support) allowance. Hardship assistance is only for basic needs such as shelter and food. All available income and assets, including the Canada Child Tax Benefit, are deducted from hardship assistance. The current rates are shown in table 5.

Table 5 Hardship assistance rates

Family size	Basic needs (support) allowance*	Shelter allowance maximum**	Total payment
Single person under 65	$185.00	$325.00	$510.00
Single person over 65	301.92	325.00	626.92
Single person eligible for PWD	531.42	325.00	856.42
Single parent under 65 and 1 child	296.00	520.00	816.00
Single parent 65 or over, and 1child	366.00	520.00	886.08
Single parent eligible for PWD, and 1 child	625.08	520.00	1,145.08
Couple, both under 65	307.22	520.00	827.22
Couple, both under 65, both on PPMB	401.06	520.00	921.06
Couple, 1 under 65, 1 over 65	471.06	520.00	991.06
Couple, both over 65	541.06	520.00	1,061.06
Couple, 1 under 65, 1 over 65, and 1 child	471.06	555.00	1,026.06
Couple, both over 65 and 1 child	541.06	555.00	1,096.06
Couple, 1 person under 65, 1 eligible for PWD	700.56	520.00	1,220.56
Couple, both on PWD	949.06	520.00	1,469.06
Couple, both on PWD, and 1 child	949.06	555.00	1,504.06
Couple, 1 on PWD, 1 over 65	949.06	520.00	1,469.06

*The basic needs (support) allowance does not increase if you have more than one child.
**Shelter rates go up by $35 per month for each additional person in your family (beyond 2 people).

When you have to repay hardship assistance

If you expect to get money from another source (like Employment Insurance, Workers' Compensation, or an ICBC settlement) in a few weeks, you may have to sign an agreement to repay your hardship assistance when that money arrives. You may also have to pay back hardship assistance you receive in other circumstances.

Sometimes you don't have to repay hardship assistance. You shouldn't have to repay hardship assistance if:

- you are a victim of family violence and pursuing assets or support would likely lead to further violence against you,
- your sponsorship agreement broke down,
- you are on strike or locked out, or
- you don't have sufficient ID to qualify for social assistance.

Ask your worker if you'll have to pay back your hardship assistance.

If you are denied hardship assistance

Your worker may turn you down for hardship assistance if:

- you lost your job because of something you did and you didn't fight the decision,
- you refused to accept a job you could do,
- you've used money or assets for purposes other than basic needs,
- you aren't looking for work, or
- you haven't used up or looked for other sources of money.

If you're turned down for hardship assistance, you might still qualify for other benefits. Turn to Part 4: Other benefits, on page 19, for more information about other benefits.

If your worker turns you down for hardship assistance or requires you to repay money you don't believe you should have to repay, you can appeal the decision or file a complaint. See Part 5: Appeals and complaints, on page 29.

Other benefits

You may be eligible for other benefits depending on your needs and what kind of assistance you receive. You may qualify for additional benefits (see page 24) even if you're not eligible for or receiving social assistance. Ask your social development worker for more information.

Special allowances

Special allowances are for people receiving social assistance, PPMB benefits, or PWD benefits. In some cases, people receiving hardship assistance may also be eligible.

Camp fee allowance

If the administering authority has funds available in its special needs budget, adults receiving PWD benefits and children of families on social assistance may get money to attend a recognized camp once a year.

Children with disabilities and children of long-time social assistance recipients have priority.

December supplementary allowance

If you receive social assistance, PPMB benefits, or PWD benefits, you may be eligible for a December allowance to help with holiday expenses. The following amounts are available:

- Single person — $35
- Couple — $70
- Families with children — $70, plus $10 per dependent child

Diet allowance

If you or your dependants have a medical condition that requires a special diet, you may be entitled to receive a diet allowance. The eligible diets and related allowances include the following:

- Restricted sodium diet — $10 a month
- Diet for diabetes — $15 a month
- Diet for kidney dialysis — $30 a month (if not covered through the Ministry of Health)
- High-protein diet — $40 a month
- Gluten-free diet — $40 a month
- Diet for dysphagia — $40 a month
- Diet for cystic fibrosis — $50 a month

You must show the worker written proof, such as a doctor's letter, of your dietary needs.

If you're receiving a natal allowance but your medically necessary special diet isn't pregnancy-related, you can receive both benefits. People receiving hardship assistance do not qualify for this benefit.

Note: BC has stopped issuing allowances for high-protein diets to people off reserve unless they have certain types of medical conditions. At the time of writing this booklet, these new restrictions did not apply on reserve. However, they may in the future. Check with your worker before applying for a high-protein diet allowance.

Family bonus top-up allowance

If your family receives social assistance or hardship assistance and your BC Family Bonus is less than $123.50 each month, you may be eligible for a "family bonus top-up" allowance (which pays the difference between the amount of your family bonus and $123.50).

If your family receives social assistance or hardship assistance but you are not eligible for the family bonus, your monthly benefit may be increased by $123.50:

- for the calendar month in which a dependent child is born (a child is not eligible for the family bonus in the first month), and
- for each month following the month a dependent child reaches 18 until the child is 19 (a child over 18 is not eligible for the family bonus).

For more information on the family bonus, see page 25.

Guide animal allowance

If you or a dependant uses a guide animal certified under the Guide Animal Act, you may be eligible to receive $62 a month to help with the costs of maintaining the animal.

Incentive allowance

The incentive allowance covers clothing, transportation, babysitting, and other costs related to volunteer work. The purpose of the allowance is to encourage you to do work that will enhance your employability skills and may lead to paid employment. Only one person in a family unit may receive an incentive allowance at any one time.

How you qualify

To qualify for an incentive allowance, you must be:

- receiving PPMB benefits;
- receiving PWD benefits or be the dependant of someone receiving PWD, and be unable to participate in employment or training skills programs;

- "temporarily excused" from working or looking for work;
- a single parent with a child who is under 3 or who has a physical or mental condition that prevents you from working; or
- 15 or over and a dependant of someone receiving social assistance or guardian financial assistance.

You'll be required to sign an incentive agreement with your worker and perform a number of volunteer hours each month for an approved organization or business. You're not eligible for an incentive allowance if you're taking part in a work opportunity program or a training or educational program such as Aboriginal Social Assistance Recipient Employment Training (ASARET).

How much you get

You can receive an incentive allowance of up to $100 a month if you complete the agreed number of hours in your contract. If you can't complete all of your hours, you may receive a partial allowance for the work that you were able to do. An incentive allowance contract extends up to six months, with one extension of up to another six months within a three-year period.

Note: The incentive allowance is not deducted from your benefits.

Infant formula allowance

You may get a formula allowance for a baby's first 12 months if breastfeeding is impossible or ill-advised (for example, when the mother has HIV or breast cancer, or is receiving methadone treatment). You must provide a letter from your doctor confirming that you have a medical condition that prevents breastfeeding to receive the formula allowance.

Babies with special dietary needs — as a result of food allergies or the failure to thrive, for example — can receive specialized formula for an unspecified time period.

Moving costs

You may be eligible for up to $500 to help with moving costs if you are eligible for social assistance and:

- you are unemployed and need to move to accept a confirmed job offer,
- you must move for health reasons, or
- you are forced into a local move because your home is:
  - destroyed,
  - unfit for habitation,
  - about to be demolished, or
  - occupied by the owner.

You must provide your worker with written proof of the reason for your move and two estimates of the moving costs from licensed movers or truck rental agencies, before you can get a moving allowance.

Your moving costs may also be paid if you're moving to repatriate to your home reserve in your best interests or in the best interests of your dependent children.

This benefit isn't available for people moving from off reserve to the reserve. Nor is it available for a move from the reserve to a home off reserve if other suitable on-reserve housing is available. People evicted due to their own actions are not eligible for this allowance.

Note: Speak with your social development worker before you move. You may not be reimbursed for your moving costs if you move before checking with your worker.

Natal allowance

If you are pregnant or have a child less than seven months old, you may be entitled to receive $35 a month to help with additional costs related to pregnancy or a new baby. The allowance may increase to $70 a month in the case of multiple births. The allowance can last up to six months.

You can get this natal allowance if you're receiving guardian financial assistance, but not if you're receiving hardship assistance.

To receive a natal allowance, you'll need to show your worker written confirmation of your pregnancy from a doctor or a midwife.

School start-up allowance

If you are a parent or guardian of dependent non-status children up to 18 years old who are attending kindergarten or grade school full-time, you may be eligible for additional money to help with back-to-school costs. (Children with Indian status are eligible for funding through their band's education program.)

The amount available for children from kindergarten age to 11 years old is $42. For children from 12 to 18 years old, the amount is $58.

Special needs allowance

Special needs allowances are for people who receive social assistance, PPMB benefits, or PWD benefits, and face a one-time financial emergency that can't be covered by their regular benefits. Payment of this allowance depends on the priorities and budget of the administering authority.

How you qualify

To qualify for a special needs allowance, you must:

- receive social assistance, PPMB benefits, or PWD benefits, and
- need the money for an unexpected emergency to prevent imminent danger to your physical health or to protect a child.

How much you get

A special needs allowance covers one or more of the following:

- Up to one month's rent arrears to prevent eviction
- Up to $200 for arrears for utilities (heat, electricity, and phone), only once, to prevent immediate disconnection
- Necessary furniture (bed, bedding, kitchen table and chairs, sofa, lamps, dresser, and cooking utensils)
- Necessary appliances (stove, refrigerator, and washing machine)
- Exceptional items recommended by your doctor (vacuum cleaner, humidifier, dehumidifier)
- Repairs to a house you own and live in that are required for health or safety
- Replacement of essential furniture, food, and clothing lost to fire, flood, or other disaster

Special transportation

If the administering authority has enough money in its special needs budget, you may be eligible for assistance with your transportation costs within BC, including necessary meals and shelter, to attend:

- a rehabilitation centre,
- a family court hearing as a witness for a family member, or
- a training program at a non-profit achievement centre for people with disabilities.

This benefit is also available for people visiting a parent, spouse, or child in an institution when a doctor or worker at the institution recommends the visit. It may also be available to someone taken to court who doesn't have the funds to return home.

Transition to employment programs

INAC provides limited funds for training, education, and temporary employment of people receiving social assistance on reserve. The amount of these funds varies from band to band and runs out from time to time. Ask your worker if these funds are available to you.

Work clothes and work transportation benefit

If you are a single parent returning to work, you may be eligible for up to $200 for necessary clothing and local transportation costs, provided the administering authority has enough money in its special needs budget.

You'll have to provide your worker with written proof of your start of employment and two estimates of your expenses.

This benefit isn't available to transients or people getting hardship assistance.

Workforce entry benefit

If you're returning to work, you may be eligible for up to $200 for necessary clothing and one month's local transportation costs, provided the administering authority has enough money in its special needs budget. You'll have to show your social development worker written proof of your start of employment.

You may receive both a workforce entry benefit and a work clothes/work transportation benefit. The workforce entry benefit is available once every 12 months.

Additional benefits, allowances, and services

The following benefits and services are available to people with low incomes. You may not need to be eligible for or receiving social assistance to qualify for these benefits.

Adult care

Adult care services are available to elderly people or people 19 or over with physical or mental disabilities who are no longer able to live in their own homes. These services may be provided in a family care home or an institution (continuing care facility).

Apply for adult care through your social development worker. If you qualify, the administering authority will pay the care provider directly, and be reimbursed by INAC. If you have enough income, you will be expected to pay part of the costs.

Burial/cremation allowance

A burial/cremation allowance is money to help pay for simple funeral or memorial service, and cremation or burial of a family member. Ask your social development worker for more information.

How you qualify

The administering authority will provide this allowance only if the deceased was living on reserve at the time of death or if the funeral or burial takes place on a reserve in BC. The administering authority gives the money directly to the funeral home.

If the deceased wasn't living on reserve at the time of death but burial will take place on reserve, the Ministry of Employment and Income Assistance (MEIA) may pay some of the costs. You must contact MEIA directly. The administering authority may pay the balance of the costs not covered by MEIA.

> **Note:** To have burial/cremation expenses paid for, you must have approval from the administering authority before you arrange for the burial/cremation. This is very important, because the contribution by the administering authority depends on the status, place of residence, and financial circumstances of the deceased and his or her family.

How much you get

The allowance will cover the cost of an "Imperial 2, cloth-covered" casket or the equivalent, or a cremation urn up to a cost of $200. It will also cover some, or all, of the cost of transporting your deceased relative, plus funeral expenses up to $690 for a child under 12 and $917 for someone older.

If the deceased lived on a reserve some distance from the place of death, the expense of transporting the body to the reserve may also be covered. However, the administering authority won't pay for transporting a body from outside BC.

Child care services

Child care services for people living on reserve are provided by MEIA. If you are a parent or custodian of children and require child care to allow you to work, to attend school or training, or to look for work, you may apply for a child care subsidy directly from MEIA. You may also be eligible for a child care subsidy if a child and family social assistance agency recommends it as part of a child protection plan.

A worker from MEIA will do a financial assessment. Depending on your income, MEIA may cover all or part of these costs.

Family bonus and family bonus top-up allowance

If you have a low income and dependent children living with you, you can get the BC Family Bonus. The BC Family Bonus has two parts: the BC Basic Family Bonus and the BC Earned Income Benefit. Benefits from these programs are combined with the Canada Child Tax Benefit (CCTB), which includes the National Child Benefit Supplement, into a single monthly benefit.

The family bonus cheque comes from the federal government. To get the family bonus, you have to file an income tax return and apply to the Canada Revenue Agency for the CCTB.

If your family receives the social assistance benefit or hardship assistance and your family bonus is less than $123.50 each month, you may be eligible for a "family bonus top-up" allowance (which pays the difference between the amount of your family bonus and $123.50).

If your family receives the social assistance benefit or hardship assistance but you are not eligible for the family bonus, your monthly benefit may be increased by $123.50:

- for the calendar month in which a dependent child is born (a child is not eligible for the family bonus in the first month), and
- for each month following the month a dependent child reaches 18 until the child is 19 (a child over 18 is not eligible for the family bonus).

Guardian financial assistance

If you have a child who isn't your own son or daughter living with you on reserve, you may be may be eligible for guardian financial assistance in certain circumstances, even if you don't qualify for social assistance or other benefits. This can happen if the parents of the child are unable to care for or financially support their child and place the child in your home on reserve.

How you qualify

You may qualify for guardian financial assistance if:

- the child is not your own,
- you and the child live in the same house on reserve,
- the child's parents agree (in writing) that the child can live with you, and:
  - the child's parents are attending treatment or are unable to care for the child due to a mental or physical disability;
  - there are child protection concerns or a recommendation from the Ministry of Children and Family Development or a First Nations Child and Family Services agency, or
  - the administering authority believes it is in the best interests of the child.

When you apply for guardian financial assistance, your worker will check the income of the child's parents. If the parents have more income than they'd get on social assistance, the parents will be asked to pay that extra income to you. The amount you get from guardian financial assistance will then be reduced by that amount from the parents.

If you have legal (court-ordered) custody of the child, you may be eligible for guardian financial assistance without the written consent of the child's parents, if all other sources of maintenance have been explored and you meet the criteria. If you're denied guardian financial assistance but are receiving social assistance, you can include the child as a dependant.

How much you get

The maximum amount of guardian financial assistance you can receive per child is shown in table 6 below.

Table 6 Guardian financial assistance rates (for each child)

Age of child	Maximum allowance
Birth to 5 years	$257.46
6 to 9 years	271.59
10 to 11 years	314.31
12 to 13 years	357.82
14 to 17 years	402.70
18 years	454.32

Note: These amounts can change. Consult your worker or advocate for current rates.

Note: You may also apply for the Canada Child Tax Benefit for the child in your care. This benefit won't affect your guardian financial assistance rates. In addition, the Child Tax Benefit won't be deducted from your social assistance.

Health benefits for non-status people

Status Indians receive non-insured health benefits through the Medical Services Branch (MSB) of Health Canada. If you (or a dependant) are non-status and live on reserve, you may be eligible for some insured and non-insured benefits through the Social Development Program. For example, you may be eligible for basic or enhanced Medical Service Plan coverage or, with a written recommendation from a doctor or dentist, non-insured health benefits such as prescription drugs, eyeglasses, dental care, medical equipment, and hearing aids. It is best to get pre-approval from your worker before you buy any non-insured items.

Note: Everyone receiving social assistance is eligible for PharmaCare coverage. PharmaCare can help you pay for prescription drugs and medical supplies. You need to register get PharmaCare coverage. This involves signing a consent form and returning it to PharmaCare. You can register, or check to see if you are registered, by going to the PharmaCare website at https://pharmacare.moh.hnet.bc.ca. For more information or to register by phone, call 1-800-663-7100 (outside Vancouver) or (604) 683-7151 (in Vancouver).

Homemaker services

Homemaker services are available to elderly people or people 19 or over with physical or mental disabilities who require assistance with some basic tasks so they can live safely and with dignity in their own homes. Homemaker services are usually limited to help with cleaning, laundry, or meal preparation, but, in exceptional circumstances, they may include help with transportation, banking, or shopping.

When you apply for homemaker services, your social development worker will do an assessment of your needs and approve only those services he or she feels you require, and will review these services from time to time. If you have enough income, you may be required to pay for some of the homemaking services yourself.

Family members and people who live with you won't be approved as homemakers, though family members who care for relatives may be eligible for respite benefits.

Transient benefits

Transient benefits include money and accommodation for people travelling through the area and staying on the reserve for only a short time.

How you qualify

To qualify, you must be a single person or a member of a childless couple staying on reserve temporarily and have no intention of becoming a permanent resident there.

How much you get

You may get up to three days of basic needs (support) allowance and a reasonable shelter allowance.

If you want to stay on reserve

If you are a transient person eligible for social assistance and you decide to stay on reserve permanently, you may get up to one month of support allowance. If housing is available on the reserve, you may also get up to one month of shelter allowance.

Appeals and complaints

You have the right to ask for an administrative review of your social development worker's decision if he or she refuses your application, or reduces, suspends, or cancels an allowance or service. You can also file a complaint if you don't like the way your social assistance application or claim is handled. It is best to get an advocate to help you file an appeal or complaint (see Who can help me with social assistance on reserve? on page 33).

Note that you can't ask for a review of "non-discretionary" issues where your worker must apply social development policy. Non-discretionary issues include:

- general eligibility requirements such as the requirement to complete an application and notify the administering authority about the change in circumstances;
- the amount of assistance rates, and
- changes in your rates because of a policy change.

How do I ask for an appeal?

First, tell your worker that you want to ask for an appeal of his or her decision. Ask for a Request for Administrative Review form.

Next, complete the Request for Administrative Review form and mail or give it to your worker within 20 business days of being notified of the decision you're appealing. Include any relevant documents and evidence you have to support your case.

If you're asking for a review of a decision that reduces or cancels a social assistance benefit you're already getting, your worker must pay you the full benefit until the review is completed. If you lose the review, you will have to pay this money back.

What is an administrative review?

A person assigned by INAC who was not involved in the original decision must review your Request for Administrative Review form and make a decision within 20 business days to:

- deny your request,
- confirm your worker's decision, or
- change your worker's decision.

This "administrative review" decision will be written on an Administrative Review Decision and Request for Appeals Committee Hearing form, and you'll receive a copy.

What if I don't like the results of the administrative review?

If you are not satisfied with the results of the administrative review, you can appeal. Fill out section 3 of the Administrative Review Decision and the Request for Appeals Committee Hearing form explaining why you are not satisfied, and return it to the administering authority within seven business days of receiving your copy of the review results.

Within 14 business days of getting your completed Administrative Review Decision form, your worker must make sure that an appeal committee of three independent people is formed to hear your appeal. The three committee members must be:

1. Someone you chose. This person can't be a relative. You must name this person on the Administrative Review Decision and the Request for Appeals Committee Hearing form.
2. Someone chosen by your band or tribal group. This person can't be an employee of your band or tribal group or of INAC.
3. A chairperson chosen jointly by your nominee and the person nominated by the band or tribal group. If these people are can't agree to a chairperson, the band chief and the INAC manager will chose a person together.

The chair must make sure the appeal hearing starts within 10 business days of his or her nomination, and must notify you, the chief and council, and INAC of the date, place, and time of the hearing at least 2 business days before it is to take place.

Appeal committee members are reimbursed for travel, accommodation, and meal expenses.

What happens at an appeal hearing?

You must attend the appeal hearing or send a representative (or advocate) on your behalf. You can bring an advocate with you. If you send a representative in your place, you must advise the chairperson of this in writing. If you don't attend or send a representative, your appeal can be dismissed.

At the hearing, you have the right to explain all your reasons for appealing your worker's decision. You may need to show documents related to the decision and to bring witnesses.

You also have the right to see any documents considered by the appeal committee members and the right to question any of their witnesses at the hearing. Your social development worker will have to explain his or her decision and answer your questions about it.

The INAC manual says that the appeals committee may only consider information, records, or testimony included in the materials submitted to the Administrative Review. This suggests that you can't present new evidence at your appeal. However,

the manual also says that the Appeals Committee can consider any "relevant" information. Speak to an advocate about the evidence you should provide at an Appeals Committee Hearing.

If the hearing can't be finished in one day, the chairperson can adjourn it for up to 20 business days and finish it later.

All information collected and shared during the hearing is confidential.

What happens after the appeal hearing?

At the end of the hearing, the appeal committee members must decide by a majority vote if they want to accept or reject the decision made by your worker. The appeal committee can also suggest changes to social development policy and procedures. When the appeal committee makes its decision, it sends a report to INAC.

If the manager of the Social Development Unit at INAC agrees with the appeal committee's decision, he or she will order the social development worker to carry out the decision. If the manager of the Social Development Unit at INAC disagrees with the appeal committee's decision, he or she will meet with the chairperson of the committee to find a solution.

INAC will inform you and the appeal committee chair about the final decision.

What if I don't like the appeal committee's decision?

If you are not satisfied with the result of the appeal, you may ask for a judicial review by the Federal Court of Canada. If you decide to do this, contact an advocate or lawyer as soon as possible. See Who can help me get social assistance on reserve? on page 33, for how to find an advocate.

What can I do if the appeal procedure is not followed?

If these procedures are not followed, you can complain. Call Indian and Northern Affairs Canada at (604) 775-5100 or 1-800-665-9320 and ask to speak to the social development specialist for your area. Or talk to your advocate about what to do.

How do I make a complaint about my worker?

If you think you were treated unfairly by your social development worker or someone who works for the administering authority, you can complain to his or her supervisor. The supervisor might be a social development manager, the band manager, or band administrator. If you are still not satisfied, you can complain to the chief and band council. Talk to your advocate about this.

Protecting your rights

Part 6

Here are some suggestions that will help you get and keep your social assistance benefits.

1. **Learn as much as you can about social assistance**
   Read this booklet. Look at a copy of the INAC *Social Development Program Policy and Procedures Manual*. Read as much as you can about social assistance and social assistance rights.
2. **Protect your rights**
   Your worker might make a mistake. Compare what your worker tells you with what it says in the *Policy and Procedures Manual*. If you ask, your worker should show you the part of the manual on which he or she bases a decision.
3. **Keep all documents and receipts**
   The social assistance world runs on paper. You often need evidence — on paper — to make your point or prove your case.
4. **Make notes**
   Make notes of all the conversations you have with your worker, including what he or she tells you about benefits. These notes will help if there is a future disagreement. Also, take notes on when, where, and to whom you send appeal documents.
5. **Take a friend or advocate**
   You're allowed to bring a friend or advocate to meetings with your worker. You also have the right to have your advocate attend your appeal hearing.
6. **Appeal if you think a decision is wrong**
   Appealing a decision doesn't mean you're insulting the worker. You're just saying that you disagree with his or her decision. Even if you don't win your appeal, the appeal committee may find the information you provide helpful in suggesting changes to social assistance policy.
7. **Reapply if your circumstances change**
   If you get turned down for a social assistance benefit and then your circumstances change (for example, if you lose your job, or you suddenly have a lot of medical expenses, or you marry and have a family to take care of), it is important that you apply for social assistance again. You might qualify the next time.

Who can help me with social assistance on reserve?

An advocate is someone who helps others get the rights or benefits they're entitled to. An advocate can help you:

- apply for social assistance,
- learn about social assistance rights and benefits, and
- appeal decisions made by your social development worker.

There are advocates and advocacy groups across BC that help people with social assistance. Most advocates are more familiar with provincial social assistance legislation and rules than with social assistance on reserve. All advocates, though, can give you information and help you with your social assistance application, appeal, complaint, or problem.

Your advocate is on your side. He or she should treat you with respect and keep your case confidential.

How to find an advocate

To find an advocate in your area, call the legal aid office or anti-poverty organization nearest to you. To find your local legal aid office, look in the white pages of the phone book under "Legal Aid — Legal Services Society." If your area doesn't have an office, call the Legal Services Society Call Centre at (604) 408-2172 (in the Lower Mainland) or toll free at 1-866-577-2525 (outside the Lower Mainland).

Other resources

The following resources, primarily Web-based, may be able to help you with an on-reserve social assistance matter.

BC Aboriginal Network on Disability Society

Provides a variety of support services to First Nations people with disabilities
(250) 381-7303; 1-800-381-7303
E-mail: bcands.bc.ca
Web: www.bcands.bc.ca

First Nations and Inuit Health

Information about the health issues facing First Nations people and the health-related services offered by the First Nations and Inuit Health branch of Health Canada.
Web: www.hc-sc.gc.ca/fnih-spni/index_e.html

First Nations Profiles

A website providing current national First Nation community profiles, which include general information about the First Nation, the First Nation's government, Tribal Councils, and reserves.
Web: http://pse2-esd2.ainc-inac.gc.ca/FNProfiles/FNProfiles_home.htm

Guide to Aboriginal Organizations and Services in BC

A resource listing of community-based services and organizations, found in PDF on the home page of the Ministry of Aboriginal Relations and Reconciliation website in the right hand sidebar under "Other topics."
Web: www.prov.gov.bc.ca/arr

Indian and Northern Affairs Canada (INAC) — BC Region

The federal department primarily responsible for meeting the federal government's constitutional, treaty, political, and legal responsibilities to First Nations, Inuit, and northerners. The department provides a range of programs and services to support First Nations and Inuit communities.
(604) 775-5100; 1-800-665-9320 (toll free within BC)
E-mail: bcinfo@ainc-inac.gc.ca
Web: www.ainc-inac.gc.ca

LawLINK

A website offering links to information about the law in BC on topics including Aboriginal law, consumer and debt, legal help, welfare, and wills and trusts.
Web: www.lawlink.bc.ca

Legal Services Society

The BC legal aid organization, which provides legal information, advice, and representation services (see page 35).
Web: www.lss.bc.ca

PovNet

A website for advocates, people on welfare, and community groups and individuals involved in anti-poverty work. It provides up-to-date information about welfare and housing laws and resources in British Columbia and Canada, and includes a list of community-based advocates in each province/territory.
Web: www.povnet.org

Services for First Nations People

An online guide to federal government services and programs for First Nations people.
Web: www.ainc-inac.gc.ca/pr/pub/ywtk/sgp_e.html

Social Development Resource Centre

An organization created by INAC and the First Nations Development Society to provide ongoing training and support, especially policy clarification, for social development workers.
(604) 924-4153; 1-800-991-7099
Web: www.resourcecentre.org

What if I need legal aid?

If you think you need legal aid, contact the Legal Services Society (LSS). LSS provides legal aid services across BC for low-income people dealing with certain criminal, family, and immigration law problems. Although LSS does not provide legal representation (a lawyer) to help people with social assistance problems, LSS offers legal information and advice services at many legal aid offices, on the Internet, and over the phone.

To find your local legal aid office, look in the business listings of the white pages of the phone book under "Legal Aid — Legal Services Society," or check the LSS website at www.lss.bc.ca under Legal aid. If you can't get to a legal aid office, contact the LSS Call Centre at (604) 408-2172 (Lower Mainland) or 1-866-2525 (toll free, outside the Lower Mainland).

For legal information, contact:

- **LawLINE,** a toll-free telephone service that provides general legal information and, in some cases, advice about legal issues. It is a service for people who can't afford a lawyer but don't qualify for legal aid. LawLINE is staffed with lawyers and paralegals, and can arrange immediate access to telephone interpreters as needed. Call (604) 408-2172 (Lower Mainland) or 1-866-2525 (toll free, outside the Lower Mainland). After you connect, press 7 to get to LawLINE.
- **LawLINK**, for help finding legal information and self-help resources on the Internet. This service has two parts:
  - A website (www.lawlink.bc.ca) with links to information on legal topics including Aboriginal issues, welfare, pensions and benefits, and legal help.
  - Free public access computers in a variety of locations across BC, including all LSS regional centres. You can use the computers to search for legal information on the Internet. At these locations there is also direct telephone access to LawLINE, and free legal information booklets. For addresses of LawLINK computers, call your local legal aid office.

Glossary

Aboriginal peoples:
In Canada, this term refers to the descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people — Indians (including non-status Indians), Métis, and Inuit. These are three separate peoples with unique heritages, languages, cultural practices, and spiritual beliefs. The term is also used in other countries to refer to the indigenous people or first inhabitants of a given area.

Band:
A body of Indians for whose collective use and benefit lands have been set apart or money is held by the Crown, or who have been declared to be a band for the purposes of the Indian Act. Each band has its own governing band council, usually consisting of one chief and several councillors. Community members choose the chief and councillors by election or sometimes through custom. The members of a band generally share common values, traditions, and practices rooted in their ancestral heritage. Today, many bands prefer to be known as First Nations.

Band council:
A body elected according to provisions of the Indian Act to be responsible for "the good government of the band" and delegated the authority to pass by-laws on reserve lands. Also known as chief and council.

Chief and council: See Band council

Department of Indian and Northern Affairs:
The federal government department responsible for meeting the government's constitutional, treaty, political, and legal responsibilities to First Nations, Inuit, and Northerners. Referred to as Indian and Northern Affairs Canada (INAC).

Extended family:
A group of people associated by birth, marriage, or close friendship that nurture and support one another.

First Nation:
A term that came into common usage in the 1970s to replace the word "Indian." Although it is widely used, no legal definition of First Nation exists. It refers to both status and non-status Indians, and some bands have chosen to replace the word "band" in the name of their community with First Nation.

Indian:
A term used historically to describe the first inhabitants of the "New World," and a legal term defined in the Indian Act. In Canada, there are status Indians, non-status Indians, and treaty Indians (see separate definitions). Although some First Nations people still refer to themselves as Indians, the term has been generally replaced by Aboriginal people (as defined in the Constitution Act of 1982) or First Nations.

Indian Act:
Canadian federal legislation first passed in 1876 and amended several times since. It sets out certain federal government obligations and regulates the management of Indian reserve lands, moneys, and other resources.

Indian and Northern Affairs Canada:
See Department of Indian and Northern Affairs

Indian reserve:
Initially created by colonial governors, and later by the Canadian government, Indian reserves are defined in Section 2 of the Indian Act as parcels or tracts of land that have been set apart by the federal government for the use and benefit of an Indian band. The legal title to Indian reserve land is vested in the federal government.

Indian status:
An individual's legal status as an Indian, as defined by the Indian Act.

Non-Status Indian:
An Indian person who is not registered as an Indian under the Indian Act. He or she is not a member of a band and is not entitled to any of the rights and benefits specified in the Indian Act.

Off reserve:
A term used to describe people, services, or objects that are not part of a reserve but relate to First Nations.

Registered Indian:
A person who is defined as an Indian under the Indian Act and who is registered under the act.

Status Indian:
A person who is registered as an Indian under the Indian Act. The act sets out the requirements for determining who is an Indian for the purposes of the Indian Act.

Treaty Indian:
A status Indian who belongs to a First Nation that signed a treaty with the Crown.

Tribal council:
A regional group of First Nations members that delivers common services to a group of First Nations.

This glossary has been adapted, with permission, from the terminology listed on the Indian and Northern Affairs Canada website at www.ainc-inac.gc.ca/pr/info/tln_e.html.

Information about the law from the Legal Services Society

Your Welfare Rights

This free 100+-page booklet explains the rules about welfare for people living off reserve in BC, including who is eligible, how to apply, what benefits are available, your responsibilities while receiving assistance, how to appeal, and how to get more information or help.

Rights and Benefits for First Nations People

This free booklet explains the rights and benefits available to registered Indians who live on or off reserve, and how to access these benefits. It includes information on medical and dental care, housing, employment benefits, and education benefits.

LawLINE

LawLINE is a toll-free telephone service that provides general legal information, referrals to other resources, and, in some cases, advice about legal issues. Call (604) 408-2172 or 1-866-577-2525.

LawLINK

The LawLINK website at www.lawlink.bc.ca can help you find plain language legal information and self-help resources on the Internet. This site provides links to information on a range of legal topics, including Aboriginal law.

Find publications or learn more about legal aid services on the LSS website at www.lss.bc.ca, or order publications from:

Distribution
Legal Services Society
400 – 510 Burrard Street
Vancouver, BC V6C 3A8

Phone: (604) 601-6075
Fax: (604) 682-0965
E-mail: distribution@lss.bc.ca

Understanding Aboriginal Delegated Agencies: Information for Aboriginal Families

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

Aboriginal delegated agencies are part of the Ministry of Children and Family Development and provide child welfare services. Child protection laws in BC recognize the importance of Aboriginal family ties to Aboriginal children. Aboriginal delegated agencies are part of an effort to restore the responsibilities of child protection and family support to Aboriginal communities. Aboriginal delegated agencies may have the authority to remove your child from your home and place your child in care.

If a social worker tells you you're being investigated for a child protection matter, he or she may be working for an Aboriginal delegated agency.

Aboriginal delegated agencies may offer the following services:

- support services for the whole family,
- help with preparing voluntary care agreements for children,
- help with writing, monitoring, and reviewing your child's plan of care,
- help with writing special needs agreements for your child if your child has special needs,
- monitoring how your child is doing while he or she is in care, and
- help for youth who are moving towards independence.

NOTE

If a social worker from the ministry or an Aboriginal delegated agency tells you that you're being investigated for a child protection matter, you have the right to get a lawyer. *Contact legal aid immediately to find out if you qualify for a free lawyer.*

Legal aid:

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

Some Aboriginal delegated agencies also have the power to:

- receive and investigate reports of child abuse and neglect,
- remove your child from your home and place him or her in a relative's care (such as an aunt, uncle, or grandparent), and
- get supervision orders to make sure your child is safe and healthy.

Aboriginal delegated agencies work with families living on and off reserve.

If you live on reserve, your band may already be involved with an Aboriginal delegated agency. If you live off reserve, your local city or town may have an Aboriginal organization that is also a delegated agency.

If you are being investigated by the ministry, and your band or Aboriginal community is represented by an Aboriginal delegated agency, you can ask the ministry to inform the delegated agency of the investigation.

In the **Lower Mainland**, you can contact the following Aboriginal delegated agencies:

Aboriginal Child and Family Services Society (Vancouver) at 604-872-6723 or 1-877-982-2377 (call no charge)

Métis Family Services (Surrey) at 604-584-6621

In **Victoria**, you can contact **Surrounded by Cedar Child and Family Services** at 250-383-2990.

Continued over

For a full list of the Aboriginal delegated agencies in BC, see the ministry's website: **www.mcf.gov.bc.ca/about_us/aboriginal/delegated/pdf/agency_list.pdf.**

Whether you're being investigated by the ministry or an Aboriginal delegated agency, you can ask for a representative from your band or friendship centre (such as a social worker) who will support you during the investigation and help to make sure your child stays connected to his or her Aboriginal family and community.

For more information on what you can do if you are under investigation for a child protection matter, please see our fact sheet *Understanding Aboriginal Child Protection/Removal Matters.*

Your important details

Date the ministry started investigating: _____

Name of ministry social worker: _____

Date you called legal aid for lawyer: _____

Name of lawyer: _____

First Nation/Band or friendship centre contact: _____

Court dates

Access order application date: _____

Presentation hearing date: _____

Protection hearing date: _____

Adjournment date: _____

Legal Services Society
www.legalaid.bc.ca

Understanding Aboriginal Child Protection / Removal Matters

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

BC law says that if the safety of a child is at risk, the Ministry of Children and Family Development must investigate and, if necessary, remove the child from the home.

BC law also says that Aboriginal cultural ties are very important to the well-being of Aboriginal children. It says that when the ministry makes plans for an Aboriginal child's care, the ministry should respect the child's family ties and Aboriginal identity.

Parents

If the ministry removes your child from your home, you can:

- Get a lawyer *before* the day of court
- Call legal aid
- Work out a plan with your band or community that supports your child's family ties and Aboriginal identity
- Ask to have your child placed with another Aboriginal family
- Ask for a mediator (someone who will help work out an agreement)
- Ask for the Report to Court, which explains why your child was removed
- Ask for visits with your child

NOTE

If the ministry tells you that you are being investigated, you have the right to get a lawyer. *Contact legal aid immediately to find out if you qualify for a free lawyer.*

Legal aid:

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

Aboriginal Community/Band

If the ministry removes your child from your home, it must:

- Notify your child's Aboriginal community representative (such as the First Nations band) that your child has been removed
- Take steps to protect your child's family ties and Aboriginal identity
- Consider your child's family ties and Aboriginal identity when choosing a foster home
- In many cases, allow a representative (someone who is chosen to speak for others) from your child's band or Aboriginal community to go to court

The Aboriginal representative has the right to:

- Receive all records and information
- Speak at the child protection hearing
- Call witnesses and question other witnesses
- Take part in any mediation
- Ask about ways to get you help

Continued over

Your important details

Date the ministry started investigating: _____

Name of ministry social worker: _____

Date you called legal aid for lawyer: _____

Name of lawyer: _____

First Nation/Band or friendship centre contact: _____

Court dates

Access order application date: _____

Presentation hearing date: _____

Protection hearing date: _____

Adjournment date: _____

Understanding Court Orders and Hearings

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

This list explains the meaning of many, but not all, of the court orders and hearings for child protection cases. When it says "the ministry" below, it means the Ministry of Children and Family Development. Words in bold text are defined somewhere else in the list.

Access order

If your child has been removed, you can apply for an access order that will say when you can visit your child, even if the judge makes a **custody order** for who the child will live with. It is best to apply for access as soon as you can.

Consent order

If you and the ministry agree about how your child should be cared for, a judge will make a consent order and you won't have to have a full **protection hearing**.

Continuing custody order

Means your child will stay in the care of the ministry without any limits on how long it will last. A judge usually makes this order only if there is a serious problem that cannot be fixed within a certain time.

NOTE

If the ministry tells you that you are being investigated, you have the right to get a lawyer. *Contact legal aid immediately to find out if you qualify for a free lawyer.*

Legal Aid:

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

Interim supervision order (child with parent)

Means your child will live with you under the ministry's supervision. The order will include the **supervision terms** you must follow.

Interim supervision order (child with relatives or in foster care)

Means your child will live with another person under the ministry's supervision. The order will say how your child will be cared for and whether you can have visits.

Interim custody order

Means your child must stay in the care of the ministry for a certain period of time. The order will also say when and how you can visit your child.

Presentation hearing

This is the first time you go to court, when the judge should ask you if you agree with what the ministry wants to do. The judge will make an order right away or may make another hearing to learn more about your case. A presentation hearing must start within 7 days of a social worker removing your child. You will be notified of the hearing date. The hearing should start within 10 days if the social worker applies for a **supervision order without removal**.

Continued over

Protection hearing

When a judge decides who will care for your child for a longer time period. Usually follows a **presentation hearing**. If you and the ministry agree about how your child should be cared for, the judge will make a **consent order** and you won't have a full hearing. The protection hearing must start no more than 45 days after the presentation hearing ends.

Report to Court

When you go to court, your social worker or lawyer must give you a copy of the Report to Court. This document should say why the ministry removed your child or asked for a supervision order, what the ministry tried before doing that, and what the ministry wants to do next.

Supervision order without removal

Means the ministry wants you to follow a certain plan to protect your child. If you agree to do what is asked of you in the terms of the order, your child can stay with you.

Supervision terms

The terms you will be asked whether you can agree with, which will allow your child to stay in your care under a supervision order.

Your important details

Date the ministry started investigating: _____

Name of ministry social worker: _____

Date you called legal aid for lawyer: _____

Name of lawyer: _____

First Nation/Band or friendship centre contact: _____

Court dates

Access order application date: _____

Presentation hearing date: _____

Protection hearing date: _____

Adjournment date: _____

Legal Services Society
www.legalaid.bc.ca

5. Welfare & Disability Benefits

Legal Services Society

British Columbia
www.legalaid.bc.ca

BACKGROUNDER

Family-first policy changes for B.C. families

- **Improve financial outcomes for vulnerable families**
  - Increase the school start up supplement so that families now receive $100 for every child aged 5-11, and $175 for every child 12 and over.
  - Provide access to dental services for children of families on hardship so parents can take their children in for regular dental checkups.
  - Child-benefit exemptions for families on hardship.
  - Families on assistance who are eligible for a lump-sum federal Family Bonus refund will get a replacement top-up from the ministry. When their refund comes, it will be exempt except for up to the amount of one month's assistance if it was provided in advance by the ministry as top up.
  - Increasing the maximum top-up for the Family Bonus from $123.50, to $181.41, and continue to match future federal increases which means more money every month for those families who are receiving the Family Bonus top-up.
  - Exempting income-tax refunds so individuals and families on income assistance will be able to keep their full income-tax refund.

- **Modest increases to personal assets**
  - A single person can now retain assets, including cash, up to $2,000.
  - Couples or families will able to keep up to $4,000 in assets, including cash.
  - For single disability assistance clients, their asset limit, including cash, is increasing to $5,000.
  - For couples and families receiving disability assistance, they can retain up to $10,000 in assets, including cash.
  - Expected to Work clients will be able to keep a car valued up to $10,000.

- **Mandatory income tax filing and relieve the claw back on income tax benefits**
  - Effective spring 2013, mandatory income tax filing to ensure individuals and families are getting all the tax credits for which they are entitled.
  - Appropriate exemptions will be in place to protect anyone who may be exposed to risk, such as fleeing an abusive partner.
  - Exempting income-tax refunds to maximize the monetary benefit available to clients when they file. Under current policy, all provincial and federal tax credits are already exempt.
  - A Community Benefit Fund, intended for first-time tax filers, is being established to provide additional community level capacity to help people living with disabilities access RDSPs, file their taxes and improve their financial literacy.

- **Providing assistance for parents without status who are fleeing abuse**
    - Parents without status who are fleeing abuse and who can't leave the country with their children can receive assistance while they work with Citizenship and Immigration Canada to resolve their legal status.

Assist individuals with disabilities to lead more independent lives

- **Earnings exemption enhancements for disability assistance clients**
    - Individuals receiving disability assistance will be able to earn up to $800 per month and still receive their full benefits.
    - A couple who are both collecting disability assistance can earn up to $1,600 per month without impacting their benefits.
    - Providing the flexibility to calculate earnings on an annual basis rather than monthly will help to address the range of circumstances persons with disabilities may face, including episodic conditions. Individuals with disabilities can maximize their earning during times when they are feeling healthy and able to work to an annual total yearly exemption of $9,600.
    - The waiting period for claiming earnings exemptions for former disability assistance clients who find they have to reapply for assistance will be waived.

- **Trust and asset enhancements**
    - People on disability assistance can now invest up to $200,000 – double the previous amount – in a non-discretionary trust account. This is the same amount that individuals can keep in their Registered Disability Savings Plan (RDSP).
    - Individuals will be able to access up to $8,000 per year from their trust account for any other cost related to promoting independence – nearly double the previous annual allowance – and make their own choices about how best to use these funds.

Help individuals and families avoid the cycle of income assistance dependency

- **Reinstate earnings exemptions for employable clients**
    - Instituting a modest $200 monthly earnings exemption for all expected-to-work clients, regardless of family size, to give employable individuals a better opportunity to get job skills and experience, take advantage of short-term or temporary work, and better provide for their families while receiving assistance.

- **Extend work search for new applicants to five weeks**
    - For new income-assistance applicants, the work search period is being extended to five weeks to strengthen income assistance applicants' efforts to find employment.
    - Returning clients will still be required to undergo a three-week work search before they are eligible to receive income assistance.

- **Expand Application and intensity of work search requirements**
    - Remove time limits (previously 24 months in a five-year period), and replace with intensified work-search requirements to help ensure that those on income assistance are using all available resources to find work.
    - Clients with an immediate need for food, shelter or urgent medical attention will receive hardship assistance while still being required to undergo a three-week (for returning clients) or five-week (for new clients) work search.
    - Enhance employment planning to support people transitioning off income assistance and returning to work.