LSLAP Manual

Law Students' Legal Advice Manual

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Introduction

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Chapter One - Criminal Law

I. Introduction

This chapter provides a reference for self-represented litigants and law students to assist and advise them through each step of the criminal justice process. It highlights the procedures and issues self-represented litigants and law students commonly face in representing themselves or clients in criminal proceedings, sets out the relevant substantive law to assist students in preparing for trial, and includes practice recommendations for students and self-represented litigants.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2019.

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II. Governing Legislation and Resources

Resources Annotated Criminal Codes:

- Edward Greenspan, Marc Rosenberg, & Marie Henein, eds, *Martin's Annual Criminal Code*, 2020 ed (Toronto: Thomson Reuters, 2019)
- Alan D. Gold, *The Practitioners Criminal Code*, 2020 ed (Toronto: LexisNexis Canada, 2019)
- The Honourable Mr. Justice David Watt, The Honourable Madam Justice Michelle Fuerst, *Tremeear's Annotated Criminal Code*, 2019 ed (Toronto: Thomson Reuters, 2018)

Note: All criminal lawyers carry around one of the three leading annotated criminal codes. The most commonly used is Martins. When reviewing any case the annotations on the section a client is charged with provide a good place to start regarding identifying the elements of the offence.

- Edward Greenspan, QC& Marc Rosenberg, eds, *Martin's Annual Criminal Code*, 2017 ed (Aurora: Canada Law Book Inc, 2017).
- Eugene E Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed (Toronto: Canada Law Book, 1988).
- Peter K McWilliams & S Casey Hill, *McWilliam's Canadian Criminal Evidence*, 4th ed (Toronto: Canada Law Book, 2003).
- David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 1998).
- R Paul Nadin-Davis & Clarey B Sproule, eds, *Canadian Sentencing Digest Quantum Service* (Toronto: Carswell, 1988) (also available on e-carswell).
- Francis Lewis Wellman, *Art of Cross-Examination With the Cross-Examinations of Important Witnesses in Some Celebrated Cases* (New York: Collier Books, 1903).
- Earl J Levy, *Examination of Witnesses in Criminal Cases*, 3d ed (Toronto: Carswell, 1994).
- Thomas A Mauet, Donald G Casswell, & Gordon P MacDonald, *Fundamentals of Trial Techniques* (Toronto: Little, Brown, 1995).
- Christopher Bentley, *Criminal Practice Manual: a Practical Guide to Handling Criminal Cases* (Scarborough, Ont: Carswell, 2000).

Relevant statutes

- *Criminal Code*, RSC, 1985, c C-46.
- *Controlled Drugs and Substances Act*, SC 1996, c 19 (if drug offence).
- *Canada Evidence Act*, RSC, 1985, c C-5.
- *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 (particularly ss 7 – 14, 24 (1) and (2)).
- *Identification of Criminals Act*, RSC, 1985, c I-1.
- *DNA Identification Act*, SC 1998, c 37.

1. Legal Aid

The Legal Services Society of B.C. (LSS) is the only source of criminal legal aid in British Columbia. Legal Aid's purpose is to provide free representation for financially eligible accused persons (low-income individuals), who are charged with certain offences. The Society will provide a retainer to a lawyer chosen by the eligible client in private practice who will provide legal assistance on a contract basis. The Society will also assist the eligible applicant in finding a lawyer if needed.

A wide range of booklets and pamphlets covering various legal problems and legal rights are also available from LSS offices. This material is free.

The client should be advised to contact Legal Aid directly at (604) 408-2172. See Chapter 23: Referrals, or the blue pages of the phone book, for more information.

a) Financial eligibility

The Legal Services Society will grant a letter of referral to applicants who meet the Society's financial eligibility requirements. These can be found at http://www.lss.bc.ca/legal_aid/doIQualifyRepresentation.php.

There is some flexibility in the requirements, subject to the discretion of the person assessing the application. Clients will be required to fill out a means test indicating income, expenses, education, and employment history.

b) Eligible offences and conditions

Legal aid lawyers may be able to represent an accused person in his or her criminal case if, after conviction (or a plead guilty) the accused would:

- be sentenced to a period of jail (including a conditional sentence),
- lose his or her way of earning an income
- face an immigration proceeding that could lead to deportation from Canada.

Legal aid lawyer may also represent an accused person, if he or she:

- have a physical condition or disability or mental or emotional illness that makes it impossible for the accused to represent themselves, or
- are indigenous and the case affects his or her ability to follow a traditional livelihood of hunting and fishing.

c) Reviewing a decision

An accused who has been rejected can have the decision reviewed where circumstances warrant it. Requests for reviews must be in writing, must set out the reasons for disagreeing with the decision, and must include copies of supporting documentation. LSS does not consider any requests received 30 or more days from the date of the intake legal assistant's decision.

2. Vancouver Lawyer Referral Service

The accused may call (604) 687-3221 or 1-800-663-1919 (for those outside the Lower Mainland) to reach the service, where an operator will provide the name of a lawyer who practices criminal law. The client should then call the lawyer to make an appointment. The initial half-hour meeting is only a consultation, and the client will have to negotiate the fee for subsequent sessions at his or her first meeting with the lawyer. See **Chapter 22: Referrals** for more information.

3. Duty Counsel

If the accused does not have a lawyer (either retained privately or through Legal Aid) Duty Counsel (lawyers paid by the government) are there to assist unrepresented people (whether in custody or out of custody) by providing them with basic legal information and advice, and to assist them in conducting basic court appearances. Duty Counsel is often the first lawyer to give legal advice to people in custody. As Duty Counsel are there to assist anyone on a given day, they cannot conduct trials or other lengthy matters. Duty counsel can help the accused by:

- giving advice about the charges and court procedures; conducting a bail hearing;
- entering a guilty plea and providing background information about the accused for the purposes of sentencing; and
- talking to the accused about possible ways of resolving the file such as through diversion.

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III. Etiquette

A. Courtroom procedure for self-represented litigants

When an accused attends court for a matter, he or she should check the court lists to confirm which courtroom the matter is to be heard in. If the court is not sitting at the time, the accused should attempt to seek out the Crown Counsel who has conduct of the matter, and identify him or herself.

In order to get his matter called the self-represented accused person should indicate to Crown Counsel or the Crown assistant that he/she is present, self-represented, and ready to proceed. Crown Counsel will proceed with the shortest matters first; priority will also be given to matters for which the accused **and their counsel** are present. Do not interrupt Crown Counsel when they are addressing a matter.

When the Judge enters or exits the court, the accused should stand. If the court is sitting, the accused should enter the courtroom, and be seated at the chairs located behind the bar.

When the matter is called, the accused should rise and approach the counsel's table. He or she should stand on the other side of the podium from the Crown. The rule of thumb is that Crown is seated next to the witness box while the defence and the accused are seated furthest away. In order to get the matter called, the accused should indicate to the sheriff or the Crown that he/she is ready to proceed.

> **NOTE:** Provincial Court Judges wear robes and are addressed as "Your Honour" in court while JPs wear suits or other clothing, and are addressed as "Your Worship."

1. Interacting with Crown

When interacting with the Crown (or anyone else for that matter), the accused should always be pleasant and polite. There are times when the accused needs to be more assertive but this should be done in a tactful way. The accused should always respect the Crown, even when pointing out errors.

2. Courtroom demeanor & etiquette

- Be well-groomed and well-dressed
- Always be polite to everyone in the courtroom
- Never mislead the court.
- Be punctual. Do not waste the court's time
- Address the court in a loud clear voice. Most microphones in the courtrooms are only for recording and not for amplification purposes;
- Stand when the judge enters or leaves the courtroom;
- Stand when addressing the Court, being addressed by the Court, objecting and responding to objections. Stand when (or if) you are being sentenced or convicted;
- Sit when Crown counsel is speaking to the court, or interjects to make an objection;
- Stand on the other side of the podium from Crown Counsel and furthest away from the witness box;
- Be well prepared. Know the factual basis of your file, the applicable law and the relevant procedural rules. Part of being well prepared means being able to answer questions from the court;
- Be respectful in your comments. In your dealings with the Court adopt a formal approach which reflects courtesy and respect for the authority of the court. Let the court know what you are doing with phrases such as "with your Honour's leave I would like to approach the witness to show him his statement";

- Do not interrupt the judge. Listen to what the judge says;
- Pause briefly to consider your words and then respond;
- Address all remarks to Crown Counsel through the judge; and
- Do not quarrel with Crown Counsel, witnesses or the Court.
- **Slow down.** The judge will likely be taking notes, if you see that the judge is not looking at you and writing things down pause and wait.

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IV. Criminal Charges

A. Arrest

There may be a *Charter* issue here. See Section IX: Charter Issues with respect to arbitrary detention and unlawful arrest.

B. Informing an accused of the charge and compelling appearance

A person may learn that he or she is accused of committing a criminal offence in one of several ways. He or she may:

1. receive an appearance notice or a promise to appear from the police;
2. receive a summons (in the mail or personally); or
3. be arrested and kept in custody until he or she is brought before a judge or JP (Justice of the Peace).

An accused person will have received an appearance notice or a summons requiring him or her to attend court. Such an appearance notice indicates that the police officer involved in the case believes that he or she has a case against an accused. After an appearance notice is issued, the police officer forwards a package to the Crown for charge approval. Usually such charges are approved by the Crown prior to the first appearance in court. By the time an accused attends court, an Information will likely have been sworn. The accused person **must** attend court on the date required by the appearance notice or summons. If he or she fails to attend court, a warrant for the accused person's arrest will usually be issued.

1. Appearance notice

The attending officers at the scene of an alleged summary conviction or hybrid offence do not always have cause to arrest the suspect. (See Section 495(2) *Criminal Code*) When there is no cause to arrest the suspect but the police still intend to forward charges for an offence, they will serve an appearance notice on the accused compelling him or her to appear at a future date and time at a courthouse to face potential charges. (See *Criminal Code*, s. 496

> **NOTE:** An accused person should note that he or she **MUST** attend court as directed in the Appearance Notice, but that sometimes the accused person will not be on the court list as the police might not forward the charges, the Crown might not approve charges or there may be a delay in processing the charges. If an accused person does not see their name on the court list on the appearance date they should go to the court registry to show them the Appearance Notice and ask if their they are on any court list.

2. Promise to appear

If an accused is arrested then the police must decide whether to a) keep the accused in custody for the Crown to seek detention, or b) exercise the power to release the accused. A promise to appear is a binding agreement whereby the accused person promises to attend court on a later date and abide by the conditions the police impose, and in exchange the police releases the accused from custody.

3. Summons

A summons is a written order by a justice in prescribed form requiring the accused to appear before a justice at a particular time and place. (See *Criminal Code*, s 509).

> **NOTE:** A summons should not be disregarded because of a misspelling of the accused's name, nor because of minor irregularities or mistakes.

The summons may be served by a peace officer personally, or it may arrive by mail. It can also be served, when the accused cannot conveniently be found, to a person living in the accused's residence who appears to be at least 16 years old (*Criminal Code*, s 509(2)).

4. Judicial interim release (bail)

A person who has been charged with an offence may be arrested by the police and not be released on a promise to appear. This can occur if the police are seeking conditions on the promise to appear which the accused does not agree to or if the police determine that in its opinion the accused ought not to be released from custody.

A detained person must be brought before either a judge or a justice of the peace without unreasonable delay or where a justice is not available within a period of 24 hours after the person has been arrested, the person shall be taken before a Justice as soon as possible. (see *Criminal Code*, s 503). When the accused is brought before a Judge or a justice of the peace and the Crown is seeking the continued detention of the accused the onus is on the Crown to show cause as to why the continued detention of the accused is necessary (see *Criminal Code*, s 515(10)), except for the offences listed under section 469 of the Criminal Code.

There are three ways in which the detention of a person charged with a criminal offence can be justified under section 515(10) of the Criminal Code. In the case law these are usually referred to as:

- Primary—to ensure attendance in court (a possible flight risk)
- Secondary—bail can be denied for the protection and safety of the public, including a substantial likelihood the person will commit a criminal offence or interfere with the administration of justice.
- Tertiary—the detention is necessary to maintain confidence in the administration of justice (includes seriousness of the offence charged and strength of the Crown's case)

Often during the show cause hearing, the focus becomes the conditions an accused person can be released upon and the adequacy of the accused's bail plan. A release plan may include: sureties, cash deposit or restrictive conditions such as a curfew or an area restriction. The Crown will usually have specific concerns about an accused's behaviour. Previously, the law required conditions of release to be as minimally restrictive on a person's freedom as possible while still addressing the cause for concern.

Currently, over 50% of inmates in provincial remand centres consist of individuals detained prior to their trial. Pre-trial detention can last as long as 24 months, inmates are held in crowded conditions, and indigenous individuals are overrepresented among them. Furthermore, detention can hurt an accused's ability to provide a full defence and may lead to induced guilty pleas. Therefore, the bail decision can be life-changing to an individual accused. However, because of the temporary nature of bail and the length of time the court process takes, bail decisions are rarely appealed.

In response to these problems, the Supreme Court of Canada modified the test for judicial interim release in *R v Antic*, 2017 SCC 27 and *R v Myers*, 2019 SCC 18. The court emphasized that the accused should be released at the earliest reasonable opportunity and on the least onerous grounds. The test in *Myers* requires a bail plan that reduces the risk of the accused re-offending to a reasonable level. There is no longer any requirement to address the risk completely. Furthermore, the courts in *Myers* allows for accused to be released from detention in order to receive treatment for mental health conditions and issues with substance abuse; this may help reduce the rate of re-offence and help defence counsel achieve better sentences for these accused.

Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, 42nd Parl, 2019, cl 210 (received Royal Assent on June 21, 2019, coming into force on December 18, 2019) [Bill C-75] amended Criminal Code to add sections 493.1 and 493.2 regarding releasing accused that are in custody. In short, the amendment emphasized the rulings in *Antic* and *Myers*, stating that peace officers, justices, and judges should place the highest priority on releasing an accused at the earliest possible opportunity and on the least onerous grounds. Furthermore, section 493.2 obligates peace officers, justices, and judges to give particular attention to the circumstances of aboriginal accused and those accused who belong to vulnerable populations that are overrepresented in the criminal justice system and are disadvantaged in obtaining release.

5. Warrant in the first instance

A warrant for arrest may be issued when an accused fails to appear for a summons or a Justice decides that it is in the public interest to issue a warrant. Some common situations where this arises are as follows:

- An appearance notice or summons was issued for the accused to attend court, and he or she did not attend court at the appropriate date and time;
- The accused is avoiding service or is unable to be located;
- The accused was never actually arrested for the offence; or
- The Crown cancels a promise to appear and seeks a warrant because they are seeking the accused's detention or conditions on the release of the accused. (See *Criminal Code*, s 512).

6. Fingerprinting and photographing

A person in lawful custody for an indictable offence (or a hybrid offence where the Crown has yet to elect) may be fingerprinted and photographed. A person may be required to submit to being fingerprinted and photographed under the *Identification of Criminals Act*, R.SC 1985, c I-1.

If the Crown is proceeding summarily, they have no power to require fingerprints. If the accused attends court prior to the fingerprinting date, the accused can ask the Crown to elect in court how they are proceeding. Once Crown has stated on record that it is proceeding summarily, the accused will not be required to attend fingerprinting. If the accused has already been fingerprinted and the Crown is proceeding summarily, the accused can apply to the Crown to have those fingerprints destroyed.

7. Varying conditions of interim release (bail variation)

Sometimes an accused is unhappy with one or more of his/her bail conditions and wants those conditions changed. Bail conditions can be changed in Provincial Court with consent of the Crown. However, if a trial has already begun, the judge can make the variation without Crown consent. If there is no consent by the Crown, it becomes a Supreme Court matter (see below). In order to convince the Crown to vary bail conditions, it will be necessary to convince the Crown Counsel that a less restrictive condition is sufficient to meet the concern addressed by the condition or that the condition is no longer necessary. For example, on a spousal assault file, an accused is usually released on a condition that they do

not contact their spouse. It is not uncommon that following an incident the couple will want to contact with each other. In these circumstances the Crown will often interview the complainant in order to determine what if any no-contact conditions remain necessary for the complainant.

Should Crown not consent to the proposed bail review an accused can bring an application to review the bail conditions before a judge of the BC Supreme Court under section 520 of the Criminal Code. Review procedures in Supreme Court are difficult for a layperson to navigate through and anyone conducting such a review is advised to retain a lawyer.

8. Charge approval by Crown Counsel

In BC, charge approval is conducted by the Crown Counsel, not by the police. On occasion, an accused person will have a compelled court appearance or will be arrested for an offence by the police, but when the Crown Counsel reviews the charges being recommended by the police they may conclude that it does not meet their Charge Approval standard.

The criteria used by Provincial Crown to determine whether to proceed with a charge are:

- whether there is a substantial likelihood of conviction; and
- whether it is in the public interest to proceed.

More information regarding charge approval is available online at http:/ / www2. gov. bc. ca/ assets/ gov/ law-crime-and-justice/ criminal-justice/ prosecution-service/ crown-counsel-policy-manual/ cha-1-charge-assessment-guidelines.pdf, in the Crown Counsel Policy Manual (Policy Code CHA 1).

C. Appearance requirements

For summary offences, anyone can appear as agent for the accused if the accused is unable to attend court.

For indictable offences, the self-represented accused must appear in person.

An accused person who fails to attend court without lawful excuse as required under a recognizance, appearance notice, promise to appear, or summons, may be charged with an offence (*Criminal Code*, s 145).

D. Initial appearance(s)

Matters are generally set for the Initial Appearance Room if the accused has not previously appeared in court for this matter, has not yet obtained counsel or has not set a date for trial or guilty plea. An accused can have multiple Initial Appearances. If the accused person has not yet made his/her first appearance in court, he/she should be instructed to attend their Initial Appearance and obtain the particulars and Initial Sentencing Position from Crown.

> **NOTE:** If the accused does not have counsel and wants to obtain counsel, an adjournment will likely be granted. The case will be adjourned until the accused has had an opportunity to discuss the case with counsel. If the accused is self-represented, he/she should consult duty counsel.

1. Procedure at initial appearance

At an Initial Appearance, the accused comes forward; the prosecutor indicates the nature of the offence without reading the Information and a Justice of the Peace will make inquiries as to whether the accused has legal counsel and the intentions of the accused regarding the case. **An accused should not enter a plea at an initial appearance. (One cannot make a plea in front of a Justice of the Peace.)** There will often be many appearances before a plea or trial is set.

Before the accused is asked to decide how he or she will plead, counsel should ensure that the accused fully understands his or her legal rights, the consequences of a guilty plea, and the Crown's burden of proof to prove all elements of the offence beyond a reasonable doubt. Also, counsel should discuss any possible defences, mitigating factors, and any possibility of being found guilty for lesser included offences if guilt is not established for the original charge.

E. Obtaining particulars

If the accused does not already have a copy of the particulars, he or she should request the particulars at the next appearance date. Particulars are usually given to the accused on the first appearance.

F. Review the particulars

The particulars should include the following documents:

1. The Information

The "Information" contains the specifics of the charge, including the date of the alleged offence, the name of the accused, and the specific section of the statute allegedly contravened. It guides the entire legal process faced by the accused. See **Appendix B** for a sample Information.

a) Review the Information

The Information should be reviewed to determine what offence the accused has been charged with. Review the appropriate *Criminal Code* provisions in an annotated *Criminal Code* which often provides quick references to common issues that arise from prosecution under that section of the *Criminal Code.*

One should review all aspects of the Information to ensure that it has been laid properly. Particularly, ensure that the Information has been laid within six months of the alleged offence on summary conviction offences (this becomes twelve months after December 18, 2019). Also ensure that the date of the alleged offence and the names of the accused and complainant are correct.

b) Content of the Information

The Information must contain sufficient allegations to indicate that the named person committed an offence. It may contain "counts" charging the accused with separate offences. It must contain sufficient details of the circumstances of the offence(s) to enable the accused to make full answer and defence to the charge (ss 581(1) and (2) of the *Criminal Code*). If the Information does not contain full particularisation to allow full answer and defence to the charge, an application may be brought to the court to particularise the Information (*Criminal Code*, s 587). If the Information does not adequately state the charge or contains a very unclear description of the alleged offence, then a motion can be made to quash or strike down the Information. However, as noted below, this process is rarely used because the courts will generally allow the Crown Counsel to amend the Information instead of ordering it to be quashed.

c) Obtaining the Information

If the Information is not contained within the particulars package, a copy may be obtained from the court registry or Crown Counsel's office any time after it is laid.

d) Striking down an Information

Provisions exist for a motion to be made to quash the Information (or a count therein) before the plea or, with leave of the court, afterward (*Criminal Code*, s 601(1)). Although this is almost never done, some situations in which an Information might be struck down are if it does not adequately state the charge, does not include the date of the offence, or contains an unclear description of the circumstances of the alleged offence. To remedy the defect, the court may quash the Information or order an amendment. Amendment powers are considerable, and the Information may be amended at any time during the trial so long as the accused is not prejudiced or misled. The court will generally amend an Information if the defects are in form only. R v Stewart (1979), 46 CCC (2d) 97 (BCCA) makes it clear that courts tend to focus on substantial wrongs, not mere technicalities. There are generous provisions in the *Criminal Code* that allow technical defects in form and style to be disregarded (ss 581(2) and (3), and s 601(3)).

Challenging an Information
Although the court rarely strikes down an Information due to technical errors, at trial Crown must prove the offence as alleged in the Information. They must prove beyond a reasonable doubt the identity of the accused, the location of the crime (British Columbia), the physical criminal act, and a guilty mind. Despite the very broad power to amend an Information to cure technical defects prior to the end of the trial, amendments after the defence/accused has closed its case are less likely to be granted. This is because once defence/accused has closed its case – based on a flawed Information, and with a view to a closing argument that Crown has not proven the Information as alleged – the accused is prejudiced by any subsequent amendment of the Information. Hence a possible strategy on a case where there is an error in the Information is to wait out the Crown's case, close the defence case, and then argue reasonable doubt on the offence as alleged.

e) If the Information is struck down

If there has been no adjudication of the case on its merits, the prosecutor may lay a new Information. The prosecutor must do so within the limitation period.

f) Limitation periods and the Information

Section 786 of the *Criminal Code* states that no proceedings may be initiated in summary conviction offences after six months have elapsed from the time of the alleged offence, except on agreement of the prosecution and the defendant (twelve months after December 18, 2019). The date on which proceedings commence is when the Information is laid, therefore, the Information must be laid within the limitation period. Indictable offences have no specific statutory limitation period.

2. The Initial Sentencing Position (ISP)

The Crown's Initial Sentencing Position should be reviewed. This will sometimes indicate whether Crown is seeking jail time, or it can specify the sentence the Crown is seeking. A request for a more detailed initial sentencing position can be made. See Appendix A for a sample ISP.

3. Report to Crown Counsel (RTCC)

The Report to Crown Counsel (RTCC) sets out the police officer's narrative and summary of the case. It usually has a summary of the witness statements as well as what the police officer(s) themselves observed, and police actions taken in relation to the investigation of the alleged crime. It should also state whether the accused has a prior criminal record.

What should usually be in the RTCC:

- Summary of Police Notes;
- Summary of Witness Statements;
- Description of any Photographs or available Surveillance;
- Description of any expert evidence the police have requested;
- Criminal Record; and
- Summary of other important evidence collected by police in the investigation.

When the accused receives the RTCC with the Particulars, the RTCC should be reviewed to ensure full disclosure has been made from the investigation. If the RTCC mentions an audio statement that was taken, that audio and perhaps a transcript of the audio should be included in the disclosure. In addition, ensure that there is a narrative and corresponding personal notes from each police officer mentioned in the RTCC and any other evidence mentioned in the RTCC has been provided in the particulars. If something is missing from the file, make a disclosure request to the Crown.

4. Release conditions (contained within the bail document)

These should be obtained from the court registry if the accused has misplaced his/her copy of his release documents. The accused should review the release conditions and ensure that he/she understands all of the conditions and the importance of abiding by the conditions of release regardless of how unfair or difficult those conditions are to abide by. In a case of domestic assault there will almost always be a no-contact conditions and area restrictions. The accused may encounter situations where the complainant and the accused wish for contact and there is a no-contact bail condition. (See above section for Bail Variations)

If the accused has a good reason to have his/her release conditions varied, Crown Counsel should be contacted. The reason for the proposed variation should be explained to the Crown Counsel. It is important to make a convincing argument for the proposed variation directly to Crown Counsel, as an application cannot be made to vary bail conditions in Provincial Court without the Crown's consent. In practice, Crown Counsel only consents to hearing applications for bail variation in Provincial Court when they agree with the proposed variations. Variation applications without Crown Counsel's consent are made at the BC Supreme Court.

The accused should keep in mind that if there is a no-contact or an area restriction, he/she must remember that contacting the complainant or going to that location is a criminal offence.

G. Assessing the strength of the case

Once the accused has received the particulars and knows the evidence that Crown would seek to lead in its case to prove the accused's guilt, it is important to critically assess the strength of the Crown's case, and consider any challenges which can be made to the case. At this stage, the accused/defence should be in a position to review the elements of the offence and be able to concisely summarize the key evidence that the Crown Counsel will seek to adduce at trial to prove each element of the offense.

1. Things to consider when assessing the Crown's evidence

For each key piece of evidence that the Crown needs to establish its case, consider the following :

a) Is the evidence direct or circumstantial?

If the evidence is circumstantial, is there an innocent explanation for the totality of circumstances?

b) Is the evidence testimonial?

For testimonial evidence, consider the reliability and credibility of the witness. Consider whether there is a good reason to suspect that the witness is mistaken (attacking reliability) or lying (credibility).

c) Is the evidence physical evidence?

If the evidence is physical evidence that has been collected by the police, consider the chain of custody of the item and whether there has been a break in the continuity of custody.

d) Is there a possible Charter challenge

Consider whether there is a possible Charter challenge that could result in the exclusion of evidence. Charter challenges include challenges to police searches, arrests, and confessions. (See *Section IX* for information on Charter challenges)

e) Are there any other exclusion rules

Consider whether there are other exclusionary rules that could be used to exclude any key pieces of evidence that the Crown needs to prove its case. Generally, if a piece of evidence has more prejudicial effect than probative value, the evidence will be excluded. (*R v. Seaboyer* [1991] 2 SCR 577)

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V. Substantive Law

A. Provincial offences

All offences created by provincial statute are prosecuted as summary conviction offences. Examples of provincial offences are those created by the *Motor Vehicle Act*, RSBC 1996, c 318, *Liquor Control and Licensing Act*, SBC 2015, c 19, *Family Law Act*, SBC 2011, c 25, *Employment Standards Act*, RSBC 1996, c 113, and the *Residential Tenancy Act*, SBC 2002, c 78. Other summary conviction offences are established by municipal bylaw (i.e. parking violations and lodging-house violations). Note that *Criminal Code* offences, though stemming from a federal statute, are prosecuted provincially.

B. Federal offences

A federal statute may create an offence that is an indictable offence only, or is punishable on summary conviction only, or is either indictable or summary (i.e. hybrid) depending on the Crown's approach. Examples of federal offences are found in the *Criminal Code*, the *Controlled Drugs and Substances Act*, the *Income Tax Act*, RSC 1985 (5th Supp), c 1 and the *Customs Act*, RSC 1985, c 1 (2nd Supp). Although the federal government regulates *Criminal Code* offences, the provincial Attorney General administers the law in this area. This distinction is important in determining who will prosecute the offence. Federal Crown prosecutors handle drug and tax-related offences.

C. Penalties and punishment

a) Summary offences

Provincial offences

The Offence Act, RSBC 1996, c 338 provides that offences created under a provincial enactment (often called "regulatory offences") are punishable by summary conviction (s 2). The Act establishes the maximum penalties that may be imposed upon conviction for a provincial summary offence. These provisions apply except where a provincial statute creating an offence provides for some other penalty. Under the Act, the maximum fine that may generally be imposed is $2,000; the maximum term of imprisonment is six months. The court may impose either or both of these penalties (s 4).

The procedure followed for laying an Information (or charge), issuing a summons, appearing for trial, etc. is set out in the *Offence Act.* However, the procedure to be followed may be altered by the provincial statute that creates the specific offence.

Where the *Offence Act* is silent concerning a procedural matter, the *Criminal Code* provisions governing federal summary proceedings apply. There is little difference between the procedures set out in the Offence Act and the Criminal Code provisions for summary proceedings.

***Criminal Code* and other federal summary offences**

Unless otherwise specified, the maximum penalty for a summary conviction offence is a fine of up to $5,000, up to six months imprisonment (two years less a day on December 18, 2019), or both (*Criminal Code*, s 787(1)). An example of a summary offence which carries a greater maximum punishment is uttering threats, *Criminal Code*, s 264.1(2)(b), which carries a maximum punishment of 18 months jail time.

b) Indictable offences

Most indictable offences specify the maximum term of imprisonment. If no maximum is specifically stated, the maximum term is five years (*Criminal Code*, s 743). Minor indictable offences (e.g. theft under $5,000) carry maximum jail terms of two years. Other indictable offences carry greater maximum jail terms of five years, seven years (e.g. possession of a narcotic), 10 years (i.e. theft over $5,000), 14 years, or life (i.e. trafficking a narcotic).

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VI. Resolving Prior to Trial

It is important at this point to review the elements of the alleged offence to ensure an understanding of what one is charged with.

A. Stay of proceedings

After reviewing the police report, if there is not a substantial likelihood of conviction, or it would not be in the public interest to proceed, a letter can be drafted to the assigned Crown Counsel requesting that they reconsider the charge. Regardless of the strength of the case, if it appears that it is not in the public interest to proceed with the charges (e.g. the accused is terminally ill), the Crown may choose to reconsider. A stay of proceedings is a decision to not proceed with the charges. A stay of proceedings appears on the accused's Vulnerable Sector Criminal Record Check. Therefore, a stay may affect the accused's employment if they intend to work with children of seniors.

B. Diversion / alternative measures

This option allows for a first time offender to be "diverted away" from the court system. Although referred to as "diversion," the program's official name is Alternative Measures (*Criminal Code*, s 717). The accused or the accused's lawyer may make a request to the Crown Counsel office to be "diverted." In some cases, Crown may also recommend diversion. This program takes the accused out of the court system. The application itself may be made before or after a charge is laid. The diversion program is primarily designed for first-time offenders who are prepared to admit their culpability and remorse in the matter. It is advised to call Crown in advance of sending the diversion application to make sure they are open to it. Include the following in the application:

- That the letter is Without Prejudice,
- The circumstances of the offence, including a clear admission of all the essential circumstances of the offence,
- The background of the accused,
- The effect that a criminal record would have on the accused, and

- The accused's's feelings of remorse or repentance for the offence.

The accused must understand the concept of diversion and be prepared to speak openly and honestly to a probation officer. The accused must clearly admit the offence and express remorse for his or her commission. He or she may also be required, and should offer to in the diversion letter where applicable, to write a letter of apology, undergo anger or stress management counselling, or make restitution. These options could be considered in the letter or during meetings with the Crown.

The Crown will consider whether the accused and the nature of the offence are such that diversion is appropriate. If the Crown decides the accused is a good candidate for diversion, the file will be sent to a community worker who will review the circumstances and then discuss the matter with the accused. The accused is entitled to have legal counsel present at this meeting. If the accused admits his or her culpability, and the probation officer is satisfied that the accused is an appropriate candidate for diversion, the Crown will be so advised. The Crown will either enter a stay of proceedings or withdraw the charges once diversion has been completed. The diversion process does not directly affect the ordinary procedure for remand and fixing a trial date. There is nothing inconsistent with fixing a trial date and writing a letter of application for diversion. Some judges think they should not grant adjournment "for the purpose of considering diversion," since technically the diversion process is separate and apart from the court process. Therefore, although a pending application for diversion can be used as partial justification for applying for an adjournment, that application may not be successful and one should be prepared to move the court process forward at the same time as he or she is pursuing a diversion request. See Appendix B: Diversion Application and Sample Letter for an example of an application for diversion.

C. Peace bond (s 810)

A peace bond is a court order requiring a specific individual to "keep the peace and be of good behaviour". A peace bond is not a conviction or a guilty plea; however, a peace bond can restrict the client's liberty. Under section 810 of the *Criminal Code* the accused enters into a recognizance with conditions; in addition to requiring that the recipient to "keep the peace and be of a good behaviour", a peace bond will also set out specific conditions intended to protect a person or a specific type of property, such as, not to contact certain persons and/or not to attend a certain address or area. These conditions can last up to one year, and the length of the term can be negotiated with Crown. Although a peace bond is not itself a criminal conviction, breaching a peace bond is a separate criminal offence.

In order for a peace bond to be imposed, there must exist **reasonable grounds** for the complainant to believe that the accused will cause personal injury to the complainant or his or her spouse or child or that they will cause damage to his or her property at the time of the peace bond proceedings. Therefore, in entering into a peace bond voluntarily, the client is conceding that the complainant has reasonable grounds for their fear. The accused does not have to admit to all of the facts in the Report to Crown Counsel. However, they do have to admit to sufficient facts to form a reasonable basis for the victim to fear the accused. If there are facts that are in dispute, discuss this with Crown first. If both sides come to an agreement, the court process is similar to a sentencing hearing in terms of the submissions that are made. For more information, see the section on Pleading Guilty, below.

Occasionally, such as when the Crown wishes to impose a peace bond and the accused does not agree, there will be a full hearing on the issue. The Crown often considers peace bonds in cases of spousal assault because of a victim's reluctance to go to trial. At the hearing, the Crown must prove on a **balance of probabilities** that there are reasonable grounds for the fear. **Hearsay evidence is allowed, as it goes to the informant's belief that there are grounds for the fear** (*R. v PAO*, [2002] BCJ No 3021 (BC Prov Ct)). Since there is no criminal standard of proof, the judge must look at **all** the evidence, and not focus merely on the absence of the offending conduct (*R v Dol*, [2004] BCJ No 2314 (BCSC)).

If a person breaches the peace bond, a criminal charge may be laid against the bonded person. Peace bonds are sometimes used as alternatives to criminal charges like uttering threats (s 264.1), criminal harassment (s 264), and minor assaults (s 266). The benefit to the client is that formal criminal charges are dropped. The benefit to the complainant is that the no-contact condition of a peace bond addresses his or her concerns without raising the uncertainty and possible trauma of a trial. A client should be advised that while a peace bond is not a criminal record, it may affect future hearings, travel outside the country, and decisions concerning custody.

D. Pleading guilty

A guilty plea is appropriate when:

- diversion is not granted,
- a peace bond is not appropriate,
- the accused admits guilt,
- it appears that the Crown will be able to prove its case, and
- the accused wishes to plead guilty.

If an accused person wishes to plead guilty then the court appearances should be adjourned to allow sufficient time to "negotiate" with Crown Counsel for the most appropriate sentence. For self-represented litigants, a duty counsel will assist with a sentencing negotiation with a Crown. It is generally a very good strategy to talk to Crown in advance about a joint submission where both sides agree on a sentence. Most Crown Counsel will be eager to agree to a reasonable sentencing position. Whether an agreement can or cannot be reached with the Crown, a sentencing hearing will be scheduled at which the accused/defence can present his/her position. If an agreement is reached with Crown, it is important to know that the judge is not bound by a joint submission.

See Appendix C: How to Prepare for and Conduct a Sentencing Hearing for the process of a guilty plea.

Consequences of a guilty plea may include, but are not necessarily limited to:

- possible inability to obtain a passport or to enter the U.S.,
- difficulty or impossibility of entering some postgraduate fields of study such as law,
- exclusion from jobs requiring bonds,
- possible use of the conviction in subsequent proceedings, and
- possible deportation if the client is not a Canadian citizen.

In cases where there are two or more charges, a judge may order that sentences be served consecutively (one after the other) or concurrently (at the same time). Consecutive sentences are often ordered when the offences are unrelated and of a serious nature, with the courts evaluating factors such as the nature and quality of the criminal acts, the temporal and spatial dimensions of the offences, the nature of the harm caused to the community or victims, the manner in which the criminal acts were perpetrated, and the offender's role in the crimes. In cases where a judge finds it appropriate to impose consecutive sentences they must ensure that the entirety of the sentence is not excessive, in keeping with the Totality Principle. According to this principle the global sentence imposed by the judge must be proportionate to the gravity of the offences and the degree of responsibility of the offender. The sentence must also respect the principle of parity, which requires that similar sentences are imposed for similar offences committed by similar offenders in similar circumstances.

The judge also has discretion to credit an accused with any time spent in custody as a result of the charges.

1. Speaking to sentence (sentencing hearing)

Before a sentence is given, the accused, or counsel for the accused, must be permitted to “speak to sentence” and make submissions to the judge that could affect the sentence. After hearing Crown recommendations and then defence submissions, the judge will give a sentence. For more on the substance and procedure of speaking to sentence, see Appendix C: How to Prepare for and Conduct a Sentencing Hearing.

It is important to *consult sections 718 and 718.2 of the Criminal Code* for the principles in sentencing that the judge will consider, *and address these issues when drafting your submissions*. One should also read up to section 743.1 of the *Criminal Code* before any sentencing hearing.

There tend to be two broad strategies for presenting an accused person’s circumstances. With first time offenders this typically involves presenting the lead-up to the offence as a unique set of unusual circumstances that caused a momentary and exceptional loss of control, and then showing what has changed in the life of the accused to avoid a similar set of unusual and exceptional circumstances. The accused should seek to show the court that the problem has already been cured and will not recur, and such a harsh sentence is unnecessary. With repeat offenders, it is more strategic to present the disadvantageous life circumstances, such as lack of family support or lack of employment/educational opportunities, which may have contributed to the offence being committed. The accused should then show that he/she has changed his or her outlook and is seeking to turn his/her life around. This involves in part an understanding of an accused person’s own situation, and an understanding of the severity of the offence.

> **NOTE:** In cases of **Aboriginal offenders**, reference must be made to section 718.2(e) and the principles enunciated in *R v Gladue*, [1999] 1 SCR 688.

E.Types of sentences

a) Absolute or conditional discharge

Discharges are outlined in section 730 of the *Criminal Code*:

- They are available if accused is not subject to a minimum penalty and the offence is not one punishable with a maximum sentence of 14 years imprisonment or more.
- A discharge means there is a finding of guilt rather than a conviction. At the end of the discharge period the accused has no criminal record.
- The discharge must be in the best interests of the accused and not be against the public interest.
- An absolute discharge means that the accused has no criminal record immediately upon being sentenced.
- A conditional discharge means that the accused is on probation, with certain conditions, for a period of time. If the accused follows the rules, at the end of the probation period he or she is treated as if there were no conviction and will not have a criminal record.
- An absolute discharge is granted immediately without terms or conditions, whereas the effect of a conditional discharge is that the accused is on probation for a period of time. This can involve a number of various conditions the accused must abide by. If the accused successfully completes the period of probation with no breaches or further criminal offences, the conviction is discharged and the offender can say he or she has no prior convictions. It is important to note however that an absolute or conditional discharge still requires a finding of guilt.

> **NOTE:** Each of the sentences listed below results in a conviction and a criminal record.

b) Suspended sentences and probation

If the judge thinks that, having regard to the age, character and personal circumstances of the individual, the accused can rehabilitate him or herself, the judge can suspend the passing of sentence and release the accused subject to the terms of a probation order of up to three years (*Criminal Code*, s 731(1)(a)). This does not mean that the accused has been acquitted; *at the expiry of their probationary period, the accused will still have a criminal record*. This is an important difference between probation and a conditional discharge.

The sentence is available if the accused is not subject to a minimum penalty. An accused can be sentenced to probation for up to three years. Probation means that the accused has to follow certain conditions that the judge sets. For example, the accused will have to stay out of trouble, report to a probation officer (someone who keeps track of the accused), and obey other court-imposed conditions. An order for a suspended sentence means that the courts suspend the passing of a sentence for the duration of the probation period. If a person breaches the conditions of a suspended sentence the court may extend the length of the probation period or (in rare cases) revoke the suspension of sentence and substitute a jail sentence for the suspended sentence. In addition, the breach is a new criminal offence and the accused may be convicted for a breach of the probation conditions (typically 2 or 3 days of jail time for a first offence or weeks of imprisonment for repeat offenders.)

c) Fines

Under section 734 of the *Criminal Code*, an accused may be fined in addition to, or in lieu of, another punishment for offences punishable by imprisonment of five years or less for which there is no minimum penalty.

A fine can be ordered on its own or in addition to probation *or* imprisonment (but not both). An accused may be fined up to $5000 for summary conviction offences (or a hybrid offence where the Crown elects to proceed summarily), or any amount for indictable offences. Before a court imposes a fine, it must inquire into the ability of the accused to pay the fine.

d) Restitution and compensation

Restitution orders can be made as "stand-alone" orders imposed as an additional sentence (s 738 of the *Criminal Code*) or as a condition of probation or conditional sentence order by the court. The restitution can be ordered for the cost of repairing any property damage, replacing lost or stolen property, or any physical or psychological injuries suffered by a victim who required the victim to incur out of pocket expenses or resulted in a loss of income.

e) Conditional Sentence Order (CSO)

This is a jail sentence and occurs when a court orders the accused to serve his or her jail sentence in the community. It is not allowed when there is a minimum sentence of imprisonment, when there is a term of imprisonment of two years or more imposed, or where the offence involved a serious personal injury. The term “conditional” refers to rules the offender must follow in order to remain out of jail. The conditions are often similar to conditions imposed on a probation order; however, a curfew is almost always imposed. An accused that breaches any of his or her conditions or commits a new crime may be ordered to complete the remaining portion of the sentence in prison.

f) Imprisonment (jail)

Unless otherwise stated by statute, if the offence is a summary conviction offence (or Crown elects to proceed summarily), the maximum sentence of imprisonment is 6 months; and if the offence is an indictable offence (or the Crown elects to proceed by indictment), the maximum sentence of imprisonment is 5 years. There are many offences where the maximum sentence stated is in excess of 5 years. A judge has the discretion to order a sentence to be served concurrently (at the same time) or consecutively (one after the other) with any other sentence the accused is serving, or any other sentence arising out of the same transaction. If the total sentence is two years or more, the accused will serve his or her sentence in a federal penitentiary. If the total sentence is less than two years, the accused will serve his or her sentence in a provincial jail. An accused should note that “two years” includes time already served before trial. So, a person who is sentenced to two years of imprisonment, but has served one week in jail, will not be sent to a federal penitentiary. If a judge imposes a sentence not exceeding 90 days, he or she may order that the sentence be served intermittently on certain days of the week or month. The accused is released on the other days, subject to conditions of a probation order.

F. Matters ancillary to sentencing

a) DNA Data Bank

If an offender is convicted of a "primary designated offence" enumerated in section 487.04 of the *Criminal Code* – for example, sexual interference (s 151) and sexual exploitation (s 153) – a court must order the taking of bodily substances for the purposes of forensic DNA analysis, unless the impact on the person’s privacy would be “grossly disproportionate” to the public interest.

The court may also consider the criminal record of the offender, the nature of the offence, and the circumstances surrounding its commission. The court may also, at its discretion, make a DNA order upon conviction or discharge of a “secondary designated offence” – such as assault – but the threshold for obtaining a DNA order is higher for these offences. Once the substance is analysed, it is then entered into the Convicted Offender Index of the national DNA Data Bank. The data bank is widely used for many different types of crimes ranging from violent crimes to fraud involving impersonation.

b) Victim fine surcharge

A victim surcharge is an additional penalty imposed on convicted offenders at the time of sentencing.

The coming into force of the *increasing Offenders' Accountability for Victims Act (October 24, 2013)* amends the victim surcharge provisions in the *Criminal Code* to double the amount that an offender must pay when sentenced, and to ensure that the surcharge is applied in all cases.

The surcharge will be at 30 percent of any fine imposed on the offender. Where no fine is imposed, the surcharge will be $100 for offences punishable by summary conviction and $200 for offences punishable by indictment. In addition, the judge will retain the discretion to impose an increased surcharge where the circumstances warrant and the offender has the ability to pay.

Previously, sentencing judges had the discretion to waive the victim surcharge when it could be demonstrated that its payment would cause undue hardship to the offender or his/her dependents. This legislation removes the waiver option to ensure that the victim surcharge is applied in all cases without exception. However, the legislation is currently being reviewed by the Supreme Court of Canada to determine whether or not it complies with the Constitution, and many judges are no longer imposing the victim fine surcharge where it would be a financial hardship.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 18, 2019.

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VII. Pleading Not Guilty/Trial

A. Arraignment hearing

The purpose of an *arraignment hearing* is for the court to be advised whether the matter is for trial or disposition (guilty plea) and to set aside the required court time for the trial or disposition. It is also an opportunity to canvass any possible disclosure or *Charter* issues. If the client is not prepared to make a decision on whether to plead guilty or run a trial at the time of the hearing, the arraignment hearing should be adjourned until the clinician can consult with the supervising lawyer and obtain clear instructions from the client.

1. Setting the trial date

LSLAP clinicians are encouraged to, but are not required to appear in court to set a trial date. Whether or not the student is attending, a Trial Date Request Form must be completed and faxed to the Judicial Case Manager prior to the appearance date. This form *must* be approved by the LSLAP Supervising Lawyer and then given to the Administrator to be faxed.

> **NOTE:** The client *must* still attend the Arraignment Hearing and enter a plea of not guilty in order for the trial date to be set.

2. Arraignment hearing (trial fix date procedure)

If the clinician will be attending the arraignment hearing they should take a copy of the trial date request form. The clinician must bring two additional copies of the report to the appearance. One copy is filed with the court and the other given to the Crown.

At the appearance, a not guilty plea is entered and the time estimate for the trial is confirmed. The Crown will provide the court with its time estimates and the number of witnesses. It is essential for the clinician to note this information.

The judge or JP will then ask the clinician for their position on the time estimate and then decide how much time is appropriate to set aside for the trial The clerk will provide counsel with a form to take tothe Judicial Case Manager (JCM) to set a trial date. It is important that the client attends the JCM with the clinician, as the JCM will then adjourn the client to the pre-trial conference (PTC) date. It is essential that the clinician remind the JCM that he/she is an LSLAP student and a pre-trial conference (PTC) be set.

Once the trial and PTC dates are set, the clinician will receive a pink trial scheduling memo indicating the dates and times of the appearances. This must be brought back to the LSLAP office and placed in the file. The Public Relations director as well as LSLAP's administrative assistant must be advised of these dates so that supervising lawyers can be arranged. It is advisable to have the JCM print out an extra copy of the pink memo to be given to the client.

B. Appearance for trial - elections as to mode of trial

There are a number of different modes of procedure, although LSLAP students will only appear on summary matters.

1.Summary conviction offences

The accused has no right of election. The trial is held before a Provincial Court judge. There is no preliminary inquiry.

2. Hybrid offences and indictable offences

For a hybrid offence where the Crown chooses to proceed summarily, see above.

For a hybrid offence where the Crown chooses to proceed by indictment, or where the offence is strictly indictable, the accused has the right to elect a mode of trial, unless the indictable offence is listed in sections 469 or 553 of the *Criminal Code*.

Where the accused has the right of election, he or she will be asked to elect at the arraignment hearing.

3. Electable offences

For a list of electable offences, see sections 536 (4), 554, 558, 565 and 471 of the *Criminal Code*. For an offence not listed in sections 469 or 553, the accused may elect to be tried by: a)a Provincial Court trial with a judge, without a jury, b)Supreme Court trial with a judge, without a jury, or c)Supreme Court trial comprised of a judge and jury.

If the accused fails to elect when the question is put to them, under section 565(1) of the *Criminal Code* they will be deemed to have elected a trial in Supreme Court with a judge and jury.

If an accused elects a Supreme Court trial they have the right to test the Crowns case in a Preliminary Inquiry (see below). This right to a preliminary inquiry can be waived by an accused, however this rarely occurs because, the most common reason for electing a trial before a Supreme Court (instead of a Provincial Court) is to gain the advantage of testing and discovering Crowns case during the preliminary inquiry.

If there are two or more accused who are jointly charged in an Information, then under section 536(4.2), if one party elects to proceed before a Supreme Court and the other wants Provincial Court, both are deemed to have elected to proceed in Supreme Court. If one person elects a judge and jury in Supreme Court and the other elects judge alone, both are deemed to have elected to proceed by judge and jury.

4. Preliminary inquiry

A preliminary inquiry is held before a Provincial Court judge. The primary purpose of a preliminary inquiry is to determine whether or not there is sufficient evidence to put the accused on trial. Whether or not there is sufficient evidence is measured on a low threshold ("whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty", *USA v Shephard* (1976), 30 CCC (2d) 424 (SCC)). If the judge determines that there is sufficient evidence then the client will be ordered to stand trial; if the judge finds that there is not sufficient evidence, the client will be discharged.

Although the primary purpose of the Preliminary Inquiry is to determine if there is sufficient evidence to meet the threshold test for committal, the 2004 amendments to the *Criminal Code* substantially streamlined the Preliminary Inquiry process. The historical secondary purpose of defence counsel using the Preliminary Inquiry process to discover and test the case remains an important secondary purpose. See *R v. Rao* [2012] BCCA 275 (CanLII) at paras 96-98.

On September 19, 2019, Section 240 of Bill C-75 will come into effect. After this date, preliminary inquiries will only be available to those accused who elect to be tried in the Supreme Court (by judge only or by judge and jury) and when at

least one of the charges on the indictment is punishable by imprisonment for life. Therefore, a preliminary inquiry will be available only to those individuals who face the possibility of a life sentence.

C. Pre-Trial Conference (PTC)

The pre-trial conference is a procedural appearance for LSLAP files to confirm there is a trial supervising lawyer and that the matter is indeed going to trial, that there are no disclosure issues, and that *Charter* challenge notices have been given. The clinician is encouraged to, but need not attend the PTC. Clinicians are reminded that they must give notice of any *Charter* challenges *at least 14 days* prior to the trial date. In addition, *a trial supervising lawyer must be confirmed by the PTC in order for LSLAP to confirm the trial date*.

It can be many months between the fixing of a trial date and the trial. The clinician must endeavour to remain in contact with the client during this long time period. LSLAP requires that the clinician contact the client *2 weeks* before the PTC to make sure the contact information has not changed and that the client knows when to appear in court.

If the clinician is unable to get in contact with the client before the PTC, the clinician must either appear at the PTC, or formally withdraw from the record by sending a letter to the court registry and Crown as well as the client. If both the student and the client attend the PTC, the student should obtain new contact information from the client. If the client does not attend the PTC, the student must formally withdraw from the record at that time. The student should *never* disclose that there have been attempts to contact the client, or when the last contact was, as this is privileged information and would constitute a breach. The clinician must then mail a letter to the client's last known address to inform them of the situation.

> **NOTE:** In some cases, a clinician will be transferred a file after the PTC date, and find him or herself unable to get in contact with the client. The LSLAP Executive and the Supervising Lawyer must deal with these files on a case-by-case basis.

D.The trial

1. Conduct of the trial

The standard Provincial Court trial conducted by LSLAP generally proceeds by the following procedure:

1. The Crown calls the case.
2. The LSLAP clinician approaches the bar, introduces him or herself, the client, and the supervising lawyer for the record and advises the court that they are ready to proceed.
3. Usually Crown asks for an order excluding witnesses, which excludes any witnesses about to testify in the matter from the courtroom until such time as they are called. If Crown fails to do so and there are any witnesses in the courtroom, defence should remind the court of the need to make such an order.
4. Crown will call its witnesses (called *direct examination*), and defence may *cross-examine* each witness as they are called.
5. Crown indicates that their case is closed.
6. The clinician can choose to:
    - a) make a "no evidence" motion (this is done prior to deciding to call evidence),
    - b) choose not to call any evidence, or
    - c) call defence witnesses.
7. If the clinician chooses to call a defence, he or she can then call witnesses, and Crown may cross-examine each witness as they are called.

8. If a defence was called, defence counsel makes closing submissions, then Crown.
9. If a defence was not called, Crown makes closing submissions first, and then defence counsel.
10. The judge will consider the facts and law, make findings of fact and give his or her decision and reasons. If the accused is found guilty, a Pre-Sentence Report (PSR) may be ordered. If one is not ordered, the judge will then hear sentencing submissions.

Students should refer to *Fundamentals of Trial Techniques* by Thomas A Mauet (1992), an excellent general guideline to conducting a trial. See also Appendix D: Trial Books.

2. Nature of the trial

The goal of defence counsel at trial is *not* to find the truth or to seek justice. The goal of defence counsel is to test the Crown's case and to present evidence where appropriate, in order to either show that the evidence as a whole fails to prove the accused's guilt beyond a reasonable doubt, or to raise a reasonable doubt as to the guilt of the accused. Keep in mind that one way to reach reasonable doubt is to convince the trier of fact that based on the evidence presented; they simply cannot know for sure what happened. The adversarial process with defence counsel and Crown Counsel fulfilling their respective roles before a neutral trier of fact has been one of the most effective ways to find the truth and seek justice discovered by mankind. The adversarial process depends upon capable defence counsel vigorously challenging Crown's case and pursuing all viable defences.

3. Presentation of prosecution's case

Once a plea has been entered, witnesses will be excluded and the trial begins. The Crown may start with an opening address and then begin calling witnesses for examination and introducing any real evidence (objects, documents, etc.). Next, defence counsel or the accused, if not represented, may cross-examine Crown witnesses. The Crown may then re-examine their witness; however, this re-examination is limited to clarifying or explaining answers given during cross-examination. No leading questions may be put during re-examination and new material can be entered only with leave of the Court. If leave is granted, and new material entered during re-examination, then the defence will be given an opportunity to cross-examine on the new evidence (See: Earl J Levy, *Examination of Witnesses in Criminal Cases*).

The goal in cross-examination is to demonstrate that this particular witness's evidence is less worthy of belief, by challenging the witness's reliability or credibility, or both. The clinician is entitled to cross-examine a witness on any issue that is relevant or material to the case. The clinician does not have to have evidence on a particular point but does have to have a reasonable basis to believe whatever it is they are suggesting to the witness. The rule in *Browne v. Dunn* (1893) 6 R 67, H.L, states that the defence must put its case to each witness on cross-examination. This means that if there is a good possibility that your client will testify in their own defence or you have a specific defence theory that you will argue at the end of your case, then each Crown witness must be confronted with your anticipated defence evidence or theory and provided the opportunity to comment upon that evidence or theory. Typically this is done at the end of your cross examination of each witness with a number of "I suggest to you that..."

Reliability refers to a witness's ability to perceive an event accurately, and later recall and describe that event with detail and precision. This can be the scene, lighting, visibility, any obstructions or distractions, which may have affected the witness' perception. It can also be the state of the witness at the time (perhaps they were intoxicated at the time).

Credibility refers to a witness's desire or motivation to describe that event truthfully. Some common credibility challenges include:

- Motive based on personal animus towards the accused,
- A motive based on a personal bias towards the complainant or victim of the alleged crime,

- A motive based on a perceived advantage from the police arising from providing evidence to the police, and
- A witnesses' character is such that they simply cannot be trusted (history of perjury, fraud or lying to the police).

Practice Recommendation - Prior Inconsistent Statements

Sections 9 and 10 of the *Canada Evidence Act* outline the principles of cross-examination as to previous statements of a witness in criminal investigation. Prior statements can be used to question the reliability or credibility of that witness. The trier of fact decides whether there was actually an inconsistency and whether that inconsistency affects the witness's credibility or reliability or both.

There are times when the clinician may not want to put a prior statement to a witness, even if there are inconsistencies; for example, if the previous version is much worse than the version the witness presented in court.

Procedure for putting a prior inconsistent statement to a witness:

1. "You gave a statement to the police on December 4, 2010?" ("Yes"). "I am showing you a transcript of that statement." OR "I am showing you a 4-page written statement. Is this your handwriting? Are those your initials at the bottom of each page and your signature at the end of the document?"
2. "I refer you to page 3, line 8, where you said '[read out what is in the transcript or statement verbatim, including any ums and ahs, however, you may abbreviate any swear words to their first letter]' You said that? (yes) You knew it was important to tell the police the truth? (yes) That was the truth?" (if no) So you lied to the police when you told them that?
3. "You said in your direct examination when my friend was asking you questions [summarize conflicting evidence from your notes]?" (yes) But here you told the police [reread the line of the transcript], which version do you now say is the truth?

For more information, please see the LSLAP Guide to Criminal Defence Work.

a) Common objections

When the Crown is in the process of examining its witnesses, it is the clinician's job to ensure the Crown is doing so properly. Below are some common actions that lead to objections in a trial. In order to raise an objection, the clinician must rise from his or her seat, face the judge, say "objection," and then state the reason for the objection. At that point, Crown will either agree or disagree with the objection. If the Crown disagrees, the judge will make a ruling on the spot regarding the objection.

Leading Questions:

A leading question is one where the answer is suggested in the question. For example: "did you see Joe punch the Steve?" The party calling the witness cannot ask leading questions. *However, on cross-examination the practice is allowed and encouraged.* A common exception to the rule against leading questions in direct is when leading questions are used in order to introduce matters to the court. For example "Your name is John Doe and you reside at 555 University Drive?" Leading questions may also be used in direct examination if they relate to non-contentious issues.

Hearsay:

Witnesses are expected to tell the court what they personally observed, heard or did. Hearsay is a common objection that arises because witnesses are often told things by other persons about the event. Hearsay is presumptively inadmissible if the purpose of introducing the hearsay is to have the trier of fact accept the truth of what the witness heard another person say. The Hearsay rule has a number of exceptions (See Below for more information about Hearsay objections).

Speculation:

When we witness behavior in everyday life we often reach conclusions regarding why we think that other person was behaving in that manner. Witnesses are expected to tell the court what they saw a person say and do and not go on to speculate as to why they think that person did what they did. For example if you see someone jumping up and down and swatting at the air you may speculate that they are being bothered by an insect. Such speculation is not proper evidence unless you also saw or heard

the insect.

Opinions from Non-Experts:

As a rule, witnesses should not make any inferences or state their opinion about what that evidence proves in their testimony, for example "I think Steve was going grocery shopping because I saw him with an empty fabric grocery bag." Instead the witness should simply state "I saw Steve and in his hands he was holding an empty fabric grocery bag." Conclusions drawn from what is seen or heard is for the trier of fact to draw not the witness to opine.

4. *Voir Dires*

A *Voir Dire* is usually referred to a "trial within a trial". It is usually held during the Crown's case in order to determine the admissibility of evidence. For example, *Voir Dires* can be held to determine whether a confession is voluntary and admissible or whether it should be excluded under section 24(2) of the *Charter*. If the evidence heard in the *Voir Dire* is deemed to be admissible, counsel can agree not to repeat the evidence and the *Voir Dire* will form part of the evidence at trial.

Two very common *Voir Dires* are a challenge to the admissibility of items seized in a search and a challenge to the admissibility accused confession to the police.

If there are grounds to challenge a search Crown Counsel must be alerted to the fact that defence counsel will be challenging the admission of that item into evidence with sufficient detail to put Crown on notice as to the nature of that challenge (typically an alleged breach of section 8 of the *Charter*).

If Crown is seeking to enter a confession into evidence that was given to the police (or other person in authority) Crown Counsel must first establish that the confession was voluntary in a *Voir Dire*. It is common practice that any alleged breaches of section 10 (i.e. accused not provided with access to counsel prior to his interrogation) are dealt with at the same time as Crown Counsel's Voir Dire on voluntariness.

If an accused testifies at a *Voir Dire*, he or she can only be cross-examined on the issuesraised in the *Voir Dire*.

5. Directed verdict/ no evidence motion

In all criminal cases, it is the Crown's obligation to prove beyond a reasonable doubt:

- Time & Date of the offence.
- Location and Jurisdiction of the offence (e.g.: it happened in Surrey, British Columbia).
- Identity of the accused.
- The elements of the crime actually happened (*Actus Reus*).
- The accused intended to commit the crime (*Mens Rea*).

If the Crown failed to lead any evidence on any of the above, the defence should make a no evidence motion. This asks the judge to direct the acquittal of the accused on the ground that there is absolutely no evidence of some essential element of the offence. The test was articulated by Ritchie, J. in *USA v Shephard*, above (also *R v Charemski*, [1998] 1 SCR 679). Arguments by the Crown and defence will be heard. If the defence's "no evidence" motion fails, the defence may then call its own evidence.

> **NOTE:** The defence may make an insufficient evidence motion when the Crown has failed to bring sufficient evidence to prove a specific element of the offence beyond a reasonable doubt. If an insufficient evidence motion fails, the defence cannot call evidence. The only practical difference between making an insufficient evidence motion and calling no evidence, allowing Crown to make its closing argument, and then urging the court to acquit based on reasonable doubt is who presents closing argument on the point first. It is usually perceived an advantage

to have the last word and hence insufficient evidence motions are typically only used in conjunction with a no evidence motion, where counsel is of the opinion that although a no evidence motion has just failed an insufficient evidence motion is very likely to succeed.

6. Presentation of defence case

All accused have the right to testify in their own defence and the right to call other witnesses. After the defence examines its witnesses, the Crown has the right to cross-examine these witnesses. The defence may re-examine them in relation to new areas that could not have been anticipated ahead of time. For a discussion on when this is appropriate, see "Presentation of Prosecution's Case," above. (See *Examination of Witnesses in Criminal Cases* by Earl J Levy QC for a discussion of these techniques).

The defence will be invited to make closing submissions once all evidence has been heard. If the defence has called evidence, the defence closes first. If the defence does not call evidence, Crown closes first. The three main sections of closing submissions are: the facts, the law, and most importantly, applying the law to the facts that the judge should find. The judge can accept all, part, or none of a witness' testimony. If the client testifies, the *W(D)* principles (below) should also be discussed.

Practice Recommendation - Entering Exhibits
An exhibit should be entered through the witness who made (or found) the exhibit so they can validate it. Exhibits may be a photograph, a written document such as an email, or physical evidence such as an assault weapon. In the case of a photograph, the person who took the actual photograph is the one likely to enter the exhibit. It is also possible for the person identified in the photograph to enter the exhibit. Example of an exhibit being entered by someone who took the photograph: • "You have previously provided me with a photograph. Did you take this photograph? When did you take this photograph? And this is a true an accurate depiction of the scene as depicted on the date you took the photograph?" "Your Honour, I ask that this photograph be entered as the next exhibit." Example where an individual depicted in the photograph enters the exhibit: • "You have provided me with a photograph of some injuries. Who is depicted in this photograph? When was this photograph taken? And is this a true and accurate depiction of your injuries as of the date this was taken?" "Your Honour, I ask that this photograph be entered as the next exhibit." *The court will number each exhibit as they are entered, either place the appropriate number on your copy of each exhibit or keep an exhibit list so that you may refer the court or other witnesses to them later.*

a) Common defences

For the defences below to be raised, they must have an air of reality. This means that all of the elements of the defence would exist if the defendant were believed on the stand. The defendant is responsible for raising this air of reality. Once that is completed, in order to obtain a conviction, the Crown must then prove beyond a reasonable doubt that the defence was not applicable in the circumstance. If that is not achieved, the defendant is acquitted.

Self Defence: sections 34-42 of the *Criminal Code*

There are conditions where self-defence can be raised when the charge is assault. This can occur in a situation where the accused perceived force or a threat of force, his or her state of mind was to act in a defensive manner, and the actions taken by the accused were reasonable in the circumstances. This defence can take into account various factors, such as whether the accused had an alternative, the proportionality of the force used by the accused, as well as any history that may exist between the parties.

Consent:

If an accused is charged with assault, Crown must prove beyond a reasonable doubt that the other person did not consent to the assault. A consensual fight is not an assault as the parties are consenting to the physical contact. Consent can be negated or vitiated where the force causes bodily harm and was intended to be caused or the force was applied recklessly and the risk of the bodily harm was objectively foreseeable. In *R v Jobidon*, [1991] 2 SCR 714 the Court held that consent cannot be used as a defence for a criminal act such as assault which may cause "serious hurt or non-trivial bodily harm".

Lack of *Mens Rea*:

Mens Rea deals with the mindset of the accused at the time of the incident and means "guilty mind." *Mens Rea* of the offence must be proven by the Crown beyond a reasonable doubt. If the accused person did not intend to commit the offence, he or she can raise a reasonable doubt as to whether he or she had the proper *Mens Rea* to commit the offence.

Examples:

The main *Mens Rea* components to the charge of theft are that the action was without color of right and the individual had intent to steal. Color of right refers to an individual's belief that they had entitlement to the property they are accused of fraudulently obtaining. If it can be proved that the individual had no intent to steal, or had an honest belief of the right to the property, theft has not occurred. The main *Mens Rea* components of the charge of Personal possession of a Controlled Drug or Substance includes knowledge of the substance. The possessor must know the nature of the item. An accused has a *Mens Rea* defence to possession if:

1) the accused did not know he or she had the item on him or her, or

2) the accused did not know the nature of the item (for example, the accused thinks the substance is baking soda and not cocaine),

7. Accused testifying

The accused cannot be compelled to testify (see s 11(c), Charter). If the accused chooses not to testify, no adverse inference may be drawn. A decision to call the accused should be made on the particular facts of each case, taking into account the strength of the Crown's evidence and the risks of exposing the accused to cross-examination. Prior convictions for crimes of dishonesty (e.g. theft, fraud, etc.) are admissible for the purpose of assessing credibility only.

If your client has a criminal record and he can testify in his own defence, then the clinician should be prepared to argue a Corbett application [See. *R v. Corbett* [1988] 1 S.C.R. 670] at the end of Crown counsel's case and before a final decision is made to have the accused testify, particularly if the client has convictions for crimes that are similar to the crime alleged.

If the accused testifies, the judge must consider the instructions set out in *R v.W(D)* (1991), 3 CR (4th) 302 (SCC):

- If the judge believes the accused, he must acquit,
- If the judge does not believe the accused, but is still left with a reasonable doubt from the testimony, he must acquit, and
- Even if the judge does not believe the accused and is not left with a reasonable doubt from the testimony, the Crown must still prove its case beyond a reasonable doubt.

8. Presence of the accused

As a general rule, the accused must be present and remain in the courtroom throughout the trial. In very unusual circumstances, the case may proceed *ex parte* (i.e. in the accused's absence).

9. Witnesses

a) Privilege and compelling attendance of a witness

Both sides may contact any and all witnesses who will be called at trial, including police officers. However witnesses are not required to speak to Crown or defence counsel prior to the trial.

A witness may be compelled to attend at trial to give evidence and to bring documents by means of a subpoena processed through the court registry that is personally served on them (ss 699 and 700 of the *Criminal Code*). An arrest warrant may be issued for non-compliance (s 705). Unless the witness is served with a subpoena, he or she is under no legal obligation to attend court proceedings. Crown Counsel will often agree to subpoena witnesses who have provided a police statement and Crown Counsel does not intend to call in its case but defence counsel wants to have called. Other defence witnesses are typically known to the client (such as alibi witnesses) and attend voluntarily. Defence counsel should obtain subpoenas for witnesses if they are important, not under Crown subpoena and not likely to attend voluntarily.

Witnesses must answer all questions put to them unless it is considered privileged. Privileged information includes:

- i) discussions between a client and his or her lawyer in situations when the lawyer was acting in a professional capacity,
- ii) any information tending to reveal the identity of a confidential police informant, unless disclosure is the only way to establish the innocence of the accused, and
- iii) communication between spouses.

b) Preparing a witness

The Defence/accused should thoroughly prepare witnesses for trial. A witness must tell the truth as he or she knows it, but prior rehearsal of possible questions and answers is advised. All answers should address the specific questions asked. Witnesses should be appropriately dressed.

c) Testimony of witness

A witness is required either to swear an oath or to solemnly affirm that he or she will tell the truth. Section 16(3) of the *Canada Evidence Act* permits a witness who is able to communicate the evidence, but does not understand the nature of an oath or a solemn affirmation due to age (under 14 years) or insufficient mental capacity, to testify – as long as he or she promises to tell the truth.

The judge decides whether to admit or exclude evidence, as governed by the laws of evidence, case law, the Charter, the *BC Evidence Act*, the *Canada Evidence Act*, and the statute creating the offence. Evidence must be relevant to the facts in issue. The facts in issue are those that go to establishing the essential elements of the offence and any legal defence to that offence. Evidence may be presented with respect to other issues as well, such as the credibility of a witness, provided that the evidence does not offend the collateral evidence rule.

d) Admission or confession (to a person in authority)

Where the accused has made a statement outside the trial, for example while being questioned by the police (or a store detective, transit police, and other person in authority), the Crown may seek to use this statement,

- as evidence of an admission or confession by the accused, or
- for the purposes of cross-examination during trial.

There are two different kinds of statements, admissions and confessions.

- An admission is a statement made to another civilian. It is generally admissible.
- A confession is a statement made to a police officer (or person in authority), and there are very strict rules regarding the admission of such statements at trial.

Anything the accused says to the police before or after the arrest is admissible as a confession *only* if the Crown first proves it was made voluntarily. See the Section IX: Charter below for more information on confessions.

e) Hearsay evidence

Hearsay is generally defined as an out of court statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is inadmissible unless the statement falls into one of the hearsay exceptions. The key factor in determining if a statement is inadmissible hearsay is its purpose.. The defining features of the Hearsay rule are: (a) the purpose of adducing the statement is to prove the truth of its contents and (b) the absence of contemporaneous opportunity to cross-examine the declarant. For example, if the witness on the stand states "the passenger said the light was red," this is hearsay if: (a) the truth of the matter is to determine whether the light was red, and (b) the passenger who made this statement is not in-court and cannot be cross-examined.

There are some traditional exceptions to the hearsay rule, through which such statements can be admissible. These include:

1. confessions,
2. dying declarations,
3. declarations against the interest of the declarant,
4. records made in the course of duty if the declarant is deceased or otherwise unavailable (for example, doctor's notes),
5. declarations of a state of mind or bodily condition as evidence of the state reported, but not of its cause (for example, using the declaration "I'm cold" to establish that the person making the statement was cold, but not using it for the assumption that the weather outside was cold that day),
6. statements of intention (used to increase the probability that the person who made the statement actually performed that intended action), and
7. spontaneous declarations (*Res Gestae* - statements made so closely to the event that they are connected to it).

Each exception has its own requirements that must be met. However, there are two basic tests underlying all of them: necessity, and the circumstantial probability of trustworthiness. In addition to the traditional common law exceptions, the Courts have developed the "principled approach" to determining the admissibility of hearsay. See *R v Starr*, [2000] 2 SCR 144. This approach, too, looks at necessity and reliability. These two requirements must be met before allowing hearsay evidence to be admitted:

1. Necessity: whether the benefit of the evidence would be lost in its entirety if it is not entered (i.e. the declarant, the person who originally made the statement, is unavailable, or there is no other source by which the evidence can be admitted and have similar value). #Reliability: this test is essentially the judicial determination of what would have been gained by cross-examination. In some cases, the circumstances in which the statement was made suggest its

trustworthiness and reduce the danger of admitting evidence without an opportunity for cross-examination.

For a thorough discussion of the rules of hearsay admissibility, see *Watt's Manual of Criminal Evidence* and *R v Khelawon*, [2006] 2 SCR 787.

f) Leading a witness

Counsel is generally not permitted to lead its own witness (i.e. suggest answers), with the exception of preliminary matters such as the witness's identity, residence, age, and other matters that are not at issue, and that merely help to set the stage. In any case, testimony that is adduced from leading questions tends to be afforded less weight, as the words have come from the mouth of someone other than the witness. **Leading questions are proper and encouraged for cross-examination**.

g) Opinion evidence

Opinion evidence is permitted where it assists the trier of fact to draw conclusions from the evidence. There are two types of opinion evidence: non-expert and expert. Non-expert opinion evidence is generally not permitted. Expert evidence is not permitted where the trier of fact is capable of reaching a conclusion without such evidence. Expert opinions are necessary where the trier of fact would be unable to draw a conclusion with respect to the evidence. Experts must first be established as such – the determination is made in a *Voir Dire* (a trial within a trial). For a more complete explanation of the law on opinion evidence, see *R v Mohan* [1994] 2 SCR 9.

Section s 657.3(3), of the *Criminal Code* imposes an obligation on the defence to disclose any opinion evidence it intends to call prior to trial. *R v Stone*, [1999] 2 SCR 290 sets out the guidelines which apply to both Crown and defence in disclosing expert opinion evidence.

10. Conclusion of the trial

a) Closing argument and submissions

Defence counsel and the Crown will make closing arguments that recap their view of the facts and the pertinent law. The judge or jury may then retire to consider a verdict. If the defence has called evidence, it must make submissions first. Often a case will be decided based on the credibility of the witnesses. If the client takes the stand then the case is likely to be a credibility issue, with rules as described in *R vW(D)*, above.

b) Verdict

If the Crown is able to prove each element of any of the offences charged beyond a reasonable doubt, there will be a guilty verdict. An accused can only be convicted of an offence that is on the Information; however, the accused may also be convicted of:

- All, some, or one of the offences charged,
- A lesser included offence of an offence charged, and
- An attempt of an offence charged.

Crown can amend the Information to include new charges up until the close of Crown's case. Once the defence's case is called, no new charges can be added and applications to amend the Information will usually be denied.

c) Sentencing

The judge will sentence the accused after a conviction or guilty plea. However, the judge will ask for submissions on sentencing from both sides regarding the offence and the offender. Counsel should be prepared to address sentencing immediately following a trial. This is briefer than sentencing submissions for a guilty plea. Alternatively, the Crown or defence may adjourn the matter for sentencing on application. But such an application will be granted only if there are valid reasons for counsel to ask for more time to prepare or if a pre-sentence report is requested.

Judges have broad discretion in imposing most sentences – depending on the specific offence, whether it is provincial or federal, and whether it is summary or indictable. See Section VI: Resolving the Matter Prior to Trial, for more information on types of sentences a judge can order.

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VIII. Other Issues

A. Client suspects he or she may be charged with an offence

The client may have been stopped by the police or observed doing "something wrong," but has not yet received a summons. To see if a client has been officially charged, contact the Vancouver police or the RCMP to see if a report to Crown Counsel has been made. It is also possible to check with the court clerk, the police, or the Crown Counsel office to see if an Information has been laid and forwarded to Crown Counsel. If there is an outstanding warrant for the client's arrest, the accused must be advised that he should turn himself in immediately. This is a critical time to advise clients of their legal rights, including the right to remain silent.

B. Client is on probation or otherwise serving a sentence

The student may be able to help the client understand the terms of a sentence, or help the client in his or her relationship with the supervising authority. If the issue for which the client is seeking advice is complex, the client should be advised to seek legal counsel.

C. Staying a charge

Once the Information has been laid, the prosecution of the case is in the hands of the Crown. The Crown can only stay a charge if there is no substantial likelihood of conviction, or if it is not in the public interest to proceed with the charge.

A judge has no discretion in the decision of Crown Counsel to enter a stay of proceedings (*Criminal Code*, s 579). The Crown may enter a stay of proceedings either before or during the trial. See Section VI: Resolving the Matter Prior to Trial, above, for more information.

> **NOTE:** At trial, the accused may instead ask Crown to call no evidence rather than enter a stay of proceedings, in which case the accused is acquitted due to a lack of evidence. This decision is solely within the discretion of Crown Counsel. An acquittal is preferable to a stay of proceedings as the accused's record will be removed immediately rather than remain as a 'pending charge' for one year.

Any person who wishes to have a stay of proceedings entered should do so with advice of counsel. Complainants should be careful with regards to what is said to Crown. The complainant could potentially cause charges to be brought against them if they tell Crown that they will not testify even if summoned, or that they initially lied to the police.

If the complainant and the accused both seek advice from LSLAP, the student must be aware that this is a serious conflict of interest. The second party must seek independent advice even if the complainant and accused are husband and wife. Under no circumstances should counsel for the accused advise the complainant, or vice versa. If the other party approaches LSLAP for advice, they must be immediately referred to their own legal counsel.

D. Appeal

The accused has a right to appeal a conviction or sentence or both. Appeals must be filed within 30 days of the sentence. A client who believes that he or she has a strong case for an appeal should be referred to the Lawyer Referral Service as LSLAP does not handle appeals.

E. Default in payment of fine or non-compliance with order

1. Provincial offences

A convicted person may not be jailed for defaulting on payment of a fine, except as under the *Small Claims Act*, RSBC 1996, c 430 (*Offence Act*, s 82). Failure to pay a fine can result in the Crown obtaining a court Judgment Order by filing the conviction and entering the amount of the fine. The order has the same effect as a judgment in a civil case. The Crown can collect the fine by a Garnishing Order, Warrant of Execution, or other means, just as a judgment would be enforced in a civil case.

2. Federal summary and indictable offences

If a fine or a community work service is ordered, the court may grant more time for payment or completion of hours. This is granted when a person has a legitimate excuse for wanting an extension.

F. Criminal records

1. What is a criminal record?

The answer is not straightforward as different people will use the term "criminal record" to mean different things. Informally, a "criminal record" often refers to criminal convictions. This would include suspended sentences, fines imposed after criminal convictions and any form of incarceration such as house arrest (conditional sentence) or jail time. This would not include discharges, stays of proceedings or withdrawn charges.

A criminal record is also used to refer to the information contained in the Canadian Police Information Centre (CPIC). CPIC is a central computer database that links police from across Canada by allowing each department to enter and access information on a person's criminal history. Depending on the level, this would include the history of any criminal proceedings against a person. As a result, discharges, stays of proceedings, peace bonds and withdrawn charges may appear on a person's CPIC record until they are purged or suspended.

Individual police departments additionally keep a great deal of other information regarding a person's criminal history that is not entered into CPIC. This could include criminal charges outstanding against a person or complaints made to police.

2. What information can a third party find out about?

It is very important that people read and understand when consenting to disclosure. Often employers will simply ask; "Do you have a criminal record?" – i.e. suspended sentences, fines imposed after criminal convictions and any form of incarceration. In this case, all other information does not have to be disclosed. If a more thorough check is done, the information that is disclosed depends on the agreement signed by the individual. It should be noted that the *BC Human Rights Code*, RSBC 1996, c 210, s.13, makes it illegal to discriminate based on being convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

There are two types of criminal record checks: standard and vulnerable sector. There are 4 levels of standard criminal record checks - level 1 to 4. Criminal record checks can only be done with the consent of the individual. Only police agencies are authorized to conduct a criminal record check, with the exception of BC Ministry of Public Safety and Solicitor General.

- Level 1: Records of criminal convictions which have not been suspended following an application for a criminal record suspension.
- Level 2: Level 1 + outstanding charges that the police force is aware of.
- Level 3: Level 2 + records of discharges which have not been removed (all charges regardless of disposition).
- Level 4: Level 3 + check on local police databases, court and law enforcement agency databases (also known as "Police Record Check").

The vulnerable sector check includes a level 4 check plus any sexual offences and convictions which a records suspension was granted. A criminal record does not include convictions under provincial laws, like the *Motor Vehicle Act*, RSBC 1996, c 318.

a) How will a criminal record affect my ability to travel?

Each individual country controls entry to its territory and the impact of a criminal record will vary depending on where a person is trying to travel (and often the person working at customs!). Canada and the US share a great deal of intelligence, such as CPIC, and American authorities will use this information when deciding whether or not to admit a person. A criminal conviction could be grounds to deny entry. While discharges are not convictions under Canadian law, American authorities do not make this distinction. Also, information that is purged from CPIC, which was accessed by the American database prior to it being purged from CPIC, may not be erased from American databases. Thus, a criminal history could affect a person's ability to travel, but the exact impact will depend entirely on the policies of the host country.

Inadmissibility to the United States

Admissibility to the U.S.A. is determined in accordance with the *Immigration and Nationality Act* (1952), Public Law No 82-414, 66 Stat 163) ("INA"). Section 212(a)(2)(A) of the *INA* states that a person is inadmissible if he or she commits a crime involving "moral turpitude" (i.e. shocks the public conscience; see *Wing v United States* 46 f2d 755 (7th Cir 1931) for a detailed definition), or violates any law relating to a controlled substance (as defined in section 102 of the *Controlled Substances Act* (21 USC 802)). A person is also inadmissible to the United States if he or she commits two or more criminal offences whose convictions have an aggregate sentence of five years or more. Finally, an immigration officer can deny entry into the US if he or she has "reason to believe" that the individual has committed drug trafficking, prostitution, or money laundering offences.

> **NOTE:** A conviction as defined in s 101(a)(48)(A) of the *INA* includes any form of punishment, penalty, or restraint of liberty, which is ordered by the court. This means that conditional discharges and suspended sentences would be considered as convictions. Consult Chapter 18 – Immigration Law for more information.

b) Elimination of records

All youth convictions are sealed at the time the person turns 18 years old. However, if a person is found guilty of an adult *Criminal Code* offence within 3 years following the completion of a sentence for a criminal youth summary conviction offence or within 5 years of completion of a sentence for a criminal youth indictable offence then their youth record is re-opened and remains part of the person's permanent record under youth convictions.

> **NOTE:** The time calculation under this section of the Youth Court Justice Act is complicated. As such occasionally mistakes are made and if you see a Youth Record as part of a client's criminal record the time requirements for re-opening that youth record should be double checked.

A record suspension (formerly a pardon) allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records.

The waiting period for a record suspension is 5 years for all summary conviction offences and to 10 years for all indictable offences.

Individuals convicted of sexual offences against minors (with certain exceptions) and those who have been convicted of *more* than three indictable offences, each with a sentence of two or more years, are ineligible for a record suspension.

c) Record suspension

A record suspension (formerly a pardon) allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records. The waiting period is:

- 5 years (after the sentence is completed) for a summary offence (or a service offence under the *National Defence Act*).
- 10 years (after the sentence is completed) for an indictable offence (or a service offence under the *National Defence Act* for which you were fined more than $5,000, detained or imprisoned for more than 6 months).

The Parole Board of Canada (PBC) charges $631 to process a record suspension application (certified cheque, bank draft or money order, payable to the Receiver General of Canada). You are also responsible for additional fees related to getting the following: fingerprints, copy of your criminal record, court documents, and local police record checks.

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IX. Charter of Rights and Freedoms

A. Impact of the Charter

Procedural and substantive criminal law has been shaped and expanded by the *Charter* since its introduction in 1982. Consideration of sections 7 – 15 of the *Charter*, in addition to the remedial s 24, is required to properly understand the constitutional guarantees that profoundly influence criminal law.

A compilation of *Charter* decisions is available at the UBC Law Library, and includes decisions in such areas as arrest procedures, the right to counsel, the admissibility of illegally obtained evidence at trial, search and seizure, and the right to be presumed innocent until proven guilty.

The *Charter* provides for two types of sanctions. First, where a law is found to violate the *Charter*, section 52 of the *Constitution Act* applies to render the law "of no force or effect". Where an individual's right or freedom has been infringed upon, not by impugned legislation but by the acts of an agent for the state (e.g. the police), the aggrieved person may apply under s 24(1) of the *Charter* for an appropriate remedy. In the case of illegally obtained evidence, that evidence could be excluded by the operation of section 24(2).

Section 8 of the *Constitutional Question Act*, RSBC 1996, c 68 requires that 14 days' notice be given to opposing counsel where the constitutional validity of a law is challenged, or where an application is made for a constitutional remedy under section 24(1) of the *Charter*. Note: To challenge legislation or seek a remedy under section 24(1) separate notice must be given to both provincial Crown Counsel and the federal government. For an application to exclude evidence under section 24(2) of the *Charter* notice is typically given in the arraignment report. Note: notice to seek to exclude evidence under section 24(2) of the *Charter* is not required by the *Constitutional Question Act*, but a failure to alert Crown Counsel in a timely manner to an application to exclude evidence under section 24(2) of the *Charter* has been met in a number of decisions with the court applying its considerable powers to control its own processes against the party who failed to provide adequate notice.

B. Section 1 of the Charter

The *Canadian Charter of Rights and Freedoms*, enacted in 1982, changed criminal law so that an accused had constitutionally guaranteed rights that could not be infringed unless the government could show that such an infringement was demonstrably justified in a free and democratic society.

Section 1 of the Charter is often referred to as the "reasonable limits clause" because it is the section that can be used to justify a limitation on a person's *Charter* rights. *Charter* rights are not absolute and can be infringed if the Courts determine that the infringement is reasonably justified.

Section 1 arises in cases where a *Charter* infringement is being argued. In order for the Charter infringement to be justified, the government has to prove to a court that its actions satisfy the steps in a section 1 analysis. The standard of proof is the civil standard – on the balance of probabilities, which is not as difficult to prove as the criminal standard of beyond a reasonable doubt.

The Oakes Test is a legal test created by the Supreme Court of Canada in the case *R v Oakes*, [1986] 1 SCR 103. *R v Oakes* provided the Court with the opportunity to interpret the wording of section 1 of the *Charter* and to explain how section 1 would apply to a case. The result was the Oakes Test – a test that is used every time a *Charter* violation is found.

The Oakes test sets out several criteria to determine if a violation can be justified under section 1.

- There must be a sufficiently important objective to warrant the overriding of the *Charter* right.
- There must be a rational connection between the objective (i.e. the policy) and the means chosen (i.e. the law).
- The means chosen should constitute a minimal impairment of that *Charter* right, and
- The harm done by the means chosen should be proportionate to the government's objective (e.g. the more harmful the violation, the more important the objective must be).

C. Right to a trial within a reasonable time: s 11(b)

Section 11 – Any person charged with an offence has the right: (b) to be tried within a reasonable time;

In addition to the right to make full answer and defence, any person "has the right to be tried within a reasonable time". The recent decision by the Supreme Court of Canada in R v Jordan, 2016 SCC 27, has addressed the issue of what constitutes a "reasonable time". Jordan created a presumptive ceiling, beyond which any delay is presumed to be unreasonable, of 18 months for matters proceeding in provincial courts, or 30 months for matters proceeding in superior courts. The appropriate remedy for the State's breach of one's s. 11(b) rights is a judicial stay of proceedings arising from s. 24(1) of the Charter. One can make a Charter challenge for the breach of s. 11(b) under the Constitutional Question Act, RSBC 1996, c. 68, which requires that notice of this challenge be given to both Provincial and Federal prosecutors.

D. Finding legal counsel and other assistance where person is arrested and detained: s 10(b)

Section 10 – Right on arrest or detention: (b) to retain and instruct counsel without delay and to be informed of that right;

If an accused has been denied bail (detained), it is usually a sign that the offence is serious. LSLAP cannot act for them and the client should be referred to professional counsel. Nevertheless, it is important to have some knowledge of *Charter* issues relating to arrest and detention.

Under section 10 of the *Charter*, everyone has the right on arrest or detention:

- to be informed promptly of the reasons for that arrest or detention,
- to be informed of the right to remain silent,
- to retain and instruct counsel without delay and to be informed of that right, and
- a detainee should be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel (*R v Brydges* [1990] 1 SCR 190).

The wording of the *Charter* suggests that the right to counsel is not absolute, but rather that it is available only to a person who is under arrest or in detention. The *Charter* right to counsel is thus triggered where a person is arrested or detained (*R. v.Grant*, above).

Under s 10(b), the arresting officer has a duty to cease questioning or otherwise attempting to elicit evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel (*R v Manninen* (1987), 34 CCC (3d) 385 SCC)). The arrested person has both the right to Legal Aid counsel and the right to be informed of this right: see *R v Brydges* and *R v Prosper* (1994), 33 CR (4th) 85 (SCC).

Issues may arise at trial when an accused gave a statement to the police or provided bodily samples of some sort. In such cases, defence counsel should seek to have the evidence excluded under section 24(2) of the *Charter*.

> **NOTE:** Brydges' Line is a province-wide service that is available for arrested persons 24 hours a day, 7 days a week. A lawyer is always available to speak to the person for free.

NOTE: Detention under sections 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply. See *R v Grant*, [2009] 2 SCR 353, for more details.

E. Lawful arrest

Section 9 – Right not to be arbitrarily detained or imprisoned.

An unlawful arrest may vitiate the authority of a search or may be the basis of a *Charter* argument that the client was arbitrarily detained contrary to s 9 of the *Charter*.

1. Police powers

The police may arrest without warrant any person who is committing an offence of any type or who they believe on reasonable and probable grounds has committed or is about to commit an indictable offence (*Criminal Code*, s 495(1)). The police officer's belief must be more than a mere "suspicion".

Where the police believe on reasonable and probable grounds that a person has committed or is about to commit a summary offence, a hybrid offence, or an indictable offence listed in section 553 of the *Criminal Code*, that person cannot be arrested without warrant unless:

- a) the public interest requires it, and
- b)there are reasonable and probable grounds to believe that the person will fail to attend court (*Criminal Code*, s 495(2)).

"Public interest" includes the need to establish the person's identity, the need to secure and preserve evidence, and the need to prevent the continuation or repetition of an offence or the commission of another offence.

A client who is not arrested should be released with an appearance notice. Note that there are instances where even though an arrest was unlawful, the person's detention will not be deemed arbitrary. See sections 8, 9, 10, and 11 of the *Charter* for relevant constitutional provisions. Regular citizens also have a right to detain people they see committing a crime. Under s 494(1) of the *Criminal Code*, anyone can arrest a person without warrant if they find the person committing an indictable offence, have reasonable grounds to believe the person has committed an indictable offence, or if they see a person being pursued by anyone who has lawful authority to arrest the person. Section 494(2), meanwhile, gives store detectives the authority to arrest shoplifters. Under this section, a property owner or an agent working on the owner's behalf may arrest without warrant any person who is committing a criminal offence in relation to the owner's property.

2. The *Criminal Code*: the law of arrest and release

Some of the relevant sections of the Code are:

- a) ss 25 – 27: use of force, liability for excess force, use of force must be reasonably necessary,
- b) ss 494 and 495: arrest without warrant by private citizen, police officers,
- c) ss 496, 497, 498 and 499: appearance notice, release from custody,
- d) s 501: appearance notice, promise to appear, recognizance,
- e) ss 503 and 515: judicial interim release (bail),
- f) ss 145, 498 and 510: failure to appear, and
- g) ss 511 – 514: warrant to arrest.

Sections 7, 10, and 24 of the Charter have some measure of effect on arrest procedure, particularly in relation to the conduct of arresting officers and the admissibility of evidence: see *R. v.Stevens*, [1988] 1 S.C.R. 1153. There is also well-developed case law on arrest procedure. See *Christie v Leachinsky*, [1947] AC 573 (HL) and section 29 of the *Criminal Code*.

F. Search and seizure: s 8

Section 8 – Right to be secure against unreasonable search and seizure.

1. Search of premises, vehicles, and interception of private communications

In general, police must have a search warrant to search a person's premises (see *R v Feeney*, [1997] 2 SCR 13). However, there are exceptions where exigent circumstances exist to allow warrantless searches.

If a person can establish a reasonable expectation of privacy over the area searched, then a valid search and seizure requires prior authorization by a Justice of the Peace, who must be satisfied that reasonable grounds exist to believe that an offence has been committed, and that evidence of that offence will be found in the place being searched.

As a general rule, a search of premises must be based on reasonable grounds. If a search is conducted merely on a suspicion, the search will likely constitute a violation of section 8 of the *Charter*. In the case of *R v Kokesch* (1990), 61 CCC (3d) 207 (SCC), the search was held to be unreasonable even though a warrant had been issued, because the basis for the warrant was unreasonable and an unlawful search of the premises, based merely on suspicion. As a result, the search warrant was struck down and the search was deemed warrantless.

Practice Recommendation - Challenging a Search Warrant
To challenge a search warrant one should first seek disclosure of the Information to Obtain (ITO), which is the affidavit sworn in support of obtaining the search warrant. When assessing the ITO, first determine if the affidavits filed in support of the warrant establish reasonable grounds for searching the location, based on the contents of the ITO (assuming the contents are true). If the contents of the ITO do not establish reasonable grounds to believe items relevant to an offence will likely be found in the search location then an application may be made as a facial validity challenge to the ITO. If the ITO on its face provides sufficient grounds to issue a warrant then the ITO must be compared to the information the police had available at the time they applied for the search warrant to assess whether the police made full, fair and frank disclosure of all material relevant to the request to search that location. The ITO as an ex-parte application should provide full fair and frank disclosure of all material facts relevant to the police investigation and knowledge of the place searched at the time the ITO was sworn. If there are important errors or omissions in the facts stated in the ITO then an application can be made to cross examine the affiant of the ITO as a sub-facial challenge to the ITO, in an effort to show either that had the true state of affairs been disclosed in the ITO, the warrant would not have been issued or that the police intentionally misled the authorising justice. See *R v Garofoli* [1990] 2 SCR 1421 and *R v Araujo* [2000] SCC 65 for more information on challenging search warrants.

A warrantless search is presumed to be unreasonable and the onus is on the party seeking to justify the search and seizure to rebut this presumption: see *Hunter v Southam Inc*, [1984], 2 SCR 145. The Supreme Court, however, has recognised several situations where authorities may conduct a search without warrants – for example where evidence of the offence is in plain view, or where the occupant of the premises has consented to the search.

A search warrant authorizes the police to enter and search a specific location during a specific period of time and an occupant of the premises to be searched has a right to view the search warrant before the search is conducted. An occupant should check the address on the warrant and the time that the search is authorized to ensure that the warrant actually authorizes the search. Unless the warrant states that the police may enter and search your specific address during the time the police arrive at your address then the occupant should point out to the police that the warrant is either not for the occupants' address or has expired and may refuse police access to the residence. If the police nonetheless insist on entering the location and searching it, there is little practically speaking that can be done to stop the search while it is occurring, there may however be a civil right of action against them in trespass and a strong argument in any subsequent criminal case that any items seized should be excluded from evidence.

2. Search after valid arrest and search of person

At common law, upon a lawful arrest an officer acquires an attendant right to search for officer safety and evidence (see *R v Klimchuk*, [1991) 67 CCC (3d) 385 (BCCA). (Please review the section on Lawful Arrest above).

Where no arrest has taken place, a peace officer may also acquire a more limited right to search for officer safety. If an officer has reasonable grounds to suspect that an individual has a specific connection to a crime and detains that individual for further investigation, then incidental to this investigative detention, the officer may engage in a limited pat-down search confined in scope to locate weapons; see *R v Mann*, [2004] 3 SCR 59.

For more information on searches of the person, see *R v Debot* (1989), 52 CCC (3d) 193 (SCC), *R v Ferris*, [1998] BCJ No 1415 (CA), and *R v Simmons* (1988), 45 CCC (3d) 296 (SCC).

G. Right to remain silent: s 7

Section 7 – Right to life, liberty, and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (fundamental justice includes the ability to make a full answer and defence, the right to silence, and the right to a fair trial, meaning that there is a right to Crown disclosure).

1. General right of silence

There is a basic right to remain silent when encountering police officers that applies before and after arrest. A police officer has no right to take a person to the police station for questioning unless that person has been arrested or goes voluntarily.

An accused has the right to remain silent when questioned after arrest. This silence cannot be used in court to imply guilt – an accused is protected from self-incrimination by silence. The police must inform the accused of the right to remain silent and that anything he or she does say may be used as evidence.

An accused should be further advised that *when they are being questioned any conversation with police can only hurt them*. Police will usually ask the accused for "their side of the story". What police are looking to obtain are admissions like "I was there, but I didn't do that". This would be a confession that the accused was present at the scene, which the Crown may not otherwise be able to prove.

It is best for an accused to say nothing to the police until after consulting a lawyer. This applies even when an accused plans to plead guilty, because there may be a valid defence to the charge that the accused does not know about. For

further information, see *R v Hebert* (1990), 57 CCC (3d) 1 (SCC).

2. The modern confessions rule: Oickle

The modern confessions rule is outlined in *R v Oickle* [2000] 2 SCR 3. A confession or admission to a police officer (or other authority figure like transit police or private security officers) by an accused will not admissible if it is made under circumstances that raise a reasonable doubt as to its voluntariness. The burden of proving voluntariness falls on the Crown to prove beyond a reasonable doubt. It is the job of defence counsel to raise a reasonable doubt as to the voluntariness of the statement Consider all relevant factors to determine whether the confession was voluntary.

When arguing that a confession was not voluntary, consider the following:

- a) *Threats or promises:* fear of prejudice (if the accused was told "it would be better to confess") or hope of advantage (this does not have to be aimed at the accused, but can entail promises of reducing the charges),
- b) *Oppression:* this includes subjecting the accused to inhumane conditions, depriving of food, clothing, water, sleep, medical attention, counsel, or prolonged intimidating questioning,
- c) *Operating mind:* whether the accused knew what he was saying and that it could be used against him, and
- d) *Other police trickery:* police may be persistent and accusatorial but not hostile, aggressive and intimidating to the point where the community may be shocked by police actions.

3. Exceptions to the general right of silence

a) Motor vehicle drivers

Pursuant to section 73 of the *Motor Vehicle Act*, the driver (not passenger) of a motor vehicle must stop when asked to do so by a readily identifiable police officer and give his or her name and address and that of the vehicle's owner.

b) Pedestrian offence

A person who commits a pedestrian offence must state his or her name and address when asked by a police officer or that person may be subject to arrest (City of Vancouver, By-law No 2849, *Street and Traffic By-law* (10 May 2005)).

The decision of the Supreme Court of Canada in *Moorev The Queen* (1978), 43 CCC (2d) 83 (SCC) suggests that the same is true for offences committed while riding a bicycle. While the police have no power to arrest a person for this type of summary conviction offence, they may do so lawfully if it is necessary to establish the identity of the accused.

c) Federal statutes

Various federal statutes have provisions requiring that questions be answered: see *Canada Evidence Act*; *BC Evidence Act*, RSBC 1996 c 124; *Excise Act*, RSC 1985, c E-13; *Income Tax Act*; *Immigration and Refugee Protection Act*, SC 2001, c 27; and *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

4. Exception to right against self-incrimination: breathalyser sample

Where a police officer, on reasonable and probable grounds, believes a person has alcohol or a drug in their system, that officer may require a sample of breath to be produced. A person who refuses to comply with a valid breath demand without a reasonable excuse for refusing may ace criminal charges for failure to provide a breath sample. See Chapter 13: Motor Vehicle Law for more information.

H. Admission of evidence obtained illegally (24(2))

It is good practice to advise the Crown ahead of time before making a *Charter* argument. In the *Charter* notice the clinician should provide the Crown with sufficient particulars of the argument, including the alleged breach, the remedy sought, and the witnesses required for the application (*Voir Dire*). Cite cases on which the clinician intends to rely.

Section 24 – (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Section 24 of the Canadian *Charter of Rights and Freedoms* provides remedies to those whose *Charter* rights have been violated. The burden lies on the applicant to establish a *Charter* violation. The standard is based on a balance of probabilities. Once the *Charter* violation is proven, the focus shifts on matters concerning the possible effects on the fairness of the trial if the evidence was admitted. The three factors to be balanced in order to determine if the evidence should be excluded are: i) the seriousness of the *Charter* infringing state conduct, ii) the impact of the *Charter* breach on the accused's interest, and iii) society's interest on the adjudication of the case on its merits (*R v Grant*). The burden is on the accused to establish on a balance of probabilities that evidence should be excluded under section 24(2). See *R v Harrison* 2009 SCC 34, [2009] 2 SCR 494 for more information on the section 24(2) test.

The type of remedy a court gives normally depends on the type of government action that violates the *Charter*. If a government official took the action – for example, a police officer conducted an unreasonable search – the court will give an individual remedy that helps just the victim of the search (in that example, the court may say that the drugs found during the illegal search can't be used as evidence in the criminal trial. This helps the accused person, but it doesn't change the law for anyone else). In other cases, the court may be able to do something else, like stop a prosecution (a judicial stay of proceedings), order one side to pay the other side's legal costs, or declare that certain rights were violated.

It is good practice to advise the Crown ahead of time before making a *Charter* argument. In the *Charter* notice the clinician should provide the Crown with sufficient particulars of the argument, including the alleged breach, the remedy sought, and the witnesses required for the application (*Voir Dire*). Cite cases on which the clinician intends to rely.

1. Other Charter Remedies Obtained through S. 24(1)

S. 24(1) permits a court to craft any remedy it considers appropriate and just in the circumstances. The most commonly sought remedy is a judicial stay of proceedings under s. 24(1) for an abuse of process. Such a remedy is rare however, and is only provided only in the clearest of cases. Recent case law has somewhat reinvigorated the doctrine of abuse of process and examined the potential for alternate remedies to judicial stays of proceedings where police conduct was abusive see for example *R v. Hart* 2014 SCC 52. For more in depth information on s. 24(1), it is highly recommended that legal advice be sought.

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X. LSLAP Policies

A. Who LSLAP can help

LSLAP can help with many criminal matters, but there are restrictions. We can assist the following people:

1. people who *do not* have a serious criminal record,
2. when the Crown is *not* seeking jail time,
3. people who are charged with an *adult* summary conviction offence or hybrid offence where the Crown is proceeding summarily,
4. people who are classified as low-income, determined on a case-by-case basis,
5. the case is being tried in Provincial Court (not Supreme Court of Federal Court), and
6. people whose trial dates are 3 months away or longer.

It is important to note that all cases are contingent on the approval of LSLAP's supervising lawyer. For trials, LSLAP is only able to help if the student is able to secure a volunteer supervising lawyer for the trial.

B. What we can do for our clients

1. If the client meets LSLAP requirements

LSLAP clinicians may provide assistance to clients including:

- helping the accused obtain particulars and set trial dates,
- representing an accused at trial for some summary offences with supervision, and/or speaking to sentence for such offences,
- contacting and negotiating with the Crown, in some cases, to agree in advance to a disposition favourable to the client, and
- applying for a diversion or peace bond for the client.

2. If the client does not meet LSLAP requirements

LSLAP clinicians may assist the client solely by providing the client with a referral. No advice should be given. If the client wishes to review a decision denying Legal Aid, LSLAP may be able to assist with this review (see number 4(c), below).

3. What to do if LSLAP cannot represent a client

Clients should be encouraged to find counsel as quickly as possible. If an accused must appear in court and has not yet found counsel, he or she should ask for an adjournment. It is common for the court to allow an adjournment for several weeks to permit the accused to obtain counsel after the first appearance.

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XI. Information for LSLAP Students

A. Determine the status of the file

When a client comes into the clinic and informs a clinician that he or she must appear in court, the first thing to do is determine the nature of the next appearance.

1. Client comes to the clinic before the first appearance date

The clinician should first advise the client he or she must attend court at each appearance date. The clinician should further advise the client about the nature of the first appearance, and tell the client that the trial never proceeds at that time. If the time before the first appearance date is brief (one week or less), the client should be advised not to enter a plea, but to ask for a two-week adjournment to find counsel, to seek further legal advice, or to prepare his or her case. The clinician should assess the possible options for legal counsel and give general advice. They should not get into the client's version of the events that led to the criminal charge until particulars are obtained and they have met with the supervising lawyer. If the complainant and the accused both seek advice from LSLAP, the student must be aware that this is a serious conflict of interest. The second party must seek independent advice even if the complainant and accused are husband and wife. Under no circumstances should counsel for the accused advise the complainant, or vice versa. If the other party approaches LSLAP for advice, they must be immediately referred to their own legal counsel.

2. Client is on probation or otherwise serving a sentence

The student may be able to help the client understand the terms of a sentence, or help the client in his or her relationship with the supervising authority. If the issue for which the client is seeking advice is complex, the client should be advised to seek legal counsel.

3. Client has already appeared in court

If the client has only appeared in court once, he or she has likely already been granted an adjournment to retain counsel. If the client has appeared in court on a number of occasions, the Justice of the Peace (JP) might not grant another adjournment, and a trial date may be set at the next appearance. A judge, however, has discretion to allow further adjournments when there are extenuating circumstances, like LSLAP black-out dates. If the client has already obtained particulars and the Initial Sentencing Position, and the clinician needs time to review the particulars and to discuss the client's options, the client should be instructed to attend the Initial Appearance and inform Crown that they are being represented and ask that the matter be adjourned for one to two weeks. The client may also request an adjournment if there are significant outstanding disclosure issues.

4. The trial has already been set

LSLAP cannot represent a client unless the trial is more than 3 months away. If the trial date is sooner, the clinician can advise the client to ask for an adjournment of the trial to a later date. This can be done at the Trial Confirmation Hearing or earlier. If the adjournment is not granted, the clinician should tell the client that LSLAP cannot represent him/her and it is their responsibility to seek other counsel.

NOTE: Several pamphlets available from the Legal Services Society may help a client prepare for his or her own trial. These include: “Representing Yourself in a Criminal Trial,” “Speaking to the Judge Before you are Sentenced,” and “If you are Charged with a Crime”.

Practice Recommendation - File Intake		
Important: Once LSLAP has agreed to represent a client, it is always wise to confirm the exact details of the client’s next court appearance – date, time, courtroom, and what stage the matter is currently at.If the client has provided the clinician with their particulars, LSLAP will have their file number. You can access their information on the B.C. Ministry of Attorney General website. Go to http://www.gov.bc.ca/ag and follow the 'Court Services Online' link. This site allows you to look up your client by name and it will show all of his or her provincial court appearances, the nature of the next appearance, the date and time, and what courtroom it is in. Alternatively, you can call the registry (or Crown) at the particular courthouse and ask when the next court date is, and what is set to happen on that date.		
Common Courtooms		
Jurisdiction	**First Appearance Court (Judge/JP)**	**Arraignment / Plea Court (Judge/JP)**
Vancouver	307	101
Vancouver DCC	1	1
Surrey	101	102 (Prov) / 103 (Fed)
North Vancouver	IAR	002
Richmond	101	106
New Westminster	IAR	2-6
Port Coquitlam	003	001

Practice Recommendation - File Intake (Continued)
Vancouver’s Downtown Community Court (DCC)
The DCC differs from normal criminal courts in that it integrates a variety of agencies to address the underlying health and social problems that often lead to commission of the offence. The DCC only has jurisdiction to take summary conviction cases where the offence occurred in Downtown Vancouver (with Clark Dr. and Stanley Park as the east-west boundary; and Coal Harbour and Great Northern Way as the north-south boundary).
Drug Treatment Court Vancouver (DTCV)
The goal of the Drug Court program is to reduce drug use in adults charged with offences motivated by drug addiction problems. Individuals charged under the *Controlled Drugs & Substance Abuse Act* and other drug-motivated *Criminal Code* offences are eligible for the drug treatment court program. In exchange for less severe sentences, offenders plead guilty and participate in a supervised drug treatment program, which includes individual and group counselling and social activities.

4. Client failed to appear

Failure to appear for a scheduled court appearance is an offence (*Criminal Code*, ss 145(4) and (5)) usually punishable by summary conviction. If the client did not appear, there is probably a bench warrant out for his or her arrest. This can be verified online on the CSO website (see box above for link). The client must be advised to report to the courthouse and apply to "vacate the warrant". The client must be advised to turn himself or herself in immediately.

B. Discuss LSLAP file procedures and policies with the client

The clinician must establish certain "ground rules" to govern the relationship between clinician and client in a criminal file:

1. The client will attend all court appearances as required. LSLAP clinicians will not appear as agents for their clients.
2. Counsel represents the client, and as such it is the clinician who is in charge of the file. While the client may assist in their own defence and can give the clinician specific instructions, it is the clinician who contacts Crown and other parties.
3. The client cannot request another law student; the client can either be represented by the clinician they are assigned, or they can seek alternate representation outside of LSLAP.
4. Clinicians cannot follow illegal or unethical instructions, such as tampering with witnesses or counselling a Crown witness not to attend court. Clinicians also cannot put the client on the stand knowing that the client will be untruthful and commit perjury. Students should be advised to speak to a supervising lawyer if there are any emerging ethical concerns.

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XII. Etiquette for Law Students

A. Courtroom etiquette for law students

When attending court for a matter, the student should check the court lists to confirm which courtroom the matter is to be heard in. If the court is not sitting at the time, the student should attempt to seek out the Crown Counsel who has conduct of the matter, and identify him/herself.

In order to get the client's matter called, the student should indicate to Crown Counsel or the Crown assistant that both client and counsel are present and ready to proceed. Crown Counsel will proceed with the shortest matters first; priority will also be given to matters for which the accused **and his/her counsel** are present. Do not interrupt Crown Counsel when they are addressing a matter.

When the judge enters or exits the court, the student should rise and bow to the judge.

If the court is sitting, the student should enter the courtroom, bow to the judge at the door and/or the bar of the court, and be seated at the chairs located beyond the bar. The client should sit in the gallery behind the bar.

When the matter is called, the student should rise and approach the counsel's table. The student should stand on the other side of the podium from the Crown. The rule of thumb is that Crown is seated next to the witness box while defence is seated furthest away.

The student should invite the client to come forward and address the court in a loud, clear voice, keeping in mind that the microphones in most courtrooms are only for recording and not for amplification purposes. The student should introduce himself or herself in the following manner:

"Your Honour, my name is <Full Name><Spell Out Last Name>, first initial <First Initial>. I am a law student with the Law Students' Legal Advice Program, and with leave of the Court, representing Mr./Ms. ____________________ who is here in the court today." <Have client stand up and point towards him/her>

> **NOTE:** Judges are addressed as "Your Honour" in court while JPs are addressed as "Your Worship."

If there is a supervising lawyer present, they **must** be introduced as well at this time. The student should then remind the court what is to occur with the file (e.g. the matter is set for an arraignment hearing or disposition or trial, etc.).

Upon completion of the student's appearance, on exiting the courtroom the student should turn and bow to the judge at the bar of the court and/or the door.

1. Interacting with Crown

When interacting with the Crown (or anyone else for that matter), students should always be pleasant and polite. They are people a student will continue to work with for many years. There are times when students need to be more assertive but this should be done in a tactful way. Students should always respect the Crown, even when pointing out errors. Clinicians should be firm, but polite.

2. Courtroom demeanour and etiquette

- Review Section III "Etiquette" for general recommendations on courtroom etiquette.

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XIII. Practice Recommendations

Practice Recommendation - Ensuring the Crown Can Prove Its Case
Prior to asking an accused what happened from their perspective, some counsel want to review the nature and character of the charges and the possible defences with the accused. Even if the client admits his/her guilt, an accused must be advised regarding the strength of the Crown's case. A criminal defence lawyer has an ethical obligation to pursue any viable defence, even if only as a negotiation tactic. There is nothing unethical about running a trial with regards to a client who admits their guilt, as long as the clinician is not misleading the court and the client does not take the stand to testify.

Practice Recommendation - Explaining a Client's Options

Be very sure that the accused understands exactly what they are pleading to, and the consequences of their plea. Also be very sure that the accused understands that it is ultimately his/her decision as to which option to apply. Ensure that the accused person understands the consequences and risks of going to trial, any possible defence he or she may have and the difficulties in raising such a defence.

Students must never force an accused person to choose a particular option, particularly one where the accused is required to admit guilt. **It is always the client who ultimately decides the course of action they wish to follow.**

The accused may ask the student what they should do or what option they should take. The student should always remind the client that the choice is up to them, and refrain from telling the student what to do. Explain the options open to the student again and review the risks and consequences facing the client for each option. However, the student must not counsel a client to plead guilty unless he or she is actually guilty **AND** the Crown can prove its case beyond a reasonable doubt.

In explaining the student's assessment of whether Crown can prove its case beyond a reasonable doubt the student should never give clients "odds" or their chances of winning an acquittal, rather students should point out the possible defences available to the client and the difficulties, if any, of arguing such a defence.

Common Ethical Situations Arising in Assisting a Client with their Options

In certain circumstances, the course of action the client wants to take may render the student unable to represent the client, for example if the client insists on illegal or unethical instructions, or where the client wishes to plead guilty for convenience. Some examples of this are as follows:

"I didn't do it, but I want to plead guilty because this is taking too much time away from my job, and it is just more convenient if I plead guilty."

Students have an ethical duty to ensure that the innocent do not plead guilty. Particularly, students cannot represent clients in cases where they wish to plead guilty for the purposes of convenience, not because they actually admit guilt.

"What if my wife / girlfriend / husband / boyfriend (complainant) doesn't come to testify?"

At this point in time the accused may ask what would happen if the complainant does not attend court to testify, even if summoned. Inform the accused that if the key witness does not attend at court Crown may stay the charges against the client. **If a Crown witness wishes not to attend to testify, he/she should obtain independent legal advice.** If any witness has been summoned, and fails to attend to a summons, they can be arrested and even jailed. In addition, **the accused should be advised that if he/she tell a witness not to attend court to testify, he/she would be committing the criminal offence of obstructing justice** (*Criminal Code*, s 139).

Practice Recommendation - Contacting Crown Witnesses
If, while preparing for trial, the defence must contact a Crown witness for whatever reason, the defence be extremely careful in its approach and speak to a supervising lawyer before contacting the witness. There is no property in a witness and the defence may contact Crown witnesses, however the witness is not required to speak with the defence and this must be made clear to the Crown witness. It should also be made clear to the Crown witness that the law student is representing the client, and as such may be in conflict with the witness' interests, and is in no position to provide the witness with legal advice. If a student chooses to interview a Crown witness, he/she should **never do so alone**. Another student should attend and should take notes of the conversation in case a dispute develops about what was said in the interview or the circumstances in which the interview took place. The witness may be required to give evidence as to what happened. If interviewing the Crown witness by telephone, a witness should be present via conference call or speakerphone. The student must be careful to avoid any appearance of impropriety or witness tampering, and **must never, either explicitly or implicitly, advise a Crown witness to not attend court when summoned**. **Note: if there is a no contact order in place, the clinician can contact the witness only to discuss the trial, but the client cannot.**

1. Challenging the admissibility of evidence

Prior to the trial commencing one should have reviewed the key evidence in the case and identified potential challenges to the admissibility of that evidence. One should consider if the admissibility issue or *Charter* challenge to the evidence can be canvassed with Crown counsel prior to the start of a trial. Generally, unless there is a good strategic reason to not inform Crown counsel, (i.e. informing the Crown will allow it to call additional evidence that the defence knows is available, but not being called) admissibility issues should be brought to the Crown's attention ahead of time.

Challenging the admissibility of evidence is perhaps the most important work that the defence can perform as an advocate for the client as lay litigants are ill-equipped to recognize and challenge inadmissible evidence. Rules of admissibility of evidence tend to be complex issues that require a critical analysis of the law followed by an application of the law to the facts. Diligent preparation would allow student to present challenges to the admissibility of evidence and have inadmissible evidence excluded from the court's consideration. Some challenges to the admissibility of evidence are simply made through objections and legal arguments at the time Crown seeks to adduce the evidence, while others will require the court to hear additional evidence that is relevant to its admissibility.

2. Setting the trial date

LSLAP clinicians are encouraged to, but are not required to appear in court to set a trial date. The trial date must be set with the approval of the supervising lawyer and according to LSLAP trial avaiability.

> **NOTE:** The client **must** still attend the Arraignment Hearing and enter a plea of not guilty in order for the trial date to be set.

3. Pre-Trial Conference (PTC)

The **pre-trial conference** is a procedural appearance for LSLAP files to confirm there is a trial supervising lawyer and that the matter is indeed going to trial, that there are no disclosure issues, and that *Charter* challenge notices have been given.

The clinician is encouraged to, but need not attend the PTC. Clinicians are reminded that they must give notice of any *Charter* challenges **at least 14 days** prior to the trial date. In addition, **a trial supervising lawyer must be confirmed by the PTC in order for LSLAP to confirm the trial date**.

It can be many months between the fixing of a trial date and the trial. The clinician must endeavour to remain in contact with the client during this long time period. LSLAP requires that the clinician contact the client **2 weeks** before the PTC to make sure the contact information has not changed and that the client knows when to appear in court.

If the clinician is unable to get in contact with the client before the PTC, the clinician must either appear at the PTC, or formally withdraw from the record by sending a letter to the court registry and Crown as well as the client. If both the student and the client attend the PTC, the student should obtain new contact information from the client. If the client does not attend the PTC, the student must formally withdraw from the record at that time. The student should **never** disclose that there have been attempts to contact the client, or when the last contact was, as this is privileged information and would constitute a breach of solicitor-client privilege. Even when a judge asks for this information, it is ethical practice to politely tell the judge that the information is privileged. The clinician must then mail a letter to the client’s last known address to inform them of the situation.

> **NOTE:** In some cases, a clinician will be transferred a file after the PTC date, and find him or herself unable to get in contact with the client. The LSLAP Executive and the Supervising Lawyer must deal with these files on a case-by-case basis.

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Appendix A: Initial Sentencing Position

	This appendix is available on Clicklaw Wikibooks for download in PDF. A permanent archive version is also available at https://perma.cc/7JR6-J3JZ. Readers of the print edition please see the "Supplementary Documents for Appendices" section.

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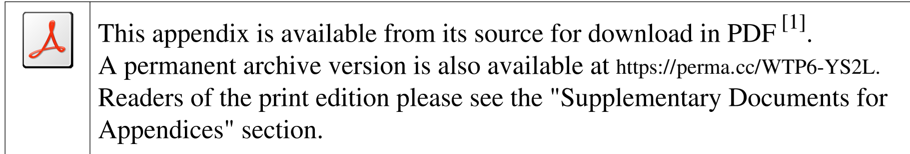
Appendix B: Diversion Application

A. Diversion application



This appendix is available from its source for download in PDF [1].
A permanent archive version is also available at https://perma.cc/WTP6-YS2L.
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

B. Sample diversion letter

12 January 2013

By Fax

Crown Counsel

Provincial Court

Court Address Location

WITHOUT PREJUDICE

Dear Crown Counsel,

Re: B. Bird

Court File Number: 12345

Next Court Date: March 13, 2013, Courtroom 2

Request for Diversion

My client, Mr. Bird, has instructed me that he wishes to apply for diversion. Mr. Bird admits all essential elements of the theft and advises me he is extremely remorseful.

Mr. Bird's Background

Mr. Bird is 42 years old and resides at 123 Sesame St. He was born on November 10, 1969. Mr. Bird is separated from his wife, with whom he has one four year old son. Mr. Bird completed a post-secondary degree in Children's Media at Greater Sesame University.

Mr. Bird has been involved in non-profit work for the past twenty years. At the time of the incident he was working with the Twelve Steps Program at the Sesame Care Facility as a social worker. He worked there from March 2011-November 2011, where he provided day-to-day monitoring and support for federal offenders on day parole. He is also employed as a social worker at the Sesame Village Neighbourhood House. Prior to these positions Mr. Bird worked for Bert & Ernie's from 2003-2007, and for Von Count Accounting from 2007-2011. Due to his stress and injuries he is no longer employed at the Sesame Care Facility; however he continues to do casual work for Sesame Village Neighbourhood House. He has been on Employment Insurance for two months.

Mr. Bird suffers from a number of mental health issues including depression, anxiety and panic disorders and is currently under a doctors' care at Sesame Narrows Community Health Centre. At the time of the incident he was taking Effexor and Clonazepam to treat these conditions. Although Mr. Bird continues to take medication his doctors are aware of the incident and the issue of whether the medication and/or the dosage may have been a contributing factor. Mr. Bird attends Sesame Narrows Community Health Centre for counselling and treatment on a regular basis and advises me he is stable on his current levels of medication.

Circumstances of the Offence

On March 13th, 2012, Mr. Bird stole a pair of shoes from Oscar's Footwear Emporium. He had a job interview requiring formal shoes, which he felt he could not afford. He experienced extreme anxiety with regards to his financial situation and lack of clothes appropriate for a job interview; and he suffered a panic attack with respect to concerns over his dress. Unfortunately Mr. Bird decided to steal the shoes instead of paying for them. Mr. Bird is extremely embarrassed and sincerely regrets this decision. He also sincerely regrets his actions with regards to the store detective. He acknowledges they were completely inappropriate and he would appreciate the opportunity to write a letter of apology. Mr. Bird attributes his actions to his anxiety condition. He is nonetheless aware of how inappropriate it was, and he is experiencing sincere remorse. Mr. Bird has never been convicted, nor even charged with an offence in the past, and he is truly ashamed of his behaviour.

Consequences of the Offence

Mr. Bird is still experiencing serious physical and economic consequences as a result of this incident. He suffered several injuries as a result of the struggle with the security guard. According to Dr. Snuffleupagus, who was his diagnostic physician on March 19, 2012, he received a 5 cm laceration on his face which required 6 sutures. Post offence, his injuries were still a source of concern and he was sent for a CT scan on March 25, 2012. According to the CT scan report completed by Dr. Snuffleupagus, he continued to suffer vertigo, diplopia (double vision), headaches and vomiting one week after the accident. His jacket was torn as a result of this struggle. Please find a photograph of the injuries and the jacket attached.

In addition to the physical concerns, Mr. Bird has experienced employment and economic consequences. As a result of this incident he had to take ten days off work, from March 18 to March 28, 2012. Please find a copy of the doctor's note attached. Mr. Bird has since stopped working with Corrections Canada due to the stress of this incident.

Mr. Bird works in the non-profit sector. All jobs available within this field require a criminal record check. If Mr. Bird receives a criminal record as a result of this incident he will likely be unable to find work in his field. Furthermore, he will be obligated to reveal this charge to Sesame Village Neighbourhood House, which is providing him with occasional employment, and he

will likely lose this small amount of income. This will have a serious impact on Mr. Bird’s ability to provide support for himself and his son.

In addition to everything else, Mr. Bird is being harassed by a law firm in Ontario seeking to collect damages, all of which is increasing his anxiety.

Due to all of the above concerns we believe there is no public interest in proceeding with this case. We respectfully request that he be accepted for diversion.

Please find the following attached documents:

1. A photo of Mr. Bird’s injury.
2. A photo of Mr. Bird’s ripped jacket.
3. A copy of the doctor’s note requesting Bird be given time off work.
4. A copy of the letter from the law firm that is threatening to sue Mr. Bird on behalf of Oscar’s Footwear Emporium.

Mr. Bird is to appear in court on March 13, 2013, at Courtroom 2, Provincial Court, 200 East 23rd St, North Vancouver, BC. I have instructed Mr. Bird to seek a two week adjournment for the matter to be considered.

Thank you for your consideration of this letter.

Sincerely,

Kermit T. Frog
Law Student
Attachments

References

[1] http://justiceeducation.ca/themes/framework/documents/unrep1.pdf

Appendix C: Sentencing Hearing

1. Determine the available sentence and the appropriate range of sentence. Review sections 720-729 of the *Criminal Code* and, in particular, section 718.
2. Determine the Crown's position on sentence – Consider whether
   - a. There is anything the client could demonstrate to cause the Crown to soften its position
   - b. A delay of the hearing would be advantageous to the client
3. Consider any mitigating or aggravating factors. The following are some mitigating factors:
   - Early plea of guilt
   - Pre-trial custody attributed to this offence
   - Restrictions placed upon the client pursuant to the release (bail) order
   - Loss of employment or loss of license (if there was a driving offence) or other events which have caused hardship to the client.
4. Consider the facts of the offence as it relates to our client:
   - the client's role in the offence, i.e., follower or under the influence of others
   - offence was the result of a spontaneous event
   - incident was an isolated occurrence absence of property loss
   - absence of injuries or full recovery from injuries
   - motive, e.g., for property offences, the items obtained were necessities
   - previous and/or subsequent positive relationship with the victim
   - client's state of mind at the time of offence:
   - mental illness short of not criminally responsible
   - alcohol or drug involvement, particularly if addiction present
   - client's limited or diminished intelligence or emotional instability
   - any changes made by the client such as counseling or other treatment.
5. Collect reference letters or letters of employment. Make 2 copies of each **and confirm with the writers of the letter that the letters are authentic. The letters must state that the writer is aware of the criminal charges.**

Procedure (after the Crown has made submissions)

1. Tell the judge what you are seeking in terms of a sentence
2. Tell the judge whether you are in agreement with the Crown's sentencing position in terms of the sentence, the length, & conditions
3. If you are not in complete agreement with the Crown position tell the judge:
   - a.Which facts are in dispute
   - b.Which portions of the Crown sentencing position are in dispute (such as the sentence, length & conditions)
4. Briefly review the client's background (use the client questionnaire as a starting point)
5. Briefly discuss the effect of the crime on our client and the changes made as a result
6. Review why some of the conditions sought by Crown may not be necessary
7. Tell the judge our client is extremely remorseful and embarrassed by the incident (if you have instructions from the client to say that)
8. Review what you are seeking and why it satisfies the principles of sentencing as set out in section 718

LSLAP clinicians: please review the section of the Guide to Criminal Defence Work with respect to court etiquette and guilty pleas/sentencing.

Sentencing Submissions Script

1. Crown calls the case
2. Introduce yourself – go up to the counsel table and motion for your client to stand beside you – "Your Honour, my name is Jane Doe, last name spelled D-O-E. I am a law student with the UBC Law Students' Legal Advice Program and with the court's leave I represent John Smith, who is present before the court." – Getyour client to stand up from where they are seated. If they are in the gallery get them to cross the bar to stand beside you.

Explain why are you here – "Your Honour, this matter is before the Court today for guilty plea and sentencing on counts 2 and 3 of the information, and we are ready to proceed."

Waive the Formal Reading of the Information - "Your honor we waive the formal reading of the information.

Continue on and Confirm Your Clients Understanding and Guilt - "Count 2 charges Mr. Smith with committing an assault in Vancouver on 3 May 2010, do you understand the charge, Mr. Smith?"

Client – "Yes"

Mr. Smith, do you wish to plead guilty or not guilty on Count 2?"

Client – "Guilty."

Student – "And Count 3 charges Mr. Smith with committing an assault in Vancouver on 3 May 2010, do you understand the charge, Mr. Smith?"

Client – "Yes."

Student – "And with respect to Count 3, Mr Smith, what is your plea, guilty or not guilty?"

Client – "Guilty."

In very rare circumstances, if you have concerns about your clients' ability to understand the process, you can instead state, "I ask that the charge be formally read to Mr. Smith."

The Court will then read the charge to the accused and ask the client to enter his or her plea, plus the questions required by s 606(1.1). This should only be done in rare cases where the client is seriously mentally ill, changing instructions and throwing up red flags and you need to protect yourself in case the client tries to withdraw his or her guilty plea in the future.

(You and your client can sit down at this point in time). Crown will read in the facts, state Crown's sentencing position and make submissions as to why their position is fit and appropriate in the circumstances.

Your submissions – it depends on your style and each case and each submission is different, but it should have the following contents and in approximately this order.

You should stand when making submissions and your client can remain seated:

- a) Defence sentencing position – tell the judge right away what you want
- b) Facts – do you agree or disagree with the facts underlying the charges as alleged by the Crown? Is there further information or facts you wish to submit?
- c) Circumstances of your client – you should tell the judge everything that's on the background questionnaire
- d) Go through your proposed conditions and why. Link the condition you're proposing back to a specific principle of sentencing.
- e) Summarize and conclude and tell the judge again what you're asking for and why.

Please review the section of the Guide to Criminal Defence Work with respect to court etiquette and guilty plea-sentencing.

Appendix D: Trial Books

TRIAL BINDER

TAB	
1.	**Information**
	Charging documents
2.	**Report to Crown Counsel**
	Particulars, Report to Crown Counsel Summary/Synopsis
3.	**Police Witness Statements**
	(Separate each witness with a coloured sheet and/or post it note) Include Police Statements & Police notes together
4.	**Civilian Witness Statements**
	(Separate each witness with a coloured sheet and/or post it note) Include all statements, notes, 911 recordings etc. for each witness together
5.	**Submissions/Closing Arguments**
6.	**Case Law**
	(3 copies of each case) 1 for you, Crown & Judge
7.	**Sentencing Submission**
	Always be prepared to speak to sentence in case the accused is found guilty • Use background interview sheet for client information • Instructions in the fishroom (criminal corner box)
8.	**Draft Cross Examination notes of each Crown witness**
	Draft Direct Examination notes of each Defence witness
	(Separate each witness with a coloured sheet and/or post it note)

Appendix E: Glossary

Absolute discharge

- An accused pleads guilty or is found guilty but has no conditions or probation period imposed. There will be no conviction on the criminal record

Accused

- The person whom the Crown charges with a criminal offence

Actus Reus

- The elements of the crime; what the accused physically did to commit the crime

Adjournment

- A postponement; an accused or clinician can ask for this at an appearance if they need more time before deciding what to do about the charge

Admission

- A statement made by an accused to a civilian witness

Agent

- An appearance made by a person other than the accused acting on behalf of the accused

Alternative measures

- A program offered by Crown to divert the offender away from the criminal justice system, no guilty plea is made and charges are stayed. An acknowledgment of guilty and expression of remorse are required by the client

Appeal

- Formally contesting the verdict or sentence.

Appearance notice

- A notice provided by a police officer requiring the accused to attend court at a certain date and time

Arraignment hearing

- A hearing in front of a Judge or JP where the accused decides whether to plead guilty or go to trial

Bail

- Refers to the release (or detention) of a person charged with a criminal offence prior to a trial or guilty plea

Bail conditions

- Release conditions imposed on an accused that he or she must abide by in order to be released from custody prior to trial or plea

Bench warrant

- A bench warrant is an order issued by a judge requesting the detention of a person until he or she can appear in court. Such an order is often issued because a defendant did not appear in court.

Complainant

- The person who usually makes the report to the police about having been the victim of a crime

Conditional discharge

- A period of probation imposed on an accused where after the period is complete, no convictions will appear on a criminal record

Conditional sentence

- A conditional sentence is a jail sentence that you serve in the community instead of jail. Judges will use a conditional sentence only if they are satisfied that you won't be a danger to the community and don't have a history of failing to obey court orders.

Confession

- A statement of guilt made to a police officer or other person in authority

Cross-examination

- The interrogation (leading questions) of a witness called by the other side

Crown counsel

- Lawyers appointed by the government who prosecute criminal cases

Custodial sentence

- A sentence served in jail

Detention

- A suspension of an individual's liberty by physical or psychological restraint

Direct examination

- Where the defence or Crown questions its own witnesses

Disposition

- If a matter in court is "for disposition," this means there will be a guilty plea instead of a full trial

Duty counsel

- Lawyers paid by the government who work in the court house and advise accused with basic legal information and basic court appearances

Election

- For indictable offences, where the accused can decide whether to have their case tried in Provincial Court or Supreme Court (and with or without a jury)

Ex Parte

- Proceeding without the accused present

Hearsay

- Evidence that is offered by a witness of which they do not have direct knowledge but, rather, their testimony is based on what others have said to them

Hybrid offence

- An offence where the Crown can choose to proceed either summarily or by indictment. The majority of *Criminal Code* offences are hybrid

Judicial Case Manager

- A JP who controls the calendar for the court and sets trial dates

Justice of the Peace (JP)

- A person appointed by the government to conduct certain tasks in court (like initial appearances), fix trial dates, and hear bail applications

Indictable offence

- A more serious criminal offence where the maximum sentence could be life imprisonment. There is no time limit to when charges can be laid (e.g. an accused can be charged 20 years after an act has occurred). The exception to this point is treason, which has a 3-year limitation period.

Information

- The document which sets out the specific offences the accused is charged with

Initial appearance(s)

- An appearance before a JP or Judge where the accused can decide how to proceed. There can be multiple initial appearances

Initial sentencing position

- The sentence Crown would seek if the accused were to plead guilty and not go to trial

Insufficient evidence motion

- A motion made by defence at trial claiming Crown has not proven the case beyond a reasonable doubt

K-file

- A file where the accused and complainant are family members. The most common is spousal assault

Mens Rea

- The mental element of the criminal offence (an intention to commit the crime)

No evidence motion

- When the Crown has presented the case against you, if you feel that he or she has failed to prove all the things that had to be proved, you can make a no evidence motion. This means that you are asking the judge to dismiss the case, without hearing the defence evidence

Particulars

- The disclosure package provided to the accused by Crown containing all the relevant evidence in the Crown's case against the accused

Preliminary inquiry

- A hearing held in provincial court to determine if there is enough evidence to move forward to the trial in Supreme Court. The Preliminary Inquiry is available to all accused persons charged with offences that proceed by way of indictment. A preliminary inquiry is a hearing to determine whether there is sufficient evidence to proceed to trial, this is not a trial.

Pre-Sentence Report

- A report that can be ordered by a judge after a guilty plea has been entered and prior to sentencing in order to recommend an appropriate sentence for the accused

Report to Crown Counsel

- Summary of the police narrative and any witness statements taken with respect to the case

Sentence

- What punishment the judge decides the accused should be subject to when found guilty

Summary conviction offence

- A less serious offence where the maximum jail term is usually 6 months and maximum fine is $5,000

Summons

- A written order by a judge or JP requiring the accused to attend court at a certain date and time

The bar of the court

- The partition in the courtroom between where the lawyers sit and where the general public sits

Vacating a warrant

- In order to vacate a bench warrant, the client will need appear before a judge and apply to be re-released on bail.

Verdict

- After the trial, the judge returns a finding of guilty or not guilty

Voir Dire

- An in-trial hearing that is considered a separate hearing from the trial itself. It is known as a "trial within a trial" and designed to determine an issue separate from the procedure or admissibility of evidence.

Witness

- Anyone called to give evidence at a trial

Chapter Two - Youth Justice

I. Introduction

A. Recent History

As of April 1, 2003, the Youth Criminal Justice Act, SC 2002, c 1 [“*YCJA*”] came into effect. The *YCJA* represents the culmination of nearly a century of evolution in how the legal system understands young offenders. The *YCJA* recognizes that youths have rights under the *Charter, the Canadian Bill of Rights* SC 1960, c 44, and the *United Nations Convention on the Rights of the Child* [“*UNCRC*”], which Canada signed and ratified in the early 1990s.

The *YCJA* focuses on three key objectives to better protect the public (*YCJA*, s 3):

1. preventing youth crime by addressing underlying causes;
2. meaningful consequences for offences; and
3. increased focus on rehabilitation and reintegration for youth returning to the community.

The *YCJA* also encourages judges to impose non-custodial sentences on young persons who are found guilty under the Act where it is consistent with the general principles. This does not mean that it seeks to prohibit custodial sentences, but rather to ensure that custodial sentences are the last option.

Victims play a significant role in the process. While victims have no rights per se as they are not a party to criminal proceedings, the *YCJA* holds that victims will be heard and treated with courtesy, compassion, and respect for their privacy, and be minimally inconvenienced. Also, consequences will include educating the offender about the impact of the crime, and focusing on repairing the damage or paying back society in a constructive fashion. In some respects, BC legislation dealing with victims of crime has already incorporated a number of these principles, particularly in the *Victims of Crime Act*, RSBC 1996, c 478. In 2015, Parliament enacted the *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2 (“*CVBR*”). The Act guarantees victims of crime various rights, including the right to information about the criminal justice system, their rights as victims of crime, and their right to have their security and privacy considered by the appropriate authorities in the criminal justice system. For more information on victims’ rights, and resources for victims of crime see **Chapter 4: Victims**.

The *YCJA* was amended by Bill C-10 (“*The Safe Streets and Communities Act*”) on October 23, 2012. One change to the *YCJA* in Bill C-10 is that individual deterrence and denunciation of unlawful conduct were added as a sentencing principle. It also sets out that youths are presumed to have diminished moral culpability or blameworthiness in comparison to adult offenders. Furthermore, Bill C-10 states that the youth justice system is intended to protect the public by holding young persons convicted of offences accountable through using proportionate measures, promoting rehabilitation and reintegration, and preventing crime by directing youths to programs that address underlying causes of their actions. Bill C-10 also sets out definitions for a “serious offence” and a “violent offence” which are broader than previous definitions given in the case law.

The *YCJA* was further amended by Bill C-75, passed on June 21, 2019. On September 19, 2019 the first amendments to the *YCJA* came into force. Firstly it repealed section 64(1.1) and (1.2) of the *YCJA*, which required the Attorney General to determine whether to seek an adult sentence in certain cases and if the Attorney General decides not to make an application, to advise the youth justice court (bill section 376). Secondly it repealed section 75 and 110(2)(b), which required the court to decide whether to lift a ban on publishing the identity of a young person who is convicted of a

violence offence (bill sections 377 and 379). Changes coming in effect on December 18, 2019 mainly purport to decrease the number of charges for administration of justice offences (e.g. breach of conditions) and the rates of incarceration related to them when no harm to society has been done. The changes include a new assumption of the appropriateness of extrajudicial measures in certain breach of condition/failure to appear charges and an increase in the threshold for holding young offenders in custody for breach of conditions. In cases where extrajudicial measures may not be appropriate, judicial referral hearings at the bail stage or judicial reviews of youth sentences are recommended. Bill C-75 also include changes that explicitly require imposed bail conditions to be appropriately related to the nature of the offence, the protection or safety of the public, victims, witnesses and that the offender will be reasonably able to comply with them, and that they not be a "substitute for appropriate child protection, mental health or other social measures".

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II. Governing Legislation and Resources

A. Legislation and Web Links

Criminal Code, RSC 1985, c C-46 [1] ["*CC*"].

United Nations *Convention on the Rights of the Child* [2] *["*UNCRC*"].*

Youth Criminal Justice Act, SC 2002, c 1 [3] ["*YCJA*"].

- Note: Bill C-75 amended parts of *YCJA* in 2019

Youth Justice Act, SBC 2003, c 85 [4] ["*YJA*"].

B. Books

Youth Criminal Justice Act Manual, Loose-leaf service. (Canada Law Book)

Nicholas Bala & Sanjeet Anand. *Youth Criminal Justice Law*, 3d ed. Essentials of Canadian Law Series (Irwin Law: 2012),

Lee Tustin and Robert E. Lutes. *A Guide to the Youth Criminal Justice Act, 2012*, updated yearly, (LexisNexis Canada Inc: 2018).

C. Websites

Youth Directory of Youth Justice Resources [5]

Youth Criminal Justice Act FAQs [6]

Department of Justice: YCJA Overview [7]

Youth Justice Fact Sheets [8]

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References

[1] http://laws-lois.justice.gc.ca/eng/acts/C-46/
[2] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
[3] http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html
[4] http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03085_01
[5] http://www.justice.gc.ca/eng/cj-jp/yj-jj/index.html
[6] http://www.law-faqs.org/national-faqs/youth-and-the-law-national/youth-criminal-justice-act-ycja/
[7] http://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/oycja-alssj.html
[8] http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/index.html

III. Youth Criminal Justice Act

A. Applicable Age

A “Child” is defined in section 2(1) of the *YCJA* as "a person who is, or, in the absence of evidence to the contrary, appears to be less than 12 years old". The *CC* states in section 13 that no person under the age of twelve years will be convicted of an offence.

A “Young person” is defined in section 2(1) of the *YCJA* as "a person who is, or, in the absence of evidence to the contrary, appears to be, 12 years old or older, but less than 18 years old".

Section 14(5) states that the *YCJA* applies to "persons 18 years old or older who are alleged to have committed an offence while a young person". Section 14(4) states that "extrajudicial measures taken or judicial proceedings commenced against a young person" under the Act may be continued "after the person attains the age of 18 years".

B. Applicable Court

Under section 2(5) of the *Provincial Court Act*, RSBC 1996, c 379, the Provincial Court is designated as the Youth Justice Court for the purposes of the *YCJA*, and a Provincial Court judge is a Youth Justice Court judge. The superior court of British Columbia has concurrent jurisdiction as a Youth Justice Court where the Crown is seeking an adult sentence for a young person.

C. Declaration of Principle

The *YCJA* contains a declaration of principle. The principles are set out in section 3 of the *YCJA*, and must be used to interpret the entire Act.

1. The youth criminal justice system is intended to protect the public by:
   - a. holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
   - b. promoting the rehabilitation and reintegration of young persons who have committed offences, and
   - c. supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour.
2. The criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability, and must emphasize the following:
   - a. rehabilitation and reintegration,

- b. fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
- c. enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
- d. timely intervention that reinforces the link between the offending behaviour and its consequences, and
- e. the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time.

3. Within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should:
   - a. reinforce respect for societal values,
   - b. encourage the repair of harm done to victims and the community,
   - c. be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
   - d. respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.
4. Special considerations apply in respect of proceedings against young persons. In particular,
   - a. young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
   - b. victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
   - c. victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
   - d. parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

D. Right to Counsel

Under section 25 of the *YCJA*, "a young person has the right to retain and instruct counsel without delay...at any stage of the proceedings". A police officer must inform young persons of their right to counsel upon their arrest or detention. The Legal Services Society of British Columbia provides legal services for young persons, regardless of their income or their parents' income.

E. Right to Notice

Notice must be given to the parents as soon as possible in any of the following circumstances:

- the young person is arrested and detained in custody
- a summons or appearance notice is issued to the young person
- the young person is released on giving a promise to appear, or
- upon the young person entering into a recognizance (ss 26 (1) and (2))

When the whereabouts of the parents of a young person are unknown, notice may be given to an adult relative or to any other adult, who is known by the young person and who is likely to assist the young person (s 26(4)). When notice has not been given, the court may adjourn the proceedings until notice is given or may dispense with notice if the court

thinks it would be appropriate (s 26(11)).

Notice is not required if the person has attained the age of 20 at the time of his or her first appearance before a Youth Justice Court (s 26(12)).

The court may, if necessary, order the attendance of a parent at proceedings against a young person. A parent who then fails to attend may be held in contempt of court (s 27).

F. Alternatives to the Court Process: Extrajudicial Measures and Sanctions

1. Extrajudicial Measures

Extrajudicial measures (EJM) are an alternative to the formal court process. The principles applicable to the use of EJM's are set out in section 4 of the *YCJA*. There is a presumption that EJM's are adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence.

However, it may also be appropriate even if there has been a prior use of EJM's or a prior finding of guilt. The addition of section 4.1(1) from Bill C-75 sets out the direction that EJM's are also adequate to hold a young person accountable in certain cases of breach of sentencing conditions or failure to appear at court, subject to the violations not having caused harm or safety concerns to the public or the young person having a history of failures or breaches. (in force on December 18, 2019.)

Section 5 of the *YCJA* outlines the objectives of EJM's. EJM's should be designed to:

- provide an effective and timely response to offending behaviour,
- to encourage young persons to acknowledge and repair the harm caused,
- to encourage families of the young persons and the community to become involved in the design and implementation of those measures,
- to provide an opportunity for victims to participate in decisions, and
- to respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence.

Both summary and indictable offences (in exceptional circumstances) may be considered for EJM's.

Forms of EJM available:

- To a police officer are (s 6):
  - to take no further action
  - to warn the young person
  - to administer a caution, or
  - to refer the young person to a program or agency in the community.
- To Crown Counsel are (s 8):
  - to administer a caution.

2. Extrajudicial Sanctions

Extrajudicial sanctions (EJS) may be used where the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances make a warning, caution, or referral inadequate (s 10).

EJS's may be used only if(s 10(2)):

1. they are part of a program of sanctions authorized by the Attorney General;
2. the sanctions are considered appropriate having regard to the needs of the young person and the interests of society;
3. the young person, having been informed of the EJS, fully and freely consents to be subject to it;
4. the young person has, before consenting to be subject to the EJS, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
5. the young person accepts responsibility for the act or omission that forms the basis of the alleged offence;
6. there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence;
7. the prosecution of the offence is not in any way barred at law.

This procedure commonly involves an interview with a youth worker (through the local probation office), who will recommend a plan to the prosecutor that may include conditions such as counselling, restitution, community service, victim offender mediation, or an apology. Section 10(3) precludes EJS's in circumstances where the young person denies culpability or expresses a desire to have the charges proceed against him or her in youth justice court. Statements accepting responsibility, made as a condition of being dealt with through EJS's, are not admissible in evidence in any subsequent civil or criminal proceedings (s 10(4)). If EJS's are imposed, the person who administers the program must inform the parents of the young person about the sanctions (s 11). Victims, upon request, are entitled to be informed of the identity of the young person and how the offence was dealt with when an EJS is used (s 12).

G. Court Process

1. Compelling a Young Person's Appearance in Court

The procedure for compelling a young person to attend court is generally the same as that for adults as set out in the *CC*. A police officer may release a young person on either an Appearance Notice or a Promise to Appear (and Undertaking). These documents will indicate a time, date and location for the Young Person's first appearance in Court. If the Information is not laid prior to this first appearance the Appearance Notice or the Promise to Appear will be rendered a nullity. The Undertaking, however, will continue in force as long as the charges are before the Court.

The Ontario Court of Appeal in *R v Oliveira*, 2009 ONCA 219 held that a Promise to Appear and an Undertaking serve two distinct and separate purposes. The Court went on to explain that the purpose of the Promise to Appear is to secure the initial attendance of the Accused in Court. The Undertaking, in contrast, constitutes a promise by the Accused to comply with certain conditions in exchange for his release from custody pending the resolution of the charges.

Alternatively, and after an Information has been laid, a young person will be compelled to Court by either a Summons or a Warrant. A Warrant is issued where:

- Crown Counsel is either seeking the Detention of the young person or conditions of release for the young person, or
- the whereabouts of the young person are unknown.

2. Time Limitations

The time limitation for commencing a prosecution is the same for adults and youth. The time limitations vary depending on the nature of the offence and are set out in the *CC*. See Chapter 1: Criminal Law**.**

3. Proof of Age

The age of the young person must be established. This is usually done at the early stages of the proceedings. There are a number of ways that this can be accomplished:

- a parent can testify as to the age of the young person (s. 148(1) *YCJA*),
- a birth or baptismal certificate can be evidence of the age of a young person (s. 148(2) *YCJA*),
- Defence Counsel may attest to having spoken with a parent or guardian, and on that basis, admit the age of the young person (s. 149 *YCJA*), or
- the Court may act on any other information it considers reliable to determine the age of a young person (s. 148(3) *YCJA*).

4. Proof of Notice

It must be shown that a young person's parent or guardian has been notified of the charges against the young person. See Section III (D) above.

5. Pre-Trial Detention

The rules for pre-trial detention are set out in sections 28 and 29 of the *YCJA*. A young person cannot be detained in custody as a substitute for appropriate child protection, mental health or other social measures. Section 28 will be altered by Bill C-75 on December 18, 2019, so that both pre-trial detention and conditions would not be allowed as a substitute for appropriate child protection, mental health or other social measures.

Moreover, starting December 18, 2019, a young person may be subjected to a condition only if the judge/justice is satisfied that (s 29(1)):

- the condition is needed to ensure their court appearance or keep safe or protect the public,
- the condition is reasonable to the circumstances of the offending behavior, and,
- the young person would reasonably be able to keep the condition.

The requirements for pre-trial detention remain unaffected by Bill C-75. A young person may only be detained in custody where the Crown has proven, on a balance of probabilities, that:

1. The young person has either:
    - been charged with a serious offence (as defined in s 2, *YCJA*), or
    - has a history that indicates a pattern of either outstanding charges or findings of guilt.
2. There is either:
    - a substantial likelihood that the young person will not appear in court, or
    - evidence that detention is necessary for the protection of the public having regard to all the circumstances including a substantial likelihood that the young person will commit a serious offence, or
    - evidence that the young person has been charged with a serious offence and detention is necessary to maintain confidence in the administration of justice having regard to the declaration of principle and all the circumstances, including: strength of the prosecution's case, gravity of the offence, circumstances surrounding the commission of the offence, and the young person is liable for a potentially lengthy custodial sentence.

3. There are no conditions that would reduce the likelihood that the young person would not appear in court, or offer adequate protection to the public, or maintain confidence in the administration of justice.

A young person may be placed in the care of a responsible person instead of being held in custody if a youth justice court is satisfied that:

1. the young person would otherwise be detained in custody; and
2. the person is willing and able to take care of and exercise control over the young person; and
3. the young person is willing to be placed in the care of that person.

A responsible person who agrees to care for a young person under section 31(3) adopts a very serious responsibility. The responsible person must sign an undertaking that binds them to oversee and essentially police the young person's bail order. This undertaking often includes a term that the responsible person report to the police and the bail supervisor any breaches of the bail conditions. Wilful failure to comply with the terms of the care order may result in the responsible person being charged with an offence punishable with up to two years imprisonment (s 139).

Section 30 of the *YCJA* provides that a young person who has been detained in custody prior to being sentenced must be placed in a youth facility. When that person attains the age of 20 years they shall be placed in an adult facility.

6. Pleas

A young person may plead guilty or not guilty (s 36). The plea of not guilty by reason of mental disorder is also available. Pleas must be entered before a Youth Justice Court judge (not a judicial justice of the peace).

After a guilty plea is entered a Youth Justice Court judge may order the preparation of:

1. a pre-sentence report (s 40); or
2. a medical, psychiatric and/or psychological report (s 34).

The Judge may also convene a section 19 Conference. Where a not guilty plea is entered a Trial Date is set.

7. The Trial Process

The trial process is the same for young persons as it is for adults.

Admissibility of Statements

The law relating to the admissibility of statements made by adult accused persons to persons in authority also applies to youths (s 146(1)). There are, however, specific provisions that ensure a young person both understands the consequences of making such a statement and is given the opportunity to seek and/or consult counsel (s 146(2)). The right to counsel may be waived but must be done so either by a signed written statement or a recorded statement (s 146(4) and (5)). A judge may rule inadmissible any statement given by a young person if satisfied that it was given under duress (s 146(7)). Voluntary statements can be admitted into evidence, even where there has been a technical irregularity in complying with a young person's statutory protection, provided that the Youth Justice Court is satisfied that the admission of the statement would not offend the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and that their rights are protected (s 146(6)).

In *R v AD*, 2010 BCSC 1715, the statement of the 15-year-old accused was found inadmissible for non-compliance with s 146(2)(d) of the *YCJA*. In that case, Justice Stromberg-Stein notes that "[i]nforming a young person they are *entitled* to have a lawyer or third party with whom they have consulted present, rather than phrasing this as a *requirement*, is 'deficient' and 'not completely accurate', as s 146 draws an important distinction between the rights of the young person and the requirements placed upon the police." In that case, counsel for the accused was out of town and unable to immediately come to the police station where the accused was detained. Although the police informed AD of his right to

have his lawyer present during the interview, it was clear that they were going to interview him that same day, regardless of his lawyer's availability.

The *YCJA* does not specify the standard of proof the Crown must meet to show compliance with s 146. In *R v LTH*, 2008 SCC 49 at paragraph 6, the Supreme Court of Canada stated each component of s 146 must be proved beyond a reasonable doubt. If a young person has been interviewed, Crown must prove the person taking the young person's statement took reasonable steps to ensure the young person understood her or his rights. Simply reading a standardized form will likely not fulfill the caution requirement of s 146(2)(b). The person in authority must make reasonable efforts to determine the level of comprehension of the specific young person to ensure their explanation is appropriate.

In *R v LTH*, the majority of the Court found the police officer, when reading the accused his rights, failed to take into account that the accused had a learning disability, and as a result found the statement inadmissible. In *R v LTH*, the Court also notes that Crown Counsel does not have to prove the young person actually understood the rights explained to them. If the Judge is satisfied, beyond a reasonable doubt, that the young person's rights and options were explained as required by s 146, the judge may infer the young person understood those rights and the consequences of waiving them. The burden then shifts to the defence to point to evidence showing the young person did not in fact understand his or her rights or the consequences of waiving those rights.

Children and Young Persons as Witnesses

Where a child is a witness at a Youth Court trial, the Judge or Justice must instruct that child as to the duty to speak the truth and the consequences of failing to do so. Where a young person is a witness the Judge or Justice may instruct the young person as to this duty "if he/she considers it necessary" (s 151).

There are special protections under the *Criminal Code* for witnesses who are under the age of 18 years. A justice/judge has the discretion under section 486 of the *CC* to exclude members of the public from the courtroom if they are of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice. The "proper administration of justice" includes ensuring that the interests of witnesses under the age of eighteen years are safeguarded in all proceedings (*CC*, s 486(2)(b)). A witness who is under the age of 18 years may also be entitled to have a support person present in the courtroom while testifying (*CC*, s 486.1), to testify outside the courtroom or to testify behind a screen (*CC*, s 486.2). The child or young person must be advised of these options.

Section 16.1 of the *Canada Evidence Act* provides that a person under 14 years of age is presumed to have the capacity to testify. Any person who challenges the capacity of such a witness bears the burden of satisfying the Court that there is an issue as to the witness' capacity to understand and respond to questions. It must be shown that the witness does not understand the duty of speaking the truth.

H. Sentences

1. Youth Sentences

The purpose and principles of sentencing under the *YCJA* are set out in sections 3 and 38 of the Act. The purpose of sentencing is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public (s 38(1)). The principles of sentencing are set out in section 38(2) and include:

- a. The sentence must not result in a punishment greater than would be appropriate for an adult convicted of the same offence committed in similar circumstances,
- b. The sentence must be similar to that which would be imposed in other regions,

- c. The sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence,
- d. All available sanctions other than custody should be considered, with particular attention to the circumstances of Aboriginal young persons,
- e. The sentence must be one that is the least restrictive, the most likely to rehabilitate and that will promote a sense of responsibility in the young person and an acknowledgement of the harm done to the victim(s) and society,
  - e.1. Any condition imposed as a part of the sentence can only be imposed only if it is necessary to achieve the purpose set out in s 38(1), if the young offender would reasonably be able to comply with it, and if it is not used as a substitute for appropriate child protection, mental health or other social measures. (in force on December 18, 2019.)
- f. The sentence may have the objective to denounce unlawful conduct and deter the young person from committing offences.

General deterrence is not a sentencing principle under the *YCJA*.

In determining a youth sentence, section 38(3) requires a Youth Justice Court consider:

- a. The degree of participation of the young person in the offence,
- b. The harm done to victims,
- c. Any reparation made by the young person,
- d. The time the young person has already spent in detention as a result of the offence,
- e. Any previous findings of guilt of the young person, and
- f. Any other aggravating and mitigating circumstances.

A Youth Justice Court shall, before imposing a youth sentence, consider a pre-sentence report prepared by a youth worker, representations made by the parties, other relevant information and recommendations submitted as a result of a section 19 Conference (s 42(1)). Mandatory minimum sentences under adult or provincial statutes do not apply to young persons. The maximum duration of youth sentences is set out in section 42(14) to (16). A custodial sentence cannot be used as a substitute for appropriate child protection, mental health or other social measures (s 39(5)).

Sentencing options are set out in section 42(2),*YCJA*. Non-custodial sentence options include:

- a. A judicial reprimand,
- b. An absolute discharge,
- c. A conditional discharge,
- d. A fine to a maximum of $1000,
- e. Compensation and restitution,
- f. Community work service,
- g. Probation,
- h. An Intensive Support and Supervision Program Order (ISSO), and
- i. Non-residential programs

Where a fine or an order for compensation or restitution is imposed, a court must consider the present and future means of the young person to pay. If a fine is imposed, the *YCJA* allows for the lieutenant governor in council of the province to order a percentage of any fine imposed on a young person to be used to assist victims of offences (s 53(1)). In B.C., an Order in Council has set this at 15%. Where a conditional discharge, probation or ISSO is imposed, a court may include whatever reasonable conditions it considers advisable in the interest of the young person and the public.

Section 39(1) of the *YCJA* provides that a young person cannot be committed to custody unless:

- a. The young person has committed a violent offence,

- b. The young person has failed to comply with non custodial sentences (valid to December 17, 2019), [Paragraph 39(1)(b) of the Act will be replaced by the following on December 18, 2019: "(b) the young person has previously been found guilty of an offence under section 137 in relation to more than one sentence and, if the court is imposing a sentence for an offence under subsections 145(2) to (5) of the Criminal Code or section 137, the young person caused harm, or a risk of harm, to the safety of the public in committing that offence"]
- c. The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than 2 years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt, or
- d. In exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

The Youth Justice Court under section 39(2) of the YCJA is required to consider all alternatives to custody that are reasonable in the circumstances and, if custody is imposed, reasons must be given as to why the Court found a non-custodial sentence inadequate to achieve the purpose of sentencing as set out in section 38(1) (s 39(9)).

Prior to committing a young person to custody, the Judge must consider a pre-sentence report (s 39(6)). This requirement can be waived, with the consent of the prosecutor and the young person, and if the Youth Justice Court is satisfied that it is unnecessary (s 39(7)).

Custodial sentence options include:

- a. **Deferred Custody and Supervision Order (s 42(2)(p)**: This is a custodial sentence served in the community. It is not available where a young person has committed an offence that causes or attempts to cause serious bodily harm. The maximum duration of this sentence is 6 months. If the young person breaches a condition of the DCSO, a warrant may be issued and, after a hearing, the DCSO may be converted to a Custody and Supervision Order.
- b. **Custody and Supervision Order (s 42(2) (n))**. The maximum duration of a CSO is two years, or three years if an adult maximum sentence is life imprisonment. Two thirds of the sentence must be served in custody while the remaining one-third is served under a community supervision order. The level of custody (open custody or secure custody) must be specified by the youth justice court (s 88 and Order in Council 267/2003). The provincial director sets the mandatory and optional condition of the community portion of the CSO (s 97). In *R v RRJ*, 2009 BCCA 580, the British Columbia Court of Appeal held that pre-sentence detention is not part of the sentence imposed. The Court explained that the Judge must consider time already served in custody when sentencing a young person but he/she may still choose to impose the maximum period of custody and supervision available under the statute.
- c. **Custody and Supervision Order (s 42(2) (o))**: A custody term of a maximum of three years can be imposed where a young person is convicted of either attempted murder, manslaughter or aggravated sexual assault. There is no minimum time period that must be spent in custody. The time spent in custody is left up to the Judge's discretion.
- d. **Custody and Supervision Order (s 42(2) (q))**: Young persons convicted of murder can be committed to custody for longer periods of time. A young person convicted of 1st degree murder can serve a custodial sentence of 10 years (no more than 6 years can be served in continuous custody). In the case of 2nd degree murder a sentence of 7 years can be imposed (no more than 4 can be served in continuous custody).
- e. **Intensive Rehabilitative Custody and Supervision Order (s 42(2) (r) and 42(7))**: These orders are rare and are usually imposed when a young person has serious mental health issues.

The *YCJA* allows for a delay in the imposition of a custody order where appropriate. In these instances, the probation order commences prior to the custody order and stipulates that the custody sentence begin immediately after the designated period of delay (s 42(12)).

While in custody a young person, with the assistance of a youth worker, must plan for his or her reintegration into the community, including the preparation and implementation of a reintegration plan that sets out the most effective programs for the young person in order to maximize his or her chances for reintegration in the community (s 90(1)).

Section 76(2),*YCJA* prohibits young persons under the age of 18 years from serving any portion of their custodial sentence in either a provincial correctional facility for adults or a penitentiary. A young person who is serving a youth custodial sentence may be transferred to an adult correctional facility if the Court considers it to be in the best interests of the young person or in the public interest (s 92). A young person who turns 20 years old while serving a custodial sentence will be transferred to an adult facility (s 93). A young person who has reached the age of 20 at the time the custodial youth sentence is imposed will be committed to a provincial correctional facility for adults (s 89(1)).

Section 19 Conferences

A Youth Justice Court may convene a conference under section 19 for recommendations as to an appropriate sentence (ss 41 and 19). Conferences can be an effective means of coordinating services, broadening the range of perspectives on a case, and arriving at more creative and appropriate resolutions. Conferences can be composed of a number of different people, including the victim the accused, his or her parents, members of the justice system, and community resource professionals. The conference may elicit advice on decisions such as a suitable extrajudicial measure, a condition for release from pre-trial detention, appropriate sentencing and plans for reintegrating the young person back into the community after release from custody.

2. Adult Sentences

Crown Counsel may make an application to the youth justice court for an order that a young person is liable to an adult sentence if the young person is or has been found guilty of an offence for which an adult is liable to imprisonment for a term of more than 2 years and that was committed after the young person attained the age of 14 years (s 64(1)). Prior to changes in Bill C-75, the Crown Counsel was obligated to consider whether it would be appropriate to seek an adult sentence for a young person, over the age of 14 years, who committed a serious violent offence (murder, attempt murder, manslaughter or aggravated sexual assault), and to advise the court of that decision. Provinces could also choose to fix an age greater than 14 years but not greater than 16 years for the purpose of this requirement to consider an adult sentence. As of September 19, 2019, the last two points have been repealed.

The Youth Justice Court shall order that an adult sentence be imposed if Crown Counsel has satisfied the Court that:

- a. The presumption of diminished moral blameworthiness or culpability of the young person is rebutted (s 72(1)(a)), and
- b. A youth sentence would not be of sufficient length to hold the young person accountable for his or her behaviour (s 72(1)(b)).

Although youths can be sentenced as adults the sentencing guidelines are not strictly the same as those that would be utilized in sentencing an adult. In *R v Pratt*, 2007 BCCA 206, the British Columbia Court of Appeal recognized that the court must consider the principles of sentencing in section 3 YCJA when sentencing a youth, including a youth who receives an adult sentence.

3. Reintegration Leave

The Provincial Director may, subject to any terms or conditions that he or she considers desirable, authorize a young person committed to custody in a youth facility the opportunity to have leave from the facility. There are two categories of leave:

- a. **Reintegration Leave**: This leave is granted for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or reintegrating the young person into the community. The maximum length of time is 30 days (s 91(1)(a)).
- b. **Day release:** This leave is to allow a youth to attend an educational facility, to attend work, to assist his or her family, to participate in programming related to school and/or work or to attend an outpatient treatment program or other program that provides services to address the needs of the young person (s 91(1)(b)).

Reintegration leaves are also available to a young person serving an adult sentence in a youth facility.

4. DNA Sample

When a young person is found guilty of certain designated offences (see s 487.04 of the *CC*), an order may be made for the young person to provide samples of one or more bodily substances for the purpose of forensic DNA analysis, under ss 487.051 and 487.052. The resulting DNA data is stored in a DNA databank, which is maintained by the RCMP.

The *DNA Identifications Act*, SC 1998, c 37, has been amended so as to limit the retention of DNA samples taken from a young person. DNA samples taken from young persons can be retained for shorter periods of time than those taken from adults (s 9.1) and shall be promptly destroyed when the record relating to the offence is expunged (s 10.1).

I. Review of Sentences

1. Custodial Sentences

An annual review is mandatory for all custodial sentences over one year. This review is to take place without delay at the end of one year from the date of the earliest youth sentence imposed and the end of every subsequent year from that date (ss 94 (1) and (2)).

A young person may be entitled to an optional review. When the youth sentence is for less than one year a young person may request a review 30 days after the sentence is imposed or after serving one third of the sentence, whichever is greater (ss 94(3)(a)(i) and (ii)). When the youth sentence exceeds one year a young person may seek a review after serving six months of the sentence (s 94(3)(b)). In either case, the review will only take place where the Youth Justice Court is satisfied that there are grounds for such review (s 94(5)). Possible grounds for review are as follows:

- The young person has made sufficient progress to justify a change in the sentence
- The circumstances that led to the youth sentence have changed materially
- There are new services or programs available that were not available at the time of the youth sentence
- The opportunities for rehabilitation are now greater in the community, or
- Any other grounds the youth justice court considers appropriate (s 94(6)).

A progress report must be prepared for the purposes of review (s 94(9)). A Youth Justice Court, after review, may confirm the sentence or it may release the young person from custody and place the young person on conditional supervision (s 94(19)). The terms of the condition supervision will be imposed by the youth justice court in accordance with section 105.

2. Non-Custodial Sentences

As of December 18, 2019, section 59(1) of the *YCJA* will allow for non-custodial sentences to be reviewed at any time after they are imposed and no longer require leave from a PCJ for a review in the first 6 month period. The application for review can be made by the provincial director, the young person, the young person's parent, or by Crown Counsel (s 59(1)). The grounds for review are:

- The circumstances that led to the youth sentence have changed materially,
- The young person is unable to comply with or is experiencing serious difficulty in complying with the terms of the youth sentence,
- The young person has contravened a condition of an order without reasonable excuse,
- The terms of the youth sentence are adversely affecting the opportunities available to the young person to obtain services, education or employment, or
- Any other ground that the youth justice court considers appropriate (s 59(2)).

A progress report may be ordered for the purposes of such a review (s 59(3)). A Youth Justice Court, after conducting a review, may confirm the youth sentence, terminate the youth sentence or vary the youth sentence (s 59(7)). Subsection 59(8) states that the varied sentence cannot be more onerous that the original youth sentence, unless the young person consents or more time is required to comply with the youth sentence (s 59(9)). The time to complete a community work service order or a restitution order may be extended for up to 1 year (s 59(9)). As of December 18, 2019, subsection 59(8) will also allow that more onerous conditions can also be added onto the sentence if they would either better protect the safety of the public from the risk of harm by the young offender, or if it would assist the young offender to comply with any conditions previously imposed as part of the sentence (s 59(10)).

J. Appeals

Under the *YCJA*, young persons and the Crown have the same rights of appeal as adults under the CC (ss 37(1) and (5)). However, a young person cannot appeal a sentence review decision, whether mandatory or optional (s 37(11)).

K. Special Concerns

1. Public Hearings

Youth Justice Court hearings are open to the public. A justice may, however, exclude any person from all or part of the proceedings if the Justice considers that the person's presence is unnecessary to the conduct of the proceedings and the justice is of the opinion that:

- Any information presented to the Justice would be seriously injurious or seriously prejudicial to the young person, a witness, or a victim, or
- It would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any member of the public (s 132).

2. Publication of a Young Person's Identity

Section 110(1) *YCJA* states that no person shall publish the name of a young person, or any other information that would result in the identification of a young person. This ban does not apply:

- Where the information relates to a young person who has received an adult sentence, or,
- Where the publication of information is made in the course of the administration of justice and not for the purpose of making the information known in the community.

Bill C-75 eliminated the court-initiated lifting of publication ban for violent youth offenders as of September 19, 2019.

Once a young person attains the age of eighteen years he or she may apply to lift the ban on publication for the purpose of permitting that person to publish information that would identify him or her as having been dealt with by the *YCJA*. The ban will only be lifted if the Youth Justice Court is satisfied that the publication would not be contrary to the young person' best interests or the public interest (s 110(6)).

3. Fingerprints and Photographs

The *Identification of Criminals Act*, RSC 1995, c I-1, applies to young persons. Fingerprints and photographs of a young person can only be taken in circumstances in which an adult would be subject to the same procedures (*YCJA*, s 113).

4. Records: Access and Disclosure

Sections 114 to 129 of the *YCJA* govern the records relating to young people which are kept in relation to the Youth Justice Court process. These provisions set out who may keep records in relation to a young person who is charged under the Act, and restrict access and control the disclosure of information contained within these records.

Records that arise out of proceedings under the *YCJA* may be kept by:

- A Youth Justice Court, a review board or any court dealing with matters arising out of proceedings under the *YCJA* (s 114),
- An investigating police force may keep a record relating to any alleged offence or any offence committed by a young person (s 115(1)),
- An investigating police force may keep a record of any extrajudicial measures that they use to deal with young persons (s 115(1.1)),
- A department or an agency of any government in Canada for the purpose of investigation, use in proceedings against the young person, sentencing, and considering the young person for extrajudicial measures (s 116(1)).

Who has access to these records is set out in sections 117 to 124 *YCJA*. Except as authorized by the *YCJA* no person is to be given access to a record, kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person as a person dealt with under the Act (s 118(1)). Sections 119(1-2) list the persons to whom access to records may be granted and the time limits within which access can be granted. These time limits vary in length depending on the treatment of the young person by the court. After the applicable access period has ended a person must apply to a Youth Justice Court judge to gain access to the records and the application must meet the requirements set out in section 123(1). The group of persons to whom access will be granted with respect to extrajudicial sanctions has special limitations (s 119(4)).

Not all records concerning young persons are governed by the same rules with respect to access. Under section 120 *YCJA* RCMP records may be accessed by:

- the young person to whom the record relates,
- the young person's counsel,

- a government of Canada employee for statistical purposes,
- any person with a valid interest in the record if a judge is satisfied that access is desirable in the public interest for research or statistical purposes,
- the Attorney General or a peace officer for the purpose of investigating an offence,
- the Attorney General or a peace officer to establish the existence of an order in any offence involving a breach of an order, and
- any person for the purposes of the Firearms Act.

Sections 125 to 127 of the Act deals with disclosure of the information in a record. These rules outline who may disclose information which is in their possession, to whom they may disclose the information, and when such disclosure will be permitted. Before any information is disclosed, the young person must have an opportunity to be heard unless reasonable, but unsuccessful, efforts have been made to locate the young person.

5. Mental Health Provisions

Young persons who come into contact with the criminal justice system may suffer from mental health issues. The *CC* provisions regarding mental disorders apply to the *YCJA* except to the extent they are inconsistent with the *YJCA* (s 141). Section 34 of the *YCJA* allows the Court to take into account the mental health of a young person and order a report in certain circumstances.

Pursuant to section 34, at any stage of the proceedings the Court may order an assessment of a young person by a qualified person who is required to report the results of the assessment in writing:

- i) with the consent of the young person and the Crown, or
- ii) on its own motion or on application of the young person or the Crown if the court believes a report is necessary and:
- a) the Court has reasonable grounds to believe that the young person is suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability, or a mental disability,
- b) the young person has a history indicating a pattern of offences, or
- c) the young person is alleged to have committed a serious violent offence.

An assessment report can be ordered under *YCJA* section 34(2) for a limited number of designated purposes, i.e. if the Youth Justice Court is:

- considering an application under s 33 (release from or detention in custody),
- deciding whether to impose an adult sentence under s 71,
- making or reviewing a youth sentence,
- considering an application for continuation of custody (s 104(1)),
- setting conditions for conditional supervision (s 105(1)),
- making an order after a review of a breach of conditional supervision (s 109(2)), or
- authorizing disclosure of information about a young person (s 127(1)).

Only the people described in section 119 of the *YCJA* can have access to the medical and psychological reports outlined in section 34.

For more information on mental illness and the law, see Chapter 14: Mental Health Law.

6. Victims

Amendments have been made to the *CC* to enhance the role of the victim in the criminal trial process. The *YCJA* also aims to enhance the victim's role. This is demonstrated by the references to victims' rights in the general principles of section 3 and the fact that consideration of the harm done to victims and reparations are relevant in youth sentencing (s 38(3)).

B.C. is at the forefront when it comes to victim rights' legislation, particularly in relation to the enactment of the *Victims of Crime Act*, which helps to ensure victims' views and concerns will not go unnoticed. In 2015, Parliament enacted the *Canadian Victims' Bill of Rights*, which guarantees victims' rights throughout the criminal justice system across Canada. Refer to Chapter 4: Victims for more information.

7. Sex Offenders Information Registration Act

In April 2004, Parliament enacted the *Sex Offenders Information Registration Act*, SC 2004, c 10 ["*SOIRA*"], to help police investigate sexual crimes by providing them with up-to-date information from convicted sex offenders. The Act imposes an ongoing reporting process for sex offenders to provide information regarding residence, telephone numbers, employment, education, and physical description.

Section 490.011(2) of the *CC* provides that the *SOIRA* applies to young persons only if they are given adult sentences. Section 7 of the *SOIRA* allows a sex offender who is under 18 years to choose an adult to be in attendance when they report to a registration centre where information is collected.

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IV. Youth Justice (British Columbia) Act

The original *Young Offenders (British Columbia) Act*, RSBC 1996, c 494 [“*YO(BC)A*”] was proclaimed on May, 1984 to complement the federal *Young Offenders Act*. In April, 2004, the *YO(BC)A* was replaced with the *Youth Justice Act*, SBC 2003, c 85 [“*YJA*”]. The *YJA* imposes tougher sentences on young persons for gang activity, driving offences, and contraband activity within youth custody facilities. The *YJA* updates the provisions of the *YO(BC)A* in order to reflect new practices within the youth criminal justice system, as well as to render the provincial legislation more consistent with the federal *YCJA*. The *YJA* acts to narrowly expand custodial sentence options within the province, as well as to create a small number of new offences. Under the previous *YO(BC)A*, probation was the harshest sentence imposed on young persons, but under the new *YJA*, young persons may face jail time for six different offences. This legislation is not often used, and so only a brief overview is provided below.

A. Definition of Young Person and the Effect of Age on Proceedings

Under the *YJA*, “young person” is defined as a person who has reached 12 years of age but is less than 18 years of age (s 1).

B. Notice to Parents

If a young person is charged with an offence and is required to appear in court, the person who issued the process must immediately give written notice of the charge against the young person and the time and place of that young person’s court appearance to a parent of the young person, if a parent is available. This section does not apply where proceedings are commenced by way of a violation ticket (ss 5(1) and (2)).

If a young person is going to be detained until his or her court appearance, the officer in charge at the time of the young person’s detention must give written or oral notice of the arrest to a parent of the young person as soon as possible, if a parent is available. The notice must state the place of detention and the reason for the arrest of the young person (s 5(3)).

If notice is not given under sections 5(1) or (3), the proceedings are still valid (s 5(4)).

C. Sentencing

1. General

Once a young person is found guilty of an offence, the Court must impose one or more of the available sentences provided within the *YJA*, and no others (s 8(1)). The sentence is effective as of the date it is imposed by the court, unless the young person is already serving a custodial sentence, in which case the new sentence will be imposed on the date of expiry of the previous custodial sentence (ss 9(1) and (2)).

The possible sentences available to the court are:

- an absolute or conditional discharge, if there is no minimum penalty required for an adult convicted of that offence, and if it is in the best interest of the young person and not contrary to the public interest;
- a maximum fine of $1,000;
- community work service hours to a maximum of 240 hours and to be completed within a specified period no longer than one year;
- probation for a maximum of 6 months;

- custody not exceeding 30 days for specified offences under s 8(2)(e) (for example, trespassing on school grounds under section 177(2) of the *School Act*);
- custody not exceeding 90 days for other offences specified under section 8(2)(f) (for example, driving while prohibited or suspended under sections 95(1), 102, or 234(1) of the *Motor Vehicle Act*); and/or
- a driving prohibition for an offence under the Motor Vehicle Act.

The Court must not impose a sentence that results in punishment being imposed on a young person that is greater than the maximum punishment that could be imposed on an adult who has been convicted of the same offence (s 8(5)).

> **NOTE:** Custodial sentences under the *YJA* do not include a period of community supervision, as under the *YCJA*. However, the Court may order a period of probation to follow a custodial sentence if it thinks it appropriate.

2. Sentence Review

A young person, a parent of the young person, or the Attorney General may apply for a review of the young person's sentence if the Court deems it appropriate (s 15(1)). The application may be made at any time after three months after the date the sentence was given, or with leave of the Court at any time.

In the case of custodial sentences under section 8(2)(e) or (f), an application may be made once the greater of 15 days or one third of the sentence has been served (s 15(2)). Under a review, the Court may vary, rescind, or confirm the sentence, or make an entirely new sentence, but the new or varied sentence must not be more onerous than the sentence under review (ss 15(8) and (9)).

D. Special Concerns

1. Publication of a Young Person's Identity

The provisions under Part 6 of the *YCJA* that ban the publication of a young person's identity apply to the *YJA* (s 4(1)). See Section III.J.2: Publication of a Young Person's Identity.

2. Records

The provisions of the *YCJA* governing the records of young persons dealt with under that Act are deemed to apply to the *YJA* (s 4(1)). The sections of the *YCJA* which apply to the *YJA* are sections 114 to 116, sections 118 to 127 and section 129. See Section III.J.4: Records: Access and Disclosure.

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Appendix A: Glossary

Adult

- means a person who is neither a young person nor a child.

Adult Sentence

- in the case of a young person who is found guilty of an offence, means any sentence that would be imposed on an adult who has been convicted of the same offence.

Attorney General/Crown Counsel

- means the government agency or agents who prosecute offences under the *Youth Criminal Justice Act*, *Youth Justice Act (BC)* and the *Criminal Code*.

Child

- means a person who is or, in the absence of evidence to the contrary, appears to be less than 12 years old.

Conference

- means a group of persons who are convened to give advice in accordance with s 19 of the *YCJA*.

Extrajudicial Measures

- means measures other than judicial proceedings under the *YCJA* used to deal with a young person alleged to have committed an offence and includes extrajudicial sanctions.

Extrajudicial Sanction

- means a sanction that is part of a program referred to in s 10 of the *YCJA*.

Offence

- means an offence created by an Act of Parliament.

Parent

- includes any person who is under a legal duty to provide for the young person or who has, in law or in fact, custody or control of the young person. However, this does not include a person who has custody or control of the young person by reason only of proceedings under the *Youth Criminal Justice Act* or *Youth Justice Act*.

Pre-sentence Report

- means a report on the personal and family history and present environment of a young person made in accordance with s 40 of the *YCJA*.

Publication

- means the communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means.

Serious Offence

- means an indictable offence under an Act of Parliament (i.e. *Youth Criminal Justice Act* or *Criminal Code*) for which the maximum punishment is imprisonment for five years or more.

Serious Violent Offence

- means an offence under one of the following provisions of the *CC*:
  - s 231 or 235 (first degree murder or second degree murder),
  - s 239 (attempt to commit murder),

- s 232, 234, or 236 (manslaughter), or
- s 273 (aggravated sexual assault).

Violent Offence

- means
  - an offence committed by a young person that includes causing bodily harm as an element of the offence;
  - an attempt or a threat to commit an offence that includes causing bodily harm as an element of the offence; or
  - an offence during which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

Young Person

- means a person who is or, in the absence of evidence to the contrary, appears to be 12 years old or older, but less than 18 years old and, if the context requires, includes any person who is charged under the *YCJA* with having committed an offence while he or she was a young person or who is found guilty of an offence under the *YCJA*.

Youth Custody Facility

- means a facility designated under subsection 85(2) of the *YCJA* for the placement of young persons.

Youth Sentence

- means a sentence imposed under sections 42, 51, 59 or 94-96 of the *YCJA*.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on September 15, 2019.

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Chapter Three - Family Law

I. Introduction

A. Note on the Family Law Act and this Manual

On March 18, 2013, British Columbia's *Family Law Act [FLA]* came into force. The *FLA* is the culmination of many years of research and policy development, and has transformed British Columbia family law dramatically .

The current Manual chapter deals primarily with the *FLA* rather than the previous *Family Relations Act [FRA]*. If you are starting a legal challenge in family law now or in the future, the *FLA* will apply to your case. However, if you made a claim for property division before the FLA came into force (March 18, 2013), then those claims will be decided under the *FRA*; all of your other claims (such as for parenting arrangements, child support, spousal support) will be dealt with under the *FLA*, or the *Divorce Act (DA)*, if it applies.

If your case still involves the *FRA*, we encourage you to look at an older version of this Manual, as we will not deal with the *FRA* in this version.

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II. Governing Legislation and Resources

A. Resources in Print

1. Continuing Legal Education Society of British Columbia, *Family Law Sourcebook for British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia, 2015).
   - This loose-leaf sourcebook contains a thorough overview of all aspects of family law, with cites to the relevant authorities for each statement of law.
2. Continuing Legal Education Society of British Columbia, *Annotated Family Practice 2011 - 2012* [regular updates]. (Vancouver: Continuing Legal Education Society of British Columbia, 2008).
   - This is an essential resource for many family law lawyers, and is updated each year.
3. Continuing Legal Education Society of British Columbia, *British Columbia Family Practice Manual, 5th ed.* [regular updates] (Vancouver: Continuing Legal Education Society of British Columbia, 2011).
   - Loose leaf manual providing a solid how-to approach to common family law problems and processes.
4. Continuing Legal Education Society of British Columbia, *Desk Order Divorce—An Annotated Guide* (Vancouver: Continuing Legal Education Society of British Columbia, 2013).
   - Annotated guide to divorce, with regular updates.
5. John D. Gardner and A.K. Korde, *British Columbia Family Law: Annotated Legislation* (Markham: Lexis Nexis Butterworths, 1984-2008).
   - This loose leaf guide contains annotated legislation and judicial consideration of statutes pertaining to family law. Remember, it will only contain amendments up to the date of publication.

6. The Honourable Madam Justice Carol Huddart and Trudi L Brown, QC, *British Columbia Family Law Practice, 2015 Edition + E-Book* (Markham: Lexis Nexis Butterworths, 1984-2008).
    - This loose leaf guide contains annotated legislation and judicial consideration of statutes pertaining to family law. Remember, it will only contain amendments up to the date of publication.

Library References:

1. Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery Publications, 2004).
    - A good casebook, which provides an overview of new family law issues in Canada.
2. Julien D. Payne, *Payne on Divorce* (Scarborough: Carswell, 1996).
    - A very good Canadian text on family law.

B. Resources on the Internet

1. Ministry of Justice – Family Law Legislation

Government website for the Family Law Act [1]

Resources that are particularly relevant include:

- Table of Concordance [2] – allows for quick cross-referencing from the *FRA* sections to the *FLA* sections.
- Family Law Act Explained [3] – an excellent primer on the major changes behind the *FLA*, breaking down the purpose of each new section individually.
- Questions and Answers [4] – perhaps the best and most concise introduction to the changes that can be found on this website.

2. BC Supreme Court Services

Website: http://www.supremecourtselfhelp.bc.ca

- This service provides information to help users prepare the procedural aspects of a family or civil case. There is an office at 290 – 800 Hornby Street in Vancouver, but it does not handle phone, e-mail, or written inquiries. The staff cannot provide substantive advice on legal issues.

3. J.P. Boyd's BC Family Law Web Resource

Website: http://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law.

- This is an excellent site for those unfamiliar with family law rights and procedures, written in plain English. It is a good place to begin for those who have not had the benefit of a family law course.
- The Family Law Resource is one of the leading resources in BC, particularly for the *Family Law Act*.
- There is a link to forms for both matters in the Provincial Court and Supreme Court.

4. BC Family Maintenance Enforcement Program (FMEP)

Website: http://www.fmep.gov.bc.ca

- Administered by the Ministry of Human Resources, this program helps families to enforce child support and spousal support orders from ex-partners. The program is administered through select BC Employment and Assistance centres.

5. Legal Services Society Family Law in British Columbia

Website: http://www.familylaw.lss.bc.ca

- This site has general information on family law, including self-help materials, forms a client needs to file for an uncontested divorce, and step-by-step instructions for filling out the forms. It also houses web versions of Legal Services Society family law publications. *Living Together, Living Apart: Common-Law Relationships, Marriage, Separation and Divorce* [5] is very useful. This publication is available in English, French, Simplified and Traditional Chinese, Punjabi, and Spanish.

6. British Columbia Vital Statistics Agency

Website: http://www2.gov.bc.ca/gov/content/life-events

- The Vital Statistics Agency is a service provided by the provincial Ministry of Health Services. The web site includes information on birth and death registration and certificates. It also includes wills notice registration and searches, information on how to change your name, and information on marriage licences. Contact numbers are available for various services including adoption records information. Marriage certificates can also be ordered online.

7. Ministry of Attorney General

Website: http://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice

- This site provides general information about a number of issues of interest to BC couples who have separated or who are about to separate. It may also be useful for guardians and other family members, such as grandparents, who may be involved in making important decisions about the family and its future.

8. Department of Justice Canada

About Spousal Support/Spousal Support Advisory Guidelines: http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html

About Child Support/Federal Child Support Guidelines, P.C. 1997-469: http://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/sbs-eng.pdf

9. Support Calculator

Website: http://www.mysupportcalculator.ca/

- People can use this website to calculate how much child support and spousal support they have to pay under the guidelines.

10. British Columbia Supreme Court

Website: http://www.bccourts.ca/supreme_court

- Procedural guidelines for divorce proceedings can be found on this website.

11. Divorce Registry of Canada

Website: http://www.justice.gc.ca/eng/fl-df/divorce/crdp-bead.html

Telephone: (613) 957-4519

- The registry is relevant as you need to fill in and print out a form and file it with the Court when you are seeking a divorce. This is required so that the Divorce Registry can confirm that you have not already been divorced.

12. MOSAIC

Website: http://www.mosaicbc.com

Telephone: (604) 254-0244

- Deals with issues that affect immigrants and refugees while settling into Canadian society. They also offer translation services.

13. Interjurisdictional Support Orders

Web site: http://www.isoforms.bc.ca

- Interjurisdictional Support Orders (ISOs) can be obtained from other Canadian provinces and territories and from reciprocating foreign countries by following the procedure set out in the *Interjurisdictional Support Orders Act*, SBC 2002, Chapter 29.

14. Children and Travel

Website: http://travel.gc.ca/travelling/publications/travelling-with-children

15. Ministry of Justice Dispute Resolution Office

Website: http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/dispute-resolution-office

Telephone: (250) 387-1480

- Develops and implements dispute resolution services and justice transformation projects with administrative tribunals, courts, government ministries and agencies and external organizations.

16. Collaborative Divorce

Website: http://www.collaborativepractice.com

Website: http://www.collaborativedivorcebc.org (Vancouver)

Website: http://www.nocourt.net (Lower Mainland)

Website: http://www.bccollaborativerostersociety.com

- These sites provide information about Collaborative Divorce, an option for parties wishing to resolve disputes respectfully and without going to Court. Parties work out a negotiated settlement with the help of collaboratively trained professionals including (as needed) lawyers, divorce coaches, child specialists and financial specialists.

17. Clicklaw

Website: http://www.clicklaw.bc.ca

- Described as a "portal-project", Clicklaw is a website aimed at enhancing access to justice in British Columbia by helping users to sort through the myriad of legal information and assistance that is available and find the most appropriate resources for a given situation. *Visitors are directed to user-friendly resources designed for the public by contributor organizations (including the Community Legal Assistance Society and LSLAP).

18. The Law Society of British Columbia - Family Law Mediators

Website: https:/ / www. lawsociety. bc. ca/ support-and-resources-for-lawyers/ lawyers-insurance-fund/ coverage/ mediators-and-arbitrators-(includes-family-dispute/

- The Law Society offers accreditation for those who wish to become family law mediators. Those who become accredited are able to help people reach a consensual settlement regarding issues relating to their marriage, cohabitation, separation or divorce. The website provides a list of lawyers who have been accredited, and what area of BC they practice in.

19. BC Hear the Child Society

Website: http://www.hearthechild.ca

- This society provides a provincial roster of qualified child interviewers who work in the legal and mental health fields.

C. Resources by Telephone

1. Family Justice Centres

Family Justice Centres assist families going through a separation with issues of child custody and access, and spousal support as well as child support issues. Family justice counsellors provide dispute resolution services, and make referrals to legal aid, other legal services, and community resources for families facing separation.

Location	Telephone	Fax
Vancouver – Commercial Drive	(604) 660-6828	(604) 775-0679
Vancouver – Robson Square	(604) 660-2084	(604) 660-4177
Victoria	(250) 356-7012	(250) 356-6093
Nanaimo	(250) 741-5447	n/a
Abbotsford	(604) 851-7055	(604) 851-7056
Chilliwack	(1-888) 288-8249	(604) 795-8258
Langley	(604) 501-3100	(604) 532-3626
Surrey	(604) 501-3100	(604) 501-3112

Maple Ridge	(604) 927-2217	(604) 466-7343
Port Coquitlam	(604) 927-2217	(604) 927-2220
New Westminster	(604) 660-8636	(604) 660-2414
North Vancouver	(604) 981-0084	(604) 981-0035
Richmond	(604) 660-3511	(604) 660-3640

2. Provincial Court Vancouver Registry

Family Court Registry: (604) 660-8989

3. Provincial Court Vancouver Family Duty Counsel Service

Telephone: (604) 660-1508

- Duty counsel is also available in other cities, contact Legal Services Society for a current list
- Legal Services Society telephone: (604) 601-6000

4. Supreme Court Vancouver Registry

Administration: (604) 660-2847

Family Law Registry: (604) 660-2486

Courthouse Library: (604) 660-2841

5. Supreme Court New Westminster Registry

Civil Registry: (604) 660-8522

Criminal Registry: (604) 660-8521

Divorce: (604) 775-0671

Courthouse Library: (604) 660-8577

Family Law Duty Counsel: (604) 775-0628

D. Relevant Legislation

1. Divorce Act, RSC 1985, c 3 [DA]

This is the federal legislation that provides for both divorce law and the determination of corollary relief (support, custody, and access). Support orders under the Act have effect throughout Canada. All actions under the *Divorce Act* are generally heard in BC Supreme Court except those applications pursuant to Rule 18-3 of the *Supreme Court Family Rules*, which allows such actions to be heard in certain Provincial Courts. However, if the Attorney General has designated a Provincial Court registry as a Supreme Court Registry under s 4 of the *Provincial Court Act*, then that Provincial Court may decide interlocutory applications made under the *Divorce Act*.

> **Note:** The *DA* does not provide for division of matrimonial assets. A person has to seek division of matrimonial assets under the *Family Law Act [FLA]*.

2. Child, Family and Community Service Act, RSBC 1996, c 46 [CFCSA]

This Act provides for official apprehension of children (under 19 in BC) who are believed to be in need of protection or care. A hearing must be held before a judge within seven days. The hearing does not lead to any temporary or permanent custody orders, except by consent. Separate hearings are held for temporarily custodial orders and continuing custodial orders.

The enforcement of **child support and spousal support** orders is administered by the Family Maintenance Enforcement Program.

3. Family Relations Act, RSBC 1996, c 128 [FRA]

The *FRA* has been replaced by the *FLA* and is no longer in force except for actions that commenced before the *FLA* was in effect, and only in respect of property and pension division.

4. Family Law Act, SBC 2011, c 25 [FLA]

The *FLA* came into force on March 18, 2013, and replaced the *Family Relations Act*. The *FLA* places the safety and best interests of the child first when families are going through separation and divorce. It also clarifies parental responsibilities and the division of assets if relationships breakdown, addresses family violence and encourages families to resolve their disputes out of Court.

Some of the main changes in the *FLA* include:

- Shifting focus to the safety and best interests of the child
- Moving from custody to guardianship and parenting arrangements
- Clarifying the law on family violence and its impact on family Court decisions
- Defining the responsibilities of guardians
- Expanding the toolbox to enforce family Court orders

Since March 18, 2013, the *FRA* no longer applies except only in dealing with the division of assets for proceedings which were filed before the *FLA* came into force. This includes cases that were commenced while the *FRA* was the relevant statute. Essentially, this means that child-related issues are determined by the *FLA*, while property division issues that commenced under the *FRA* will continue to be governed by the *FRA* unless the parties agree to transition their legal matter to be governed under the *FLA*. Sections 250-255 of the *FLA* allow parties to transition legal matters concerning care of and time with children, property division, pension benefits, and restraining orders from the *FRA* to the *FLA*. Property division for cases that were started after March 18, 2013 will be governed by the *FLA*, including actions commenced by common law spouses before the *FLA* came into force, if the pleadings are amended to include division of property and debt under the *FLA*.

5. Family Homes on Reserves and Matrimonial Interests or Rights Act, (SC 2013, c 20) [FHRMIRA]

Website: http://canlii.ca/t/52mbr

FHRMIRA came into force in 2013 and governs family law cases involving property located on Indian Reserves. FHRMIRA also incorporates the local laws of the First Nation where the Reserve is located.

Matters regarding the division of matrimonial interests or rights in property on Reserve may become complicated as some orders require consultation with the Band Council and with other Band Members, other than the spouses, who have an interest or right in the home. It is important to consult FHRMIRA as well as the Band's legislation and investigate all of the potential interests in the matrimonial home when dealing with these matters.

6. British Columbia Supreme Court Family Rules, BC Reg. 169/2009

Website: http://canlii.ca/t/8mcr

These are the procedural rules that govern family law cases brought in the Supreme Court. Refer to these rules for the specific procedural requirements when making family law applications.

7. British Columbia Provincial (Family) Court Rules, BC Reg. 417/98

Websites: http://canlii.ca/t/85pb

These are the procedural rules that govern family law cases brought in the Provincial Court.

E. Referrals

1. The Non-Legal Problem

Many clients will have problems that are not strictly legal. If the client has a personal problem, refer the client to an appropriate social service agency in the lower mainland. The Red Book [6] is a very useful resource for this purpose. Often, even when a client does have a legal problem, the legal remedy will not resolve all issues for that person. Be aware of this and try to get clients the help they need.

2. The Legal Problem

Care should be taken in making referrals. Someone has referred this person to you and the client does not want to be shoved further down the line. *Do not refer* unless you are sure that the agency handles such problems.

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References

[1] http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act
[2] http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/table-of-concordance-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained
[3] http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/the-family-law-act-explained
[4] http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/family-law-act/family-law-act-questions-and-answers
[5] http://www.lss.bc.ca/publications/pub.php?pub=347
[6] http://www.bc211.ca/

III. Marriage

III. Marriage

Marriage creates a legal relationship between two people, giving each certain legal rights and obligations. A marriage must comply with certain legal requirements. Therefore, not all marriages are valid.

1. Legal Requirements and Barriers

To be valid, a marriage must meet several legal requirements. Failure to meet these requirements may render the marriage void *ab initio* (void from the beginning). In other circumstances, such as sham marriages or marriage in which one party did not consent or did so under duress, the marriage may be voidable, meaning the marriage is valid until an order is made by the Court to annul the marriage.

a) Sex

In the past, spouses had to be of opposite genders. This has been found to be unconstitutional (see *Reference re Same Sex Marriage*, [2004] SCR 698, [2004], SCJNo 75 [1]), and same-sex couples can now marry in every province and territory with the passing of Bill C-38 in the House of Commons, and subsequent passing in the Senate. Bill C-38 received Royal Assent on July 20, 2005 becoming the *Civil Marriage Act*, SC 2005, c 33 [2].

b) Relatedness

The federal *Marriage (Prohibited Degrees) Act*, 1990, c 46 [3], bars marriage between lineal relatives, including half-siblings and adopted siblings.

c) Marital Status

Both spouses must be unmarried at the time of the marriage.

d) Age

Both spouses must be over the age of majority (19 in BC; see the *Age of Majority Act*, RSBC 1996, c7 [4]). In BC, a minor between the ages of 16 and 19 can marry only with the consent of both of his or her parents (see the *Marriage Act*, RSBC 1996, c 282, s 28 [5]). A minor under the age of 16 can marry only if permission is granted in a Supreme Court order (s 29). However, a marriage is not automatically invalid if the requirements of sections 28 and 29 have not been met at the time of marriage (s 30); the Court may preserve the marriage if it is in the interests of justice to do so (e.g., if parties have grown up and have lived as husband and wife for some time).

e) Mental Capacity

At the time of the ceremony, both parties must be capable of understanding the nature of the ceremony and the rights and responsibilities involved in marriage.

f) Residency

The *Civil Marriage Act*, SC 2005, c 33 was passed in 2014. With this new act, marriages performed in Canada between non-Canadian residents will be valid in Canada, regardless of the law in either spouse's country of residence. Additionally, Canadian courts will be able to grant divorces to non-resident spouses who were married in Canada, and who are unable to get divorced in their own state because that state does not recognize the validity of the marriage.

g) Foreign Marriages

The common law rule is that the formalities of marriage – i.e. who can marry, who can perform weddings – are those of the law where the marriage took place, while the legal capacity of each party is governed by the law of the place where they live.

h) Sham Marriages

When parties marry solely for some purpose such as tax benefits or immigration status, the marriage may be voidable for lack of intent. However, the marriage may not be void for lack of intent alone, and courts may find the marriage valid and binding when the parties consented to the union (for example, see *Grewal v Kaur*, 2009 Carswell Ont 7511, 84 Imm LR (3d) 227 (Ont SCJ) [6]. Sham marriages are uncommon.

i) Customary Marriage

The law recognizes traditional customary marriages of Aboriginal people in some circumstances where the marriage meets the criteria of English common law.

B. Common Law Relationships

1. General

save

Common law spouses have certain rights/obligations conferred on them by various statutes and the common law. Each statute may give a slightly different definition of a common law "spouse". A general rule is that for most federal legislation it takes one year of living together in a "marriage-like relationship" to qualify as common law and for most provincial legislation it takes two years to qualify (See *Takacs v. Gallo* (1998), 157 D.L.R. (4th) 623 [7] for a summary of the indicators to be considered when determining whether parties have lived in a "marriage-like relationship"; see *Matteucci v Greenberg*, 2014 BCSC 1434 [8]; *Trudeau v Panter*, 2013 BCSC 706 [9] that merely living together does not mean a relationship is marriage-like).

Under the *FLA*, a person will be considered a 'spouse' if they have lived in a marriage-like relationship and have a child together (for spousal support only), or if they have lived in a marriage-like relationship for a continuous period of 2 years (see *CAM v MDQ*, 2014 BCPC 110 [10] regarding the child exception to living together for two years). This period begins when the couple began to live together in a marriage-like relationship. Someone separating within two years of *FLA* coming into force is a spouse (*Meservy v Field*, 2013 BCSC 2378 [11]).

See Appendix A: Glossary at the end of this chapter for a brief list of definitions. For more extensive definitions, consult the current legislation.

Remember that a common law relationship is not a legal marriage. Nevertheless, where legal rights and obligations are conferred on common law spouses, the relationship is still valid even if one or both of the parties is currently married to someone else.

2. Estate Considerations

a) Wills, Estates and Succession Act (which came into force March 31, 2014) [WESA]

WESA is available online at CanLII: http://canlii.ca/t/8mhj

Two persons of either gender are considered spouses under this act if they are either married to each other, or if they have lived in a marriage-like relationship for at least 2 years (s 2(1)(b)). They cease to be considered spouses if one or both partners terminates the relationship (s 2(2)(b)).

If two or more persons are entitled to a spousal share of an intestate estate (estate for which the deceased has not left a will), they may agree on how to portion the share. If they cannot agree, a court will determine how to portion the spousal share between them.

If two or more persons are eligible to apply to be given priority as a spouse in the division of an intestate estate, they may agree on who is to apply. If they cannot agree, the Court can make a decision.

b) Canada Pension Plan Act, RSC 1985, c C-8

Available online at: http://canlii.ca/t/7vfd

Common law spouses who have cohabited with a contributor for one year before the contributor's death may be able to claim death benefits. Forms can be obtained from a CPP office.

c) Workers' Compensation Act, RSBC 1996, c 492

Available online at: http://canlii.ca/t/84g2

A common law relationship is recognized after cohabitation for two years. If there is a child, one year is sufficient.

d) Employment and Assistance Act, SBC 2002, c 40

Available online at: http://canlii.ca/t/84l7

A common law relationship can arise from cohabitation as short as 3 months that is "consistent with a marriage-like relationship" (s 1.1). Common law relationships are dealt with as marriages, and as single-family units where there are children.

C. Marriage, Pre-Nuptial, and Cohabitation Agreements

1. General

Marriage or pre-nuptial agreements are agreements drafted by a married couple or in contemplation of marriage that address how to resolve a family law dispute, if one should arise. Cohabitation agreements similarly govern family law disputes between unmarried couples who expect to live in a marriage-like relationship for at least 2 years. Agreements can address matters that may be the subject of a dispute in the future, the means of resolving a dispute, and the implementation of the agreement. Agreements cannot override dispute resolution procedures mandated by statute.

Those interested in drawing up marriage, cohabitation, or pre-nuptial contracts on their own can be directed to the self-help kit. However, contracts drawn up using self-help kits are often overturned in Court. Independent legal advice is

extremely important in order to have enforceable marriage or cohabitation agreements, and persons wishing to rely on a pre-nuptial agreement are strongly encouraged to seek the advice of a lawyer.

2. Legislation: Family Law Act [FLA]

The new *FLA* attempts to increase the enforceability of marriage, cohabitation, and pre-nuptial contracts, and to provide clearer guidelines for the circumstances under which they can be binding. Agreements will be binding on the parties whether or not a family dispute resolution professional has been consulted, and whether or not the agreement has been filed with a court. Agreements will be binding on children who are parents or spouses (Part 2, s 6).

Section 93(3) of the *FLA* also states that courts can set aside an agreement if:

- a) spouses do not make full and honest disclosure of all relevant financial information
- b) one spouse takes improper advantage of another's vulnerability
- c) one spouse does not understand the nature or consequence of the agreement
- d) other circumstances that would cause, under common law, all or part of the contract to be voidable

The above concerns are often addressed by having the parties obtain independent legal advice. Section 93(5) of the *FLA* states that the courts can also set aside an agreement if they find the agreement substantially unfair after considering these factors:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

The *FLA* is drafted to make it harder for courts to set aside agreements on the basis of unfairness. The Court will only set aside an agreement made between spouses respecting the division of property and debt, if the division agreed to would be "substantially different" from the division that the Court would order and "significantly unfair" to one of the spouses (See *Thomson v Young*, [2014] CarswellBC 1287 (BCSC) [12]).

The test for setting aside an agreement is to first look at the formation of the agreement (s 93(3)) and then the effects of the agreement (s 93(5)). Please note that section 93(4) states that a Court may refuse to set an agreement aside even if it was unfairly reached (*Asselin v Roy*, 2013 BCSC 1681 [13]).

Section 1 of the *FLA* provides a definition of "Written Agreement" as an agreement written and signed by all parties. Written agreements should also be witnessed by someone over the age of 19 to address potential evidentiary issues at a later date.

3. Substance of Contract

The main part of the agreement usually deals with the division of property and debt in the event of a relationship breakdown. The agreement may provide for management and/or ownership of family assets during a marriage or cohabitation and/or when the relationship ends. The parties may also specify that neither party is responsible for debts of the other incurred either before or during the relationship.

While it was once against public policy to contract in anticipation of future separation, section 92 of the *FLA* explicitly anticipate such considerations in a marriage contract. Under the *FLA*, spouses can agree on how to divide family property, and what debts or items are eligible for division.

Section 93 of the *FLA* states that agreements respecting property division can be set aside for lack of procedural fairness, such as failure to disclose, where one party has taken advantage of the other, or where one spouse did not appreciate the consequences of the agreement.

According to section 93(4) and (5) of the *FLA*, the Court will only set aside an agreement on property under these sections “if the division agreed to would be ‘substantially different’ from the division that the Court would order and ‘significantly unfair’ to one of the spouses”.

a) Parenting Arrangements

Parenting arrangements are generally never in cohabitation or marriage agreements.

Parenting arrangements are covered by section 44 of the *FLA*. Please note that an agreement for contact is not an agreement for “parenting arrangements” and will not be enforced under this section.

Agreements made about parenting are not binding unless made after separation or when parties are about to separate with the purpose of being effective upon separation (s 44(2)).

FLA section 44(3) holds that the written agreement may be given the force of a Court order if it is filed in a Supreme Court or Provincial Court registry. A Court must alter or set aside the terms of a parenting agreement if they are found not to be in the best interests of the child (s 44(4)), a concept discussed at length in this chapter.

Section 58 of the *FLA* outlines guidelines for agreements regarding contact with children. The *FLA* only emphasizes the importance of the best interests test, upgrading it from the “paramount” consideration to the “only” consideration. For more information on Custody and Parenting, see Section X: Custody, Guardianship, and Access.

b) Child Support

Per section 148 of the *FLA*, an agreement respecting child support is binding only if the agreement is made after separation, or when the parties are about to separate, for the purpose of being effective on separation. It would thus not be binding if it is in a marriage/cohabitation agreement.

Courts can override or vary any such terms that are inconsistent with the *Federal Child Support Guidelines* [14] (*Young v Young*, 2013 BCSC 1574 [15]) or with section 150 of the *FLA* [*Determining Child Support*]. Section 150 states that the amount of child support is to be determined by the *Federal Child Support Guidelines* (*Thibault v White*, 2014 BCSC 497 [16]). These guidelines have not been changed by the new *FLA* and old court decisions interpreting the guidelines continue to apply (*SML v RXR*, 2013 BCPC 123 [17]).

The primary objective is to ensure, so far as practicable, that the children will enjoy a reasonably consistent, and reasonably adequate, standard of living, unaffected, so far as is practicable, by changes in the relationships among their parents and step-parents (See *B (C) v B (M)*, [2014] CarswellBC 1212 (BCPC)). It is also important to note that any term purporting to exclude support obligations is likely to be found invalid on public policy grounds. The Court will seldom uphold an amount lower than the guidelines, even if the parties agree on it, unless there is an appropriate reason to approve it, such as some other arrangement that directly benefits the child. It is important to note that the Court may refuse an application for a Divorce Order if the Court is not satisfied that appropriate arrangements have been made for the support of the parties’ children. See Section VIII: Spousal and Child Support.

c) Spousal Support

The law relating to contracting out of spousal support is complex. Clients should seek professional legal advice before entering into an agreement for spousal support. Under the *FLA*, spousal support agreements that are filed with a Court registry will be treated as if an order of the Court (*FLA*, s 163), but can be set aside for lack of procedural fairness, such as failure to disclose, where one party has taken advantage of the other, or where one spouse did not appreciate the consequences of the agreement; they can also be set aside if the Court finds that the agreement is significantly unfair (see s 164 of the *FLA*).See Section VIII: Spousal and Child Support.

d) Void Conditions

Marriage contracts sometimes incorporate terms that are not enforceable at law. For example, a clause stating, "the husband shall do all the cooking" is a contract for personal services and is therefore not enforceable. A breach of such an agreement cannot be grounds for divorce.

> **NOTE:** Consider whether a marriage agreement should contain a clause stating: "Anything held to be void/voidable will be severed from the agreement leaving the rest of the agreement intact". This prevents the whole of a marriage agreement being voided by the inclusion of void conditions or clauses. See *Clarke v Clarke* (1991), 31 R.F.L. (3d) 383 (BCCA) [18].
>
> **NOTE:** Consider whether any agreement should contain a clause stating that the greater detail in the Agreement does not merge with any later Order. This ensures that if a Divorce Order is granted at a later date, the terms of the Agreement continue to apply unless expressly stated otherwise. This is more applicable to Separation Agreements.

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IV. Divorce

A. Legislation

The federal legislation governing divorces in Canada is the *DA*. The *DA* applies to legally married couples, including same sex couples as long as residency requirements for one spouse are met. It does not apply to common law couples or other unmarried couples. The provincial family law legislation in BC is the *FLA*, which applies to people in all relationships. The reason there are two statutes governing this area is the division of powers under sections 91 and 92 of the *Constitution Act, 1867* [1], which gives the federal government jurisdiction over “Marriage and Divorce” (s 91), while giving provincial governments jurisdiction over “The Solemnization of Marriage in the Province” and “Property and Civil Rights” (s 92).

B. Jurisdiction

1. Supreme Court

The Supreme Court of British Columbia has jurisdiction over both the *DA* and the *FLA*. Because all divorce claims must be heard under the *DA*, the Supreme Court has exclusive jurisdiction over divorce claims. The Supreme Court has concurrent jurisdiction with Provincial Court over guardianship, parenting arrangements and support for children (including common law couples) while division of property is under exclusive jurisdiction of the Supreme Court. If a Supreme Court order for custody, access, or support is made under the *DA*, that order supersedes any existing *FLA* order. However, given the new *FLA* and change of terms under the provincial legislation (custody, guardianship and access to guardianship, parenting arrangements and contract), there is likely to be litigation regarding which act applies and when.

An uncontested divorce does not require a personal appearance in Supreme Court. Evidence can be submitted by affidavit with the application for the Divorce Order, called a “Desk Order Divorce”. In fact, parties are required to submit applications for Divorce by way of a “Desk Order” unless there is a reason to bring it on by way of application in Chambers.

2. Provincial Court

The Provincial Court only has jurisdiction to hear matters under the *FLA* and cannot hear any claim under the *DA*, including divorce applications. The Provincial Court can make orders or vary original Provincial Court orders relating to guardianship, parenting arrangements, contact, child support, and spousal support. The Court does not have jurisdiction to deal with claims for the division of **property** under the *FLA*.

C. Requirements for a Divorce

1. Jurisdiction

To obtain a divorce in a particular province, one of the parties to the claim must have been “ordinarily resident” in that province for at least one year immediately preceding the presentation of the Notice of Family Claim (*DA*, s 3(1)). A person can be “ordinarily resident” in a province and still travel or have casual or temporary residence outside the province.

An Act to Amend the Civil Marriage Act [2] received Royal Assent and came into force on June 26, 2013. It allows non-resident couples married in Canada to divorce in Canada if they cannot get a divorce where they live.

There must not be another divorce proceeding involving the same parties in another jurisdiction. If two actions are pending and the proceeding filed first is not discontinued within 30 days after it is presented, the first Court will have exclusive jurisdiction (*DA* s 3(2)) to hear and determine the divorce proceeding. Parties must submit a clearance form, filled out online and printed, at the time of filing the Notice of Family Claim and Marriage Certificate.

2. A Valid Marriage: Proof of Marriage

Section 52(1) of the *Evidence Act*, RSBC 1996, c 124 [3] states that if it is alleged in a civil proceeding that a ceremony of marriage took place in BC or another jurisdiction, either of the following can serve as evidence that the ceremony took place:

- a) the evidence of a person present at the ceremony (less common); or
- b) a document purporting to be the original or a certified copy of the certificate of marriage (the church certificate is not acceptable). Note: A certified copy is often not accepted by the Registry and all efforts should be made to obtain the original marriage certificate.

The simplest way is to use a certificate of marriage or registration of marriage. Only if the certificate or registration of marriage is not available should the evidence of a person present at the ceremony be used. An official translation of the marriage certificate and a translator's affidavit must be provided if the marriage certificate is in any language other than English. French language marriage certificates must also be translated. The Court may require further proof that the marriage is valid if the documents evidencing the marriage appear questionable. Immigration and landing documents can be used as additional proof of marriage in these situations. In British Columbia, a party can obtain an original marriage certificate from Vital Statistics by filling out a request form. See the Vital Statistics website [4].

If a marriage certificate absolutely cannot be provided (e.g. the records cannot be obtained from the parties' country of origin or were destroyed), and if there are no witnesses to the marriage available, a party to the divorce proceeding can attempt to prove her or his marriage by attesting to "cohabitation and reputation" in an affidavit. The Court will hear evidence of the couple's "cohabitation and reputation" from the parties and witnesses. Where there are witnesses to the marriage available, a witness will be required to sign and swear an affidavit stating that: he or she was at the ceremony, it was conducted in accordance with the laws and religion of the country where the parties married, and to the best of his or her knowledge, the two parties were in fact married according to their law and traditions.

3. Grounds for Divorce

In accordance with s 8(1) of the *DA*, either or both spouses may apply for a divorce on the ground that there has been a breakdown of their marriage as evidenced by separation for a year, adultery, or physical or mental cruelty (see below). For the divorce action to succeed, the claimant must have valid grounds under s 8(2)(a) or 8(2)(b), and the respondent must be unable to raise a valid defence. Most divorces are based on separation rather than adultery or cruelty, in part because the accusing party must prove adultery and/or cruelty on the balance of probabilities. Where a claim for divorce based on adultery or cruelty has been filed for more than one year before the application for divorce is heard, the Court will usually grant the divorce on the ground of one year separation.

Note the decision of *McPhail v McPhail*, 2001 BCCA 250 [5], in which the Court found that, where both the grounds of cruelty and the grounds of a one year separation for divorce exist, it would be appropriate for a trial judge to exercise his or her discretion to grant the divorce on the grounds of a one year separation (no-fault) instead of on cruelty (fault). This was extended in *Aquilini v. Aquilini*, 2013 BCSC 217 [6] to state that a one year separation should be used as the grounds for divorce instead of adultery where both exist.

D. Divorces Based on Separation: s 8(2)(a)

1. Separation - One Year

Under the *DA*, neither party needs to prove “fault” to get a divorce. Most divorces will proceed under s 8(2)(a), separation for a period of at least one year. **Although the pleadings starting the action can be filed immediately upon separation, the Divorce Order cannot be sought until one day after the parties have been separated for one year.**

The ground of separation requires recognition by **one** of the parties that the marriage is at an end. It is not necessary that the parties form a joint intention. It is also not necessary that the two parties live in separate homes, although they must live “separate and apart” and demonstrate their intention to separate. For example the parties may, move into separate bedrooms in the same home.

2. 90-Day Reconciliation Period

Any number of reconciliation attempts may be made during the separation year without affecting the application for divorce. However, if:

- the length of any reconciliation attempt exceeds 90 days; or
- the aggregate total length of reconciliations exceeds 90 days, then the time for calculating the one year period of separation must start over again with the first day of calculation being the first day of separation after the 90+ day reconciliation ended (s 8(3)(b)(ii)).

3. Living Under the Same Roof

Some couples may choose to continue to live under the same roof after they have decided to separate for financial reasons or for the sake of the children. Indications of separation include: they have separate bank accounts, separate bedrooms, cook their own meals, do their own laundry, etc. (i.e., if there is an obvious severance of the conjugal relationship), they can still be considered separated.

This is the case for the *DA*, though it should be noted that the Canada Revenue Agency (CRA) takes a different position when it comes to taxes and child benefit payments. The CRA does not recognize living separate and apart under the same roof for the purpose of tax benefits unless there is a separate suite in the home.

E. Divorces Based on Cruelty or Adultery: Divorce Act, s 8(2)(b)

Divorces based on separation require at least one year to pass before the divorce order can be granted. Divorce claims based on the ground of cruelty or adultery can result in an immediate divorce.

1. Adultery: s 8(2)(b)(i)

Adultery is voluntary sexual intercourse between a married person and a person other than his or her spouse. The meaning of “adultery” includes sexual acts outside the marriage with a person of the same sex (*SEP v DDP*, [2005] BCJ No 1971 (BCSC)). The standard of proof for adultery is the same as the civil standard: the Court must be satisfied on a balance of probabilities (see *Adolph v Adolph* (1964), 51 W.W.R. 42 (BCC.A)). Proof can come in the form of an affidavit from one or both of the adulterers.

The Court will require proof that the adulterous conduct was not forgiven by the innocent spouse (condonation) and that the conduct was not conspired towards for the purposes of obtaining the divorce (collusion and connivance, see below).

2. Physical or Mental Cruelty: s 8(2)(b)(ii)

The test for cruelty is subjective. The question asked in a cruelty case is whether the conduct is of such a kind as to render intolerable the continued cohabitation of the spouses. There is no objective standard in the sense that certain conduct will constitute cruelty in every case while other conduct will not. The respondent's conduct may constitute cruelty even if there is no intent to be cruel. What has to be determined is the effect of the conduct on a particular person, rather than the nature of the acts committed (*Burr v Burr*, [1983] BCJ No 743).

If the spouses are still cohabiting, the Court will infer that the conduct was not intolerable unless the claimant had no means or opportunity for leaving (*Cridge v Cridge* (1974), 12 RFL 57, (BCSC)). Lack of income, children at home, and a difficulty with the English language may qualify as reasons for continuing cohabitation.

Again, to make a case based on cruelty, there must be proof on the balance of probabilities. Things that could be entered as evidence in this area include medical evidence such as charts and doctors' statements.

F. Why a Divorce Application May Be Rejected

1. Collusion

Collusion is, simply put, both parties conspiring to obtain a divorce. A more expansive definition can be found in s 11(4) of the *DA*.

Collusion is an **absolute bar** to a divorce on the grounds of cruelty or adultery.

2. Condonation

Condonation consists of forgiving a marital offence that would otherwise be a ground for divorce. There are three requirements: knowledge of the matrimonial offence by the claimant; forgiveness of the offence; and actual reinstatement of the relationship. A single attempt or a series of attempts at reconciliation totalling less than 90 days does **not** qualify as condonation.

Condonation is a **discretionary bar** to a divorce. If the matter is raised, the onus is on the claimant to disprove it.

3. Connivance

Connivance occurs when one spouse encourages the other to commit adultery or cruelty. There must be a "corrupt intention... to promote or encourage either initiation or the continuance... or it may consist of a passive acquiescence....". Keeping watch on the other spouse does not constitute passive acquiescence: *Maddock v Maddock*, [1958] OR 810 at 818, 16 DLR (2d) 325 (CA) [7].

Connivance is a **discretionary bar** to a divorce, similar in effect to condonation.

4. Discretion of the Court

In cases of condonation or connivance, the claim for divorce will be dismissed unless, in the Court's opinion, the public interest would be better served by granting the divorce.

The Court may also reject an application for divorce where: a divorce is pending in another jurisdiction; a marriage certificate or registration of marriage has not been provided; there are defects in the application materials; or there are defects in the form of draft order provided with the application. The Court registry is very particular about the content and form of both the applications materials and the draft order, which may result in the rejection of the application before it gets to a judge.

5. Divorce Will Not Be Granted Until Child Support Is Settled

In a divorce proceeding, it is the duty of the Court to satisfy itself that "reasonable arrangements" have been made for the support of any children of the marriage, typically having regard to the Federal Child Support Guidelines. If such arrangements have not been made, s 11(1)(b) of the *DA* requires the Court to stay the granting of the divorce. When stepchildren are involved, the Court will determine child support requirements for a stepfather or stepmother on a case-by-case basis. The definition of "child of the marriage" in s 2 of the *DA* is broad enough to include children for whom one spouse "stands in the place of a parent".

G. Separation Agreements

1. General – Family Law Act

The *FLA* defines a written agreement as an agreement that is in writing and signed by all parties (s 1 *FLA*). A separation agreement is a legal contract that generally provides for a division of property and debt, the support of a dependent spouse, and for the support, guardianship and parenting arrangements of a child by a parent.

A separation agreement can deal with some or all of these issues. It can eliminate much of the emotional disturbance involved in courtroom proceedings, and provide the parties with an arrangement to which they have both agreed, as opposed to a Court order, with which neither party may be happy. Part 2, Section 6 outlines that parties are able to make agreements to resolve disputes and respecting matters at issue in a family law dispute and subject to the *FLA*, the agreement is binding on the parties.

The overarching test for any changes to agreements made regarding Part 4 of the *FLA* (guardianship, parenting arrangement contact) is the best interest of the child test in section 37 of the *FLA*. Children's interests are now the only consideration.

A separation agreement between spouses can also deal with division of family property and family debt, as well as any assets excluded from division.

Section 85 of the FLA excludes the following from the division of family property: property acquired by a spouse before the relationship between the spouses began;

- inheritances to a spouse;
- gifts to a spouse from a third party;
- a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for

1. loss to both spouses, or
2. lost income of a spouse;

- money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for

1. loss to both spouses, or
2. lost income of a spouse;

- property referred to in any of the paragraphs above that is held in trust for the benefit of a spouse;
- a spouse's beneficial interest in property held in a discretionary trust

1. to which the spouse did not contribute, and
2. that is settled by a person other than the spouse;

- property derived from property or the disposition of property referred to in any of the above paragraphs.

It is essential that each spouse be aware of the potential influence of any agreement on future expectations, and the legal implications of that agreement on questions of ownership and title in family assets. Each spouse should have independent legal advice, even in cases where the parties seem to be in agreement on the terms of a separation agreement. If a separation agreement has been signed and one party did not have independent legal advice this may go towards evidence of unfair contracting and it may be possible to overturn the contract.

It is possible that a separation agreement containing provisions for support may be regarded by the Court as evidence of liability on the part of the supporting spouse. While the agreement does not usurp the Court's jurisdiction in support, guardianship or parenting arrangements, the Court will consider the terms of the agreement when making the order. Whether the Court will uphold the terms of the agreement changes depending on the subject matter of the agreement. See sections of the *FLA* that apply to each subject matter. Note also that any orders respecting agreements are subject to s 214 of the *FLA*.

In addition to property settlements, guardianship or parenting arrangements, and support, the separation agreement may embrace any other matters the parties wish to include in it, and often includes estate provisions, releases, penalties for breach of the contract, etc. A separation agreement can be more flexible than a Court order. For example, a Court order cannot contain contingent terms, but a separation agreement can.

> **NOTE:** Because of the complicated nature of separation agreements, clients who wish to make a separation agreement should be given family law referrals.

H. Other Points to Note

1. Jurisdiction to Vary Proceedings

Section 5(1) of the *DA* allows a Court in a province other than the Court of original jurisdiction (that is, the Court which originally made an order) to vary an order made under the *DA* if:

- one of the former spouses is habitually resident in the province; or
- both former spouses accept the jurisdiction of the Court.

2. Adjournment for Reconciliation under the DA

Where at any stage in a divorce proceeding it appears to the Court from the nature of the case, the evidence, or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, s 10(2) of the *DA* allows the Court to adjourn the proceedings to give the spouse an opportunity to reconcile. The Court can also, with the spouses' consent, nominate a marriage counselor, or in special circumstances, some other suitable person to assist a reconciliation.

3. Alteration of Effective Date of Divorce

Under s 12 of the *DA*, a divorce takes effect on the 31st day after the day on which the judgment granting the divorce is rendered. The 31 days allow for the appeal period to expire. The Court may order that the divorce take effect before this if it is of the opinion there are special circumstances and the spouses agree that no appeal from the judgment will be taken. The impending birth of a child and remarriage are generally not considered compelling reasons to shorten the appeal period. However, one may file an appeal waiver to remarry sooner.

4. Support Order After Divorce Has Been Granted

Under s 15 of the *DA*, for the purposes of child support, “spouse” means either of two persons a male or female who are married to each other (s 2(1)) and also includes “former spouse”. This means that a former spouse may be able to get a support order after the divorce has been granted.

5. Mediation

A form of mediation for separating couples is provided by the Family Justice Counsellors of the Ministry of Attorney General. It is intended to steer people out of the Court system. Similar to the small claims process, if the two parties come to an agreement through mediation they may choose to sign a binding contract after the process. Should either party choose not to sign, the agreement will not be binding. There are offices throughout BC, which can be located using the blue pages of the telephone book under BC Corrections Branch, or Family Court: Probation and Family Court Services. The service is confidential and free. Family Justice Counsellors cannot deal with property and debt division.

There is also the Family Mediation Practicum Program which aims to provide affordable mediation services to participants while also offering practical training to new mediators (along with an experienced mentor mediator). See Family Mediation Practicum Project.

Parties may wish to retain a private family law mediator to assist them in mediating a resolution to their family law matter. They may contact the British Columbia Mediator Roster Society for names of family law mediators. See British Columbia Mediator Roster Society. Not all family law mediators are listed on the roster, and there are many family lawyers who are specifically trained and accredited in family law mediation.

The new *FLA* favours out of Court resolution of issues, and even gives courts the authority to refer parties to counselling and mediation (s 4 *FLA*). It also formally recognizes the role of and duties of family dispute resolution professionals (Section 1-8), family justice counsellors (section 1-10), and parenting coordinators (Division 3).

6. Collaborative Divorce

Another option for parties dealing with family law matters is the Collaborative Divorce Model. This offers an option for parties to resolve disputes respectfully and without going to Court. Parties work out a negotiated settlement with the help of collaboratively trained professionals including (as needed) lawyers, divorce coaches, child specialists and financial specialists. This allows the parties to negotiate a settlement without the threat of Court. If the parties are unable to resolve matters through the Collaborative process, the Collaborative professionals will not be involved in Court proceedings. See the websites listed in Collaborative Divorce for more information.

7. Rule 7-1: Judicial Case Conferences

In cases where relief other than a simple divorce is sought in the Supreme Court, Rule 7-1 of the Supreme Court Family Rules (British Columbia) requires that a judicial case conference (JCC) be held before a party to a contested family law proceeding delivers a notice of application or affidavit in support of an interlocutory application to the other party. The purpose of a JCC is to help the parties to come to an agreement on some or all of the matters at issue, to identify the issues that are in dispute and those that are not, explore alternatives to litigation, to schedule disclosure, discoveries, the exchange of documents, and to schedule interim applications and the trial date. JCCs may be heard by either judges or masters and are set for approximately 1-1/2 hours. Parties can set more than one Judicial Case Conference.

8. Divorce Law and First Nations People

Special concerns arise in cases involving First Nation People registered under the *Indian Act*, RSC 1996, c 23,s 68 [8]. The *Indian Act* sets out guidelines for and definitions of Aboriginal people, and defines who is eligible for "status". Only "status" people are affected by the legislation under the *Indian Act*. One spouse's treaty payment may be directed to the other "where the Ministry is satisfied he deserted his spouse or family without sufficient cause, conducted himself in such a manner as to justify the refusal of his spouse or family to live with him, or has been separated by imprisonment from his spouse and family" (*Indian Act*, s 68). As well, reserve land allocated by a certificate of possession cannot be dealt with in the same manner as a matrimonial home as the rules in the *FLA* do not apply to reserve land. However, in such cases, the Court may ask that the spouse in possession of the reserve land pay cash compensation to the other spouse (*George v George* (1997), 30 BCLR (3d) 107). Keep in mind that most provincial laws apply to Aboriginal people and reserve land, unless they are in direct conflict with the *Indian Act*. Further, courts will almost always take the cultural identity of the children into consideration when making an order for custody; see e.g. *D.H. v H.M.*, [1999] SCJ No 22 [9], and see *Van de Perre v Edwards*, [2001] SCJ No 60 [10].

Furthermore, for First Nation Peoples living on reserves, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (S.C. 2013, c. 20) applies and can affect the division of assets in the case of divorce or separation (see ss 43, 46).

9. Other Procedural Options

There are many other procedural options available to parties in Family Law disputes. Section 8 of the *FLA* requires counsel and other Family Dispute Resolution Professionals to discuss the advisability of the various types of family dispute resolution, which include those listed above as well as the following:

- (a) Mediation
- (b) Family Law Arbitration. See http://www.familylaw.lss.bc.ca/help/who_Arbitrators.php for more information
- (c) Med/Arb, which is a combination of both Mediation and Arbitration.
- (d) Judicial Settlement Conferences pursuant to Rule 7-2 of the *Supreme Court Family Rules*
- (e) Family Case Conferences pursuant to Rule 7(1) of the *Provincial Court (Family) Rules*
- (f) The use of a Parenting Coordinator to address ongoing parenting and communication issues between the parties after an order or agreement has been reached for the parenting arrangement. For more information see http://www.bcparentingcoordinators.com/

I. Availability of Divorce Services in BC

1. Legal Aid

Legal Aid [11] will provide extremely limited assistance to those who meet their income requirements. Clients must also have a risk or history of family violence, or a risk or history of child abduction, to be eligible for this service. Legal Aid will not assist with divorces.

2. Lawyers

All lawyers will expect an initial payment from their client. The amount of the initial retainer will vary depending on the lawyer's hourly rate and his or her estimation of the complexity of the case. The cost of a simple, uncontested divorce begins at approximately $1,000 and up. Advise clients to use the Lawyer Referral Service [12] (604) 687-3221 or 1-800-663-1919. The first half-hour will only cost $25, with the lawyer charging his or her standard rate thereafter.

To minimize costs when retaining a lawyer, clients should be advised to:

- negotiate the cost of legal services in advance, so they do not come as a surprise;
- personally collect all necessary documentation rather than pay the lawyer to do it;
- call the lawyer only when imparting necessary information (every phone call costs money);
- use Family Court and Supreme Court resources (such as Family Justice Counsellors) if appropriate;
- ask for regular or scheduled billing to monitor escalating legal costs;
- carefully read all correspondence sent by the lawyer; and
- treat the lawyer as a professional.

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V. Uncontested Divorce

A. Required Documents

If the spouse is trying to do the divorce on his or her own, the following information details the basic documents that he or she will need. A person handling his or her own divorce is advised to get a copy of the documents and instructions from Self-Counsel Press.

1. Marriage Certificate

Any official, **government-issued** form of marriage certificate or registration of marriage can be accepted. Importantly, it **cannot** be a church-issued document, marriage license, or slip of paper attesting to the celebration of the marriage. In some areas of the world, it may be difficult to obtain an official government document.

If the marriage certificate is in a language other than English, an official certified translation must be provided. Clients who require translation can be referred to Mosaic Translations [1], which can be reached at (604) 254-0469, or to the Society of Translators and Interpreters of BC [2], at (604) 684-2940. Marriage certificates in French must also be translated.

Clients who were married in Canada can request a copy of their marriage certificate for about $27 (in BC) from the Department of Vital Statistics [3].

2. Photograph of the Spouse

Clients must have a recognizable photograph of the spouse. The photograph is for service purposes and will not be returned immediately. The process server usually returns the photo with the affidavit of personal service. They should also provide information about how to locate the spouse (i.e. their address, their employer's address, the make and model of their vehicle).

3. Copies of Any Court Orders or Separation Agreements

These documents can be attached to the divorce affidavits as exhibits.

If the client or spouse had previously started a divorce action, he or she must provide a filed copy of the Notice of Discontinuance that authorized discontinuance of that action.

If a separation agreement is the only document signed between the parties that involves guardianship, parenting arrangements, and consent and support of the children (i.e. if there are no court orders), the agreement may be filed in either the Provincial or the Supreme Court and enforced as a court order. Section 44 of the FLA allows for written agreements respecting parenting arrangements, section 148 allows for written agreements respecting child support and section 163 allows for written agreements respecting spousal support. The separation agreement does not need to be filed in Court to obtain a divorce order. However, if there are children of the marriage, the agreement should be attached to the affidavit regarding child support as evidence of the parties' agreement.

B. Joint or Sole Application

For joint applications, in addition to the original Notice of Joint Family Claim, two additional copies will be required - the original is filed at the registry and the two copies as personal records. See Section H: Service, below, regarding sole applications.

A joint application is quicker, less expensive, and less complicated than a sole application because a Notice of Joint Family Claim need not be served (Supreme Court Family Rules, r. 2-2). However, if lawyers or a mediator is preparing the joint claim, both parties will need to seek out independent legal advice.

C. Filling Out the Notice of Family Claim

The Registry is extremely scrupulous, and documents containing inconsistencies or omissions will be rejected. This could cost the client valuable time. Clients should be advised to check and re-check every document, especially dates and the spelling of names.

Do not use abbreviations, even common abbreviations such as "n/a" or "a.k.a." or even "BC". Answer every paragraph in full.

If at any time, one party is aware of errors in the supporting documents (such as the certified copy of registration of marriage), the pleadings must be amended to show the true facts as that party knows them. This is because the party requesting the divorce must swear an affidavit as to the correctness of the documents and the statements contained therein.

D. Style of Proceedings

The style of proceedings should use the names of both parties as they appear on the certificate or registration of marriage. The wife's maiden name on the marriage certificate is not an alias and you need not use "also known as" or add it to the style of proceedings. If the certificate shows a typographic error, you may wish to include in the style of proceedings the name the party presently uses and "also known as" (or "formerly known as," as appropriate) the name on the certificate.

E. Backing Sheets

The backing sheet is the last page of the entire document, placed backwards so the documents can be easily identified when folded. Orders filed at the Registry for entry require backing sheets. Some Registries may also require backing sheets on all documents filed.

F. Notice of Family Claim

The Notice of Family Claim will include general information about the parties, the spousal relationship history, prior court proceedings and agreements, as well as what is being sought by the claimant. The appropriate schedules should be completed and attached to the Notice of Family Claim.

Follow the directions outlined on the forms carefully.

Under Part 2 of the Notice of Family Claim, when the parties began living in a marriage-like relationship is usually (though not always) when the parties first began cohabiting. Conversely, the date of separation is the date the parties stopped living in a marriage-like relationship, even though they may have continued to live together under the same roof. If the breakdown of the marriage is due to separation, the date of commencement of the separation should be noted.

Under Part 3 of the Notice of Family Claim, any separation agreement or financial agreements determining any matters related to the dissolution of the marriage, any orders from the Courts, and/or other proceedings in the Courts should be noted. Details such as the date of the agreement, the matters resolved, and whether or not the agreements are still in effect should be set out, but the more specific details of the agreements do not need to be set out.

If the claimant is only seeking a divorce and has settled all other corollary matters without the need for court orders, he or she need only fill out the Notice of Family Claim, Schedule 1 – Divorce, and, if applicable, Schedule 5 - Other Orders if he or she wants an order changing his or her name under the *Name Act* [4].

The forms must include an address for service. This address must be within 30 km from the courthouse. It can include a fax number and/or an email address. The address must be kept up to date with the Court and opposing party.

1. Schedule 1: Divorce

Place a check for each applicable box and fill in the form accordingly. Addresses must be accurate. Do not use post office boxes. A government issued certificate of marriage or certificate of registration of marriage must be filed where the party intends to seek an uncontested divorce.

2. Schedule 2: Children

Place a check for each applicable box and fill in the form accordingly. Under the *DA* and the *FLA* s 146, children who are over the age of majority but whose illness leaves them unable to leave the care of a parent or whose attendance of a post-secondary institution leaves them financially dependent on their parent may be considered a dependent child. **With the *FLA* now enacted, which Act you are seeking an order under (the *DA* or *FLA*) can have an impact on the parties' rights. Before checking one box or the other where it specifies the Acts, advise clients to seek legal advice**

from a lawyer.

3. Schedule 3: Spousal Support

Place a check for each applicable box and fill in the form accordingly. A lawyer should be consulted for advice on entitlement to spousal support. **With the *FLA* now enacted, which Act you are seeking an order under (the *DA* or *FLA*) can have an impact on the parties' rights. Before checking one box or the other where it specifies the Acts, advise clients to seek legal advice from a lawyer. The test for awarding spousal support is the same, however, there are different limitation dates for the two.**

4. Schedule 4: Property

Place a check mark for each applicable box and fill in the form accordingly. If one of the parties wishes to obtain more than equal division of family division and family debt, details and reasons should be set forth here. **Only a lawyer should deal with property issues.**

5. Schedule 5: Other Orders

Place a check mark for each applicable box and fill in the form accordingly. If the claimant is seeking a name change, he or she should indicate the full current and new names here.

G. Child Support Affidavits

Whenever there are children of the marriage and the requisition for a Desk Order Divorce is ready to be submitted, a Child Support Affidavit must be filed. Even if the matter of guardianship, etc. is to remain in the jurisdiction of the lower court, a judge is still required to satisfy him or herself thatreasonable arrangements have been made for the care of the children, hence the requirement for financial information. It is imperative that all income of both the child support claimant and the respondent be listed on the affidavit.

H. Service

Personal service is only required if the client is making a sole application.

Clients should be advised that they **must** have a third party, over the age of 18, serve their Notice of Family Claim. Clients who choose to use a professional service should provide the server with a photograph of the spouse. The server should be told to take down the spouse's driver's licence number. Taking these steps will ensure that the Court does not question the validity of the service.

> **NOTE:** If the process server serves the Notice of Family Claim based on a photograph and does not, or is not able to obtain the spouses' driver's license number, the client must swear an additional affidavit confirming the identity of his or her spouse in the photograph used.

If the respondent's address is not known, the client should write letters to friends and family members to try to locate him or her. The client might also want to consider hiring the services of a skiptracing agency. This takes extra time, but will avoid the additional costs associated with a substitute service application.

In a substitute service application, the client must make an extra application to obtain permission toserve the respondent in a way other than that normally required by the *Supreme Court Family Rules*. The client may also incur the cost of publishing notices in a local newspaper and/or the Gazette [5], which could cost anywhere between $111 and $315, depending on the order given. Other options include posting a copy of the substitution service order and the pleadings in

the Court Registry, mailing them to the respondent's last known address by registered mail, or serving an adult in the house where the respondent is believed to reside, or serving the respondent through e-mail or Facebook.

I. Costs

Clients should always double-check the following court fees because they tend to change:

- Ordering a marriage certificate or registration of marriage: $27 for couples married in BC. It can be ordered by mail or in person. Refer to http://www.vs.gov.bc.ca/marriage/certificate.html for more information.
- Court fee to file the Notice of Family Claim for divorce: $210 ($200 for filing the Notice of Family Claim and $10 for filing the registration of divorce).
- Fee for Serving the Notice of Family Claim on the respondent: varies depending upon where the respondent lives. The average fee is $100. Process Server Fees for the Lower Mainland can run from $69 plus $20 for an affidavit, or $70 to $100 all inclusive. For other parts of BC or Canada, it can cost $200 or more for all attempts.
- Notarization: between $25 and $50, if the affidavit is already completed.
- Final application fee: $80 (for requisition for the Desk Order Divorce).
- Fee to apply for a certificate of divorce: $40. (Note that there is no requirement to apply for a certificate of divorce. Once the Order for divorce has been made and is effective, the parties are divorced.)

> **NOTE:** There is no fee to file a separation agreement in Provincial Court. There is a fee of $90 to file a separation agreement in the Supreme Court.

J. Approximate Length of Time for Divorces

Simple divorces, with or without children, take approximately three to four months to complete, or one to two months in the case of joint applications. Substitute service divorces take longer, an additional one or two months depending on the terms of the order for substitute service. Please note that these time estimates do not account for delay caused if the Court rejects some portion of the material filed and it needs to be redone.

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References

[1] http://mosaicbc-lsp.org/
[2] http://www.stibc.org/
[3] http://www2.gov.bc.ca/gov/content/life-events
[4] http://canlii.ca/t/8481
[5] http://www2.gov.bc.ca/gov/content/governments/services-for-government/bc-bid-resources/goods-and-services-catalogue/bc-gazette

VI. Simple Divorce Procedure

The following are steps to help applicants through the process.

> **NOTE:** If an individual is self-representing, they are responsible for purchasing the Self-Counsel Press divorce guide and forms. The instructions and steps for filling out the forms and filing them, etc. are included in the kit.

A. Sole Application

Step 1: Collect all necessary documents: i.e. the marriage certificate, copies of court orders or agreements regarding custody, access, and support of the children.

Step 2: The client fills in the Notice of Family Claim and relevant schedules.

Step 3: The client fills in the Registration of Divorce form, only available online.

Step 4: The client should then go to the nearest Supreme Court, and bring the original and three copies of the Notice of Family Claim, the original marriage certificate or the certified copy of the marriage registration, and $210 in cash, debit, money order, or cheque, payable to the Minister of Finance.

Step 5: In the sole application process, the client must then arrange for the court-stamped Notice of Family Claim to be personally served on the respondent.

Service by a friend: The friend should know the respondent, but not be involved in the divorce in any way. When the friend serves the respondent, the friend should ask whether the respondent is Mr./Ms. X, and ask for identification. It would be helpful, although not mandatory, to give the friend a picture of the respondent. The friend will then have to swear an affidavit of personal service and say how he or she identified the spouse (*Supreme Court Family Rules*, r. 6-3).

Service by a Process Server: Process Servers are listed in the Yellow Pages. They require the home and business addresses of the respondent, the telephone numbers, and a photograph of the respondent. They will also need two copies of the Notice of Family Claim, one for the spouse, and one to staple tothe affidavit of personal service.

Substitute Service: Evidence of efforts to find the respondent will be required before an order for substitute service can be granted. Some methods of finding the respondent are:

- calling or writing to relatives (usually the most successful);
- advertising in a local newspaper;
- writing to the Superintendent of Motor Vehicles [1] to see if any vehicles have been registered in his or her name. The client should ask whether any fees will be incurred before proceeding;
- asking the local police if they have any information on his whereabouts, although they are usually reluctant to help;
- using a credit bureau or collection agency;
- asking friends of the respondent about his current address; or
- searching on Google and social media sites such as Facebook.

Step 6: Once the time for the respondent to file a Response to Family Claim has expired, the spouse applying for the divorce must swear an affidavit. The affidavit will need to be sworn before a notary public, the registry staff ($40), or a lawyer. The time limit for filing a Response to Family Claim orCounterclaim, is 30 days, or, in the case of a substitution service order, such time as the order provides for the filing of a Response to Family Claim or Counterclaim.

Step 7: If there are any children, a child support affidavit must be filled out and sworn before a notary public, the registry staff, or a lawyer.

Step 8: The claimant applies for the divorce order. This requires:

- a) a requisition in Form F35 requesting an order that the parties be divorced;
- b) a draft of the order sought;
- c) the original of the affidavit of service complete with all exhibits and any supplementary affidavits confirming the identification of the respondent;
- d) a certificate of the registrar in Form F36;
- e) a requisition requesting a search for any Response to Family Claim;
- f) an affidavit, sworn within 30 days of the date on which the application is made, in support of the application (Form F38). This affidavit must be sworn after the time for the respondent to file a Response to Family Claim has expired (no earlier than one year after the date of separation if the ground of divorce is that the spouses have lived separate and apart for one year). Th affidavit include proof of the allegations made regarding the breakdown of the marriage or (in the case where the only ground of divorce is that the spouses have lived one year separate and apart) a sworn statement that the facts in the Notice of Family Claim are true;
- g) a child support affidavit in Form F37, if there are children; and
- h) the filing fee.

When the divorce is based on adultery or cruelty, proof of the adulterous or cruel conduct must be filed in affidavit form. Proof of adultery might consist of the respondent admission to the adulterous conduct. Proof of cruelty will usually consist in the affidavits of third parties, or letters from treating physicians, psychologists or psychiatrists attached to an affidavit as exhibits.

> **NOTE:** If a Response to Family Claim has been filed, the respondent has chosen to contest all or some of the relief sought and a lawyer's advice should be sought immediately.

Step 9: If the Court is prepared to make the order sought, the order will be available at the Court registry some time after the application is filed. Clients should simply call the registry to see whether their order is ready rather than attending in person. Clients will be required to show valid photo ID to pick up their divorce order.

Step 10: Thirty-one days after the divorce order has been granted (the date shown on the front of the divorce order), the client may apply to get a Certificate of Divorce by filing two copies of the requisition requesting a Certificate of Divorce. The fee is $40. Note that it is not always necessary to obtain a Certificate of Divorce.

B. Joint Application

In the joint application process, most of the required documents are filed at once. All required affidavits except one of the supporting affidavits may be sworn ahead of time. At least one of the supporting affidavits must be sworn and filed after the other materials are filed.

Step 1: Complete Steps 1 to 3 above. Both parties will be required to sign the Notice of Joint Family Claim.

Step 2: Complete all of the documents listed in Step 8 above, except for: one affidavit in support of the divorce application; the affidavit of service, and the requisition asking the registrar to search for a Response to Family Claim and Counterclaim.

Step 3: One or both parties attend Court to apply for the divorce order. This requires:

- a) a requisition in Form F35 requesting an order that the parties be divorced;
- b) a draft of the order sought;
- c) a certificate of the registrar in Form F36;
- d) one affidavit in support of the application, sworn after the time for the respondent to file a Response has expired, which includes proof of the allegations made regarding the breakdown of the marriage;
- e) a child support affidavit in Form F37, if there are children; and

- f) the filing fee.

A second affidavit in support of the application must be sworn and filed after the Notice of Joint Family Claim has been filed. That affidavit can be sworn at the court registry immediately after the filing of the other materials.

Step 4: Complete Steps 9 and 10 above.

C. Special Problems

1. Serving Divorce Papers Outside Canada

In circumstances where the respondent in a divorce action is living outside Canada, **and** is willing to go to the Canadian Consulate office [2] nearest to where she or he lives in order to accept service, the Consul will serve the respondent at that office, for a fee. However, this form of service requires the respondent's cooperation, as she or he must be willing to attend at the consular office personally when notified by its staff to do so.

To comply with the requirements of this form of service, the client must forward service documents to the Consulate:

- a copy of the Notice of Family Claim ;
- a partially completed Affidavit of Service (Form F15);
- Exhibit "A" to the Affidavit of Service (i.e. a copy of the Notice of Family Claim); OR
- If the country in which the respondent lives is a contracting state under the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, the respondent can be served using Forms F12, F13, and F14. See the Supreme Court Family Rule 6-5 for more details.

The client may then serve the documents outside of Canada. The Department of Authentication of Documents will help serve the documents. Their mailing address is:

Foreign Affairs and International Trade Canada

Legal Advisory Division (JLAC)

125 Sussex Drive

Ottawa, Ontario K1A 0G2

This office in Ottawa will in turn forward the documents to the appropriate consulate office. The charge will be billed to the client at the end, and is usually $50.

If the respondent is not willing to go to the consulate office to be served, the Department of External Affairs will not arrange service. In these cases, the client must determine if the court outside of Canada has jurisdiction to hear the family law case under section 10 of the *Court Jurisdiction and Proceedings Transfer Act [SBC 2003] c 28* [3] or section 3 of the *DA*. If the court does have jurisdiction, then the client must find a friend or relative in that country who is willing to serve the respondent. Otherwise, the client must apply to the court for leave to serve the respondent outside BC under Rule 6-4 of the Supreme Court Family Rules.

2. Foreign Language Marriage Certificates

Foreign language marriage certificates must be accompanied by a certified English translation. Certificates in French must also be translated. MOSAIC Translations will translate marriage documents. The minimum charge for this service is $35. It should be noted that foreign marriages might be considered valid if the evidence shows that the marriage is valid in the foreign country. The Society of Translators and Interpreters of BC also translates marriage certificates. They can be reached by telephone at (604) 684-2940.

3. Amending a Document

Under Rule 8-1 of the *Supreme Court Family Rules*, a party may amend his or her pleadings. A party may amend an originating process or pleading issued or filed by the party at any time with leave of the Court, and, subject to Rules 8-2(7), 8-2(9) and 9-6(5):

- once without leave of the Court, at any time before delivery of the notice of trial or hearing; and
- at any time with the written consent of all the parties.

Unless the Court otherwise orders, where a party amends a document under 8-1(1), a new document, being a copy of the original document but amended and bearing the date of the original, shall be filed.

Unless the Court otherwise orders, service on a party of an amended originating process or pleading shall be required if the original has been served on that party and no Response to Family Claim has been filed.

Unless the Court otherwise orders, where a party amends a document under 8-1(1), the party shall deliver copies of the amended document to all the parties of record within seven days after its amendment and, where service is required under 8-1(4), the party shall serve copies on the persons required to be served as soon as reasonably possible and before taking any further step in the proceeding.

Where an amended Notice of Family Claim or Counterclaim is served on an opposing party, that opposing party may amend the Response to Family Claim or Response to Counterclaim, as applicable. The opposing party may only do so if he or she has already delivered a Response to Family Claim or a Response to Counterclaim. In addition, the following conditions apply to the opposing party's amendments:

- the opposing party must amend the Response to Family Claim to Response to Counterclaim only with respect to any matter raised by the amendments to the Notice of Family Claim or Counterclaim; and
- the period for filing and delivering an amended Response to Family Claim or a Response to Counterclaim to an amended Notice of Family Claim or amended Counterclaim is 14 days after the amended pleading is delivered. Where a party does not serve an amended Response as provided in 8-1(5), the party shall be deemed to rely upon his or her original Response.

D. Contested Actions

If the claimant's action is contested, the client should retain a lawyer, or at least seek a lawyer's advice, before proceeding. However, there are some situations where it is possible for the respondent to file a Response to Family Claim without contesting the divorce application. For example, the respondent can file a Response to Family Claim regarding access to children without a contested action ensuing, but a support or custody issue would definitely result in a contested action, and a considerable wait for trial.

E. “Quick” Divorces

If there are special circumstances such that the parties would both agree to a quick divorce, the respondent can waive the waiting period after service by filing a Response to Family Claim. Both parties would then sign a waiver of appeal. However,waiving the waiting period will only speed up the procedure by a few weeks as the waiting period for appeal is 31 days.

The Court might not advance the date of divorce merely because of an impending birth or marriage. The Court must be “of the opinion that by reason of special circumstances the divorce should take effect earlier,” and the spouses must agree not to appeal the decision: *DA*, s 12(2). The courts have interpreted “special circumstances” very strictly, and grant a quick divorce in exceptional cases only, *e.g.* where the immigration status of the claimant’s fiancée is in jeopardy. The courts tend not to consider pregnancy or ordinary remarriage to be “special circumstances.”

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References

[1] http://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/road-safety-rules-and-consequences/contact
[2] https://travel.gc.ca/assistance/embassies-consulates
[3] http://canlii.ca/t/84m2

VII. Alternatives to Divorce

A. Annulment

An annulment differs conceptually from a divorce because a divorce terminates a legal status, whereas an annulment is a declaration that the parties’ marital status never properly existed. A declaration of nullity may be obtained for two types of marriages:

- void marriages, which are null and void *ab initio* (from the outset); and
- voidable marriages, which are valid until a court of competent jurisdiction grants a declaration of nullity (although such a declaration has the effect of invalidating the marriage from its beginning).

The difference between a void and voidable marriage is less important in matrimonial proceedings in British Columbia than it once was, as the *FRA* s 95(2) makes no distinction between the two and Part 5 of the Act applies to both. The *FLA* ss 21-22 also do not make any distinction. For purposes other than the *FRA*/*FLA*, the distinction may still be relevant.

A marriage is void *ab initio* if:

- either of the parties was, at the time of the marriage, still married to another party;
- one of the parties did not consent to the marriage;
- the parties are related within the bonds of consanguinity (descent from a common ancestor); or
- the formal requirements imposed by provincial statute (such as the *BC Marriage Act*) are not fulfilled.

Misrepresentation is a ground for annulment only where the misrepresentation leads to a mistake about the identity of the other party or as to the nature of the marriage ceremony.

A voidable marriage is valid until one of the parties to it obtains a declaration of nullity. The declaration must be obtained during the parties’ joint lives, and is not available if the parties are already divorced. In Canada, a marriage may be voidable in the following circumstances:

- either party is impotent or otherwise unable to consummate the marriage (as opposed to unwilling to consummate the marriage, which may constitute cruelty but does not render the marriage voidable (see *Juretic v Ruiz*, 1999 BCCA 417 [1]); or
- a party is under 14 years of age.

These are common law rules.

> **NOTE:** If a marriage is found to be void, this does not affect the property claims that a party might have. Pursuant to s 56 of the *FRA* and s 21 of the *FLA*, the matrimonial regime still applies in this situation.

B. Judicial Separation

The Court can no longer grant a judicial separation. Judicial separation was formerly used to sever the legal obligations and liabilities between a married couple without terminating the marriage, when a spouse’s religion forbade divorce.

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References

[1] http://canlii.ca/t/54b4

VIII. Assets

A. General

The *FRA* only applies to proceedings started prior to March 18, 2013 and to agreements made before the *FLA* came into force.

The division of property on marriage breakdown is dealt with in Part 5 of both the *FRA* and the *FLA*. The *FRA* creates a basic presumption of equal entitlement to family assets, and real and personal property that is ordinarily used for a family purpose. Part 6 deals with the division of pensions. These two parts of the *FRA* do not apply to common law relationships, although common law partners could contract into the property provisions of the Act. Also, the rights of the parties to family assets may be resolved by agreement, mediation or litigation. All litigation relating to property must be dealt with at the Supreme Court level. The Provincial Court does not have the jurisdiction to deal with assets.

The *FLA* significantly changed the property law regime in British Columbia and reduced judicial discretion. It is a simpler model designed to help parties achieve resolutions out of Court. It operates on the presumption that spouses are equally entitled to family property and equally responsible for family debt (s 81). It also provides that unmarried spouses (who have lived together in a marriage-like relationship for at least two years) may avail themselves of the property and liability provisions of the Act in Part 5 and 6.

B. Legislation

1. Divorce Act [DA]

The *DA* does not deal with property division.

2. Family Law Act [FLA]

Section 81 of the *FLA* outlines that each spouse is entitled to an undivided, one half interest of family property and is equally responsible for debt upon separation (*Stonehouse v Stonehouse*, 2014 BCSC 1057 [1]; *Joffres v Joffres*, 2014 BCSC 1778 [2]). However, the *FLA* substantially changes what is considered to be family property, essentially allowing spouses to keep property they bring into a relationship and share only in the increase in value of that property and the net value of new property obtained after cohabitation.

The *FLA* carves out a category of excluded property under section 85.

Section 85 (1) of the FLA reads as follows:

> The following is excluded from family property:
>
> (a) property acquired by a spouse before the relationship between the spouses began; (b) inheritances to a spouse; (b.1) gifts to a spouse from a third party; (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for

- (i) loss to both spouses, or
- (ii) lost income of a spouse;

> (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for

- (i) loss to both spouses, or
- (ii) lost income of a spouse;

> (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse; (f) a spouse's beneficial interest in property held in a discretionary trust (i) to which the spouse did not contribute, and (ii) that is settled by a person other than the spouse; (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

Any increases in the value of the excluded property that occur during the relationship are considered family property and are not excluded from division. The spouse claiming that the property in question qualifies as excluded property is responsible for demonstrating that it fits the definition under s 85(1) (*Bressette v Henderson*, 2013 BCSC 1661 [3]).

This property division regime applies to all married spouses as well as all unmarried common law spouses who have lived in a marriage-like relationship for at least two years. The date of separation will be the relevant date used to identify the pool of family property to be divided. However, it is the date of the hearing or agreement which determines the date of valuation of property. Spouses may choose to opt out of these property division rules but must make these different arrangements through an agreement.

Family property is defined at s 84(1):

> (a) on the date the spouses separate,

- (i) property that is owned by at least one spouse, or
- (ii) a beneficial interest of at least one spouse in property;

(b) after separation,

- (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
- (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

C. Types of Assets

1. Family Assets/ Family Property

Under sections 84 – 85 of the *FLA*, family property includes all real and personal property owned by one or both spouses at the date of separation unless the asset in question is excluded, in which case only the increase in the value of the asset during the relationship is divisible. It is no longer relevant whether an asset was ordinarily used for a family purpose in deciding if it is family property.

A spouse can choose to prove that property falls under one of the following exclusions:

- Property acquired before or after the relationship;
- Gifts (from a third party) or inheritances to one spouse, unless the gift or inheritance was transferred into the parties' joint name or the other spouse's sole name;
- Most damage awards and insurance proceeds, except those intended to compensate both spouses
- Some kinds of trust property
  - Under s 85(e), property must be held in trust for the benefit of a spouse
  - A spouse's beneficial interest in property held in a discretionary trust to which the spouse did not not contribute, and that is settled by a person other than the spouse are also excluded from family property under s 85 (f)

Family property is presumptively divided equally unless it would be significantly unfair to do so (ss 81 and 95 of the *FLA*).

Family debt, which is new in the *FLA*, is divided equally, unless equal division would be significantly unfair to one spouse. The value of all property is calculated at either an agreed date, or at the date of a court hearing. Any increases in the value of the excluded property that occur during the relationship are considered family property and are not excluded from division.

2. Savings

Under the *FLA*, all money held by one spouse in a financial institution is considered family property and equally divisible, unless that spouse can prove that it is excluded property.

3. Pensions and RRSPs

Rights under an annuity, pension, home ownership, or registered retirement savings plan are considered family property, including each party's Canadian Pension Plan (CPP) [4] credits.

The division of pensions is clarified in the *FLA*. Unless the pension is proven to be excluded property, it will be divisible. The presumption is equal division unless it would be significantly unfair based on the considerations in s 95 of the *FLA*. If a spouse is to receive benefits at a later date, they may become a limited member of the plan. If they cease to be a limited member then their share is transferred. A spouse can generally either choose to have a lump-sum payment of their share, to have a separate pension payment issued to them (s 115) or a hybrid of both (s 116). This decision may be made at any time (either before or after the pension commences) but the division will only occur after the pension has commenced (s 115).

If an agreement or order regarding the benefits of a pension provides that the benefits are not divisible or is silent on entitlement to benefits, a member and a spouse may agree to have benefits divided before the earliest of the following:

1. Benefits are divided under the original agreement or order,
2. The member or spouse dies, or
3. Benefits are terminated under the plan.

If an agreement or order provides that the member must pay the spouse a proportionate share of benefits under a plan where the member's pension commences and the member's pension has not commenced, the member and spouse may agree, by the spouse giving notice to Division 2 of Part 6 of the *FLA*, to divide the benefits in accordance with the Part, and unless the member and spouse agree otherwise, the original agreement or order must be administered in accordance with the regulations.

> **NOTE:** BC is one of the few provinces that allow spouses to enter into a written agreement to waive the equalization of their pensionable credits under the CPP.

4. Real Property

It is often necessary to take early steps to secure the title to real property when there is a separation. In fact, it is recommended for clients to file as soon as possible to avoid missing any limitation dates and preserve their claim. This is particularly so where property is registered in the name of only one spouse, and there is a risk of that party disposing of or encumbering the property, or where judgments are likely to be registered against one party's interest, which might prejudice the other party. Under section 91 of the *FLA* and Rules 12-1 and 12-4 of the *Supreme Court Family Rules*, one may request an automatic restraining order to prevent the sale or disposal of family property including real property. There are several ways of protecting a spouse's interest.

a) Certificates of Pending Litigation and Caveats

Caveats and Certificates of Pending Litigation are warnings to potential purchasers and establish claim priority over the property from the day the Caveat or Certificate of Pending Litigation is filed. This document will defeat the presumption of claim priority given to the bona fide purchaser for value. Entitlement to a certificate of pending litigation is limited. See the *Land Title Act*, RSBC 1996, c250 [5] and *Annotated Land Title Act* by Gregory and Gregory for the procedure and forms. Note that Caveats have an expiry date and are therefore a temporary measure to protect a party's interest.

b) Land (Spouse Protection) Act, RSBC 1996, c 246

The *Land (Spouse Protection) Act*, RSBC 1996, c 246 [6] applies where a party has elected not to commence legal proceedings, but needs to protect his or her interest in real property. It provides an alternative to a Certificate of Pending Litigation for a married spouse (not common law) where the "property" was the "matrimonial home". The Act allows a charge to be placed on land that will prevent disposition of the property without the written consent of the applicant for the charge (refer to the *Land (Spouse Protection) Act* and the *Land Title Act* for the registration procedure). Note that this only applies while the parties are legally married. The charge may be struck out on the death of, or final divorce from, the applicant.

Registration of a charge by one spouse under the *Land (Spouse Protection) Act* prevents the other spouse from selling or encumbering his or her share, but is not protection against a creditor who could obtain an order for sale of the house. So long as one is legally married to his or her spouse, one may file against the property without the other spouse's notice or consent, in order to prevent the transfer of the property.

c) Registration of a Notice Under the Land Title Act

A spouse who is a party to a marriage agreement or a separation agreement may file a notice in the Land Title Office regarding any lands to which the agreement relates (*FLA*, s 99). This applies to married spouses and common law spouses who have lived in a marriage-like relationship for at least two years.

The information required in the notice includes the names and addresses of the spouses, the legal description of the land, and the provisions of the agreement relating to that land. The Registrar may then register this notice in the same manner as a charge on the land.

Once the notice is registered, there can be no subsequent registration of a lease, mortgage, transfer, etc., unless both spouses or former spouses sign a cancellation or postponement notice in the prescribed form. A spouse or former spouse may apply to the Supreme Court for an order to cancel or postpone a notice where the other party to the agreement cannot be found after reasonable search, or unreasonably refuses to sign a cancellation or postponement, or is mentally incompetent.

The use of this notice also extends to mobile homes.

d) Supreme Court Family Rules

Generally, Rule 15-8 of the Supreme Court Family Rules governs legal remedies for joint tenants. Where a dispute arises, an application can be made to the Supreme Court to settle the matter, but clients should be advised that a court action is costly and a negotiated settlement is generally to their advantage because courts have a wide discretion to distribute matrimonial property under Rule 15-8. For example, a court could order the sale of property at a time when the housing market is poor, resulting in a low sale price. Sometimes, a spouse should consider selling his or her interest in a property to the other spouse.

e) Limitation Period

A former spouse is considered a "spouse" within the meaning of the *FRA* (s 1) and *FLA* (s 3) for the purpose of proceedings to enforce or vary an existing order. However, where an entirely new order is sought, the parties cease to be "spouses" within the meaning of the Act after 2 years has passed since the order granting the divorce was made. This distinction has engendered a debate as to whether there is a limitation period for the redistribution of property "between spouses" under the FRA. See *Staires v Staires* (1991), 34 R.F.L. (3d) 376 (BCSC) [7] and *Tatlock v Tatlock* (1992), 71 BCLR (2d) 194 (SC) [8]. The Supreme Court of Canada partially addressed the issue in *Stein v Stein*, [2008] 2 SCR 263, 2008 SCC 35 [9], para. 12: "...the [*Family Relations Act*] does not place any temporal limits on the division of assets. Nor

does it state that once assets have been subject to an initial division, a reapportionment cannot occur at some point in the future”.

Under s 198(3), a spouse may make an application to set aside an order or agreement for property division no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

The *FLA* allows common law spouses only two years to apply for property division and spousal support after the separation date (s 198). The limitation period may be suspended for both married and unmarried spouses if they were engaged in family dispute resolution with a family dispute resolution professional.

Under the *Limitation Act* [10], there is no limitation date for claims on arrears of spousal and child support payments. Once a distribution scheme for family property is set, either by the Court or by agreement, it is always enforceable subject to the relevant case law.

f) Interim Relief

A court may order temporary exclusive occupation and possession of the family residence and its contents by just one spouse (*FLA* s 90).

g) Business Assets

Under the *FLA*, business property is no longer singled out as it was in the *FRA*. Business property is family property unless it is excluded property under the *FLA*.

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Under the *FLA*, business property is no longer singled out as it was in the *FRA*. Business property is family property unless it is excluded property under the *FLA*.

D. Use of Assets

The Court can award one spouse exclusive use of assets pending further agreement between the parties or a Court order. This can include large assets such as a home and car; or smaller assets as may be required to operate a business, or for the departing spouse’s television, computer, books, for example.

E. Unmarried Couples

Under the *FLA*, unmarried couples who have lived in a marriage-like relationship for at least two years are treated the same way as married couples. Unless an action was started under the *FRA*, the *FLA* now applies (as long as the time limit has not expired) and may apply even if proceedings have already beencommenced.

The courts will recognize an equitable interest of a common law spouse in all the property and assets acquired by the couple through the joint efforts of the two spouses, although registered in the name of the other spouse (i.e. a constructive trust). The scope of constructive trusts was greatly expanded in *Peter v Beblow* (1993), 3 WWR 337, 77 BCLR (2d) 1 [11], in which the Court found a constructive trust arising from the contributions made by homemaking and childcare services, which allowed for the retention of money that would otherwise be paid for such services to be used as mortgage payments.

Claims in trust may be constructive, resulting (implied trusts), or express. Constructive trusts are the most common type of trust claim, where the Court imposes a trust to remedy the unjust enrichment of one party at the deprivation of theother. However, there are limits, and a court will not interfere where the elements of constructive trust are not present. A causal connection must be found to exist between the contribution made and the property in question. Refer to a

general text for a more comprehensive description of the elements of constructive trust. Because common law constructive trusts are relief granted by a court, spouses can make use of both the *FLA* requirements for equal division and common law constructive trust principles when seeking relief for unfair division of property.

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IX. Spousal and Child Support

A. General

Support is the financial support one person provides for another person (adult or child). This is meant to provide for that person’s reasonable needs (i.e. food, clothing, shelter, education, and medical care). Spousal support is intended to pay for basic living expenses and is highly discretionary. In contrast, child support is an obligation acquired through parenthood; it is mandatory with firm guidelines. Child support always takes precedence over spousal support if a party’s ability to provide financial support is limited.

An application for support may be made under the *FLA* or *DA*, but it is essential to look into the standards, limitations and other important differences between the Acts. The parties may also agree on the issue of support and incorporate their agreement into a written document (a separation agreement), which may have the legal status and force of a personal contract. An agreement is not completely determinative of the issue however; the Court will make orders superseding the provisions of an agreement in order to bring the obligations of parties in line with the requirements of statute.

In making an order for spousal support, the Court will not look to the conduct (or misconduct) of the parties, but will consider the “condition, means and other circumstances of each” in making an order. Nevertheless, in *Leskun v Leskun*, [2006] SCJ No25 (SCC) [1], the Court held that the effect of spousal misconduct on the other spouse’s ability to achieve self-sufficiency should be taken into consideration. In some cases, the Court will refer the matter to the registrar who holds an independent inquiry into the spouses’ assets, income liabilities, etc., and then recommends a “reasonable” support payment. This recommendation does not become an order until a judge confirms it. Arrangements for spousal support can be made as part of a separation agreement, granted at the time of a divorce or, if no order for support is made or it is denied at the time of divorce, within a reasonable time thereafter. Under the *FLA*, the time limit is 2 years for both married and unmarried couples who have lived together in a marriage-like relationship for at least two years (s 198; *Meservy v Field*, 2013 BCSC 2378 [2]). The exception to this rule is if the couple have a child(ren) together (s 3(1); *CAM v MDQ*, 2014 BCPC 110 [3]).

Orders for child support are almost always fixed according to the schedule of support payments set outin the *Child Support Guidelines* [4], which are based on the payer's gross income and the number of children for whom support is being paid. There is an exception to the strict application of the Guidelines in cases where the parties share parenting time (i.e. where one parent has at least 40% of the time with the child(ren)). In those cases there is not simply a pay or spouse and a recipient, rather the support is typically calculated based on a set-off approach whereby each parent's support obligation is calculated and one is set-off against the other.

The Court will not grant a divorce if there are not reasonable arrangements made for child support (*DA*, s11). The level of child support is based on the income of the non-custodial parent and is set out in the Federal Child Support Guidelines.

Under the *FLA*, the most important changes are in wording. The following are some examples of new vocabulary from the FRA || FLA:

- Custody || Guardianship/Parenting Time
- Access || Parenting Time/Contact
- Maintenance || Support

B. Courts

Both the Supreme Court and the Provincial Court have the powers to grant or vary support orders made under the *FRA* and *FLA*, but only the Supreme Court can grant or vary support orders made under the *DA*. Only the Supreme Court can grant interim relief under the *DA*, but the Provincial Court can grant interim relief under the *FLA*.

1. Provincial Court

The Provincial (Family) Court is often the most accessible court to self represented litigants. It can deal with applications for support made under the FLA, as well with variation of previous Provincial Court child or spousal support and arrears of child or spousal support orders. Applications can be made at certain Provincial (Family) Courts for a Supreme Court Hearing.

2. Supreme Court

The Supreme Court can order interim relief under the *DA* or *FLA* or make an order for support upon the granting of a divorce order. If a Supreme Court order for support is made under the *DA*, that order ousts any provincial statutory jurisdiction in that matter. While obtaining interim relief from the Supreme Court is more expensive than obtaining a Provincial (Family) Court order, it can be faster if the application is urgent or if the party wishes to proceed *ex parte* (without notice to the other side).

C. Enforcement

1. Family Maintenance Enforcement Act (RSBC 1996, c 127) [FMEA]

The *FMEA* [5], passed in 1988, gives the provincial government extensive powers to collect support arrears including:

- a Notice of Attachment (s 17);
- 12-month garnishing orders (s 18);
- Attachment Orders (s 24); and
- Attachment of money owing by the Crown (s 25) including Income Tax refunds and Employment Insurance benefits directly from the Federal Crown.

The Family Maintentance Enforcement Program (FMEP) [6] can only enforce support orders if the payor is in its jurisdiction or sister jurisdictions that will assist in enforcing the order. For a complete list of sister jurisdictions see https://www.fmep.gov.bc.ca/paying-or-receiving-maintenance/out-of-province-orders/other-jurisdictions/. Any person who receives a support order or separation agreement that has been filed in court may voluntarily register with the program.

2. Reciprocal Enforcement

If properly filed in BC, a support order from another jurisdiction is enforceable under the *FMEA*. All other Canadian jurisdictions have similar legislation and will enforce BC orders on registration in their courts. Many foreign jurisdictions will also enforce BC orders; see the table of reciprocating states in the *Court Order Enforcement Act*, RSBC 1996,c 78 [7].

3. Variation of Orders

Spousal support orders may be varied where there have been changes in the needs, means, capacities and economic circumstances of each party (*DA*, s 17(4.1), *FLA* s 215(1)). The Court may also reduce the amount of support to a spouse where it finds that the spouse or former spouse "is not making reasonable efforts" to become self-sufficient. Note that for a variation application to be successful the applicant must demonstrate that there has been a "material change in circumstances" which means circumstances that, if known at the time of the agreement or Order, would have resulted in a different outcome.

There may also be a variation in child support levels provided there is a change in circumstances per the Child Support Guidelines, which include changes in the payor parent's income (*DA*, s 17(4), *FLA* s 152). If the payor's income has changed, a variation of the child support order is virtually automatic when one makes an application in court. Provincial Court orders made in other Canadian jurisdictions and in certain reciprocating foreign states may be varied under the *Interjurisdictional Support Orders Act*, SBC 2002, c 29. The Act creates a system where an application is made through the filing of prescribed documents and filed with the Reciprocals Office in British Columbia, which is responsible for transmitting the documents to the originating jurisdiction for adjudication.

Support orders made under the *DA* may only be varied through the provisions of sections 17, 18, and 19. In this process, someone seeking to change a support order made in another Canadian jurisdiction must apply to the courts of BC for a provisional order. The provisional order is sent to the originating jurisdiction for a second hearing to confirm the order. Unless the order is confirmed, the provisional order has no effect.

4. Agreements

The Court can enforce written agreements that provide for the payment of child or spousal support., a written agreement concerning support may be filed in the Provincial Court and in the Supreme Court. Once filed, the agreement has the effect of a court order for enforcement purposes.

D. Spousal Support

The first thing that a spouse must determine regarding spousal support is whether or not they are entitled to receive it. After that, the amount and duration of spousal support can be determined. The fundamental question in determining spousal support is whether the objectives of spousal support under the *Spousal Support Advisory Guidelines* [SSAG] [8] are met. The division of assets in the divorce will impact whether or not the spouse is entitled to spousal support and will be taken into account when the court decides how much spousal support to order. It should be noted that if a party is entitled to compensatory support arising from the relationship, the receipt of significant assets in the division of assets may not result in a loss of entitlement to support (See *Chutter v. Chutter*, 2009 BCCA 177 [9]).

1. Legislation

a) Divorce Act [DA]

Section 15.2 of the *DA* creates an obligation to support a spouse. However, s 15.3(1) directs the Court to give priority to child support in any application for child and spousal support under the *DA*. The entire gross income (guideline income) is used to calculate child support and then any Net Disposable Income that remains (as calculated based on the incomes of both parties and taking into account taxes and other charges) is apportioned between the parties based on the length of marriage. It may be that the result of the payment of child support reduces the Net Disposable Income to very little and in those cases child support takes priority over the sharing of the NDI and there would be little to no spousal support payable. There is no limitation date under the *DA*.

b) Family Law Act [FLA]

The *FLA* aligns support considerations with the *DA*, permits periodic reviews to allow for changing circumstances, and provides guidelines for when a deceased spouse's estate is obliged to continue payments. Considerations for posthumous support payments include the size of the estate and the need of the payee (s 171). Additionally, child support is to be prioritized over spousal support where a paying spouse has limited resources. (s 173). The *SSAG* are not referred to in the Act and remain advisory, although Courts in British Columbia give them much deference.

c) Spousal Support Advisory Guidelines

The final version of the *Spousal Support Advisory Guidelines* (*SSAG*) [8] was published in July 2008. The *SSAG* do not have the force of law and are not expected to become law.

The *SSAG* set out two basic mathematical formulae for determining the quantum and duration of spousal support when a person's entitlement to receive support is established: the "with children" formula when the parties have dependent children, and the "without children" formula when child support is not being paid. The "without children" formula is relatively simple, however the "with children" formula cannot be completed without the assistance of a computer program (refer to http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html).

While the *SSAG* have no regulatory effect and are merely "informal", and "advisory", they are nevertheless being used by the courts and the bar and the ranges provided by the SSAG are given strong consideration by the Court after the entitlement analysis is complete (see *Yemchuk v Yemchuk*, 2005 BCCA 406 [10] and *Redpath v Redpath*, 2006 BCCA 338

[11]).

2. Principles of Spousal Support

a) General

There are three bases for entitlement to spousal support:

1. Compensatory (to compensate one spouse who was economically disadvantaged as a result of the role that spouse took on during the relationship) (*Moge v Moge*, [1992] 3 SCR 813 [12]);
2. Non-compensatory (need based) (*Bracklow v Bracklow*, [1999] 1 SCR 420 [13]); and
3. Contractual (i.e. if there was a marriage or cohabitation agreement setting out terms for support) (*Miglin v Miglin*, 2003 SCC 24 [14]).

Once a party has met the requirement of demonstrating entitlement, you move to the calculation of quantum. When determining quantum of support one factor to be considered is whether the needs of the recipient spouse have been met by the division of assets however if support is compensation based then even if the recipient receives significant assets that is not a basis to reduce support (See *Chutter v Chutter*, [2009] CarswellBC 1028 (BCCA) [9]). Typically the way this is addressed is to determine what income a party can reasonably earn from the assets received on division and to take that into account in calculating the quantum of support.

b) Factors considered

Section 15.2(6) of the *DA* and section 161 of the *FLA* direct courts to consider the following objectives in determining entitlement to spousal support:

- to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- to relieve any economic hardship of the spouses arising from the care of the child, beyond the duty to provide support for the child; and
- as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Section 15.2(4) of the *DA* and section 162 of the *FLA* direct courts to consider the same factors in determining the amount and duration of spousal support, namely, the conditions, means, needs and other circumstances of each spouse, including:

- the length of time the spouses cohabited;
- the functions performed by each spouse during cohabitation; and
- any order, agreement or arrangement relating to support of either spouse.

3. Issues Related to Spousal Support

a) Employment and Income Assistance and Spousal Support

Spouses can opt into this program so that the FMEP can continue to assist in collecting the support, but still allow them to keep their support rather than having it deducted from other government assistance they are receiving, if any.

b) Taxes and Spousal Support

Spousal support is treated by the recipient as taxable income. The spouse who pays support is entitled to deduct the amount from income tax. The spouse who receives support is required to declare it as income, in contrast to child support which has no income tax consequences. Lump payments of support are not taxable. There are free online child support and spousal support calculators on the Internet (e.g. child support: http://www.justice.gc.ca/eng/fl-df/child-enfant/look-rech.asp; spousal support: http://www.mysupportcalculator.ca/Calculator.aspx, http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html). It is essential that support payments be identified as such in court orders and separation agreements if the payor is to be able to claim a deduction. As a rule, oral or informal agreements are not sufficient to establish the status of payments as spousal support. Parties are permitted to enter into retroactive agreements which set out the amount paid and received in prior years for the purposes of claiming income tax relief. However any such agreement must be entered into before the end of the calendar year immediately following the year in question (*e.g.* if payments were made in 2012, a retroactive agreement would need to be entered into before December 31, 2013).

Other tax issues can arise if payments are made through a corporate account or if the payor has a lower tax burden than usual (i.e. aboriginal spouses or U.S. residents).

E. Child Support

1. Definition of "Child"

The definition of "child" varies slightly between the *DA* (s 2) and the *FLA*.

Under the *DA*, the definition of "child" is someone who is under the age of majority (19 years in B.C.) **and** who has not withdrawn from the parent's charge, or who is at or over the age of majority but unable, by reason of illness, disability or other cause, to withdraw from parental charge or to obtain necessaries of life. Therefore, under the *DA*, there may not be an obligation to pay child support to a child under 19, if the child has already withdrawn from the parent's charge.

Under the *FLA*, the definition of "child" is a person who is under 19 years of age or a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of his or her parents or guardians.

2. General

Child support is intended to be used to pay most of a child's day-to-day expenses. The amount of child support payable is determined under the Federal Child Support Guidelines, which set support levels based on the payor's income and the number of children to be supported and the parenting arrangements in place. Several web sites, including J.P. Boyd's helpful site, offer online child support calculators (see J.P. Boyd's BC Family Law Web Resource). If the paying parent lives in B.C., the child support is determined by the B.C. Child Support Tables [15]; the appropriate table is for the province where the paying parent lives, not where the child lives.

The Court may also provide for "special or extraordinary" expenses in a Child Support Order (see s 7 of the *Federal Child Support Guidelines*), in addition to the basic child support order, requiring payment for other expenses such as child care, health related expenses (e.g. orthodontic treatment, hearing aids, prescription drugs, speech therapy, contact

lenses and professional counselling), expenses for child care in order to maintain employment (see *Bially v Bially* (1997), 28 RFL (4th) 418 (Sask. QB) [16]), extraordinary educational expenses for primary and secondary education, expenses for post-secondary education, and expenses for extracurricular activities.

Expenses for extracurricular activities must be reasonable having regard to the parents' means, but need not be restricted to a special talent of the child. "Extraordinary" is also determined by what would be extraordinary in a household with a similar income; it depends on the lifestyle of the family.

3. Legislation

a) Divorce Act [DA]

The *DA* provides for support orders as a corollary to divorce under s 15.1, with the discretion to extend support for a child who is over the age of majority and is unable, by reason of illness, disability or other cause, to withdraw from their charge. If the majority-age child is otherwise unable to obtain the necessaries of life – for example, if the child is a university student – support orders may also be extended (s 2(1)).

An order for child support made under the *DA* has effect throughout Canada (s 14). Under s 17(1) of the *DA*, any court of competent jurisdiction, as defined by s 5, can vary, rescind, or suspend an order.

Children born within the marriage and adopted children are treated equally under the *DA*. However, some controversy remains as to whether a stepchild, for whom the respondent stood in *loco parentis* (in place of the parent), qualifies for support under the *DA*. Child support will be assessed in light of the biological parents' support obligation.

b) Family Law Act [FLA]

Generally, sections 153 – 159 of the *FLA* replace section 93.3 of the *FRA*, but do not substantively change the provisions. The *FLA* continues to provide authority for the child support service and the recalculation project.

Under section 147 of the *FLA*, each parent and guardian of a child has a duty to provide support for the child unless the child is a spouse or is under 19 years of age and has voluntarily withdrawn from his or her parents' or guardians' charge, except if the child withdrew because of family violence or because the child's circumstances were considered intolerable. For example, a child who has been incarcerated for more than one year is considered to have voluntarily withdrawn (*MA v FA*, 2013 BCSC 1077 [17]). If the child was removed from the family by the state (*DZM v SM*, 2014 BCPC 198 [18]) or refuses to visit, this is not considered voluntary withdrawal (*Henderson v Bal*, 2014 BCSC 1347 [19]). However, if this child returns to his or her parents' or guardians' charge, their duty to provide support to the child resumes. Additionally, section 147 of the *FLA* also states that a child's stepparent does not have a duty to provide support for the child unless the stepparent contributed to the support of the child for at least one year and a proceeding for an order under this part is started within one year after the date the stepparent last contributed to the support of the child. Qualifying step-parents have a duty to provide child support (*CLP v ND*, 2014 BCPC 154 [20]). A step-parent may also be ordered to provide support if the parents are not able to provide the child with consistent and reasonable standards of living (*CB v MB*, 2014 BCPC 75 [21]).

If parentage is at issue, section 151 of the *FLA* states that the Court may make an order respecting the child's parentage in accordance to s 31 of the *FLA* or make an order under s 33(2) of the *FLA*.

c) Child Support Guidelines

The *Federal Child Support Guidelines* are federal regulations that determine the amount of child support owing, and vary from province to province. The guidelines establish how much child support must be paid based on the payor's income and the number of children for whom support is to be paid. For more information refer to the resources listed at the end of the chapter.

d) Other Legislation

Section 215 of the *Criminal Code* places a legal duty on parents to provide their children with the necessaries of life until they reach the age of 16, unless the child is able to provide the necessaries of life independently.

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X. Interjurisdictional Support Orders

Parents living in different provinces or countries can apply for or enforce support orders without needing to travel to the other jurisdiction. Under the *Interjurisdictional Support Orders Act*, SBC 2002, c 29, many jurisdictions have agreed to recognize family support (maintenance) orders and agreements made elsewhere. British Columbia has reciprocal agreements with all Canadian provinces and territories and with several foreign countries.

For a list of all reciprocating jurisdictions, see the Schedule in the *Interjurisdictional Support Orders Regulations*, BC Reg 15/2003 at www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/10_15_2003.

Appeals of decisions made under this Act must be made within 90 days of the ruling (s 36(5)) but, despite this, the Court to which an appeal is made may extend the appeal period before or after the appeal period has expired (s 36(6)). The website http://www.isoforms.bc.ca provides a questionnaire under the heading "forms select" to determine which application forms are required for a client's specific situation. Forms can be accessed online or be mailed to you. A guide to filling out the forms can be found at www.isoforms.bc.ca/shared/pdfs/GuideIntroInstructions.pdf. Completed forms can be submitted to:

Reciprocals Office

Vancouver Main Office Boxes

P.O. Box 2074

Vancouver, B.C. V6B 3S3

In BC, Family Justice Counsellors have the ability to track the status of Interjurisdictional Support Order (ISO) applications. If an applicant has questions on the status of their ISO application, they can talk to a Family Justice Counsellor at their local Family Justice Centre. To find the nearest Centre, call Enquiry B.C. at (604) 660-2421 between 8:00 a.m. and 5:00 p.m., Monday to Friday, and ask the operator to transfer you to a Family Justice Centre.

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XI. Custody, Guardianship, and Access

A. General

Disputes over custody of minor children are often the most difficult issues to resolve during the breakdown of a marriage or other relationship. Custody decisions can always be changed, however, courts rarely make such changes. Thus, the decision about who gets interim custody is particularly important. Children usually stay with the parent who has provided primary care in the past and who can spend the most time with them. Sometimes, courts will order joint custody on an interim basis so that neither parent's position is prejudiced.

The best interests of the child is the **only** consideration in determining custody and access and parenting arrangements.

In addition to custody, courts can also make decisions regarding guardianship of minor children. Guardianship gives a parent or other person "a full and active" role in determining the course of a child's life and upbringing (see *e.g. Charlton v Charlton*, [1980] BCJ No 22 [1]). There is considerable overlap between the two, but it is useful to note that while having custody usually includes having guardianship, the reverse is often not true. This distinction is impacted somewhat by the *FLA* as the term "Guardianship" subsumes all the rights and responsibilities of a parent and there is no longer reference to "Custody".

The case law on custody and guardianship has developed to the point where there is a presumption in favour of joint custody or both parents being guardians(although there is no legislative presumption). A parent seeking sole custody will generally have to show that there is a serious defect in the other person's parenting skills, that the other person is geographically distant, or that the parents are utterly unable to communicate without fighting before the Court will consider granting such an application, and in the last case, the Court may explore other options such as Parenting Coordination or parcelling out decision making and responsibilities to address the communication issue instead of granting sole custody to one parent.

B. Legislation

1. Divorce Act

The *DA* only speaks of access and custody. Under s 16, the Supreme Court may make an order for custody. This order will supersede any existing *FLA* orders, which cover custody, access, and guardianship, and can be registered for enforcement with any other Superior Provincial Court in Canada. The Supreme Court can also grant interim custody before a divorce action is heard.

The *DA* applies only to married couples. Under the Act, the person making the application for custody must have been "habitually resident" in the province for at least one year prior.

2. Family Law Act

Among a plethora of changes to the general family law in BC, the Act makes the following changes to the law surrounding guardianship:

- Replace the terms “custody” and “access” with “guardianship”, “parenting time”, and “contact”.
- Define “guardianship” through a list of “parental responsibilities” that can be allocated to allow for more customized parenting arrangements.
- Provide that parents retain responsibility for their children upon separation if they have lived together with the child after the child’s birth. (Note: this does not mean that the law presumes an automatic 50-50 split of parental responsibilities or parenting time.) If they have not, the parent with whom the child lives is the guardian.
- Under the *FLA*, the terms custody and access are no longer used – only guardianship will be considered.
- Additionally, the “best interests of the child” is no longer the paramount consideration under the *FLA*; it is the only consideration.

C. Courts

1. Supreme Court

The Supreme Court has jurisdiction to deal with all matters relating to custody, guardianship and access to children, pursuant to the *DA*, the *FLA*, and the *CFCSA*. Although, the Court almost never deals with the *CFCSA* unless there is the matter of adoption to be considered. The Supreme Court also has jurisdiction over orders restraining contact or entry to the matrimonial home.

The Supreme Court has *parens patriae* jurisdiction over all children in the province. In operation, this can allow the Court to transcend the statutory letter of the law in drafting orders that best represent the best interests of the child.

A written agreement about custody or guardianship may be given the force of a court order under section 44 of the *FLA*. Under the *FRA*, the relevant sections were 121 and 122. Any orders made under the *FRA* are still in force. An order made under the *DA* can be registered for enforcement in any other province’s Supreme Court registry.

2. Provincial Court

The Provincial Court has jurisdiction to deal with all matters relating to custody, guardianship and access to children, and the *Child, Family and Community Service Act*. This includes restraining orders but does not include orders restraining entry to the matrimonial home. A written agreement about custody or guardianship may be given the force of a court order, or s 44 of the *FLA*, if it is filed in court.

D. Custody

Proceedings regarding parenting arrangements or contact that have been started, but not determined, before the *Family Law Act* is in force, do not need special transition sections. Section 4 of the *Interpretation Act* [2] provides a default rule that the Act will be used upon it becoming effective, so cases started under the *FRA* will be determined under the *FLA*.

In the absence of a court order or a written agreement, custody of a child remains with the person with whom the child usually resides. One must bear in mind that the Act does not touch on day-to-day life until it is invoked, usually by filing a lawsuit or by making an application.

1. Factors in Awarding Custody

The factors that the Court must consider in determining the "best interests of the child" are set out in, s 37 of the *FLA*:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

and at s 16(8-10) of the *DA*:

- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

These factors should not be viewed as a checklist. Rather, the discretionary, contextual, and complex nature of custody cases makes it more appropriate for the factors to be viewed holistically. Similarly, these factors do not necessarily form an exhaustive list of the factors to be considered. The best interests argument is often expansive, considering a range of factors illuminated at both the statutory and common-law level.

The Court will generally consider the child's health and emotional well-being, his or her education and training and the love, affection and similar ties that exist between the child and other persons such as relatives and family friends. If appropriate, the views of the child will be considered. For a custody order relating to a teenager to be practical, it must reasonably conform to the wishes of the child (*O'Connell v McIndoe* (1998), 42 R.F.L. (4th) 77 (BCCA) [3], *Alexander v Alexander* (1988), 15 R.F.L. (3d) 363 (BCCA) [4]).

Other factors have emerged through the common law, including a preference that siblings remain together and a willingness to look into the character, personality and moral fitness of each parent. However, there is no presumption against the separation of siblings (*P (AH) v P (AC)*, 1999 BCCA 203 [5]). The welfare of the child is not determined solely on the basis of material advantages or physical comfort, but also considers psychological, spiritual, and emotional factors (*King v Low*,(1985), 44 R.F.L. (2d) 113 (SCC) [6]). The Court will take into account the personality, character, stability, and conduct of a parent, if appropriate (*Bell v Kirk* (1986), 3 R.F.L. (3d) 377 (BCCA) [7]).

Agreements between parties regarding custody do not oust the Court's jurisdiction. An agreement is important, but only one of several factors to be taken into consideration when determining the best interests of the child. The degree of

bonding between child and parent is also taken into consideration. The biological link does not outweigh other considerations, but when all other factors are equal, the custody of the child is best served with the biological parents (*L (A) v K (D)*,2000 BCCA 455 [8]; *H (CR) v H. (BA)*, 2005 BCCA 277 [9]).

Race and aboriginal heritage are relevant considerations, but neither is determinative of custody alone. The importance of race differs in adoption cases, where it may be given more weight because the Court is making a decision about the child's exposure to his or her race or culture (*Van de Perre v Edwards*, 2001 SCC 60 [10]). Aboriginal heritage is to be weighed along with other factors in a determination of a child's best interests (*H (D) v M (H)*, [1997] BCJ No 2144 (QL) (SC) [11]).

Clients may wish to vary a custody order. The threshold for a variation of a custody or access order is a material change in the circumstances affecting the child. There is no legal presumption in favour of the custodial parent, although that parent's views are entitled to respect. The focus is on the best interests of the child, not the interests and rights of the parents (*Gordon v Goertz*, [1996] 2 SCR 27 [12]).

Section 211 of the *FLA* allows the Court to order an assessment by a psychologist of each party's parenting abilities and relationship with the child. These reports are particularly important where the dispute over custody is bitter and unlikely to settle. An assessment provides the Court with an independent and neutral expert opinion. Where expert evidence would assist the Court, the Court can order an *FLA* Section 211 report (*Gupta v Gupta*, 2001 BCSC 649 [13]).

2. Types of Custody Orders

> **NOTE:** "Custody" is a term that only appears in the *DA* and so only applies to claims that are proceeding in Supreme Court under the *DA*.

a) Interim Orders

An interim order is a temporary order made once the proceedings have commenced but before the final order is pronounced. Courts will usually make interim custody orders while an action in divorce is underway, with an eye to the child's immediate best interests. Courts tend to favour stability, so an interim order is likely to favour the party with custody at the time of the marriage breakdown. This presumption toward stability can give an interim order substantial weight in determining a final custody order.

b) Sole Custody

Sole custody, in which one parent provides the primary residence and is mostly responsible for day-to-day care, can be granted in cases where the parents request such an arrangement, where they live far apart, or where relations between the parties are so poor as to preclude cooperation.

> **NOTE:** The concept of "full custody" does not exist. A parent using this term is most likely referring to sole custody.

c) Joint Custody

In joint custody, both parents have custody of the child. While the child may reside primarily with one parent, the parents cooperate in raising the child, acting as both joint custodians and guardians of the child. In British Columbia, there is a presumption toward joint custody.

d) Shared Custody

"Shared custody" is a term used by the *Federal Child Support Guidelines*, but not by either the *DA* or the *FLA*. Shared custody is a form of joint custody in which the child spends an almost equal time with each parent. Typically, the child would be switching homes on a frequent basis, such as every few days or once a week. This usually requires that the parents live near one another and have good communication skill. It also requires that the child is able to adapt to living in two homes. Any agreement for shared custody will affect child support.

e) Split Custody

"Split custody" is a term used by the *Federal Child Support Guidelines*, and not by either the *DA* or the *FLA*. On rare occasions, courts will order siblings to live with separate parents. This is usually a drastic solution, ordered only after a *FLA* section 211 report (a court-ordered report respecting the needs of a child, the views of a child, and the ability and willingness of one of the parents to satisfy the needs of a child) is submitted to the Court. A split custody order will affect child support.

3. Other Custody Issues

a) Consent Orders

Where there is agreement on the terms of support or custody provisions, but no written agreement, a consent order may be made by the Court under s 219 of the *FLA* if the written consent of the party against whom the order is to be enforced has been obtained. The order can extend only to the terms consented to.

b) Enforcement of Custody Orders

Where a custody order is in force, the Court may make an order prohibiting interference with a child. The Court may further order sureties and/or documents from the person against whom the order is made, and require that person to report to the Court for a period of time (*FLA*, s 183).

Under the *FLA*, police officer enforcement clauses can only be granted when there has been a breach of an order (s 231).

A child abducted and taken elsewhere within the province will be returned to their rightful custodian. Abduction is an offence under the *FLA*, s 188 that carries a possibility of criminal proceedings (*Criminal Code*, RSC 1985, c C-46 [14], ss 280-281). The *Criminal Code* makes it an offence for a non-custodial parent to abduct a child. Where a custody order is in effect, abduction amounts to contempt of Court.

c) Parental Mobility (Under the FLA, this is referred to as Relocation which has separate considerations from that of Mobility under the DA)

Relocation is defined and explained under Division 6 of the *FLA*. It considers relocation of a child that can reasonably be expected to have a significant impact on the child's relationship with his/her guardian(s) or other adults with which the child has a significant relationship (s 65). The guardian intending to relocate with the child must provide 60 day written notice to all other guardians and persons having contact with the child (s 66). The notice must include the date of the relocation, and the name of the proposed location. Exemptions to these requirements can be granted by the Court if they are satisfied that the notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child or there is no ongoing relationship between the child and the other guardian or the person having contact with the child (s 66(2)).

The child's other guardian(s) can object to the relocation within 30 days of receiving the notice. If an objection is made, the guardian requesting the relocation must satisfy the court that (s 69(4)(a)):

- (i) the proposed relocation is made in good faith, and
- (ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life

When considering the good faith requirement, the Court must consider (s 69(6)):

- (a) the reasons for the proposed relocation;
- (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities;
- (c) whether notice was given under section 66 [notice of relocation];
- (d) any restrictions on relocation contained in a written agreement or an order.

Issues of parental mobility may arise in conjunction with custody issues. That is, one parent may wish to relocate away from another parent with whom they share custody. In *Gordon v Goertz*, [1996] 5 WWR 457 (SCC), the Supreme Court of Canada set out the basic principles for the *DA*. Once the parent applying for the change meets a threshold requirement of demonstrating a material change in the circumstances affecting the child, the Court is required to begin a fresh inquiry into what is in the best interests of the child. Factors to be considered include: the desirability of maximizing contact between the child and both parents, the disruption to the child, and the child's views.

One v One, 2000 BCSC 1584 [15], also a *DA* case, identifies the following list of factors to be considered in determining whether a proposed move is in a child's best interests:

1. the parenting capabilities of and the child's relationship with parents and their new partners;
2. employment, security and prospects of the parents and, where appropriate, their partners;
3. access to and support of extended family;
4. the difficulty of exercising the proposed access and the quality of the proposed access if the move is allowed;
5. the effect of the move on the child's academic situation;
6. the psychological and emotional well-being of the child;
7. the disruption of the child's existing social and community support and routine;
8. the desirability of the proposed new family unit for the child;
9. the relative parenting capabilities of either parent and the respective ability to discharge parenting responsibilities;
10. the child's relationship with both parents;
11. the separation of siblings;
12. the retraining or educational opportunities for the moving parent.

E. Access

"Access" is the term under the *DA*. Under the *FLA*, it is called "Parenting Time" for guardians, or "Contact" for non-guardians.

Proceedings regarding parenting arrangements or contact that have been started, but not determined, before the *FLA* is in force, do not need special transition sections. Section 4 of the *Interpretation Act* provides a default rule that the Act will be used upon it becoming effective, so cases started under the *FRA* will be determined under the *FLA*.

Unless a parent poses a risk to the safety or well-being of the child, he or she will usually be allowed access or visiting rights. Courts can make an order for access and may view a custodial parent who denies access as acting against the best interests of the child.

> **NOTE:** It is important to note that access is a distinct and separate issue from child support. **Denial of access is not grounds to withhold support; nor is a failure to pay support grounds for withholding access.**

1. Factors Considered in Making an Access Order

The overriding principle remains the **best interests of the child**. The courts will not be bound by the wishes of the child, although the child's views can be a powerful factor. When the **FLA** came into force, it introduced an overarching consideration "**to ensure the greatest possible protection of the child's physical, psychological, and emotional safety.**" It can be argued that this consideration is functionally in place already, however. The courts will look into several factors in making access orders. These include:

- The age of the child: older children will be allowed longer visits, but courts will also consider the wishes of children over 12 who may not wish to see the non-custodial parent;
- Distance between homes: if the distances are great, courts may order longer stays;
- Conduct of the non-custodial parent: access can be denied for reasons such as alcoholism, abuse, past attempts to abduct the child, or attempts to alienate the child from the custodial parent;
- Health of the non-custodial parent: if health problems limit the non-custodial parent's ability to care for the child, access may be limited;

2. Types of Access Orders

a) Interim Orders

After making an interim custody order, a court will often grant access on an interim basis. Usually, such an order will favour the status quo, in order to minimize disruption for the child.

b) Specified and Unspecified Access

Specified orders set out the times and places at which the non-custodial parent must have access to the child. Specified orders are generally preferred. Unspecified access is less common and is ordered when the parents are willing to accommodate one another.

c) Conditional Access

Courts may impose requirements, such as not smoking or using drugs or alcohol in the presence of the child. If the parent fails to meet the condition, access may be denied.

d) Supervised Access

Courts may order visits to be supervised by a designated third party if there are concerns about abuse, abduction, mental and physical handicaps or attempts to alienate the child from the custodial parent. It is up to the custodial parent to demonstrate that access should be supervised.

> **NOTE:** There are no filing fees nor does a person need legal representation in Provincial Court, making it a more accessible option for many clients.

3. Extra-provincial Custody and Access Orders

Under the *FLA*, the Court may exercise its jurisdiction to make custody and access orders if one of the following conditions is met:

1. the child was "habitually resident" in BC (s 74(2)(a)).
2. If the child is not habitually resident in B.C., the Court must at the commencement of the application order be satisfied that (s 74(2)(b)):
    - i. the child is physically present in British Columbia when the application is filed,
    - ii. substantial evidence concerning the best interests of the child is available in British Columbia,
    - iii. no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,
    - iv. no extraprovincial order has been recognized by a court in British Columbia,
    - v. the child has a real and substantial connection with British Columbia, and
    - vi. on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
3. the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to (s 74(2)(c))
    - i. remain with, or be returned to, the child's guardian, or
    - ii. be removed from British Columbia.

B.C. courts are required to enforce extra-provincial orders (s 75) with certain exceptions (s 76). Such exceptions include situations where the child would suffer serious harm if he/she was returned to the guardian or leaving British Columbia (s 76(1)(a)).

If one spouse is not in B.C., the only B.C. Court that the B.C. residing spouse can proceed in is the B.C. Supreme Court, because the Provincial Court has no jurisdiction outside of the province.

F. Guardianship

Guardianship may be the most important aspect of any legal arrangements concerning the care and control of the children. Guardianship encompasses the whole bundle of rights and obligations involved in parenting a child, including making decisions about the child's school, moral instruction, religion, health care, dental care, extracurricular activities, etc.

When they are still together, both parents are presumed to be guardians, pursuant to a statutory presumption set out in section 39 of the FLA, playing a "full and active role" in the upbringing of the child (see *e.g. Charlton v Charlton* [1]). Upon marital breakdown, this can change either by agreement or by order of the Court.

Under the *FLA*, guardianship is primarily governed by sections 39, 41, and 42.

Parents can also appoint a guardian in a will. If the parents are both dead or have abandoned the child, the Public Guardian and Trustee becomes the child's guardian.

While a child's parents are living together and after the child's parents separate, each parent of the child is presumed to be the child's guardian (s 39). However, an agreement may be made to provide that a parent is not the child's guardian after the parents separate or when the parents are about to separate.

Section 39 of the FLA also provides for three other scenarios under which a parent is presumed to be a guardian. A parent who has never resided with a child is not the child's guardian unless:

- 1) there is an agreement made under section 30 of the FLA,
- 2) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian, or

- 3) the parent regularly cares for the child.

Additionally, a person does not become a child's guardian by reason only of marriage or a marriage-like relationship.

A person who is not a parent or a parent who is not a guardian may become a guardian of the child by court order, pursuant to section 50 of the FLA. The person applying to court for a guardianship order must demonstrate why it would be in the best interests of the child and provide notice to all of the child's guardians and adults with whom the child resides (s. 51). If the child is over 12, the child's written consent is also required. The evidentiary requirements to obtain such an order are set out under the Supreme Court Family Rules Rule 15-2.1 and the Provincial Court (Family) Rules Rule 18.1. The applicant must provide:

- 1. An affidavit setting out the following information:
  - a. the nature and length of the applicant's relationship with the child,
  - b. the child's living arrangements,
  - c. a detailed plan for how the applicant going to care for the child,
  - d. information about any other children in the applicant's care,
  - e. information about any incidents of family violence that may affect the child, and
  - f. information about any family or child protection court proceedings the applicant has been involved in;
- 2. A Ministry of Children and Family Development records check;
- 3. A Protection Order Registry records check; and
- 4. A criminal records check.

If an application is made for guardianship of a treaty First Nation's child, the child's First Nation's government must be served notice of the application and has standing in the proceeding (ss. 208 and 209).

At the time of birth, the two parents of a child are presumed to be its birth mother and its biological father unless the child was born as a result of assisted reproduction (section 26, *FLA*). Assisted reproduction has, at present, always included the use of one or more of donated eggs, donated sperm, and the cooperation of a woman who is willing to carry the baby to term. Section 24 of the FLA clarifies that a donor of eggs or sperm is not the parent of a child on the basis of their biological contribution alone – donors cannot be made to pay child support unless there is some other connection to the child which justifies holding that the person is a parent under the FLA. If a donor wishes to be regarded as a parent, written agreements can be drafted and signed before the child's birth which would substantiate their parental claim under the FLA. Unlike donors, surrogate mothers are presumed to be a parent of the child under the FLA since they are the birth mother. However, this presumption can be overcome by the intended parents and the surrogate mother signing a written agreement before the child is conceived which states that the surrogate mother will not be a parent to that child. Without such an agreement, the surrogate mother and biological father would be the presumed parents.

Section 41 of the *FLA* lists out the parental responsibilities with respect to a child:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervisionof the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;

- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law toreceive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
  - (i) starting, defending, compromising or settling any proceeding relating to the child, and
  - (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

Section 42 of the *FLA* defines parenting time as time that a child is with a guardian. During this parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.

Additionally, Division 6 of Part 4 of the new *FLA* states that if you are a child's guardian and you want to relocate with the child, you must give any other person who can contact the child 60 days' notice which includes both the date of the relocation and the name of the proposed location. The Court may not grant an exemption to give notice if it is satisfied that notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child or there is no ongoing relationship between the child and the other guardian or the person having contact with the child. Once notice is given, a child's guardians and persons having contact with the child must use their best efforts to resolve any issues relating to the proposed relocation. The proposed relocation may occur unless another guardian of the child files an application to prohibit the relocation within 30 days of receiving notice. The Court will make its decision based on s 37 of the *FLA* considering what would be in the best interests of the child.

1. Terminating Guardianship

Sole guardianship and joint guardianship are not terms used in the *FLA*. The parents or a court may decide that one parent should be the only guardian of the child. This terminates the presumption of guardianship for the other parent. The parents may terminate one parent's guardianship via written agreement (s. 39). The court can terminate one parent's guardianship pursuant to section 51 of the *FLA*. This is an extreme step, taken only when one parent has been shown to be either uninterested in or incapable of proper parenting.

2. Both Parents are Guardians

Under the *FLA*, the standard guardianship agreement, wherein both parents are or remain guardians, is structured such that parental responsibilities and parenting time are specified in the agreement, with specific provisions which govern the allocation of parenting responsibilities. If no such provisions are included, then each party may exercise all parental responsibilities in consultation with the other guardians (*FLA* section 40(2)).

The following are standard elements typically included in guardianship agreements:

- a) Both parents equally have all of the parental responsibilities of guardians [with any exceptions listed].
- b) A guardian, after becoming aware of important information relating to the child not known to the other guardian(s), must immediately notify the other guardian(s) about that information.
- c) Subject to other clauses in the agreement, both guardians must consult about any important decisions that must be made and try to reach agreement concerning these important decisions.
- d) During parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the child provided that the guardian must advise the other parent of any matters of a significant nature affecting the child.

- e) Optionally, the agreement may specify that if one guardian dies, the remaining guardian will assume all parenting responsibilities.

Also, agreements will typically include a dispute resolution clause which governs the situation where the guardians cannot reach agreement over one of their shared responsibilities. The options include:

- a) one parent has the final word, however the other party can apply to court if they disagree with the deciding parent. In particularly high-conflict cases, giving one parent decision-making authority may be the only solution (*Friedlander v Claman*, 2015 BCSC 2409 [16]);
- b) the parties go to mediation, wherein the mediator will have the final word if the parties cannot agree;
- c) the parties go to a parenting coordinator who has decision-making authority;
- d) other collaborative law processes; or
- e) the parties can resolve the matter in court.

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XII. Children and the Law

A. Relevant Ages

1. Age of Majority

The *Age of Majority Act*, RSBC 1996, c 7 [1], s 1 provides that the age of majority in B.C. is **19** years. Section 1 also applies to private documents, such as wills. A person's age is determined by the provisions set forth in s 25(8) of the *Interpretation Act*, RSBC 1996, c 238 [1].

2. Other Relevant Ages

a) Criminal Liability

A person must be 12 years of age or older to be liable for a criminal offence (*Criminal Code*, R.S.C. 1985, c 46 [2], s 13). A person between the ages of 12 and 17, inclusive, can be criminally liable as a young offender under the *Youth Criminal Justice Act* [*YCJA*] [3].

The *YCJA* came into force on April 1, 2003. The purpose of the Act is, in part, to repeal and replace the *Young Offenders Act*, RSC 1985, c Y-1 [4] and to provide principles, procedures, and protections for the prosecution of young persons under criminal and other federal laws. For more information, see Chapter 2: Youth Justice.

b) Attending Restricted and Adult Films (Without Being Accompanied by a Responsible Adult)

In 1997, the Director of Film Classification revised the classification system for motion pictures. A person under the age of 18 years is classified as a minor (*Motion Picture Act*, RSBC 1996, c 314 [5], s 1). Minors may not view films classified as "Restricted" or "Adult", and may not view films labelled as "18A" unless accompanied by an adult (*Motion Picture Act Regulations*, BC Reg 260/86 [6], s 3).

c) Possession and Consumption of Alcohol

A person must be at least 19 years of age to lawfully possess or consume alcohol in B.C. (*Liquor Control and Licensing Act*, RSBC 1996, c 267 [7], s 34).

d) Ability to Obtain a Driver's License

An individual must be 19 to qualify for a driver's licence. If an individual is between 16 and 18 years of age, a parent or guardian must submit the application for the driver's licence in the form required by the Insurance Corporation of British Columbia verified by affidavit (*Motor Vehicle Act*, RSBC 1996, c 318 [8], s 32). The Insurance Corporation of British Columbia ("ICBC") [9] will **never** grant a licence to someone under the age of 16. For more information, see Chapter 12, Automobile Insurance (ICBC).

e) Ability to Work

Any person aged 15 years or over may work. A child between the ages of 12 and 14 needs written permission from their parent or guardian prior to working. A child under the age of 12 must have both the written consent of the parent or guardian and the written permission of the Director of Employment Standards prior to working. For more information, see Chapter 9, Employment Law.

f) Sexual Consent

As of 1890, the age of consent for sexual activity was set at 14 years. Recently, the age of consent in Canada has been changed from 14 to **16 years** (*Tackling Violent Crime Act*, Bill C-2, An Act to amend the *Criminal Code* and to make consequential amendments to other Acts, 39th Parliament, 2nd Session, October 2007, effective May 1st, 2008 [10]). However, if the sexual activity involves exploitative activity, such as prostitution, pornography or where there is a relationship of trust, authority or dependency, the age of consent is 18 years.

Section 150.1(3) of the *Criminal Code* provides what is often referred to as a “close in age” or “peer group” exception: a 12 or 13 year old can consent to engage in sexual activity with another person who is less than two years older and with whom there is no relationship of trust, authority or dependency. A 14 or 15 year old can consent to engage in sexual activity with a partner who is less than five years older with whom there is no relationship of trust, authority or dependency. An exception is also available for pre-existing marriages and equivalent relationships.

g) Marriage

Both parties to the marriage must be at least 19 years old. However, the *Marriage Act*, RSBC 1996, c 282 [11], provides that:

- individuals between the ages of 16 and 19 may marry without the consent of anyone if they are a widower or widow (s 28(1)), and,
- other persons between the ages of 16 and 19 may marry if they have the consent of:
  - a) both parents or of the parent having sole guardianship, or the surviving parent (s 28(1)(a);
  - b) a lawfully appointed guardian of that person (s 28(1)(b));
  - c) the Public Guardian if both parents are dead and there is no lawfully appointed guardian (s 28(1)(c)); or
  - d) a judge of the Supreme Court (usually only where the parent’s consent is unreasonably withheld) (s 28(2)).

No person under the age of 16 can marry unless the marriage is shown to a Supreme Court judge to be expedient and in the interest of the parties (s 29). If the parent or guardian “unreasonably or from undue motives refuses or withholds consent to the marriage,” a minor may apply to court for a declaration to allow the marriage (s 28(2)).

Section 28(6) provides that a marriage of a minor must not be solemnized, and a license must not be issued, unless a birth certificate or other satisfactory proof of age has been produced to the issuer of marriage licenses or to the religious representative.

However, s 30 provides that failure to comply with ss 28 or 29 will not invalidate a marriage that has taken place. In other words, if someone manages to get married at 15 and obtains a valid marriage license, the marriage is valid.

h) Ability to Make a Will

Under s 36 of the 'http://canlii.ca/t/8mhjl|"Wills, Estates and Succession Act", RSBC 2009, c 13, a will made by a person under the age of 16 is not valid unless he or she is on active service with the Canadian Armed Forces or any armed forces of the British Commonwealth of Nations or any ally of Canada. For more information, see Chapter 16, Wills and Estates.

B. Child Abduction

1. Criminal Code

Sections 280 to 285 of the Criminal Code deal with the offences of abduction. Section 282(1)provides that:

Everyone who, being the parent, guardian or person having the lawful care or charge of a person under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that person in contravention to the custody provisions of a custody order in relation to that person made by a court anywhere in Canada with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person of the possession of that person is guilty of an indictable offence (maximum 10 years imprisonment)... or an offence punishable on summary conviction.

Section 283 creates a similar offence for circumstances in which there is no custody order.

> **NOTE:** One should be especially careful when giving advice in custody disputes to avoid inadvertently giving advice that may lead to the commission of these offences. If there is evidence that a parent may abduct a child, or if there is evidence that visits are very "disturbing and harmful", access may be denied. See *Re Sharp* (1962), 36 DLR (2d) 328 (BCCA).

2. Child Abduction Convention

The *Hague Convention on the Civil Aspects of International Child Abduction* [12] enables a person whose custody rights have been violated to apply to a "Central Authority" (each party to the convention must create such a body) for the voluntary return of the child, or to apply for a court order. Keep in mind that not every country is a signatory to the *Hague Convention*. Applications can be made either in the person's jurisdiction or in the jurisdiction to which the child has been abducted.

Each Central Authority has several tasks:

- i) to discover the whereabouts of the child;
- ii) to take precautions to prevent harm to the child;
- iii) to encourage voluntary return of the child or some other agreeable arrangement;
- iv) to facilitate administrative processes; and
- v) to arrange for legal advice where necessary.

It appears that the Convention applies where the parents are formally separated and the child has been in the sole custody of one parent.

Finally, it should be noted that the Central Authority does not decide the merits of any custody order. It is merely an enforcement agency.

A federal coordinator of the Department of Justice deals with abductions to France, Switzerland, Portugal and Canada. The contact number is (613) 995-6426.

If the child has been taken to another jurisdiction, contact the Department of External Affairs, 125 Sussex Drive Ottawa, K1A 0G2. Attention: J.L.A. The contact number is (613) 995-8807.

A further resource in the case of abductions and violations of custody orders is the office of the Child Youth and Family Advocate, 600-595 Howe Street, Vancouver, BC. The contact number is (604) 775-3203.

C. Discipline

The *Criminal Code* (s 43) allows a parent, a person standing in the place of a parent, or a school teacher to discipline a child, by way of correction, provided that only reasonable force is used. However, section 76(3) of the *School Act*, RSBC 1996, c 412 [13] requires that teachers ensure the discipline is similar to that of a kind, firm, and judicious parent, and must not include the use of corporal punishment.

The Supreme Court of Canada examined s 43 in *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] SCC 4, 16 C.R. (6th) 203 [14]. The Court held that section 43 does not violate the constitutional rights of children. The discipline must be "by way of correction" meaning "only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour" (para 24). Furthermore, the Court provided a comprehensive definition of "reasonable force":

Generally, section 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered.

D. Child Protection

Under the *Child, Family and Community Service Act* [*CFCSA*] [15], a Director or member of the municipal or provincial police forces can apprehend any child under the age of 19 years when the child is believed to be in need of protection or care. Section 6 lists conditions justifying temporary protective custody under this Act.

Within seven days after the child's removal, a Director must attend Supreme or Provincial Court for a presentation hearing. The Director must, if possible, inform the child, if 12 years of age or over, andeach parent of the time, date, and place of the hearing. If the situation warrants it, a hearing may result in temporary (or permanent) custody of the child being given to the Director or some other agency.

1. Principles

The *CFCSA* codifies child protection remedies available in B.C. It also gives specific rights to children in care under the Act (section 70). The *Representative for Children and Youth Act*, SBC 2006, c 29 [16] s 6 provides that it is the responsibility of the Representative to:

- support, assist, inform and advise children and their families respecting designated services;
- monitor, review, audit and conduct research on the provision of a designated service by a public body or director for the purpose of making recommendations to improve the effectiveness and responsiveness of that service, and comment publicly on any of these functions
- review, investigate and report on the critical injuries and deaths of children as set out in Part 4

The guiding principles in section 2 of the *CFCSA* provide that:

- children are entitled to be protected from abuse, neglect, harm, or threat of harm;

- the family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
- if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
- the child's views should be considered when decisions relating to that child are made;
- kinship ties to extended family should be maintained;
- the cultural identity of Aboriginal children should be preserved; and
- decisions relating to children should be made and implemented in a timely manner.

B.C. Children and Youth Review: An Independent Review of B.C.'s Child Protection System (April 7, 2006) recommends a number of changes to the sections discussed in this chapter, including the appointment of a Representative for Children and Youth. The full report can be viewed online at www.cecw-cepb.ca/publications/946.

2. Best Interests of the Child

Section 4 of the *CFCSA* defines "best interests of the child" somewhat differently than does the *FRA* and the *FLA*. Factors that must be considered under the *CFCSA* include:

- the child's safety;
- the child's physical and emotional needs and level of development;
- continuity in child care;
- the quality of relationships with parents;
- the child's cultural, racial, linguistic and religious heritage;
- the child's views; and
- the effect on the child of any delays in making a decision.

Section 4(2) mandates that, in assessing the best interests of Aboriginal children, the importance of preserving the child's cultural identity must be considered.

The *CFCSA* definition of when a child needs protection includes the following (s 13):

- situations where there is a risk of physical or sexual abuse, harm, or exploitation;
- emotional harm by a parent's conduct;
- deprivation of necessary health care;
- situations where the parent is unable or unwilling to care for the child and has not made adequate provision for the child's care; and
- where the child has been abandoned and adequate provision has not been made for the child's care.

See s 13 for a complete enumeration of circumstances where children need protection.

3. Duty to Report Need for Protection

The *CFCSA* s 14(1) requires that someone who believes a child is being or is likely to be physically harmed, sexually abused, or exploited to report the matter to the Ministry of Children and Family Development [17]. The Helpline for Children [18] (310-1234) provides 24-hour access to social workers in case of an emergency.

Reports to the Ministry are anonymous. No action lies against a person making a report unless it is made maliciously or without reasonable grounds. Failure to report cases of abuse or exploitation constitutes an offence (s 14(3)), even when the information was confidential or privileged, except for when the information was obtained through a solicitor-client relationship (s 14(2)). The Director under the *CFCSA* must assess the information reported (s 16). Case law has demonstrated that the duty of the director to act is actually broader than the legislated duty: see *BS v British Columbia*

(Director of Children, Family, and Community Services), [1998] 8 WWR 1 (BCCA) [19].

E. Removal

Under the *Child, Family and Community Service Act* [*CFCSA*], the Ministry for Children and Families has different options to deal with an unattended child (s 25), or a lost or runaway child (s 26). Pursuant to these sections, the Ministry can take the child for up to 72 hours without formally removing the childfrom his or her parents. Furthermore, the Ministry can take a child away to provide essential health care without legally removing the child, provided that the Ministry first obtains a court order under s 29 of the *CFCSA*. In situations where there are reasonable grounds to believe that the child's health or safety are in immediate danger, a police officer may take charge of the child (s 27).

1. Removal Procedure

Under the *CFCSA*, Directors are appointed to enforce the Act. A Director may, without a court order, remove a child if there are reasonable grounds to believe that the child needs protection and that the child's health or safety is in immediate danger, or no other less disruptive measure that is available is adequate to protect the child (s 30). When removing a child, a Director must make all reasonable efforts to notify each parent of the child's removal (s 31). Practically speaking, the Director delegates his or her duty to social workers who then carry out the removal procedure.

2. Presentation Hearing

The Director must attend a presentation hearing within seven days of the removal (*CFCSA*, s 34) and present a written report that includes:

- the circumstances of the removal;
- information about less disruptive measures considered before removal; and
- an interim plan of care for the child, including, in the case of an Aboriginal child, the steps to be taken to preserve the child's aboriginal identity (s 35).

A child who is removed under the *CFCSA* is put under the care of the Director until the Court makes an interim order about the child, the child is returned, or until the Court makes a custody or supervision order (s 32). A presentation hearing is a summary hearing and must be concluded as soon as possible (normally within 30 days) (s 33.3).

If the parents consent to the interim removal, an order will be made that the child remain in the custody of the Director pending a protection hearing (see below). If the parent(s) disagree with the removal, a presentation hearing will be scheduled as soon as possible (s 33.3) to determine where the child should live pending the full protection hearing. The presentation hearing may proceed by way of affidavits or viva voce evidence. At the conclusion of the presentation hearing, the child may stay in the custody of the Director, may be returned to his or her parent(s) or may be returned to his or her parent(s) under supervision(s 35(2)). It is important to note that the notice of the presentation hearing need not be formally served, and informal notice is adequate.

3. Protection Hearing

A protection hearing must start within 45 days after the conclusion of the presentation hearing (*CFCSA*, s 37(2)). The purpose of the protection hearing is to determine whether the child needs protection (s 40(1)). The Director must return the child to the parent(s) as soon as possible if it is determined that the child does not need protection (s 40(2)). A child can be returned and still be under minimum supervision of the Director, or returned without supervision. If the child is returned without supervision, the proceedings are at an end (s 37(1)).

4. Orders

Section 41 of the *CFCSA* outlines orders that can be made at a protection hearing:

- an order to return the child to the custody of the parents while being under the Director's supervision for a period of up to six months;
- an order that the child be placed in the custody of a person other than the parent (e.g. a relative) with the consent of that other person and under the Director's supervision for a specified period of time;
- an order that the child remain or be placed in the custody of the Director for a specified period of time; or
- an order that the child be placed in the continuing (permanent) custody of the Director. Continuing (permanent) orders should be made under s 49.

The parents may consent to or oppose the order. If the parents oppose the order, a Rule 2 case conference is scheduled as soon as possible and a judge will attempt to resolve any issues in dispute (see *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg 533/95 [20] for a complete description). If the matter is not settled at the case conference, a date is scheduled to determine whether the child needs protection.

The content of supervision orders is outlined in the *CFCSA*, section 41.1. Terms and conditions that may be attached to a supervision order include:

- services for the child's parent(s);
- day-care or respite care;
- the Director's right to visit the child; and
- the Director's duty to remove the child if the person with custody does not comply with the order.

Section 43 outlines the time limits for temporary custody orders and s 47 outlines the rights and responsibilities of a Director who has custody of a child either under an interim or temporary custody order. These rights and responsibilities include:

- consenting to health care for the child;
- making decisions about the child's education and religious upbringing; and
- exercising any other rights to carry out any other responsibilities as guardian of the child, except consent to adoption.

Temporary orders can be extended under section 44.

When a continuing custody order is made, the Director becomes the sole guardian of the person of the child and the natural parents' legal rights to the child are extinguished. The Director may then consent to the child's adoption. The Public Guardian becomes the sole guardian of the estate of the child. The order, however, does not affect the child's rights with respect to inheritance or successionof property (s 50(1)). In certain cases, the Director can seek a last chance order of up to six months (s 49(7)).

Parents can apply to set aside both temporary and continuing (permanent) orders under s 54. Temporary custody orders may also be extended where a permanent transfer of custody is planned under s 54.01. For more information, see *British Columbia (Director of Family and Child Services) v K(TL)*, [1996] BCJ No. 2554 (Prov Ct FD) (QL).

5. Access and Consent Orders

Section 55 of the Child, *Family and Community Service Act* [*CFCSA*] allows parents, or other persons, to apply for an access order at the time of or after, an interim or temporary custody order is made. Section 56 provides for applications for access by parents or other persons after a continuing custody order is made. This entitles parents to apply for access visits during any apprehension, whether interim or permanent, if the Director opposes access.

Consent orders under the *CFCSA* may be an advisable option for parents. A consent order is outlined in s 60, which provides that the Court may make any custody or supervision order without a finding of fact that their child actually needed protection, and without an admission of any of the grounds alleged by the Director for removing the child (ss 60(4) and (5)). A consent order requires the written consent of:

- a) the Director;
- b) the child, if 12 years of age or older;
- c) each parent of the child; and
- d) any person with whom the Director may be placing the child in temporary custody.

Children 12 years of age or older must be given notice of the hearings, report copies, etc.

6. Rights of Children in Care of the Director

Section 70 of the *Child, Family and Community Service Act* [*CFCSA*] sets out the rights to which children are entitled while in care of the Director. Children in care have the right to be fed, clothed, and nurtured according to community standards; be informed about plans regarding their care; be consulted with respect to decisions affecting them; reasonable privacy and possession of their personal belongings; be free from corporal punishment; and receive medical and dental care when required. For a complete list of enumerated rights, see s 70.

7. Priority in Placing Children with a Relative

When deciding where to place a child, the Director must consider the child's best interests (s 71(1)). The Director must give priority to placing the child with a relative before considering a foster parent, unless that is inconsistent with the child's best interests (s 71(2)).

Children under protection can be placed in the custody of extended family or other concerned parties (s 8). This is known as a "kith and kin" agreement. The Director may also refer the matter to a familyconference co-ordinator to allow the family to reach an agreement on a 'plan of care' that serves the best interests of the child (ss 20, 21).

Until March 31, 2010 a relative caring for a child residing in his or her home may have been eligibleto receive monthly Child in the Home of a Relative ("CIHR") benefits from the Ministry of Social Development (previously the Ministry of Employment and Income Assistance). As of April 1, 2010, these benefits are no longer available to new applicants. In the absence of the CIHR benefits, relatives looking after a child in their home may be eligible for the child tax benefit, the B.C. family bonus, the universal child care benefit, and/or the child disability benefit. For more information, see: www.gov.bc.ca/meia/online_resource/verification_and_eligibility/cihr. An alternative (but not a substitute) for relatives to consider is the Extended Family Program benefits available through the Ministry of Children and Family Development (see www.mcf.gov.bc.ca/alternativestofostercare/extended_family.htm). These benefits are intended to be temporary and the relative is not eligible if they have a guardianship order. The application for benefits must be initiated by the child's parent.

8. Priority in Placing Aboriginal Children with an Aboriginal Family

The Director must give priority to placing an Aboriginal child with the child's extended family within the child's Aboriginal community or with another Aboriginal family (s 71(3)). Section 39(1) mandates notification of the band. See also ss 2(f), 3(b) and (c), and 4(2) of the *CFCSA*. If a child is of mixed heritage, the Ministry will generally treat the child as an Aboriginal child and notify the band accordingly.

Certain additional considerations are provided throughout the Act for an Aboriginal, Nisga'a or treaty First Nations child.

F. Child Leaving Home or Parent Giving Up Custody of a Child

Children may leave home before the age of majority, or alternatively, parents may voluntary give up legal custody of their children. Please note that "emancipation" (a legal mechanism by which a person may be legally separated from his or her parents before the age of majority) is not a legal remedy for children in BC as it is in some parts of the United States.

1. Rights of the Child

Children may leave home as soon as they are able to support themselves. The following considerations should be kept in mind:

- a) under the *School Act*, a child must attend school until age 16 (s 3(1)(b)). It would be extremely difficult for the child to go to school and maintain a job to support him or herself sufficiently at a younger age than this;
- b) a child under 15 needs written permission from their parent or guardian prior to working (*Employment Standards Act*, RSBC 1996, c 113 [21], s 9(1)). Additionally, a child under 12 needs the written permission of the Director of Employment Standards prior to working (s 9(2));
- c) pursuant to s 26(1) of the *Child, Family and Community Service Act* [*CFCSA*], a Director may take charge of a child for a period of up to 72 hours if it appears that the child is lost or has run away. If the person responsible for the child is not located by the end of the 72-hour period, the Director no longer has charge of the child (s 26(5)). (Note that "child" is defined in the *CFCSA* as a person under the age of 19 years, and includes a youth.);
- d) a child under 19 may qualify for social assistance if he or she does not live with a parent or guardian, and if the ministry is convinced that no parental support is being provided; and
- e) pursuant to s 91 of the *Family Relations Act* a child may be eligible for child support payments from their parents. However, children have been found to have withdrawn from their parents' care and control when they live with a boyfriend or girlfriend who provides for their needs, have moved out of their parents' home and refuse to return, or live on their own and have demonstrated they are capable of independently supporting themselves financially.

2. Giving Up Custody of a Child

There are four basic ways that a parent can voluntarily give up legal custody of a child. This is done by transferring the rights that the parent possessed through one of the following mechanisms:

- a) by a custody and guardianship order under the *Family Relations Act* (s 30);
- b) by making a will (which would take effect only on the death of the parent), if the parent has sole guardianship (*Infants Act*, s 50);
- c) by the parent(s) consenting to the adoption of the child by other persons (*Adoption Act*, RSBC 1996, c 5, s 13(1)); or
- d) by a written agreement between the parent and the Director of Child, Family and Community Service where the parent transfers his or her rights to the Director (*CFCSA*, ss 6 and 7)

G. Child Benefits

1. Child Disability Benefit

The Child Disability Benefit (CDB) is a non-taxable supplement to the Canada Child Tax Benefit (CCTB) and Children's Special Allowance. To receive the CDB, a child must be eligible to receive the CCTB and must also qualify for the Disability Tax Credit (DTC). Not all children with disabilities qualify. For more information about eligibility visit the Canada Revenue Agency website [22] or call 1-800-387-1193.

The CDB provides up to $2,455 per year, per child who qualifies for the disability amount, for low- and modest-income families caring for children under the age of 18 who have a severe and prolonged mental or physical impairment.

2. Universal Childcare Benefit

In July 2006, the Government launched the Universal Childcare Benefit (UCCB), a new benefit paid monthly to help eligible families provide child care for their children less than 6 years of age. The UCCB will provide families a $100 monthly payment (up to $1,200 annually) for each child 3-57 less than six years of age. It is paid separately from the Canada Child Tax Benefit (CCTB). The UCCB is taxable. One must apply for UCCB through Canada Revenue Agency.

For more information on eligibility, the application process and access to an online application, visit the Canada Revenue Agency website [23] or call 1-800-387-1193.

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XIII. Adoption

A. Legislation

1. Adoption Act, RSBC l996, c 5

The *Adoption Act* [1] governs adoptions in BC. The Act provides for the licensing of adoption agencies. These agencies, in addition to the Director of Adoption, have exclusive authority for facilitating adoptions, matching birth families with adoptive parents, adoption planning, pre-placement assessment, placement services, and post-placement counselling and assessments for non relative adoptions in BC.

The *Adoption Act* enables any adult person to apply to adopt a child, or to adopt another adult person. Under ss 5 and 29, one or two adults may apply to adopt a child. This allows unmarried couples, including same sex-couples, to apply to adopt.

The *Adoption Act* says that a child may be placed for adoption by the Director of Child, Family and Community Service; an adoption agency; a parent or guardian of a child by direct placement; or a parent or guardian of a child, if the child is placed with a relative of the child. A direct placement means the placing of a child by a parent or other guardian with one or 2 adults who are not a relative of the child.

Section 37 of the *Adoption Act* states the effect of the adoption order. For all purposes, an adopted child becomes the child of the adopting parent(s) and the biological parents cease to have any parental rights or obligations with respect to the child.

Two legal exceptions under the Act are:

- a) an adopted First Nations child does not lose status, rights, privileges, disabilities, and limitations acquired under the *Indian Act* and other Acts (s 37(7)); and
- b) adoption adds a prohibited degree of consanguinity for the purpose of marriage or laws relating to incest (s 37(4)).

The adopted person takes the given names specified in the adoption order, and the surname of the adopting parents, unless the court orders otherwise (s 36).

Furthermore, openness agreements are recognized by statute (s 59) and may be entered into by the adoptive parents, the birth parents, and others with a relationship to the child, after consents to adoption have been signed.

An adoption effected under the law of a jurisdiction other than BC is valid in BC as though it had been made under BC's adoption legislation (s 47). Part 4 of the *Adoption Act* deals with interprovincial and intercountry adoptions. Before a person brings a child into the province for adoption they must obtain the approval of a director or an adoption agency.

Part 4 Division 2 deals with intercountry adoption of children from countries that are signatories to the Hague Convention on Intercountry Adoption [2]. To complete an adoption from a foreign country, whether that country is a "Hague Country" or not, a person needs the approval of the British Columbia Central Authority [3].

Under the *Adoption Act*, ss 63(1) and 64(1), birth records may be disclosed to both birth parents and adult adoptees. The Reunion Registry [4] facilitates reunions and disclosure of records. The Act provides for filing of non-disclosure vetoes and no-contact vetoes (ss 65 and 66).

B. Procedure

1. Consent

Section 13 of the *Adoption Act* states that no adoption order may be made without the written consent of:

- the child, if 12 years of age or over; children aged between 7 and 11 must be interviewed to ascertain whether they understand the meaning of adoption, and their views on the proposed name changes and a report must be filed with the court;
- the child's parents. The birth mother can not sign consents until the child is at least 10 days old. The consent of the biological father, who is not presumed to be the child's biological father under s. 26 of the *Family Law Act*, is not required unless the biological father acknowledges he is the father and is named as the father by the child's birth mother;
- the child's guardians;
- where a child is a permanent ward of the Director of Child, Family, and Community Service, the Director, as guardian, must consent.

The court may dispense with the need for consent from some of these parties. Parental consent may be dispensed with if it is in the best interest of the child or if the person has abandoned or deserted the child, cannot be found, is incapable of giving consent, has persistently neglected or refused to contribute to support for which he or she is liable, or is a person whose consent ought, in all the circumstances of the case, to be dispensed with (s 17). The consent of a child over 12 years of age can only be dispensed with if the child is not capable of giving an informed consent (s 17(2)).

A person's consent must be in the form of an affidavit sworn in front of a notary or a lawyer. Each affidavit must state that the effect of the consent and of adoption was fully explained to the person consenting, and that he or she signed the consent freely and voluntarily.

How and when a person can revoke their consent is set out below in section 6.

2. Notifying the Director of Adoption

Within 14 days after receiving a child into their home for the purposes of adoption, the prospective adoptive parents must notify, in writing the Director of Adoptions or an adoption agency (s 12).

A person wishing to apply to adopt must notify the Director of Adoption in writing of his or her intention (s 31) at least 30 days before filing the application unless:

- the child has been placed in a licensed adoption agency;
- the child is related to the applicant by blood; or
- the applicant is the child's stepparent.

The Director of Adoption then makes an inquiry and files a report with the court before the hearing date. At least 30 days before the date fixed for the hearing of the application or an application to dispense with consent, the applicant must give a copy of the application with a notice of the date of hearing to the Director or licensed adoption agency.

The court may dispense with the times needed for the notices where the Director's report shows good cause that the waiting period is not necessary to protect the interests of all parties (s 6(9)).

In cases of “direct placement", potential adoptive parents must notify either the Director of Adoption or an adoption agency as soon as possible before the child is received in their home, and then in writing within 14 days after the child is received. Prior notice is required to allow the adoption agency or the Director of Adoption to receive or provide information to and from the birth and adoptive parents. Such information may include providing alternatives to the birth parents, doing a pre-placement assessment of the adoptive parents, counselling adoptive children if necessary, and

ensuring that children over 12 have given informed consent.

Under s 33, a post-placement assessment must be made by either the Director of Adoption or an adoption agency, providing a recommendation on whether the adoption should be made or not, or whether insufficient information is available to make the determination.

3. Adoption by the Child's Blood Relatives or Stepparents

The Director of Adoption does not need to be notified or make a report where one adult may apply to the court to become a parent of a child jointly with another parent, nor where a blood relative of achild applies to adopt the child.

In the case of stepparent and blood relative adoptions, the application may not be made until the child has lived with, and been in the custody of, the applicant for at least six months prior to the application, except by order of the court. The court may still order a report from the Director. Wherea report from the Director is not necessary, the material filed in support of the application should inform the court:

- in whose care the child has been since birth;
- whether the parents have consented or proper reasons for the omission of such consent;
- how long the applicants have been married;
- the ages and occupations of the applicants;
- whether either of the applicants have any other children living with them;
- that the applicants are able to bring up, maintain and educate the child; and
- any unusual circumstances relevant to the application.

4. Where all Parties Have Consented to Adoption

If all of the necessary consents have been obtained, no notice need to be given and the application is made under Rule 17-1(24) of the *BC Supreme Court Family Rules*. The real application is thus the Requisition made to the registry and all other documents can be "the material on which the application is founded".

5. Where Consent is Not Obtained

Where consent is not obtained, Rule 17-1(24)0-7(1) cannot be used and an application must be made to the court to dispense with consent. Subject to circumstances where s 42 of the *Adoption Act* apply, an application under s 11 of the *Adoption Act* dispensing with notice of a proposed adoption to a birth father and an application under s 17 of the *Adoption Act* dispensing with consent to an adoption, may be included in an application for an order for adoption under *Supreme Court Family Rule* 17-1(26). See Family Practice Direction 1: Adoption Applications at http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/family_practice_directions.aspx.

Since it is preferred that the petition not contain requests to dispense with consents, the applicantsshould file, with the petition, a Notice of Motion and supporting affidavit under Rule 44 asking that such consent be dispensed with. Note that for the application for an order dispensing with consent to be granted there can be no person whose "interests may be affected" by the adoption order.

6. Revocation of Consent

Fraud, undue influence, and duress may invalidate consent. In the absence of such defect with the agreement, the court may only revoke consent if it is in the best interests of the child.

Consent may be revoked in writing before the child is placed (s 18). The birth mother may revoke her consent within 30 days of the child's birth regardless of the child's placement. The child may revoke consent at any time before the order is made (s 20). After the child has been placed, subject to the above, consent may be revoked only by court order and only if it would be in the best interests ofthe child. The application for revocation of consent must be made before the granting of the adoption order (s 22).

A person who consents to an adoption may revoke his consent prior to the child being placed if the revocation is in writing and received by the director or agency before placement.

7. Checklist for Filing an Adoption

The necessary documents for an adoption application can be found on the BC Supreme Court website [5].

The applicant should include:

- the petitioners' affidavit;
- Petition to the Court (Form F73);
- affidavit of parent's consent to adoption;
- paternity affidavit of birth mother if no father named;
- birth parent expense affidavit, sworn by the adoptive parents;
- requisition to have adoption heard in chambers, if necessary;
- Notice of Hearing of petition (Form F75), if necessary;
- Requisition re: Desk Order for Adoption, if the adoption is uncontested and the necessary consents have been obtained; and
- Desk Order for Adoption (no hearing necessary); and/or order after hearing in chambers.

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References

[1] http://canlii.ca/t/84g5
[2] https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption
[3] http://www.cic.gc.ca/english/immigrate/adoption/authorities.asp
[4] http://www2.gov.bc.ca/gov/content/life-events/births-adoptions/adoptions/search-reunions-registries
[5] http://www.courts.gov.bc.ca/supreme_court/self-represented_litigants/info_packages.aspx

XIV. Name Changes

A. Legislation: Name Act, RSBC 1996, c 328

The instructions for changing a surname are outlined in the *Name Act* [1]. It can be skipped if the change occurs during the marriage ceremony or divorce. The procedures for changing a first name are much less formal and are not set out in legal rules (see Section XIII.C: Changing a First Name). The Department of Vital Statistics [2] provides a name change package complete with forms and instructions. They can be reached in Vancouver at (604) 660-2937.

Note the Court decision in *Trociuk v British Columbia (Attorney General)*, [2003] 1 SCR 835 [3] which declared ss 3(1)(b) and 3(6)(b) of the British Columbia *Vital Statistics Act* [4] unconstitutional. These sections prevented a father from having the registration of the child's surname altered, violating the father's rights under s 15(1) of the *Canadian Charter of Rights and Freedoms* [5].

B. Changing a Surname

1. General

Any person may apply to change his or her own name.

a) At the Time of Marriage

At the time of marriage, a person may elect to:

- retain the surname he or she had immediately before marriage;
- use the surname he or she had at birth; or
- use the surname of his or her spouse by marriage.

b) A Parent with Custody of an Unmarried Child

A parent with custody may change the surname of their child. He or she must submit written consent of:

- the child if the child has attained the age of l2 years;
- the other parent, if living; and
- the applicant's spouse if the application is to change the child's surname to that of the applicant's spouse.

A parent with custody of an unmarried child may allow that child to informally use any surname he or she wants, and that child may be registered in grade one under that name. No consent from the other parent is necessary in this case. A parent may apply to change a minor child's name legally. It is also possible to apply for a change of name if the other parent:

- a) isn't paying support for the child;
- b) hasn't exercised access of the child for over one year; **and**
- c) the whereabouts of the other parent are unknown.

c) A Widowed Person

A widowed person may apply to change their surname. The applicant must submit a death certificate, or if the death occurred in British Columbia they may state date and place of death and name of spouse.

d) A Divorced Person

A divorced person may, upon divorce, go by the name listed on his or her birth certificate.

2. Eligibility

To be eligible to change his or her name under the *Name Act*, a person must be:

- a) an adult; or
- b) if a minor, must be a parent having custody of his or her children;

and:

- a) must have lived in BC for at least three months; or
- b) must have resided in the province for at least three months immediately prior to the date of application (s 4).

3. Procedure

> **NOTE:** A change of name application can be included in the Notice of Family Claim and attached Schedule 5: Other Orders filed in divorce proceedings to avoid the procedure described below.

a) When the Applicant Has Already Assumed the Name

Sometimes the name to be legally adopted is one that has already been informally assumed. The assumed name should be indicated when preparing the application form. For example: "...change my name from John Doe, known as Henry Smith, to Henry Smith".

b) Publishing Notices of Intention

A person who wishes to legally change his or her name is no longer required to publish a notice of intention.

c) Making the Application

When making application for a change in his or her surname or given name, or both the surname and given name, the applicant must insert his or her name in full in the notice of application for a change of name.

Application for a legal change of name must be accompanied by:

- i) the birth certificate, landed immigrant identification card or Canadian citizenship certificate of the applicant, and others included in the application;
- ii) a marriage certificate where the change affects the name of a married man or woman (not required for persons married in British Columbia);
- iii) any required consents, as above;
- iv) proof of custody from applicants who have been divorced, respecting any children included in the application who were born prior to the divorce;
- v) the statutory fee of $137, and $27 for each additional individual; and
- vi) proof of death from widowed applicants respecting any children included in the application.

> **NOTE:** Information can be obtained from the Division of Vital Statistics (Vancouver telephone: (604) 660-2937; website: http://www.vs.gov.bc.ca/) regarding other related procedures such as a bride's election of surname at

marriage, and changes of name resulting from adoption, legitimisation of birth, dissolution of marriage, or due to improper registration of the birth originally.

C. Changing a First Name

1. Eligibility

Anyone may change his or her first name. However, minors should be advised that they must obtain the written consent of their parents to do so.

2. Procedure

The client does not need to go through the application procedures necessary for changing a surname. The client can start using another first name at any time.

All identification – including credit cards, driver's license, social insurance card, school records (where applicable), health care cards, bank accounts, and birth certificates – should be changed to the first name being used. This can be done by contacting the relevant organizations and filling out a Change of Name Form.

Usually, the client's former first name will become a middle name instead.

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References

[1] http://canlii.ca/t/8481
[2] http://www2.gov.bc.ca/gov/content/life-events
[3] http://canlii.ca/t/1g6ph
[4] http://canlii.ca/t/84fk
[5] http://canlii.ca/t/8q7l

XV. Court Procedures

A. Limitation Dates

Spousal support can be claimed under the *DA* in a divorce proceeding or in a proceeding for corollary relief alone (ss 3, 4 and 15.2). There is no limitation period within which spouses or divorced spouses must bring a spousal support application.

Under *FLA*, unmarried spouses have two years to bring an application for division of assets or support after the separation, and married spouses have two years to do so after the divorce or declaration of nullity. Despite this, a spouse may make an application after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

The limitation period for setting aside an agreement is delayed in that it does not run until the spousediscovers or ought to have discovered grounds for the application.

B. Supreme Court

The Supreme Court is the only court that hears actions under the *DA*. Under the *FRA* and *FLA*, the Supreme Court has both statutory and inherent jurisdiction to decide all support, division of property, custody, and access matters. Therefore, all *FRA* and *FLA* issues can be incorporated into a divorce action.

All Supreme Court procedures in family law proceedings are governed by the *Supreme Court Family Rules* effective July 1, 2010. (The *Supreme Court Family Rules* replace the former *Rules of Court* in respect of family law matters). Unless a client is familiar with these rules and able to strictly adhere to the formal procedures, this person should appear in Supreme Court with representation.

Actions are started when a claimant files a Notice of Family Claim or a Petition to Court. Matters may be decided through interlocutory applications or by trial. Interlocutory applications are hearings held in chambers. No witnesses are called. Instead, all evidence is taken from sworn affidavits. If the judge ormaster is satisfied with the credibility and substance of the evidence presented, then an interim order can be granted. A final order may be obtained at trial or by way of a summary trial on affidavit evidence ifthere are no serious issues of credibility.

C. Small Claims Court

Clients can enforce agreements concerning the division of assets between persons in a common law relationship and between those in other relationships in Small Claims Court. See Chapter 20: Small Claims Procedure for more details. Also, one may be able to make a trust claim in Small Claims Court.

D. Provincial (Family) Court

1. Jurisdiction

Provincial (Family) Court has jurisdiction under the *FLA* over matters of custody, access, support and guardianship, subject to the jurisdiction of the superior courts and the federal government. The *FLA* provides greater powers for the enforcement of Orders which are available to the Provincial Court. Provincial (Family) Court has jurisdiction over the enforcement of support orders whether made in Supreme Court or Provincial (Family) Court (*Butler v Butler* (1981), 27 BCLR 268 (BCCA) [1]) and has original jurisdiction to make support orders and to vary or rescind its own orders.

Provincial(Family) Court can also make, vary, rescind, or enforce its own custody/access orders, but does not have the power to make orders regarding occupancy of the family home (*Polglase v Polglase* [1979 [2] BCJ No 58 (QL)]). Where the Supreme Court has made an order respecting custody, access, support, or child support, Provincial (Family) Court will be unable to vary that order, although the Court can enforce the order.

The Provincial Court offers free counselling and mediation services to family members considering separation or divorce. The Family Justice Counsellors (who may also be probation officers) will try to help the parties reach agreement on contentious matters.

2. Contacting Provincial (Family) Court

Clients should phone Provincial Court (and ask for the Family Court Division) in advance to arrange an interview. An Intake Officer will speak with the client, and if the problem is something the Provincial Court deals with, the client will be assigned to a Counsellor and an appointment will be arranged.

For a list of Family Courts in the Lower Mainland, see Chapter 22: Referrals.

3. Family Justice Counsellors

Family Justice Counsellors are not lawyers and do not necessarily know what the client's rights and obligations are. Clients should seek legal advice before signing any agreement.

The Family Justice Counselling Service helps people seeking remedies for their family problems through the Court or through counselling and mediation services. The aim of the counsellors is not reconciliation. Where a couple indicates a willingness to restore the marriage, they will be referred to a marriage counsellor. There are also clerks who help clients understand and implement child support guidelines.

Counselling is non-adversarial. The counsellors are impartial third parties who will assist both spouses in coming to an out-of-court settlement, although the counsellors are not of a uniform quality and expertise. After gathering minimal information, the Counsellor will normally send a letterto the other spouse to advise him or her of the situation and try to set up a meeting with the first spouse and the counsellor. All information received from a spouse is private and confidential and willnot be given out except with the express permission of that person, or as required by law.

Counsellors attempt to avoid court disputes by obtaining a Consent Order. If this is not possible, pertinent details regarding custody and support will be obtained, and forms will be prepared for court.

The counsellors will:

- provide information regarding the court processes, available options, and current legislation;
- offer conciliation and mediation services;
- investigate the matters under dispute;
- help with court applications and general preparation for court; and
- screen for family violence situations and direct parties to the appropriate services.

The client can choose to avoid the counselling service and appear in court directly. The counsellor towhom the client has been assigned will still offer assistance with the application forms, etc. The Family Justice Counsellors can be reached at (604) 660-6828 (Vancouver) or (604) 660-8636 (Burnaby).

Family Justice Counsellors deal exclusively with issues of children and support. In limited circumstances, and for clients with assets or debt less than $25,000, a Family Justice Counsellor can mediate an agreement.

4. Provincial (Family) Court Proceedings

a) Application to Obtain an Order

Most proceedings in Provincial Court are commenced by filing an Application to Obtain an Order (Form 1). The application commences an action in Provincial Court, and requests a specific remedy. The application can be filed at either the court registry or in a family justice registry. For procedure see Provincial Court (Family) Rules.

The application must be filed with the registry, and must be personally served on the respondent by someone other than the applicant unless the judge orders otherwise. The following documents must be served with the filed copy of the application when it is served on the respondent:

- a blank reply form (Form 3);
- a blank financial statement form (Form 4), if the applicant is seeking an order for child, spousal or parental support or a variation of child, spousal or parental support; and
- a filed copy of the applicant's financial statement and applicable documentation under Rule 4 (2), if applicable.

b) Reply

The respondent must file a reply within 30 days of being served with a copy of the application, otherwise a default judgment may be sought in favour of the applicant. If the respondent disagrees with the remedy sought, he or she should be advised to obtain legal counsel to dispute the applicant's claim.

The respondent must:

- complete a reply in Form 3, following the instructions on the form;
- file that reply, together with three copies of it, in the registry where the application was filed; and
- if applicable, file the original and three copies of the respondent's financial statement and applicable documentation referred to in Rule 4 (2)(b).

In the reply, the respondent may:

- consent to one or more of the orders in the application;
- disagree with anything claimed in the application, stating the reasons for the disagreement;
- apply to the Court for child access, spousal support, or a restraining order prohibiting interference under the *Family Relations Act*; and/or
- apply to the Court for an order to change existing orders or agreements.

c) Family Justice Registries

Family Justice Registries are designated by Rule 1 of the Provincial Court (Family) Rules. Under the definitions in the Rules, "family justice registry" means the Vancouver (Robson Square), Surrey, Kelowna or Nanaimo registry. Under Rule 5, at these registries, the parties will be obliged to comply with additional requirements before the application is heard (unless the parties fall into the exception outlined in Rule 5(2)). Both parties will meet with a Family Justice Counsellor. If a settlement cannot be reached with the assistance of the counsellors, the matter will be referred to court.

For more information, see the website: http://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/family-justice-counsellors.

d) Parenting After Separation Program

Pursuant to Rule 21 of the Provincial Court (Family) Rules, parties who file at a “designated registry” must also attend a Parenting After Separation Program if there is a dispute over issues respecting children. These include the following registries: Abbotsford, Chilliwack, Kamloops, Kelowna, Nanaimo, New Westminster, North Vancouver, Port Coquitlam, Prince George, Richmond, Surrey, Vancouver (Robson Square) and Victoria.

The program is a free three-hour session and open to all parents and others (for example, grandparents) where custody, guardianship, access, and support issues are involved. For more information, see: http://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/pas.

e) First Appearance

If the application is filed with the court registry, the clerk must serve the parties with notice of the time and place they are to attend court for a first appearance to fix a date for the hearing of the application. Note that this notice is titled “Trial Notice” although the matter is set for a fix-date hearing.

f) Pre-Trial Conferences

The parties may be ordered to hold a pre-trial conference during which the judge may rule on any issues not requiring evidence, make an order, discuss the procedure that will be followed at trial, order that certain evidence be produced, or make arrangements for disclosure of one party’s evidence to the other.

g) Family Case Conference

A judge may order a family case conference, or one may be requested. The conference is informal and off the record. The meeting is between the relevant parties and a judge and is intended to reach a settlement. Note that the judge has the authority to make orders whether or not the parties agree to the order. Rule 7 of the Provincial Court (Family) Rules governs Family Case Conferences.

h) Witnesses

Witnesses are summoned to the Court by subpoena. However, a subpoena is not necessary if the witness is prepared to appear in court voluntarily. If a subpoenaed witness does not appear in court, a warrant may be issued for his or her arrest. To require the attendance of a witness, a party must complete a subpoena in Form 15, and serve a copy of the subpoena on the witness personally at least seven days before the date the witness is required to appear.

In Provincial (Family) Court, the person who subpoenas the witness is responsible for that witness’ reasonable estimated travel expenses.

i) Affidavit Evidence

At trial, evidence may be given orally or by sworn affidavit. Evidence may be given by affidavit at a trial or hearing only if permission is granted by a judge (Rule 13), either on application brought by notice of motion under Rule 12 or under Rule 8(4)(g). This evidence must be in Form 17.

j) Notices of Motion

Three copies of a notice of motion (Rule 12) must be filed in the court registry and one copy must be served on the other parties at least seven days before the date for hearing the notice of motion in court when a party wishes:

- an interim order to be made (*FLA* s216);
- to file documents in another registry;

- to have a pre-trial conference;
- to cancel a subpoena;
- for an order to produce documents;
- for an order requiring that paternity tests be taken;
- to use another method of service (no notice required);
- to settle the terms of an order;
- to extend a time limit;
- to change or cancel an *ex parte* order;
- to have a file transferred;
- to have disclosure; or
- to obtain directions on procedures not in the *Provincial (Family) Court Rules*.

Different Provincial Court Registries have different procedures regarding evidence at interim hearings. Some allow Affidavits and others require leave to produce and file an Affidavit and prefer viva voce (spoken) evidence. Be sure to check the procedure at the Registry in question before filing materials.

k) Trial

Provincial (Family) Court trial is an adversarial proceeding. Clients are there to give the judge enough facts so that he or she can make a decision about the application. However, the judge often gets involved in the presentation of evidence, especially where one party is not represented by counsel.

l) Procedure for Enforcement of Custody Orders

An Application Form (Form 21) and copy of the custody order must be filed in the registry.

m) Procedure for Enforcement of Support Orders

The most effective and simplest method of enforcing Support Orders is to register with the Family Maintenance Enforcement Program [3]. For more information call or write the Enrolment Office, Box 5789, Victoria, BC, V8R 6S8; telephone: (250) 356-8889, toll-free: 1-800-663-7616.

n) Orders

Orders come into effect on the day that they are made, unless the judge orders otherwise. If the party in whose favour the order is made is unrepresented, a clerk must prepare the order. Otherwise the favoured party's lawyer will prepare the order.

If there is a dispute about the terms of an order, a party may apply to a judge to have the dispute settled. Once an order is signed and approved, it must be given to the court registry to be signed by the judge and filed with the Court. Otherwise, the order is not enforceable. At any time, a judge may correct a clerical error in an order.

o) Compliance with Provincial Court (Family) Rules

If any of the *Provincial Court (Family) Rules* (British Columbia) are not complied with, the judge may disregard the incorrect procedure or order, order the hearing or trial to continue as if the respondent were absent, or give any direction he or she thinks is fair. Please check the Cumulative Regulation Bulletin 2014 for any non-consolidated amendments to this regulation that may be in effect.

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References

[1] http://canlii.ca/t/23nk0
[2] http://canlii.ca/t/24lhr
[3] https://www.fmep.gov.bc.ca/

Appendix A: Glossary

ANNULMENT

- A judicial pronouncement declaring a marriage invalid. Although it is commonly thought that an annulment has the same effect as if the marriage never took place, it is still possible to divide property under Part 5 of the *Family Relations Act*.

APPLICANT/CLAIMANT

- Person seeking a court order. In Provincial Court, the parties are called the applicant and the respondent, but they are claimant and the respondent under the *Family Law Act*, *Family Relations Act* and the *Divorce Act*.

CHILD

- Under the *Divorce Act*: a "'child of the marriage' is a child of two spouses or former spouses who... is under the age of majority and who has not withdrawn from their charge, or is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life".
- Under the *Family Law Act*: "a person who is under 19 years of age or a person who is 19 years of age or older and unable, because of illness, disability or another reason, to obtain the necessaries of life or withdraw from the charge of his or her parents or guardians.
- Under the *Adoption Act*: "an unmarried person under the age of 19 years".

CUSTODY

- Caring for a child on a day-to-day basis. Custody can be either sole or joint.

DECLARATORY JUDGMENT

- A judgment given by the Court in the form of a declaration, such as a s 57 (*Family Relations Act*) declaration that there is no possibility of reconciliation.

DEPENDANT

- Anyone who relies on another to support him or her.

SERVICE EX JURIS

- When the person to be served is outside the province.

FILING

- As in filing pleadings, affidavits, property and financial statements, etc. in court. A document is filed at the court registry and forms part of the court record.

GUARDIANSHIP

- Involves the right to be consulted on matters relating to the child's upbringing, such as religion, education, extracurricular activities, social environment, etc. The *Family Law Act* states that a person cannot become a child's guardian by agreement except if the person is the child's parent or as provided under the *FLA*, *Adoption Act* or *Child, Family and Community Service Act*. Please note that the definition of guardianship varies between the *FLA* and the *Divorce Act*.

INTERIM ORDER

- An order that is granted prior to the making of a final order. The order is good until a further order of the Court or agreement between the parties is made. The final order will not automatically be the same as the interim order. An interim order to determine custody and asset management while the matter is still in dispute is common in many divorce proceedings.

INTERIM EX PARTE ORDER

- A temporary order made when one party is not present by reason of lack of notice. This order is usually only granted in an emergency, such as the kidnapping of a child.

IN LOCO PARENTIS

- Where someone who is not the biological parent of a child steps in and takes over all the duties and responsibilities of a parent for that child. This commonly includes stepparents.

NOTICE OF FAMILY CLAIM

- Documents that must be filed to commence most formal proceedings in the Supreme Court, for divorce and corollary relief.

PETITIONER/CLAIMANT

- The person who presents a petition to start an action in a court or legislature. There is no longer any such thing as a divorce petition, a Writ of Summons or Statement of Claim. Now there is a specialized Notice of Family Claim and, in particular cases such as adoptions, a Petition to Court.

RESPONDENT

- Person against whom a court order is sought. In Provincial Court, the parties are called the applicant and the respondent, but they are called the claimant and the respondent under the *Supreme Court Family Rules* and the *Divorce Act*.

SERVICE

- The act of delivering a document such as a Notice of Family Claim to a person is known as personal service. There is a distinction between personal service and ordinary service in the *Supreme Court Family Rules*; see Part 6 for details. In the *Provincial Court (Family) Rules*, see Rule 3.

SPOUSE

- *Family Law Act*: 3(1): a person is a spouse for the purposes of this Act if the person(a) is married to another person, or (b) has lived with another person in a marriage-like relationship, and: (i) has done so for a continuous period of at least 2 years, (ii) except in Parts 5 [*Property Division*] and 6 [*Pension Division*], has a child with the other person.
- *Divorce Act*: "either of a man or woman who are married to each other".

- *Supreme Court Family Rules*: either a legally married spouse or "a man or woman not married to each other, who lived together as husband and wife for a period of not less than two years" and who made an application under the Act within one year of separation. Same-sex partners are now viewed as common law spouses provided the marriage-like relationship lasts for at least two years and the application for relief is commenced within one year of separation. The definition of "stepparent" includes a same-sex partner who also qualifies as a same-sex spouse (see s 1 of the *Family Relations Act* regarding the definition of spouse).
- *Estate Administration Act*: under s 85, parties must have cohabited for two years AND the claiming spouse must have been maintained AND the two years must run immediately preceding the death or a person who is united to another person by a marriage that, while not legal, is valid at common law.
- *Wills Variation Act*: the definition includes:
  - a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or,
  - b) a person who has lived and cohabited with another person, for a period of at least two years immediately before the other person's death, in a marriage-like relationship, including a marriage-like relationship between persons of the same gender.
- In British Columbia, the common law definition of a spouse evolves alongside the definition of a "marriage-like relationship". The following are considerations from Richardson Estate (Re), 2014 BCSC 2162 which arose as guiding questions in the determination of whether a couple is engaged in a marriage-like relationship, though the approach of the courts has been to treat these as considerations in a holistic determination of marriage-like relationships rather than a comprehensive checklist:
  - (1) Shelter:
    - a. Did the parties live under the same roof?
    - b. What were the sleeping arrangements?
    - c. Did anyone else occupy or share the available accommodation?
  - (2) Sexual and Personal Behaviour:
    - a. Did the parties have sexual relations? If not, why not?
    - b. Did they maintain an attitude of fidelity to each other?
    - c. What were their feelings towards each other?
    - d. Did they communicate on a personal level?
    - e. Did they eat their meals together?
    - f. What, if anything, did they do to assist each other with problems or during illness?
    - g. Did they buy gifts for each other on special occasions?
  - (3) Services: what was the conduct and habit of the parties in relation to
    - a. Preparation of meals,
    - b. Washing and mending clothes,
    - c. Shopping,
    - d. Household maintenance,
    - e. Any other domestic services?
  - (4) Social:
    - a. Did they participate together or separately in neighbourhood and community activities?
    - b. What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?
  - (5) Societal:

    - a. What was the attitude and conduct of the community towards each of them and as a couple?
  - (6) Support (economic):
    - a. What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)?
    - b. What were the arrangements concerning the acquisition and ownership of property?
    - c. Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?
  - (7) Children:
    - a. What was the attitude and conduct of the parties concerning children?

SUBSTITUTE SERVICE

- When an applicant, for a good reason, cannot serve the respondent personally because that person cannot be found, the Court may make an order providing for service in some other way (i.e. by letter, advertisement, or service on a relative).

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Chapter Four - Victims

I. Introduction

Victims of crime require a wide variety of assistance depending on their needs. This chapter outlines the avenues an individual can take to address being a victim of crime.

Sexual harassment is considered a form of sex discrimination under human rights legislation. Canadian human rights law imposes a statutory duty on employers to provide a safe and healthy work environment. Corporate employers are also liable for sexual harassment.

For more information, consult Chapter 6: Human Rights; and Chapter 9: Employment Law.

In 2015, Parliament enacted the *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2 [CVBR], which came into force on July 23, 2015. The CVBR recognises victims of crime and their families deserve to be treated with compassion and respect, and have the right to be considered throughout the criminal justice system. In particular, the CVBR acknowledges that victims of crime have the following rights:

- the right to information about the criminal justice system, the services and programs available to victims of crime and the complaint procedures available to victims when their rights have been infringed or denied
- the right to information about the status of criminal proceedings and information about hearings after the accused is found not criminally responsible on account of mental disorder or is found to be unfit to stand trial
- the right to have their security and privacy considered by the appropriate authorities in the criminal justice system
- the right to protection from intimidation and retaliation
- the right to request testimonial aids
- the right to have the courts consider making a restitution order against the offender
- the right to have a restitution order entered as a civil court judgment that is enforceable against the offender if the amount owing under the restitution order is not paid

The CVBR provides victims of crime the right to make a complaint to the relevant federal, provincial or territorial department, agency or body if they believe that any of their rights under the Act have been infringed or denied (s. 25). It is important to note, however, that the CVBR does not create a civil cause of action for victims (s. 28) nor does it grant victims the status of party to criminal proceedings.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 4, 2019.

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II. Governing Legislation and Resources

1. Legislation and Regulations

Canadian Victims Bill of Rights, SC 2015, c 13, s 2

- Website: http://laws-lois.justice.gc.ca/eng/acts/C-23.7/page-1.html

Victims of Crime Act, RSBC 1996, c 478

- Website: http://www.bclaws.ca/civix/document/id/complete/statreg/96478_01

Crime Victim Assistance Act, SBC 2001, c 38

- Website: http://www.bclaws.ca/civix/document/id/complete/statreg/01038_01

Crime Victim Assistance (General) Regulation, BC Reg 161/2002

- Website: http://www.bclaws.ca/Recon/document/ID/freeside/161_2002

Crime Victim Assistance (Income Support and Vocational Services and Expenses) Regulation BC Reg 162/2002

- Website: http://www.bclaws.ca/civix/document/id/loo88/loo88/162_2002

Criminal Code, RSC 1985, c C-46.

- Website: https://laws-lois.justice.gc.ca/eng/acts/c-46/

Adult Guardianship Act, RSBC 1996, c 6.

- Website: http://www.bclaws.ca/civix/document/id/lc/statreg/sup00600

Immigration and Refugee Protection Act, SC 2001, c. 27

- Website: https://laws.justice.gc.ca/eng/acts/i-2.5/

Family Law Act, SBC 2011 c 25

- Website: http://www.bclaws.ca/civix/document/id/complete/statreg/11025_01

2. Policy Guidelines

Ministries of Attorney General, Public Safety & Solicitor General, and Children & Family Development, Violence Against Women in Relationships Policy (British Columbia, December 2010).

- Website: http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/vawir.pdf

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Vulnerable Victims and Witnesses – Adult, Effective March 1, 2018.

- Website: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vul-1.pdf

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Victims of Crime – Providing Assistance and Information to (1) Effective March 1, 2018

- Website: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vic-1.pdf

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Victim Services Programs – Providing Information to Victims (2) Effective March 1, 2018

- Website: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/vic-2.pdf

Criminal Justice Branch, Ministry of Justice Crown Counsel Policy Manual, Sexual Services: Purchase of and Related Offences, Effective March 1, 2018.

- Website: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/sex-3.pdf

3. Resources

Crime Victim Assistance Program

Provides financial assistance and benefits to victims of violent crimes, their immediate family members and some witnesses to offset the costs of the victimization and to promote their recovery from the physical and psychological effects of the offence.

Online	Website [1] Email: cvap@gov.bc.ca
Address	P.O. Box 5550 Stn. Terminal Vancouver, B.C. V6B 1H1
Phone	Toll-Free: 1-866-660-3888 (Lower Mainland)

Directory of Victim Service and Violence Against Women Programs in BC

A directory for violence against women and victim service programs across BC.

Online	Website [2]

Victim Notification – Victim Safety Unit

The Victim Safety Unit provides information to victims when the accused or offender is supervised by BC Corrections. Some information may also be provided to persons named in a civil protection order. Victims may be provided with ongoing information about the status of an accused or an offender, including whether or not they are currently in provincial jail, when they may get out of provincial jail, what community they may be in and what conditions they accused or offender may have to follow.

Online	Website [3] Email: vsusg@gov.bc.ca
Address	302 – 815 Hornby Street Vancouver, B.C. V6Z 2E6
Phone	Toll-Free: 1-877-315-8822

Community Safety and Crime Prevention Branch

As the provincial centre of responsibility for victims' issues, human trafficking and crime prevention, the Division develops legislation and policies, provides training and delivers and funds programs that support victims, address human trafficking and provide a restorative justice response to crime.

Online	Website [4] Email: crimeprevention@gov.bc.ca
Address	302 - 815 Hornby Street Vancouver, B.C. V6Z 2E6
Phone	(604) 660-5199 Toll-free : 1-800-663-7867 Fax : 604 660-1635

VictimLink BC

VictimLink BC is available 24 hours, seven days a week and has information about and referrals to a number of support systems that are available to victims of crime.

Online	Website [5] Email: VictimLinkBC@bc211.ca
Phone	Toll-Free: 1-800-563-0808 TTY: (604) 875-0885

Public Guardian and Trustee of British Columbia

Provides assistance to adults who need support for financial and personal decision-making and administers estates of deceased persons if there is no one else to do it. They may also administer trust funds on behalf of minors. Service is available in 130 different languages.

Online	Website [6] E-mail: mail@trustee.bc.ca
Address	700 - 808 West Hastings Street Vancouver, B.C. V6C 3L3
Phone	(604) 660-4444 Fax: (604) 660-0374

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[1] https://perma.cc/RS28-X79M
[2] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/service-providers/directory-of-victim-service-and-violence-against-women-programs
[3] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/victim-notification
[4] http://http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime
[5] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/victimlinkbc
[6] http://www.trustee.bc.ca

III. Avenues to Address Crime

A. Pursuing the Matter Through the Criminal System

Apart from the initial report to police, the victim is not responsible for the prosecution of the offender. The burden to conduct the case is on the Crown. The crime is also against the community, and the victim is a witness to this crime. Whether the victim wants to proceed, drop charges, or testify has little bearing on the case.

Police can make an arrest if there are reasonable grounds for the police to believe that an offence has been committed, if there is a warrant, or if they find a person committing an offence. If the Crown believes that there is a reasonable likelihood of conviction and it is in the public interest to proceed, a charge must then be laid. However, if the police decide not to recommend charges and if the explanation is unsatisfactory, the victim may want to discuss the situation with a superior officer. In BC, the police are not responsible for laying charges; they are responsible for completing an incident report or a Report to Crown if they are recommending charges, but it is up to Crown to determine whether charges will be laid. If Crown has not approved charges and the explanation is not satisfactory, the victim may wish to discuss the matter with a more senior Crown Counsel. If still not satisfied, the victim may write to Regional Crown Counsel. Finally, it may be appropriate to write to the BC Attorney General in Victoria.

A factsheet outlining complaints processes for justice agencies has been developed for victims and is available [1].

For individuals in situations which they believe is dangerous, but are not assault, sexual assault or other more common types of violent offences, there are various sections of the *Criminal Code* that may be relevant. If a client is a victim of one of these offences, it is within their rights to contact the police and ask that charges be laid. The following is a list of some related offences:

- s 264(1): Criminal Harassment; s 264.1: Uttering Threats; s 346: Extortion; s 372(1): False Messages; s 372(2): Indecent Phone Calls;s 372(3): Harassing Phone Calls; s 423: Intimidation; s 425: Offences by employers (threats and intimidation); s 430: Mischief (damage to property); and s 810: Breaching a Peace Bond.

If the accused is convicted of an offence, the victim may submit an application for an order that the accused pay an amount by way of satisfaction or compensation for loss or damage to property suffered by the applicant as a result of the commission of an offence. This is known as a restitution order and can be found under s 738 of the Criminal Code. The application must be made early enough for the judge to render a decision at the time of sentencing and the loss must be quantifiable. Restitution amounts must be easily calculable and not in great dispute.

Restitution will not be ordered in all cases where there is monetary loss or damages. The judge must consider whether a restitution order should be included in the sentence and whether all aspects of the sentence reflect the purposes and principles of sentencing and are appropriate given the circumstances of the offence and the particular offender. The ability of the offender to pay a restitution order will be a consideration. Restitution cannot be ordered for pain and

suffering or other damages that can only be assessed in the civil courts.

The aspects of physical injury/psychological harm that could be covered by restitution would only be those that are quantifiable from a cost perspective and that take place prior to sentencing. For example, these may be:

- medications not covered by insurance
- costs related to medical treatment
- counselling expenses

This makes it distinct from the more general and less quantifiable "pain and suffering."

Although the restitution order is made by a criminal court as part of an offender's sentence, it is similar to a civil order in some aspects. If the offender does not pay the amount ordered, the victim can file the order in the civil court and use civil enforcement methods to collect the money. For example, bank accounts may be seized or liens placed on property.

1. The Canadian Victims Bill of Rights

This Act recognises that crime has a harmful impact on victims and on society. This Act lists out the rights of victims, as well as those who are authorised to act on their behalf. Section 3 provides that if the victim is dead or incapable of acting on their own behalf, another person may be able to act on their behalf.

A victim is defined as a person who has suffered physical or emotional harm, property damage, or economic loss as a result of a crime. However, a person who has been charged, convicted, or found not criminally responsible due to a mental disorder for the offence that resulted in the victimisation is not defined as a victim. Furthermore, s 19(2) stipulates that a victim is entitled to exercise their rights under this Act only if they are present in Canada or they are a Canadian citizen or a permanent resident.

Adhering to this definition, victims of crime are able to exercise their rights under this Act while an offence is being investigated or prosecuted and while the offender is going through the corrections or conditional release process. The offence committed against the victim must fall under the *Criminal Code*, the *Youth Criminal Justice Act*, or the *Crimes Against Humanity and War Crimes Act*. The rights also apply to some offences under the *Controlled Drugs and Substances Act* and parts of the *Immigration and Refugee Protection Act*.

The rights apply to offences which occur in Canada. They also apply if the offence is investigated and prosecuted in Canada or if the offender is serving a sentence or conditional release in Canada.

Victims have the right to:

- request information
- have their security and privacy considered by the appropriate authorities, be protected by the criminal justice system
- participate by presenting victim impact statements
- request that their identity be protected
- have the court consider making a restitution order against the offender
- have a restitution order entered as a civil court judgment that is enforceable against the offender

A judge can order restitution for financial losses related to:

- damaged or lost property due to the crime
- physical injury or psychological harm due to the crime
- physical injury due to the arrest or attempted arrest of the offender
- costs for temporary housing, food, childcare and transportation due to moving out of the offender's household (this only applies if a victim has moved because they had been physically harmed or threatened with physical harm due to the offence, arrest, or attempted arrest of the offender)

- costs that victims of identity theft had to pay to re-establish their identity, and to correct their credit history and their credit rating

No cause of action, right to damages, or right to appeal exists from any decision or order arises from an infringement or denial of a right under this Act.

If not satisfied by the response of the federal department, agency, or body, victims have the right to file a complaint with the relevant authority. Victims also have the right to file a complaint if they are of the opinion that their rights under this Act have been infringed or denied by a provincial or territorial department. All federal departments and agencies that have responsibilities under this Act need to provide a way for victims to file complaints. Complaints against a provincial or territorial agency, like police or victim services, will be addressed through the appropriate provincial or territorial laws.

Additional information can be found here [2].

2. Court Orientation, Preparation and Accompaniment

If a charge is laid, the victim may be asked to testify as a witness, or may want to deliver a victim impact statement. They can receive help from Victim Service Workers, who can explain their rights, the type of support available, and their role in the criminal justice process. Victim Service Workers can also help with Crime Victim Assistance Program applications, and provide victims with information about subpoenas, pre-trial meetings with Crown, the court process, as well as court accompaniment for victims who attend court. Victim impact statements allow the judge to determine whether a restitution order is required if the victim experiences a financial loss and any information on the statement may be used to impact the sentencing process for the offender.

For more information, including guides for both child and adult witnesses, and on victim impact statements, click [3].

Under s 486 of the Criminal Code, witnesses can receive testimonial accommodations such as testifying behind a screen, on video camera so as to not see the offender or in a closed court upon application. The Crown counsel in charge of the prosecuting the offence will generally ask the victim whether or not they would like testimonial accommodation but victims can also speak with the Crown counsel to discuss the matter.

Victims can also request language assistance, including visual language assistance, if they are required to testify in court. The Ministry of Justice provides court interpreters to translate criminal and family law court proceedings in a variety of different languages. Additional language support for other court related activities is available through outside organisations. Individuals can find a full list of language assistance services available at the following link: [4]

3. Things you should know about being a witness

Although as stated above there are many resources available to witnesses to assist them and to make the process of giving evidence in court less stressful it is important that before a person decides to be a witness in a criminal case, they understand the possibly intrusive and uncomfortable experience that they may be put through by agreeing to give evidence. This is particularly important for victims as the process may make them feel as if they are being revictimized.

All witnesses are generally compellable

It is also important to understand that a competent witness is generally a compellable witness. Therefore, once you agree to give evidence or clearly make it known that you are a witness to a crime, a subpoena can be issued which compels you to attend court on a specific date to give evidence. If you have been served with a subpoena and you then fail to show up for the trial or later refuse to give evidence at trial, you can be charged with contempt. Also, if you lie while giving evidence in court, you can be charged with perjury.

Cross-examination can be stressful

Cross-examination can be a stressful experience for a witness. Defence counsel will likely challenge a witness' evidence in an attempt to show that they are not a credible witness or that the evidence they are giving is unreliable. Defence counsel will generally do this by showing; the witness' testimony is inconsistent with other independent evidence, they have made prior inconsistent statements, or their testimony has changed during direct examination and cross-examination. Defence counsel may also attempt to show that the witness has a motive to lie or mislead the court, which may include cross-examining them on any bias or prejudice they have towards the accused. Even if a witness appears credible, the defence may attempt to show that their evidence is unreliable because they are mistaken about what they saw.

Discreditable conduct of a witness can be used to challenge their credibility

Section 12 of the Canadian Evidence Act states "a witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment." In R. v. Cullen, 52 CCC (3d) 459 the Ontario Court of Appeal stated at para 9 that, "for the purpose of challenging a witness' credibility, cross-examination is permissible to demonstrate that a witness has been involved in discreditable conduct." Therefore, with the exception of the accused a witness can not only be cross-examined on any criminal record that they have, but they can also be cross-examined on the details of those convictions, any pending charges, acquittals, or any other discreditable conduct which they may not have been charged with. So, for example, the defence could hire a private investigator to follow a witness and if they gather evidence of discreditable conduct that the witness has been involved in, they could cross-exam that witness on that conduct for the purpose of discrediting the witness in court.

An accused can make an application to have third-party records of witnesses such as counselling records disclosed

It is unlikely that many victims would want the records of the discussions that they have had with their counsellor or therapist disclosed, particularly if they have been the victim of a sexual offence. The disclosure of such records can be traumatizing for a witness. However, the defence can make an application to a trial judge for the disclosure of third-party records, which include medical, psychiatric, therapeutic, and counselling records. Although the burden is higher for sexual offences, under section 278.3 of the Criminal Code, the defence can make an application to a trial judge for the disclosure of such records which also includes personal records such as a victim's journal or diary.

The process the court undergoes when deciding whether to admit the records involves "the balancing of the rights of the accused under s7 and s11 of the Charter with the privacy rights of the complainant." Unlike documents which the prosecution has in their possession, the burden is on the accused to prove that third-party records should be disclosed because the information is not part of the prosecution's case, and third-parties have no obligation to assist the defence. However, under s278.5 if the trial judge is satisfied that the defence's application is made in accordance with s278.3, and that they have established that the record is likely relevant to an issue at trial or to the competence of the witness to testify, and production of the record is necessary in the interests of justice, then he may order the third-party to produce the records. The trial judge will then review the records and may order their disclosure to the accused under s278.7.

Legal representation for witnesses if an application is made to see their personal records

The Legal Services Society (LSS) provides free legal representation for victims of, or witnesses to, a crime "if an application is made to see their personal records, such as counselling records. The Attorney General authorizes LSS to provide a lawyer to represent a victim/witness at a hearing where a judge decides if the defence can access these records. The victim/witness does not have to be financially eligible to qualify for this kind of representation." Therefore, it is recommended that any witness who does not have their own legal representation applies to the LSS for representation if they are made aware of an application made by the accused for their personal records.

More information on the Legal Services Society is available here: [5] or by calling 1-866-577-2525 or 604-408-2172 (Greater Vancouver)

The Legal Services Society manual can be accessed here: [6]

4. Victim Travel Fund

The Victim Travel Fund provides funding to a maximum of $3 000 per family/victim to help attend and participate in interviews, hearings, and other justice-related proceedings. Funding is available to victims who have suffered significant physical or emotional trauma as a result of a serious criminal offence, and victims who require a support person to attend a proceeding. Funding is also available to immediate family members of deceased victims (e.g., parents, spouse, children, and siblings). Eligible expenses may include meals, accommodation and the most economical form of travel. Applicants for the Victim Travel Fund must also meet the following criteria:

- make the applications prior to the justice proceeding
- to the eligible, the applicant has to travel more than 100 km one way to attend the justice proceeding
- the justice proceeding will take place in BC and the proceeding is expected to impact the outcome disposition or results of the proceeding or hearing (this excludes provincial parole and federal hearings)
- travel and related expenses are not covered by Crown counsel, the Crime Victim Assistance Program, or any other source

For more information or to request a Victim Travel Fund application form, call the Victim Safety Unit at 604-660-0316 or toll free at 1-877-315-8822, or e-mail vsusg@gov.bc.ca.

Furthermore, you may contact VictimLinkBC by phone at 604-875-0885 or email victimlinkbc@bc211.ca to ask to be connected to a victim service worker. A victim service worker may be able to help you apply for travel assistance.

4. Parole Board of Canada Hearings

If a conviction occurs, victims may still be affected later on by decisions to release the offender(s). Victims who wish to attend Parole Board of Canada hearings may apply for financial assistance, including for travel, hotel and meal expenses. In order to be eligible, victims must have registered with Correctional Service Canada. For information on registering, click [7].

Support persons may also be eligible for funding. An eligible support person must be an adult over the age of 18 years of age who is chosen by the registered victim. Support persons may include relatives, friends or victim service workers. Support persons who wish to attend a PBC hearing with a registered victim must submit a written request to the office of the PBC in the region where the hearing will take place, once the victim has received notice from CSC/PBC of potential hearing dates. A security screening will be conducted for all visitors before they are allowed into a penitentiary. If the support person is accompanying the victim to the hearing, but does not intend to go to the hearing, then a security screening is not required. Please note, however, that if the support person should need to enter the penitentiary, the security screening would be required.

Please note that this is only available for federally supervised offenders, and that applications should be submitted at least 30 days before the hearing date.

For more information, see the Department of Justice website at: [8] .

B. Crime Victim Assistance Program

The *Crime Victim Assistance Act* [*CVAA*] is the primary piece of legislation that governs the Crime Victim Assistance Program (CVAP).

Although the *CVAA* and the *Criminal Injury Compensation Act* are both in force, it is expected that the *Criminal Injury Compensation Act* will ultimately be repealed. The transitional provisions of the CVAA allow previously adjudicated claims under the old Act to be transferred to the new Act for ongoing administration and for any further reviews.

It is important to remember that, unlike under the old Act, a person cannot be awarded damages for pain, suffering, mental trauma, etc. under the CVAA – although a person can be awarded a variety of benefits, such as counselling, medical expenses, and other services or expenses. The CVAP replaces the Criminal Injury Compensation Program. The Victim Services and Crime Prevention Division of the Ministry of Public Safety and Solicitor General administers this program.

The CVAP has been developed in response to the changing needs of victims and others impacted by violent crime. Benefits are available to victims of crime, and their immediate family members and those who meet the legislation's definition of witness. One should note that the Program is not based on a compensation model, but rather is based on a financial assistance model. This provides eligible claimants with financial support as well as additional services and assistance to aid in their recovery from the physical and psychological effects of their victimization, and to offset the costs of the victimization.

Under the CVAA, a victim can still:

- initiate civil proceedings on his or her own
- make a claim under the Act

If a victim wishes to initiate civil proceedings after making an application under the CVAA, the CVAP Director must receive a copy of the notice of civil claim within 10 days of service on the defendant (CVAA, s 15(1)). After paying fees and disbursements, any money awarded to the victim in the civil proceedings must go toward paying back the money they received under the CVAA.

The fact that an accused has not been criminally charged or has been acquitted of criminal charges is not a bar to commencing civil proceedings as the legal issues and the standard of proof are different. The difficulty with recovering anything directly from the accused is that there is seldom anything to be collected.

Moreover, the procedure for making an application for assistance under the CVAA is less complicated than initiating a civil action.

1. The CVAA Does Not Apply To All Offences

The CVAA applies to offences involving violence, as opposed to property related offences. The list of offences for which the CVAA applies is set out in the Schedule of Offences that can be found in Schedule 1 of the *Crime Victim Assistance (General) Regulations*. The CVAA does not apply where the injury or death of the victim occurred:

- in relation to an offence that occurred on or before July 1, 1972 (this is when the *Criminal Injury Compensation Act* came into effect);
- as the result of a motor vehicle offence, other than an assault using the motor vehicle;
- out of, and in the course of their employment; for which compensation is payable through workers' compensation; or
- outside of British Columbia.

The CVAA does not apply when the applicant is a party to the prescribed offence.

2. Who is Eligible and What They May Receive

a) Victims

"Victim" means a person who is injured or killed as a direct result of either a prescribed offence or when acting as a "good Samaritan" while:

- (i) lawfully arresting or attempting to arrest a person, or assisting or attempting to assist a peace officer to arrest a person, in respect of a criminal offence; or
- (ii) lawfully preventing or attempting to prevent an offence or a suspected offence under the *Criminal Code* or assisting or attempting to assist a peace officer to do so.

Victims may be eligible for the following benefits:

- medical or dental services or expenses
- disability aids
- vocational services or expenses
- repair or replacement of damaged or destroyed personal property (glasses, disability aids or clothing only - not stolen property)
- vehicle modification or acquisition for disabled victims
- maintenance for a child born as a result of the prescribed offence
- lost earning capacity (in relation to long term injuries)
- prescription drug expenses
- counselling services or expenses
- protective measures, services or expenses for high risk victims
- home modification, maintenance or moving expenses
- income support
- transportation and related expenses
- crime scene cleaning

b) Immediate Family Members

Immediate family members may be eligible for the following benefits:

- counselling services or expenses
- vocational services or expenses
- income support for dependent family members of a deceased victim
- prescription drug expenses (related to psychological trauma)
- funeral expenses
- transportation and related expenses
- earnings loss due to bereavement leave
- homemaker and child care expenses
- crime scene cleaning

Under this Act, "Immediate Family Members" include persons who at the time of the offence were:

1. a spouse, child, sibling, step sibling, half sibling or parent of the victim, and, for this purpose,
    - (i) "spouse" means a person who:
        - is married to the victim;
        - is living and cohabiting with the victim in a marriage-like relationship; or

    - was qualified as a spouse under law or was entitled to maintenance/alimony/support when the incident occurred
  - (ii) “child” includes:
    - a child to whom the victim stands in the place of a parent;
    - a child who is eligible for child support under another enactment;
    - a child of the victim born after the death of the victim; or
    - an adult to whom the victim stood in the place of a parent when the adult was a child, and
  - (iii) “parent” includes:
    - a person who stands in the place of a parent to the victim; or
    - a person who stood in the place of a parent to the victim when the victim was a child.

2. if dependent in whole or in part on the victim for financial support, a grandparent or grandchild of the victim.

c) Witnesses

“Witness” is a person who, although not necessarily related to a victim, has a strong emotional attachment to the victim and who:

- (i) witnesses in close proximity:
  - a prescribed offence that causes a life-threatening injury to, or the death of, the victim; or
  - the immediate aftermath of a prescribed offence that causes the death of the victim, in circumstances that are sufficient to alarm, shock, and frighten a reasonable person with that emotional attachment to the victim, and
- (ii) suffers psychological harm that:
  - is diagnosed by a registered psychologist or a medical or nurse practitioner as a recognized psychological or psychiatric condition; and
  - in the opinion of the person who makes the diagnosis, is the result of the circumstances in subparagraph (i).

Witnesses may be eligible for counselling, and related prescription drug expenses, transportation expenses to attend counselling and crime scene cleaning expenses.

3. Application for Benefits

The application forms are available from the Crime Victim Assistance Program (contact information is at the beginning of the chapter under Resources) or from any police department, victim service program, and many community agencies. They are also available on the Victim Services page of the Ministry of Justice website [9].

The Crime Victim Assistance Program staff will then obtain a police report of the incident (if the matter was reported to the police) and other supporting documents. When describing what happened on the application form, an applicant should give a general but clear statement of the event, and then make reference to the police report for additional details. She or he should include on the application:

- the date the report was made to the police as well as the police report number if a police report has been made (although a police report is highly advisable it is not mandatory)
- if a police report was not made, information should be provided as to why the incident was not reported and if possible, names of any witnesses, persons to whom a disclosure was made or to whom the incident was reported should be provided
- information about what occurred
- information about any physical or psychological injuries he or she may have received
- names of any doctors, counsellors, or anyone else that has been seen as a result of the injuries

- original receipts for expenses incurred as a result of the injuries. If the applicant has access to funding from other sources in relation to these expenses (e.g. extended health coverage, personal disability insurance, etc.) the original receipts should be sent to this funding source first and then CVAP will consider paying any remaining outstanding balance.

Minors can submit an application on their own and do not require a parent or guardian to apply on their behalf. However, applications for minors may also be submitted by their parent or guardian. A parent or guardian is not required because some parents or guardians may be supportive of the offender or feel that there is a stigma associated with the victimisation. In addition, some children do not want to have their parents know of the offence. In cases where the offender is the victim's parent, the Ministry of Children and Family Development may take custody of the victim. In this case, a representative of the Ministry can make an application on behalf of the child.

Depending on the case, the applicant may be interviewed by the adjudicator. In rare circumstances, the applicant may be examined by the Program's consulting medical practitioner if there are questions about the long term nature of the physical injuries sustained.

The Program will gather additional supporting information from a variety of sources such as medical, hospital, dental, employer reports, and information from CPP, Ministry of Social Development, or other sources relevant to the particular claim.

The decision regarding eligibility and entitlement to benefits involves a two-step process in which the adjudicator first determines whether the person is an eligible applicant and then determines what benefits, if any, will be provided. The decision will be made in writing and will set out the factors considered in making the determination.

4. Limitation Period

Generally, an application must be made within one year of the date of the offence or event. There are exceptions to the one year time limit, as follows:

- If the offence involves a sexual offence, there is no time limit for making an application (other than that the offence must have occurred on or after July 1, 1972).
- If the applicant is a minor, they have one year from the date they turn 19 to make an application. There is no time limit for the victim if the offence is a sexual offence. However, a minor does not have to wait until they are 19 to make a claim. Minors can submit an application on their own and do not need a parent or guardian to apply on their behalf. However, a parent or guardian may also submit an application for the minor.

The Director also has discretion to extend the one year time limit if satisfied that the application could not reasonably have been made within one year from the date of the offence or one year from the date the applicant turned 19.

5. Denials or Reductions in Benefits

Benefits can be denied if:

- The victim does not meet the eligibility criteria;
- The victim was a party to the offence that caused their injury or death; and/or
- They fail to cooperate with law enforcement authorities.

Benefits can be denied or reduced if:

- The benefits are available from another source for a same or similar purpose; and/or
- The applicant contributed to the circumstances giving rise to the injury or death.

6. Payment of Benefits

Payments can be provided directly to the service provider, such as a counsellor, or as reimbursement to the applicant for expenses that were incurred prior to the decision being completed. Some applicants are eligible for income support or lost earning capacity benefits that are provided on a monthly basis.

7. Does the Alleged Offender Have to Be Charged or Convicted?

A police report is **not** required and it is not necessary for an offender to be identified, charged or convicted in order for an applicant to be eligible for benefits. Where the victim has not reported the offence to the police, information from a witness or someone the applicant disclosed the incident to, or a report from a health care professional, counsellor, social worker or other agency may be accepted as supporting evidence of the offence.

8. Co-operation with Law Enforcement

Since the Program is part of the criminal justice system, and is a publicly funded program, there is an expectation that the victim will cooperate with the police and Crown counsel in order to hold offenders accountable. There are some exceptions in relation to issues of non-cooperation, but in general, benefits may be denied or reduced if the applicant has no reasonable basis for failing to cooperate with law enforcement.

9. Prior Claims With the Criminal Injury Compensation Program (CICP)

Applications received prior to June 30, 2002 will have been adjudicated under the *Criminal Injury Compensation Act*, RSBC 1996, c 85 [CICA] by the CICP. Once a final determination was made under the *CICA*, ongoing administration of the claim transfers to the Crime Victim Assistance Program and any further reviews for reassessment or reconsideration will be conducted in accordance with the *Crime Victim Assistance Act* [CVAA].

If a person was receiving a pension from the CICP, they will remain eligible for an ongoing pension, subject to the same conditions and limitations, except where there is a change in circumstance such that their injury improves or worsens. In cases where there is a change in their condition, their claim will be reviewed under the provisions of the CVAA.

10. Types of Reviews

Once an original adjudication is completed, there are two types of reviews available. Under s 12 of the CVAA, if there is new information available or there has been a change of circumstance that could affect the applicant's eligibility for benefits, a **reassessment** decision can be completed.

Under s 13 of the CVAA an applicant or their legal representative may request the Director to reconsider a decision. This request must be made in writing, identifying the error made in the decision to be **reconsidered** and be delivered to the Director **within 60 days** from the date the decision was made.

The Director may extend the time limit for making the request for reconsideration if satisfied that a request for reconsideration could not reasonably have been **delivered** within the limitation period. Note that since the legislation restricts consideration to whether or not the request could have been "delivered" within the requisite time period, there are limited grounds for an extension (e.g. interruption of mail service, applicant moved and the decision was returned to the program for re-direction, etc.).

A reconsideration decision is considered final and conclusive and is not subject to further review except by way of a judicial review. The legislation provides that an application for **judicial review** on a question of law or excess of jurisdiction must be brought not later than **60 days** after the decision is made.

11. Criminal Injuries Outside British Columbia

National Office for Victims

Provides general information for victims and the public, referrals to the Correctional Service of Canada (CSC) and the Parole Board of Canada (PBC) for specific enquiries, and works to incorporate a victim' s perspective in national policy development.

Online	Website [10]
Phone	1-866-525-0554

- Federal Ombudsman for Victims of Crime [11]
- Directory of International Crime Victim Compensation Programs [12]

The following is a list of criminal injury compensation legislation and program contact information for all Canadian provinces. A person who was the victim of a crime of violence that occurred in another province can contact the relevant program to determine whether he or she qualifies for any form of compensation.

a) Other Canadian Provinces and Territories

Alberta

- *Victims of Crime Act*, RSA 2000, c V-3 [13]
- **Victims of Crime Financial Benefits Program**

Online	Website [14]
Address	Alberta Solicitor General and Ministry of Public Security 9th Floor, John E. Brownlee Building 10365 – 97 Street Edmonton, AB T5J 3W7
Phone	(780) 427-3441 Toll-free in Alberta: 310-0000 Outside Alberta: (780) 427-2711

Manitoba

- *Victims' Bill of Rights*, CCSM c V55 [15]
- **Compensation for Victims of Crime Program**

Online	Website [16]
Address	1410-405 Broadway Winnipeg, MB R3C 3L6
Phone	(204) 945-0899 Toll-Free: 1-800-262-9344

New Brunswick

- *Victims Services Act*, SNB 2016 c 113 [17]
- **Victim Services Program**

Online	Website [18] Email: DPS-MSP.Information@gnb.ca
Address	Argyle Place P.O. Box 6000 Fredericton, NB E3B 5H1
Phone	(506) 453-3992

Newfoundland

- *Victims of Crime Services Act*, RSNL 1990, c V-5 [19]
- **Victim Services Program, Provincial Headquarters**

Online	Website [20] Email: victimservices@gov.nl.ca
Address	Department of Justice Victim Services Program 4th Floor, East Block Confederation Building P.O. Box 8700 St. John’s, NL A1B 4J6
Phone	(709) 729-7970

Northwest Territories

- *Victims of Crime Act*, RSNWT 1988, c 9 [21]
- **Government of the Northwest Territories**

Online	Website [22]
Address	Department of Justice c/o Public Trustee Office P.O. Box 1320 Yellowknife, NWT X1A 2L9
Phone	(867) 873-7500

Nova Scotia

- *Victims' Rights and Services Act*, SNS 1989, c 14 [23]
- **Criminal Injuries Compensation Board**

Online	Email: justweb@gov.ns.cac
Address	Victim Services Division 5151 Terminal Road, 3rd Floor P.O. Box 7 Halifax, NS B3J 2L6
Phone	(902) 424-4030

Ontario

- *Victims' Bill of Rights*, SO 1995, c 6 [24]
- **The Criminal Injuries Compensation Board**

Online	Email: info.cicb@ontario.ca
Address	4th Floor, 655 Bay Street Toronto, ON M7A 2A3
Phone	(416) 326-2900 Toll-Free: 1-800-372-7463 Fax: (416) 326-2883

- **Victim Notification System (VNS), Ontario Ministry of the Attorney General**

Online	
Phone	(416) 314-2447 Toll-Free: 1-888-579-2888

Prince Edward Island

- *Victims of Crime Act*, RSPEI 1988, c V-3.1 [25]
- **Victim Services**

Online	Website [26]

- **Queens and Kings Counties**

Address	Honourable C.R. McQuaid Family Law Centre 1 Harbourside Access Road P. O. Box 2000 Charlottetown, PE C1A 7N8
Phone	(902) 368-4582 Fax:(902) 368-4514

- **Prince County**

Address	263 Harbour Drive Suite 19, 2nd Floor Summerside, PE C1N 5P1
Phone	(902) 888-8217 or (902) 888-8218 Fax: 902) 888-8410

Quebec

- *Crime Victims Compensation Act*, LRQ c. I-6 [27]
- **Commission de la sante et de la sécurité du travail, Dir. l'indemnisation des Victimes d'actes criminels**

Online	Website [28] Email: info@ivac.qc.ca
Address	1199, Rue Bleur C.P. 6056, succursale Centre-ville Montreal, QC H3C 4E1
Phone	(514) 906-3019 Toll-Free: 1-800- 561-4822 Fax: (514) 906-3029

Saskatchewan

- *Victims of Crime Act*, SS 1995, c V-6.011 [29]
- **Victim Services**

Online	Website [30] Email: victimsservices@gov.sk.ca
Address	610 - 1874 Scarth Street Regina, SK, S4P 4B
Phone	(306) 787-3500 Toll-Free: 1-888-286-6664 Fax: (306) 787-0081

Yukon

- *Crime Prevention and Victim Services Trust Act*, RSY 2002, c 49 [31]
- **Victim Services**

Online	Website [32] Email: victim.services@gov.yk.ca

- **Whitehorse**

Address	**Street address:** 301 Jarvis Street, 2nd floor, Whitehorse Yukon **Mailing address:** Victim Services, Dept. of Justice, Government of Yukon, Box 2703, Whitehorse, Yukon Y1A 2C6
Phone	(867) 667-8500 Toll free (In Yukon): 1-800-661-0408, local 8500 Fax: (867) 393-6240

- **Dawson City**

Address	**Street address:** 705B Church Street, Dawson City, Yukon **Mailing address:** Box 1312, Dawson City, Yukon Y0B 1G0
Phone	(867) 993-5831 Fax: (867) 993-6380

- **Watson Lake**

Address	**Street address:** 820 Adela Trail, Watson Lake, Yukon **Mailing address:** Box 622, Watson Lake, Yukon Y0A 1C0
Phone	(867) 536-2541 Fax:(867) 536-2684

C. Pursuing the Matter in a Civil (Tort) Action

Criminal court determines whether or not the accused is guilty, and if so, what would be appropriate punishment. However, the criminal court will do little in the way of providing compensation for the victim, other than possibly making a restitution order. Receiving financial compensation from the offender for the damages caused is one of the reasons why survivors of violence sue in civil court.

Examples of applicable torts include: assault; battery; trespass to the person; breach of privacy; intentional or negligent infliction of nervous shock or emotional distress; false imprisonment; trespass to land; intimidation (usually a business tort, but applicable in some cases), and defamation.

MacKay v. Buelow (1995), 11 RFL (4th) 403 provides a helpful illustration of the applicability of tort law in this area. The defendant (the plaintiff's ex-husband) harassed and intimidated the plaintiff by continuously calling her, leaving notes at her home, threatening to kidnap their daughter, throwing things at the plaintiff, hanging a used condom in her home, stalking her, directly and indirectly threatening to kill her, videotaping her through her bathroom window, advising third parties about nude movies of the plaintiff, and continuously harassing her friends and colleagues. The court held that the conduct of the defendant was exceptionally outrageous and awarded the plaintiff damages based on the torts of trespass to the person, breach of privacy, and intentional infliction of emotional distress.

Pursuing the matter through the criminal justice system is best done before any civil action is taken, given that:

- in a criminal case, the investigation is conducted by the police who are public servants, which saves the victim both time and expense in gathering witnesses and other evidence;
- a criminal conviction is convincing evidence in itself; and
- in a civil suit, the opposing side has more access to the victim's personal history. If the civil suit is pursued concurrently or before the criminal trial, the information brought up in the former may leak into the latter. Furthermore, the accused could try to argue that the victim is pursuing the criminal trial only because they want to gain as much as possible in the civil action.

The burden of proof in a civil trial is lower than in a criminal trial, but the evidence must still be clear and convincing. As a plaintiff in a civil action, a survivor of physical or sexual assault must prove on a **balance of probabilities** that the assault was perpetrated by the defendant named in the action, and that this assault resulted in damages. This is a less stringent test than that placed upon the Crown in criminal proceedings, where the case must be established beyond a reasonable doubt. Thus, it is possible for a victim to win a civil suit even in the event there has been a previous acquittal in criminal proceedings.

A civil suit may also give the victim access to compensation from third parties and institutional defendants (e.g. government institutions, foster homes, and residential schools) upon whom liability may be imposed. This is beneficial where the individual perpetrator has few assets or none at all.

Pursuant to the *Limitation Act*, RSBC, c 266, in most cases, there is a **two year limitation** on initiating a claim in tort (s 6). However, there are **exceptions** to this rule. In BC, there is an exemption to the two year time limit for cases of sexual assault (s 3(1)(j)). The *Limitation Act* was also recently amended to also allow for an exemption for physical assault claims for minors and for adults who were living in a personal or dependent relationship with their abuser (s 3(1)(k)). The rationale for these exemptions are that those victims may not be expected to recognise the wrongness of what has happened to them and have the ability to bring a claim within a limitation period.

Bringing a civil action may be a long process and the plaintiff should consider the personal toll it may impose on them. Some victims who go through this process feel as though their life is on hold, and are unable to get on with other parts of their life. Remember, however, that in many cases the parties will settle, although the outcomes of negotiations are extremely difficult to predict. Some people may benefit from counselling while pursuing a civil action.

The victim should seek a lawyer who is experienced with this area of law. There may be issues and circumstances in each particular case that make it difficult to assess the probability of success. It is very important that individuals do not jump to conclusions as to whether or not it is "worth it" to take this route. Some lawyers may be willing to take on a case on a contingency fee basis, which means that they will get a certain percentage of any damages, if they are awarded.

NOTE: Others must not take control of the victim's decisions. A victim should be informed of his or her options and the potential consequences of each course of action in order to allow him or her to give informed instructions to counsel.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 4, 2019.

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References

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[10] http://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/ntnl-ffc-vctms-en.aspx
[11] http://www.victimsfirst.gc.ca/index.html
[12] https://ovc.ncjrs.gov/findvictimservices/results2.asp
[13] http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-v-3/latest/rsa-2000-c-v-3.html
[14] https://www.solgps.alberta.ca/programs_and_services/victim_services/help_for_victims/financial_assistance/Pages/GetFinancialAssistance.aspx
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[17] https://www.canlii.org/en/nb/laws/stat/snb-2016-c-113/latest/snb-2016-c-113.html
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[19] http://www.assembly.nl.ca/Legislation/sr/statutes/v05.htm
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[23] http://nslegislature.ca/legc/statutes/victims.htm
[24] http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_95v06_e.htm
[25] https://www.princeedwardisland.ca/sites/default/files/legislation/v-03_1.pdf
[26] https://www.princeedwardisland.ca/en/information/justice-and-public-safety/victim-services
[27] http://www.canlii.org/en/qc/laws/stat/rsq-c-i-6/latest/rsq-c-i-6.html
[28] http://www.ivac.qc.ca
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IV. Victims of Violence in Relationships

A. BC Government Policy

The BC Government has developed a policy for police, crown, corrections, child welfare workers and other service providers who deal with people experiencing violence in relationships. *This is the Violence Against Women in Relationships Policy* (See section II.2). The Policy can be accessed online here [1].

1. Arrest and Charge

All calls to the police relating to violence within a relationship/domestic violence are to be given priority for assessment and response. This includes all reported breaches of No Contact Orders, Peace Bonds, or civil protection orders. This is to ensure the safety of a victim who may be at risk.

If the officer has grounds to believe that an offence has occurred, especially if there is a possibility that the offence may reoccur, the officer is to arrest the alleged offender. If the alleged offender left the scene before the police arrived, they must find out if he or she is likely to return and take steps to ensure the victim's safety. Police will make immediate efforts to locate and arrest the suspect where grounds exist. They will also complete a Report to Crown Counsel with a request for an arrest warrant.

Police will assess the risk of violence the alleged offender presents and determine whether to release the alleged offender immediately, under conditions, or to hold the alleged offender in custody in order to have a bail hearing. At a minimum, some conditions are usually imposed on the alleged offender. If the alleged offender is arrested and subsequently released from custody, the police should make every effort to notify the victim and explain any conditions prior to the accused's release. Where there is evidence that an offence occurred, the police should submit a Report to Crown Counsel recommending a charge even if no injury has occurred and regardless of the victim's desire or unwillingness to testify. It is the responsibility of Crown Counsel and the police to pursue criminal charges, not the victim's. The victim need not provide a written statement immediately, though he or she should be encouraged to do so when the officer follows up. If the officer exercises his or her discretion and does not recommend a charge, the decision should be documented on the case file and affirmed by the supervisor. Police should also refer victims to victim services and arrange safe transportation to transition homes or safe shelters. In power-based crimes, such as sexual assault, police should refer to a community-based victim services worker or program, rather than a police-based victim services program, if the program exists in the community. Not all communities in British Columbia have a community-based victim service program. Please see the Victim Services Directory referred to in this chapter for a list of programs in British Columbia.

2. Requirements of Offender Diversion

The court is aware that the accused may exert influence upon the victim that affects the court process. For example, charges are not to be stayed before trial where there are threats that may affect the victim's willingness to testify, there is a history of violence, or where the victim refused to meet with Crown Counsel, making it impossible to assess the situation.

Similarly, diversion in cases of violence in relationships is generally considered inappropriate. In exceptional circumstances, diversion may be considered, but only if there is no significant physical injury, there is no history of spousal violence, and there is no reason to conclude that there is a significant risk of further offences. The use of alternative measures must not be inconsistent with the protection of society.

B. Court Orders

There are various orders available to protect a victim of violence in a relationship. Guides on both peace bonds and protection orders in English, French, Punjabi and Chinese can be found here [2].

1. Criminal Court Order

A peace bond, which is available under s 810 of the *Criminal Code*, is an order made by a judge that requires the defendant to keep the peace. This is a limited remedy that protects a victim for a period of up to 12 months. A victim seeking a peace bond should go to the Justice of the Peace at the Provincial Court Office with the police report (or at least, the report number) and lay an Information. The victim can go without a police report, but the Justice of the Peace will most likely ask for one. The victim does not need to show that they have been injured, only that they have a reasonable fear of injury to themselves or damage to their property at the hands of the defendant. Previous threats or assaults should be brought up.

A victim should be advised to ask for a no-contact order as a condition of the peace bond. The Justice of the Peace should also be informed if the defendant possesses or has access to firearms. Note that the police, and anyone else concerned, may also apply for a peace bond.

If the Information is accepted, a hearing date is set, usually about two weeks later. The victim will most likely be subpoenaed as a witness for the Crown. Failure to appear is an offence. If the victim does not want to proceed with the peace bond and Crown Counsel does, the victim may have to show up to explain their decision to the judge.

A breach of the peace bond is a punishable crime, with a maximum penalty of $5,000 and/or six months in jail on summary conviction, or incarceration for two years on indictment. The actual peace bond, however, is not considered a criminal charge.

2. Civil or Family Court Orders

A number of orders are available pursuant to the *Family Law Act*, SBC 2011, c 25 [*FLA*]. A victim or his or her representative can bring an application in Provincial (Family) Court or in the British Columbia Supreme Court. Orders involving property such as exclusive use of family home can only be obtained in Supreme Court. However, in cases where there are urgent safety concerns, you should contact the police before pursuing the matter in Family Court as the police will respond immediately, and the family court process takes time.

a) Protection Orders (FLA Part 9)

A protection order limits contact and communication between family members where there is a safety risk. It is designed to protect “at-risk family members,” defined as people whose safety and security is or is likely at risk from family violence carried out by a family member. An application for a protection order may be made by a person claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court’s own initiative. A protection order may restrain a family member from contacting or communicating with an at-risk family member and from attending at or entering a place regularly attended by the at-risk family member (FLA, s 183). An application for a protection order may be made without notice, but in such applications, the court still has the option to set aside the order or change it in some respect on application by the party against whom the order is made (FLA, s 186). Unless otherwise stated, a protection order expires one year after the date it is made. Breach of a protection order under the FLA is a criminal offence.

b) Temporary Orders Respecting Family Residence (FLA s 90)

This order is only available from the BC Supreme Court. It gives the victim the legal right to occupy the home exclusive of the other party, or to possess and use specified personal property stored at the family residence, including to the exclusion of the other party. The victim and the other party must be spouses, meaning they must be married or have been living in a marriage-like relationship and have done so for a continuous period of at least two years, or have a child together. This order lasts as long as they **both** have a legal right to be on the property. A court does not have jurisdiction to grant this order where the family home is situated on an Indian reserve.

C. Victim Notification and Safety Planning

1. Victim Link BC

Victim Link BC provides assistance in connecting to a victim service worker in any area of BC. The service is toll free, confidential and anonymous.

Online	Website [3]
Phone	Toll Free: 1-800-563-0808

2. Victim Safety Unit (VSU)

Victims, civil protected parties, and victim service workers (on behalf of their clients) may call the Victim Safety Unit to request specific information including BC Corrections custody status, court updates, and copies of protection orders. These parties may also register with VSU to receive updates automatically. If the offender is under federal jurisdiction (under the supervision of the Correctional Service of Canada or the Parole Board of Canada), the VSU will, upon request, forward the registration form to CSC/PBC. The CSC/PBC will provide victim notification to registered victims directly.

Online	Website [4]
Phone	(604) 660-0316 Toll-Free: 1-877-315-8822

3. Crime Victim Assistance Program (CVAP)

The Crime Victim Assistance Program offers a variety of benefits to assist victims in dealing with the aftermath of violence in relationships. In situations where the offender represents an ongoing significant risk to the victim's safety, protective measures such as home alarm systems, security devices, and equipment and other safety measures may be available. In cases involving high risk victims, the victim and his or her family may be eligible for relocation expenses where all other safety measures are considered insufficient to address the victim's safety needs. For a complete list of benefits available, see the CVAP website, below.

Online	Website [5]
Phone	(604) 660-3888 Toll-Free: 1-866-660-3888

D. Finding Funding for Counselling

1. Crime Victim Assistance Program funding for counselling

The *Crime Victim Assistance Act* establishes counselling services or expenses as a benefit that may be available to victims, immediate family members of injured or deceased victims, and some witnesses. The Crime Victim Assistance (General) Regulation sets out the conditions or limitations for providing counselling benefits and also establishes the approved fee rate for reimbursement of counselling services. The Counselling Guidelines provide further information and clarification regarding expectations for the provision of counselling services, reporting requirements and limitations applicable to service providers requesting reimbursement for counselling services on accepted claims with the Crime Victim Assistance Program.

For detailed information see 'Counselling Guidelines' on the CVAP page of the BC Government website [5].

2. Children's Counselling Services (formerly Children's Sexual Abuse Intervention Program)

This service helps children deal with the effects of trauma at each developmental level. Parents and professionals can call the Ministry of Child and Family Development at 1-877-387-7027 to request referrals to the program, which is free and confidential.

Address	Sunshine Coast Community Services Society
Phone	(604) 885-5881 ext. 228

3. Stopping the Violence Counselling (Ministry of Justice)

There are a number of community-based counselling programs that provide counselling services to women who have experienced sexual assault, relationship violence, or childhood abuse. The range of individual and group counselling services are based on the needs of the individual women and delivered in an accessible, safe, and supportive environment.

A list outlining the available programs is available at this website: http:/ / www2. gov. bc. ca/ assets/ gov/ law-crime-and-justice/ criminal-justice/ victims-of-crime/ vs-info-for-professionals/ directory/ stopping-the-violence-counselling.pdf

4. Children Who Witness Abuse Programs (Ministry of Justice)

This community based program provides individual and group counselling services for children who witness the abuse of a parent, who is most often a mother. Designed to help break the intergenerational cycle of violence against women, this program helps children cope with, and heal from, the trauma of living in an abusive situation. Support is also provided to the non-offending caregiver who has been abused by their partner.

For a detailed, area specific contact list, see: http:/ / www2. gov. bc. ca/ assets/ gov/ law-crime-and-justice/ criminal-justice/bc-criminal-justice-system/if-victim/children-young-victim/protecting/cwwa-directory.pdf

5. Residential Historical Abuse Program

This option is available to the victim if he or she was abused or assaulted while in foster care or in a provincially funded institution. The victim can acquire the forms from the Ministry of Health, Victim Assistance, Mental Health Centres, or by calling the toll-free VictimLINK information line at 1-800-563-0808.

The Residential Historical Abuse Program provides professional counselling services for BC residents who were abused while under the age of 19 and while living in a home or residential program operated or funded by the province. A counsellor who meets provincial standards will develop a personal treatment plan with the victim, which may include individual, group, or family counselling.

The victim does not have to prove that she or he was sexually, physically, or mentally abused to receive counselling services, nor does she or he have to name the person(s) who abused her or him. The Ministry will simply verify that he or she was in that particular residential program at the time of the offence(s). No police complaint is necessary, but there is a legal obligation to report abuses to appropriate authorities if children are still at risk of being sexually abused. The government or the police may contact the victim for information. The contents of the application are otherwise confidential.

The application process is simple and generally does not impede any legal action or application to the CVAP – although if the applicant is eligible for funding from another source for a same or similar purpose, the CVAP must deduct that funding (or those counselling sessions) when considering the application.

6. A Note on Services That May Be Harmful to Victims' Interests

Not all services that claim to be helpful or protective of victims' interests really are. Some advocacy organizations have noted that some services are not healthy for women experiencing violence. For example, marriage counselling, couples' therapy, and mediation promote reconciliation, but may not address underlying issues such as power imbalance and disrespect towards women. Some programs for offenders may not challenge the man's beliefs and attitudes towards women.

However, it must also be noted that an abuser may be any gender, and that the victim may also be any gender. Victims and their advocates should always make sure that the resources and services that they are considering will be beneficial to victims' interests.

An individual who is a victim of violence should also be advised that with regard to Compulsory Family Mediation, they can apply to not participate. The victim should be advised to consult a lawyer.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 4, 2019.

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[1] http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/vawir.pdf
[2] http://www2.gov.bc.ca/gov/content/safety/crime-prevention/protection-order-registry
[3] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/victimlinkbc
[4] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/victim-notification
[5] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-a-victim-of-a-crime/victim-of-crime/financial-assistance-benefits

V. Seniors and Others with Disabilities

Abuse and neglect of seniors and adults with disabilities occurs when a family member, friend, caregiver or other person financially, physically, or emotionally abuses or neglects such an individual. Elder Abuse and abuse of adults with disabilities includes physical, mental or emotional harm, and damage or loss in respect of financial affairs (i.e., financial abuse). Examples include intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy, denial of access to visitors, and neglect. Many types of abuse, and some types of neglect, are criminal offences.

All types of abuse and neglect are harmful. Such abuse can occur because of lack of knowledge or understanding by a caregiver of an adult’s situation, or be very deliberate. The person causing the harm may have mental health difficulties, alcohol or substance use, or more complex psychosocial issues. Further, individuals who have suffered years of spousal abuse may also be susceptible to further neglect and abuse, such as financial abuse, by others.

Abuse or neglect of seniors and adults with disabilities is often hidden behind inquiries about benefits, services, and wills and estates. For instance, such an individual may inquire about housing benefits available to them. A little probing may uncover that the reason for wanting housing benefits is to escape an abusive relative who has taken control of their house. Individuals should watch for subtle indications of abuse and neglect.

Some older adults may be embarrassed to reveal abuse or neglect, particularly if a family member is involved. Some may not know how to get help, or be unsure if what they are experiencing is considered abuse or neglect. Some may worry about repercussions on their family member or caregiver. They may also fear retaliation from the person who harmed them. Or, they may fear losing services they need, losing their money, having to move, or breaking up the family. They may worry about not being believed.

The information below pertains to the many avenues victims or those acting in their best interests may chose to pursue, as well as lists available resources. Further information on how to address seniors’ abuse may also be found in Chapter 15: Adult Guardianship and Substitute Decision-Making.

A. Ending the Abuse or Neglect

Upon discovering a case of abuse or neglect of a senior or individual with disabilities, clinicians should provide information about what kind of help is available. Police respond to reports of persons in immediate danger or possible criminal offences. They investigate offences and provide information about other agencies that may be able to help. Victim Service programs are located in community agencies or police stations. They provide emotional support, justice system information, safety planning, referrals to counselling and other services, help in accessing crime victim assistance benefits, and support to victims going to court.

VictimLink BC provides information and referrals to all victims of crime, and immediate crisis support to victims of family and sexual violence. Call 1-800-563-0808 or go to www.victimlinkbc.ca.

The Seniors Abuse and Information Line (SAIL) operated by the BC Centre for Elder Advocacy and Support (BCCEAS) is a toll free telephone line which is staffed 7 days a week (excluding holidays), 8 a.m. – 8 p.m. SAIL is a safe place for older adults, and those who care about them, to talk to someone about situations where they feel they are being abused or mistreated, or to receive information about elder abuse prevention. Call (604) 437-1940 or toll free 1-866-437-1940.

Part 3 of the *Adult Guardianship Act*, RSBC 1996, c 6, has special provisions on abuse and neglect. These include physical, sexual, emotional and financial forms of abuse/neglect. These provisions are aimed at adults unable to get help because of a physical restraint, a physical disability, or a condition that affects their ability to make decisions about the abuse or neglect.

Under Part 3 of the Act, 'designated agencies' respond to reports of abuse or neglect involving adults in these circumstances and notify police if a criminal offence appears to have been committed. Designated Agencies under the *Adult Guardianship Act* include the five Regional Health Authorities, Providence Health Care Society, and Community Living BC. They can address a range of health and safety issues and help in informal or formal ways. Formal tools include gaining access to the adult in emergencies, obtaining access orders or warrants, obtaining short and long term restraining orders, and on occasion obtaining support and assistance court orders.

Designated agencies often work with the Public Guardian and Trustee (PGT) in responding to abuse/neglect situations. Under the *Public Guardian and Trustee Act*, the PGT investigates reports of financial abuse or neglect, can restrict access to assets in emergencies where there is concern an adult may be mentally incapable, and may provide financial management services for adults incapable of managing their own affairs. The PGT makes referrals to designated agencies if there are concerns about physical risk or harm to the vulnerable adult. The following is a link to the PGT's Decision Tree for more information on knowing who to call:

http://www.trustee.bc.ca/reports-and-publications/Pages/Decision-Tree.aspx

For further information on supporting victims of elder abuse, see the Understanding and Responding to Elder Abuse E-Book [1].

Other B.C. laws aiming to protect adults in financial and health-care matters include: the *Public Guardian and Trustee Act*, the *Representation Agreement Act*, and the *Health Care (Consent) and Care Facility (Admisssion) Act*.

Remember that the victim may depend on his or her alleged abuser for financial or physical assistance. If the victim wants to make a report that may lead to the laying of information, moving to a transition house, or getting a protection order (see Section V.B.3: Protection Order, below), he or she may need to find alternate arrangements for financial or physical support that the abuser may have been providing. Some of the financial and social services available to the victim are listed below.

B. Legal Remedies

1. Criminal Charges

No B.C. legislation specifically addresses abuse of elders and adults with disabilities but the following *Criminal Code* sections may apply:

- s 265: assault;
- s 215(1)(c): duty of persons to provide necessaries to a person under his or her charge;

Financial abuse offences:

- s 322: theft;
- s 331: theft by person holding power of attorney; and
- s 332: misappropriation of money held under direction.

Remember that a victim may be reluctant to make a report that may lead to the laying of an Information against a family member.

2. Peace Bond

Pursuant to s 810 – 811 of the *Criminal Code*, a peace bond requires that the abusive person "keep the peace" for up to 12 months or face a possible prison sentence.

3. Protection Order

A protection order (formerly referred to as a restraining order) restricts contact between the abused and abuser and is available pursuant to s 183 of the *Family Law Act*, but only if the abused is a spouse or family member that lives with the abuser. The *Family Law Act* defines "spouse" as someone who is married to another person or has lived with another person in a marriage-like relationship and has done so for a continuous period of two years or has children with another person. The Act defines a "family member," with respect to a person, as that person's spouse or former spouse; a person with whom the person is living, or has lived, in a marriage-like relationship; a parent or guardian of the person's child; a person who lives with and is related to the person; or the person's child.

A restraining order can also be obtained under s 56(3)(c) of the *Adult Guardianship Act*. It is necessary to note the defendant's date of birth when applying for the restraining order so that it is not placed against the wrong individual. Applicants should remember to include a Police Enforcement Clause so that the police are required to act on breaches. Once the order is in place, it is registered with Protection Order Registry, which is accessible by police.

4. Conditional Release or Probation

Another way to protect the victim is to contact the Crown if the abuser has been charged and, on a finding of guilt, to get conditions placed on the abuser's release or probation order restricting contact between the abuser and the victim. Keep in mind that the burden of proof is higher in criminal matters than civil matters, including when proving a breach of conditions.

C. Other Remedies

BC has a Parliamentary Secretary to the Minister of Health for Seniors (Darryl Plecas), a Seniors' Services Branch and an Office of the Seniors Advocate.

The following list represents some non-legal solutions that may assist the abused person.

1. General Support

If the adult is in need of health or home care related services, or there are concerns about the adult's ability to seek support due to a disability or condition impacting their ability to make decisions, the victim's nearest health unit (see the telephone book's blue pages for contact information) is probably the best place to start. A trained nurse or social worker can investigate the situation, present options to the victim, and place them in contact with necessary assistance.

BC Association of Community Response Networks (has list of resources by community)

Online	Website [2]
Address	Sherry Baker, Executive Director
Phone	(604) 513-9758

Seniors First BC (Formerly B.C. Centre for Elder Advocacy and Support (BCCEAS))

Online	Website [3]
Address	#150-900 Howe Street Vancouver, BC V6Z 2M4
Phone	(604) 688-1927

Disability Alliance of BC (Formerly BC Coalition of People with Disabilities)

Online	Website [4] Email: feedback@disabilityalliancebc.org
Address	Mailing address: #204-456 West Broadway, Vancouver, BC V5Y 1R3
Phone	(604) 875-0188 Toll-Free: 1-800-663-1278 TTY Line (hearing impaired only): (604) 875-8835

2. Shelter

If the alleged abuser cannot be removed from the home, the victim may need temporary shelter. Older and senior women at risk of violence may be admitted to women's transition houses if space is available. Ama House in South Surrey/White Rock is a specialised transition house for older and senior women at risk of violence. See Chapter 22: Referrals for transition house phone numbers. Some houses do not have a one-week maximum stay, although all stays at transition houses are typically no longer than 30 days. If all of the local transition houses are full, Battered Women's Support Services (telephone: (604) 687-1867) can sometimes locate alternative shelter. After Hours Services (see Chapter 22: Referrals) can also provide assistance and can refer elderly men to temporary shelter or housing.

3. Home Support

The victim may depend on the alleged abuser for help in the home and may be reluctant to act because he or she fears being placed in a nursing home. In fact, the victim may only need a little extra help to live alone. Phone the BC Ministry of Health Services Long-Term Care Program to determine whether the victim is eligible to receive home support services (cleaning, handyman services, etc.). A person may also be able to contact intake in the health authority in which they live to request an assessment. Moreover, home support services may also have the benefit of relieving the stress a caregiver/abuser may experience; stress that sometimes causes the abuse.

Also phone Meals-On-Wheels, if necessary:

Vancouver, Richmond	(604) 732-7638 or (604) 733-6615 (Cantonese)
Burnaby	(604) 299-5754 ext. 23
Chilliwack	(604) 793-7242
Langley	(604) 533-1679
New Westminster	(604) 520-6621
North Shore, West Vancouver	(604) 922-3414
Surrey	(604) 588-6325
White Rock / South Surrey	(604) 541-6325
Port Coquitlam	(604) 942-7506

4. Seniors' Benefits

The victim may not be receiving all of the financial benefits he or she is entitled to. These benefits (Old Age Security Pension, Guaranteed Income Supplement, Canada Pension Plan, and others) may give the victim more freedom to change his or her situation. Phone a local seniors' centre for more information.

More information is available online at: http:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ seniors/ financial-legal-matters/income-security-programs

Information regarding Shelter Aid for Elderly Renters may be found at: http:/ / www. bchousing. org/ Initiatives/ Providing/SAFER

5. Links to the Community

The victim may feel isolated and lonely. Ask the victim if they would like a referral to a community organization. Community organisations such as a social or volunteer organisation can give them a sense of belonging and self-esteem.

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References

[1] http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/victims-of-crime/vs-info-for-professionals/info-resources/elder-abuse.pdf
[2] http://www.bccrns.ca
[3] http://seniorsfirstbc.ca/
[4] http://www.disabilityalliancebc.org/

VI. Victims of Human Trafficking

Human trafficking is a complex and multifaceted crime that can occur both domestically and internationally. The victims of human trafficking are deprived of their basic rights to freedom and movement. Thus, human trafficking is often described as modern day slavery.

Although each human trafficking case is different, a person may be trafficked if they:

- cannot leave their job to find another one
- do not have control over their wages or money
- work but do not get paid normal wages
- have no choice about hours worked or other working conditions
- work long hours, live at a work site, or is picked up and driven to and from work
- shows signs of physical abuse or injury
- are accompanied everywhere by someone who speaks for him or her
- appear to be fearful or and or under the control of another person
- owe money to their employer or another person who they feel honour bound to pay
- are unfamiliar with the neighbourhood where they live or work
- are not working in the job originally promised to them
- are travelling with minimal or inappropriate luggage/belongings
- lack Identification, passport or other travel documents
- are forced to provide sexual services in a strip club, massage parlour, brothel or other location

The following publication from the United Nations Office on Drugs and Crime provides a comprehensive list of indicators that a person may be trafficked:

http://www.unodc.org/documents/human-trafficking/HT_indicators_E_LOWRES.pdf

Despite the severity of the offence, human trafficking convictions are rare. This may be in part due to the complexity and subtleties of trafficking operations as well as reluctance on the part of victims to come forward. Victims may not come forward because they may:

- fear for their own lives
- not understand that they are victims of human trafficking;
- be taught to distrust outsiders, especially law enforcement and other government authorities; Foreign victims may be afraid they will be detained and deported, or they may limited language skills;
- be completely unaware of their rights or may have been intentionally misinformed about their rights in Canada
- fear for their families and/or loved ones
- feel threatened that traffickers will harm their families if they report their situation to, or cooperate with, law enforcement. (See *National Action Plan to Combat Human Trafficking*, Government of Canada, 2012).

In 2007, BC established the Office to Combat Trafficking in Persons (OCTIP). OCTIP is part of the Victim Services and Crime Prevention Division of the Ministry of Public Safety and Solicitor General. OCTIP develops and coordinates strategies to address human trafficking within the province. OCTIP takes a human rights approach that focuses on the rights and needs of trafficked persons. This approach gives back control to the trafficked person by offering information, referrals, support and assistance, but allows the trafficked person to make decisions and choices for themselves. Law enforcement and Crown Counsel prosecute human trafficking cases in BC. See the Resources section below for more information on OCTIP.

A. Governing Legislation and Resources

1. Legislation

Human trafficking is defined in the UN Trafficking in Persons Protocol as "the act of recruitment, transportation, transfer, harbouring or receipt of persons ... by means of threat or use of force or other forms of coercion, of abduction, fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person ... for the purpose of exploitation. Exploitation shall include, at a minimum:

- the exploitation of the prostitution of others or other forms of sexual exploitation,
- forced labour or services,
- slavery or practices similar to slavery,
- servitude,
- or the removal of organs."

Human trafficking is an offence under both the *Criminal Code* (ss 279.01-279.04), and the *Immigration and Refugee Protection Act* [*IRPA*](Part 3). Sections 279.01-279.04 of the *Criminal Code* make it an offence to:

1. Recruit, transport, transfer, receive, hold or hide a person, or exercise control, direction or influence over an adult or a minor's movement for the purpose of exploiting or facilitating the exploitation of that person.
2. Benefit materially from human trafficking.
3. Withhold or destroy a person' s travel or identification documents, such as a passport or visa, for the purpose of trafficking, or helping to traffic, that person.

Exploitation is defined in s 279.04(1) of the *Criminal Code* in the following terms:

"a person exploits another person if they cause them to provide, or offer to provide labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service".

In order to determine whether an accused exploits another person, the court may consider whether the accused (a) used or threatened to use force or coercion; (b) used deception; or (c) abused a position of trust, power or authority (s 279.04(2)).

Because of the high stigma and severe penalties that result from a human trafficking conviction, the *mens rea* for the human trafficking offences is subjective fault. Crown Counsel must prove that the accused acted "for the purpose" of exploiting the victim. In *R. v. Beckford*, 2013 ONSC 653, Justice Miller confirms at paras. 38-40 that "for the purpose" of exploitation requires both intent and knowledge. It is also important to note that consent is not a defence to human trafficking (s 279.01(2)).

Part 3 of *IRPA* applies to smuggling and trafficking of persons from another country into Canada. Sections 117 and 118 make it an offence to:

1. Organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of *IRPA* (s 117(1)).
2. Knowingly organize the coming into Canada or one or more persons by means of abduction, fraud, deception or use of threat of force or coercion (s 118(1)).

The penalties for the offences in Part 3 of IRPA include fines of up to $1,000,000 and imprisonment of up to 14 years (where fewer than 10 persons are being smuggled or trafficked) or up to life. Mandatory minimum sentences apply where the person, in committing the offence, endangered the life or safety, or caused bodily harm or death to the persons with respect to whom the offence was committed, and/or if the commission of the offence was for profit or in association

with a criminal organization or terrorist group (See IRPA sections 117(2)-(3)).

BC's First Human Trafficking Conviction under IRPA

R. v. Franco Orr, 2013 BCSC 1883, was the first conviction for human trafficking under *IRPA* in BC. In that case, a jury found Mr. Orr guilty of the following:

1. Knowingly organizing the coming into Canada of the complainant, by means of abduction, fraud, deception or use of the threat of force or coercion, contrary to s. 118(1) of *IRPA*;
2. Employing a foreign national, in the capacity to which she was not authorized to be employed, contrary to s. 124(1)(c) of *IRPA*; and
3. Misrepresenting or withholding material facts relating to a relevant matter that induced or could induce an error in the administration of the Act by providing false information to the Consulate General of Canada in support of the application for temporary resident visa for entry to Canada for the complainant, contrary for s. 127(a) of *IRPA*.

The complainant in the case was originally from the Philippines but worked for the Orr family as a domestic helper in Hong Kong. The complainant agreed to move to Canada under false pretences and was employed by Mr. Orr despite his knowledge that she did not have the required visa. While Mr. Orr was convicted, his wife, Ms. Huen, was acquitted of all the charges she faced.

At trial, Mr. Orr received a global sentence of 18 months of jail. In 2015, however, the case was successfully appealed. In R. v. Orr, 2015 BCCA 88, the Court of Appeal for British Columbia set the convictions aside and sent the matter back for trial. The court found certain expert evidence should not have been admitted, as the expert's qualifications were not properly tested. A new trial was held in June 2016. A decision is pending.

Bill C-36 and Human Trafficking

In 2014, several changes were made to increase the penalties for the human trafficking in the *CC*. The changes were made as part of Bill C-36: *Protection of Communities and Exploited Persons Act* [*PCEPA*] which was enacted in response to the 2014 Supreme Court ruling *Canada (Attorney General) v Bedford* [*Bedford*], 2013 SCC 72. In *Bedford*, the Supreme Court of Canada found certain prostitution related offences to be unconstitutional. The PCEPA posits sex workers as a vulnerable group and prostitution as a form of sexual exploitation. It also attempts to address the constitutional concerns highlighted in Bedford by including exceptions to criminal liability in order to protect prostitutes and ensure they are able to report abusive or dangerous behaviour without fear of being prosecuted. The constitutionality of the PCEPA has yet to be challenged in front of the Supreme Court of Canada, although various groups including the Canadian Bar Association have expressed concerns that certain aspects of the new law remain unconstitutional. (See "Bill C-36, *Protection of Communities and Exploited Persons Act*", National Criminal Justice Section and Municipal Law Section of the Canadian Bar Association, October 2014, http://www.cba.org/CBA/submissions/pdf/14-57-eng.pdf).

Bill C-36 made several significant sentencing changes to the human trafficking provisions in sections 279.01 to 279.03 of the *Criminal Code*. First, the new provisions include a mandatory minimum sentence of 5 years where a trafficker is convicted of human trafficking (section 279.01 of the *Criminal Code*) and also kidnaps, commits aggravated assault or aggravated sexual assault against, or causes the death of the victim. In such cases, the maximum sentence is life. In other cases of trafficking of adults, the mandatory minimum sentence of 4 years (s. 279.01). The maximum is 14 years. Second, s 279.02(2), receiving a material benefit from trafficking of minors, now carries a mandatory minimum sentence of 2 years, and the maximum sentence available for the offence has been extended from 10 to 14 years. Third, the mandatory minimum sentence for withholding or destroying documents to facilitate trafficking of minors is 1 year. The maximum sentence has been extended from 5 years to 10 years.

Bill C-36 made a number of other changes. First, offences under the *Criminal Code* apply generally only to acts committed within Canadian territory. However, exceptions to this principle of territoriality are provided in section 7 of the *Criminal Code*. These include terrorism offences, human trafficking and sexual offences against children. In this last example, the bill provides that anyone who obtains for consideration the sexual services of a minor outside Canada will face the new minimum (6 months or 1 year) and maximum (10 years) penalties.

Second, the offence of luring a child consists in communicating, by any means of telecommunication, with a person under 18 years of age for the purpose of facilitating the commission of one of the offences with respect to that person – generally a sexual offence – listed in s 172.1 of the Code. The bill adds the three existing offences pertaining to trafficking of minors (s 279.011, s 279.02 and s 279.03 of the *Criminal Code*) to the list of offences. Consequently, an accused person convicted of having lured a person under 18 years of age for the purpose of facilitating the commission of a trafficking-related offence against that person shall be liable to the following penalties:

- upon indictment: imprisonment for a term of between one year and 10 years
- upon summary conviction: imprisonment for a term of between 90 days and 18 months

Third, Bill C-10 makes it an offence to agree or arrange with another person, by any means of telecommunication, to commit one of the offences – generally of a sexual nature – mentioned in s 172.2 of the *Criminal Code*. Bill C-36 adds to the list of offences the three existing offences pertaining to trafficking of minors (s 279.011, s 279.02 and s 279.03 of the *Criminal Code*). An accused person convicted of having made an agreement or arrangement with another person over the Internet to commit a human trafficking offence in respect of a person under 18 years of age shall be liable to the same minimum and maximum sentences as those provided for luring (i.e., a term of one year to 10 years upon indictment or of 90 days to 18 months upon summary conviction).

Additional information concerning Bill C-36 may be obtained from: http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c36&Parl=41&Ses=2

BC's First Human Trafficking Conviction under the Criminal Code

In 2014, BC saw its first human trafficking conviction under the *Criminal Code* provisions. In *R. v. Moazami*, 2014 BCSC 1727, Reza Moazami was charged with 36 counts including human trafficking, living on the avails of a juvenile, and sexual assault. Two of the 36 charges were for trafficking in persons, and Moazami was convicted on one of the counts.

Justice Bruce found beyond a reasonable doubt that Moazami transported and controlled the victim's movements for the purpose of exploitation. The evidence showed Moazami intimidated the victim, J.C., with actual violence and threats of violence towards J.C.'s dog. Moazami also provided the victim with free illicit drugs to keep her addicted and dependant on him, and counseled her to distrust the police. Moazami was acquitted on the second human trafficking charge. Although it was clear Moazami abused the victim H.W., the court was in reasonable doubt as to whether Moazami's behaviour caused H.W. to fear that her safety or the safety of another person was threatened.

Sentencing was discussed in *R. v. Moazami*, 2015 BCSC 2055. Because eight of the 11 complainants were under the age of 18 years at the time of the offences, s 718.01 of the *Criminal Code* requires the Court to give primary consideration to the objectives of denunciation and deterrence when sentencing.

Further, s 718.1 stipulates that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 also mandates a consideration of the relevant mitigating and aggravating circumstances. Lastly, s 718.2(b) enshrines the principle that similar offences committed by similar offenders should be accorded similar sentences.

Where the offender has been convicted of multiple offences involving multiple complainants, the Court must decide whether the sentence for each offence should be served concurrently or consecutively to each other. The proper approach is to first determine the appropriate sentence for each offence and then decide if the sentences should be served concurrently or consecutively.

When using the applicable statutory minimum and maximum sentences as a benchmark, and applying the factors relevant to the application of the totality principle, Justice Bruce found that a sentence of 23 years is the minimum necessary to achieve the fundamental objectives of sentencing on the facts of this case. Justice Bruce stated that the aggregate of the minimum sentences informs the Court with regard to the length of sentence necessary to adequately reflect the serious nature of the offences, the multiple complainants, the many aggravating factors, and Moazami's moral blameworthiness in light of the few mitigating circumstances.

To achieve the length of sentence of 23 years, Justice Bruce decided that the sentences imposed with respect to the offences against individual complainants will be served concurrently with each other, but consecutively in regard to each of the other complainants with some exceptions.

Justice Bruce calculated the total time served credit as 1851 days or five years and 26 days. Deducting this time from the imposed sentence of 23 years, Justice Bruce found that the remaining sentence to be served was 17 years and 339 days.

2. Temporary Resident Permit for Victims of Human Trafficking

Many victims of human trafficking find themselves in Canada without proper documentation and at risk of deportation. To address this issue, Citizenship and Immigration Canada ("CIC") can issue a special temporary resident permit to victims of human trafficking (This is referred to as the VTIP TRP – Victims of Trafficking in Persons, Temporary Resident Permit). The VTIP TRP gives presumed trafficked persons legal status in Canada and is valid for up to 180 days. Depending on the circumstances of the individual, CIC can even reissue the TRP at the end of the 180-day period. The benefits of the VTIP TRP include access to health care benefits and trauma counselling through the Interim Federal Health Program. A work permit is also issued and in BC, social assistance benefits may be available. A presumed trafficked person with a VTIP TRP is eligible to apply for social assistance benefits. Victims of human trafficking need not testify against their trafficker in order to be eligible for an initial TRP. However, immigration officers will interview an individual in order to decide whether they are eligible for the TRP. For more information about obtaining a VTIP TRP, call CIC at 1-888-242 2100.

3. Resources

For information on the signs that a person may have been trafficked; services available to victims of human trafficking, including legal services, health care, shelter, interpretation and counselling; and links to resources, see BC's Office to Combat Trafficking in Persons, Ministry of Public Safety and Solicitor General website at: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/human-trafficking

BC's Office to Combat Trafficking in Persons, Ministry of Public Safety and Solicitor General

Victim Services and Crime Prevention Division

Online	Website [1] E-mail: octip@gov.bc.ca
Address	#302 – 815 Hornby Street Vancouver, BC V6Z 2E6
Phone	Main Office Phone: 604 660-5199 Toll Free 24 Hour Line: 1 888 712-7974

The above phone line is answered by VictimLink BC, 24 hours a day, seven days a week. Interpretation is provided.

The Office to Combat Trafficking in Persons offers a free online training course on human trafficking aimed at service providers in both English and French. The online training is called "*Human Trafficking: Canada is Not Immune*".

"*Communities Taking Action: A Toolkit to Address Human Trafficking*" supports communities to take action at the local level to raise awareness and prevent human trafficking. It provides practical information and specific examples of how BC communities are addressing this issue.

The online training course and toolkit are available through the following website: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/human-trafficking/human-trafficking-training

BC Crime Stoppers

Individuals with information about a crime are able to provide an anonymous tip by calling the tip line at 1-800-222-TIPS (8477).

Individuals may also provide an anonymous tip online at http://www.bccrimestoppers.com/

RCMP Human Trafficking Coordinator for BC/Yukon

The RCMP Human Trafficking Coordinator for the BC/Yukon region plays a significant role in the investigation of human trafficking situations and in raising awareness about this crime.

Telephone: (604) 598-4603

VictimLink BC

VictimLink BC provides assistance in connecting to a victim service worker in any area of BC. The service is toll free, confidential, and anonymous. VictimLink BC is available 24 hours a day, seven days a week, and has information about and referrals to a number of support systems that are available to victims of crime.

Online	Website [2]
Phone	Toll Free: 1-800-563-0808

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References

[1] http://www.pssg.gov.bc.ca/octip/
[2] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/victimlinkbc

VII. Referrals and Follow-up

If you refer the victim to a lawyer, social service agency, or health professional, remember to follow up to ensure that the victim is looked after. A simple phone call to the victim should suffice. Should you need to consult with a professional (for instance, a psychiatrist) about a victim's ongoing case, you need to have the victim sign a written release form authorizing you to collect information about them, or on their behalf. The referrals below are for more specific types of victims than the referrals at the beginning of the chapter:

Ministry of Child and Family Development - The Helpline for Children

To report suspected cases of child abuse or neglect.

Online	Website [1]
Phone	310-1234 (no area code needed)

Ministry of Child and Family Development - After Hours Services

Refers those in crisis situations to food and emergency housing resources (after office hours and weekends).

Online	Website [1]
Phone	**Vancouver, North Shore, and Richmond:** (604) 660-4927 **Rest of the Lower Mainland, from Burnaby and Delta to Maple Ridge and Langley:** (604) 660-8180 **Elsewhere in B.C.:** 1-800-663-9122

General Ministry Inquiries

Online	Email: info@gov.bc.ca
Phone	1-877-387-7027

Provincial Government Referral Service

Online	
Phone	Victoria: (250) 387-6121 Metro Vancouver: (604) 660-2421 Elsewhere in BC: 1 800 663-7867

Seniors First BC (Formerly British Columbia Centre for Elder Advocacy Support (BCCEAS))

Province-wide service with an advocacy help line, information and referrals.

Online	Website [2] E-mail: info@seniorsfirstbc.ca
Phone	(604) 437-1940 Toll-Free: 1-866-437-1940

VictimLink BC

VictimLink BC is available 24 hours, seven days a week and has information about and referrals to a number of support systems that are available to victims of crime.

Online	Website [3] E-mail: VictimLinkBC@bc211.ca
Phone	Toll-Free: 1-800-563-0808 TTY: (604) 875-0885

UBC Life & Career Centre (Formerly the UBC Women's Resources Centre)

Information and referral, counselling support groups for women, stress management, depression. Abusers may also be referred here.

Address	UBC Robson Square, 800 Robson Street, Plaza Level, Room 1.400 Vancouver, BC V6Z 3B7
Phone	(604) 822-8585

The Surrey Women's Centre

Online	[https://surreywomenscentre.ca]
Phone	(604) 822-8585

- The Surrey Women's Centre has a mobile assault response team that provides services over the phone and in-person to anyone who has experienced a physical or sexual assault. They are available 24-hours a day, 7 days a week, 365 days a year. You do not have to go to the hospital or make a police report to use their services.

WAVAW

Online	https://www.wavaw.ca/contact/
Phone	604-255-6344

- WAVAW provides support services to survivors of sexualized violence who have shared experiences of gender marginalization: cis and trans women, Two-Spirit, trans and/or non-binary people. They advocate for social and systemic change through education, outreach and activism.

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References

[1] http://www2.gov.bc.ca/gov/content/safety/public-safety/protecting-children/reporting-child-abuse
[2] http://seniorsfirstbc.ca
[3] http://www2.gov.bc.ca/gov/content/justice/criminal-justice/victims-of-crime/victimlinkbc

Chapter Five - Public Complaints

I. Introduction

Introduction

This chapter does not address all problems, legal or otherwise, relating to government, but it provides some general information that may assist making a public application or complaint. This section contains general guidelines for dealing with public bodies (e.g., the Canadian Radio-television and Telecommunications Commission, the Egg Marketing Board, or a public university). Individuals involved in the judicial review process should consult the following texts:

David J Mullan, *Administrative Law*, (Toronto: Irwin Law, 2001).

- Part of the Essentials of Canadian Law series by Irwin Law, this text provides a comprehensive review of administrative law in Canada.

Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017).

- This text provides a simple and clear review of administrative law.

Donald Brown & John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback Publishing, 1998).

- This regularly updated three-volume text provides a more detailed review of administrative law.

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II. Governing Legislation and Resources

A. General

1. Legislation

Federal Courts Act, RSC 1985, c F-7.

Judicial Review Procedure Act, RSBC 1996, c 241.

2. Resources

Community Legal Assistance Society: BC Judicial Review Self-Help Guide: www.judicialreviewbc.ca [1]

The Ombudsperson of BC website: http://www.ombudsman.bc.ca.

B. Privacy or Access to Information

1. Legislation

Access to Information Act, RSC 1985, c A-1.

Freedom of Information and Protection of Privacy Act, RSBC 1996, c 165.

Personal Information Protection and Electronic Documents Act, SC 2000, c 5.

Privacy Act, RSBC 1996, c 373.

Privacy Act, RSC 1985, c P-21.

2. Resources

BC Freedom of Information and Privacy Association

Online	Website [2]

BC Civil Liberties Association

Online	Website [3] Email: info@bccla.org
Address	900 Helmcken Street, 2nd Floor, Vancouver, British Columbia, V6Z 1B3
Phone	(604) 630-9754 Fax: (604) 687-3045

Office of the Information and Privacy Commissioner for BC

Online	Website [4]
Address	P.O. Box 9038, Stn. Prov. Govt., Victoria, British Columbia, V8W 9A4
Phone	(604) 660-2421 (Enquiry Vancouver only) 1-800-663 7867 (Enquiry BC)

Privacy Commissioner of Canada

Online	Website [5]
Address	30 Victoria Street, Gatineau, Quebec, K1A 1H3
Phone	(819) 994-5444 Toll-Free: 1-800-282-1376 Fax: (819) 994-6591

C. Complaints about Police Conduct

1. Legislation

Police Act, RSBC 1996, c 367.

Royal Canadian Mounted Police Act, RSC 1985, c R-10.

2. Resources

BC Civil Liberties Association

Online	Website [3] Email: info@bccla.org
Address	900 Helmcken Street, 2nd Floor, Vancouver, British Columbia, V6Z 1B3
Phone	(604) 630-9754 Fax: (604) 687-3045

Pivot Legal Society

Address	121 Heatley Avenue, Vancouver, British Columbia, V6A 3E9
Phone	(604) 255-9700 Fax: (604) 255-1552

Office of the Police Complaints Commissioner

Online	Website [6] Email: info@opcc.bc.ca
Address	P.O Box 9895 Stn Prov Govt. #501-947 Fort St., P.O. Box 9895 Victoria, BC V8W 9T8
Phone	(250) 356-7458 Toll-free outside of Vancouver: Call Enquiry BC at 1-877-999-8707 and ask to be connected to the Office of the Police Complaints Commissioner Fax: (250) 356-6503

Civilian Review and Complaints Commission for the RCMP

Online	Website [7] To use the online complaint form, click on the "Make a Complaint" link
Address	
Phone	Telephone for Greater Vancouver: (604) 501-4080 Anywhere in Canada: 1-800-665-6878 Fax: (604) 501-4095

D. The Right to Vote

1. Legislation

Canada Elections Act, RSC 2000, c 9

Election Act, RSBC 1996, c 106

Local Government Act, RSBC 1996, c 323

Vancouver Charter, SBC 1953, c 55

2. Resources

Elections British Columbia

Online	Website [8]

Elections Canada

Online	Website [9]

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 13, 2019.

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References

[1] http://www.judicialreviewbc.ca
[2] http://fipa.bc.ca/home/
[3] http://www.bccla.org/
[4] http://www.oipc.bc.ca/
[5] http://www.priv.gc.ca/
[6] http://www.opcc.bc.ca/
[7] http://www.crcc-ccetp.gc.ca/
[8] http://www.elections.bc.ca/
[9] http://www.elections.ca/

III. Steps to Take

Step One: Informal Review

Disputes with government agencies can often be resolved through informal communication. Agencies often make initial decisions based on misperceptions, without all relevant information. Sometimes the most difficult part of an advocate's job is to locate the person making the decision or someone in a position to review the decision. Before pursuing more drastic (and often expensive) avenues, try to locate this person and ensure that they have been provided with all relevant information.

Step Two: Formal Review

Most government agencies have some sort of formal review process. For some agencies there is little difference between formal and informal review, while others have sophisticated, published processes that closely resemble courtroom procedure. Whatever the problem is and whichever government player is involved, be sure to research the review process before launching a formal appeal. Factors such as cost, location of the hearing, type of submissions heard, and evidence required will all affect the choice of whether to pursue a resolution through the formal review process.

Generally, powers of review and review procedures are set out in the statutes and regulations that govern a particular tribunal or court. Agencies themselves further clarify this process. Many publish handbooks for internal use that are available to the general public on the court or tribunal's websites or in law libraries. Lawyers with experience in the area may also provide valuable insight. Lawyers at the Community Legal Assistance Society can be helpful when dealing with specific problems, especially those dealing with poverty law topics (EI, WCB, Income Assistance, Human Rights).

NOTE: Pay attention to time limits. Many worthy cases have been lost because an advocate failed to pay proper attention to limitation periods. Some limitation periods are very short.

NOTE: Exhausting internal appeals before judicial review. There is a general rule in administrative law which requires that, where tribunals or other administrative decision-makers (such as public universities) have an internal review or appeals process, applicants must exhaust these internal processes before applying for judicial review by the courts (see *Harelkin v University of Regina*, [1979] 2 SCR 561).

NOTE: Procedural fairness in internal review processes: as a general rule, administrative tribunals are limited in the scope of their internal review processes to the specific grounds of review listed in their enabling legislation. This raises the question of whether an applicant is able to challenge an administrative tribunal's decision on procedural fairness grounds if the enabling legislation for the tribunal does not explicitly include procedural fairness as one of the grounds for internal review. This question was recently addressed by the BC Supreme Court in *Stelmack v Amaruso* (14 July

2017), Vancouver S175091 (BCSC). The case involved a judicial review of an internal review by the Residential Tenancy Branch (RTB) which had failed to address a procedural fairness violation from the initial hearing because procedural fairness was not one of the three listed grounds for internal review in section 79(2) of the *Residential Tenancy Act*. The BC Supreme Court ruled that even if the enabling legislation does not list procedural fairness as a specific ground for internal review, arbitrators nonetheless must always consider issues of procedural fairness. The practical ramifications of this decision are currently unclear, but it opens the door to making procedural fairness arguments during all internal review processes in addition to the grounds listed in the tribunal's enabling legislation. See **Section III.C.1.c(2): Procedural Fairness** of this chapter below for more on procedural fairness.

Step Three: Examining an Appeal

If launching an internal review fails to solve an issue, an individual can either apply for judicial review or contact the BC Ombudsperson. Both of these options can be pursued at the same time, but one option may be preferable to the other in certain circumstances. Generally speaking, individuals will be looking to resort to the courts through a judicial review, which will render a binding decision on a case. The Ombudsperson is generally to be contacted only where an individual does not have a legal cause of action, but still wants to change a part of a government body's structure that leads to unfairness.

1. Judicial Review

If you receive an unfavourable decision from an agency's appeal process, or object to the appeal process itself, you may have recourse to the courts. Sometimes regulations give an individual a right to appeal directly to the courts. If so, one should use this direct right to appeal rather than the general judicial review procedure. However, even if an individual has no express statutory right to appeal to the courts, superior courts have inherent jurisdiction to review administrative action to ensure that administrative decision-makers do not exceed the authority granted to them by statute.

The courts have developed criteria against which to assess the adequacy of government agencies' decision-making procedures. These criteria form the heart of administrative law. It is not within the scope of this section to attempt a comprehensive overview of the basic principles of administrative law. Interested parties can find an excellent introduction to these fundamental principles in *Dunsmuir v New Brunswick*, 2008 SCC 9. Bastarache and Lebel JJ for the majority provide the following description at paragraphs 27-28:

As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law... By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

Remember that judicial review should not be contemplated unless all aforementioned avenues have been exhausted.

a) BC Judicial Review Procedure Act

For matters within the jurisdiction of the BC Legislature, the *Judicial Review Procedure Act*, RSBC 1996, c 241 [JRPA], provides for the judicial review of the "exercise, refusal to exercise, or proposed or purported exercise, of a statutory power" (JRPA, s 2). This includes the power to review decisions "deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence..." (*JRPA*, s 1). In a proceeding under the JRPA, the court has broad powers to craft a suitable remedy; most often the case will be returned to the tribunal for reconsideration in light of the court's findings of

law or fact (see **Section I.F.4: Available Remedies**, below). An application under the JRPA can be brought before a Supreme Court judge in Chambers. Although this is a less expensive procedure than a trial, it may still be beyond the means of many individuals.

b) Judicial Review Procedure

A party applying for judicial review must first determine whether the Federal Court or a provincial superior court has authority to decide on the matter. As a general rule, provincial jurisdiction includes tribunals established within provincial constitutional jurisdiction and tribunals created by the province due to a delegation of powers by the federal government.

(1) Federal Court

When considering judicial review of federal tribunals, look at both the *Federal Courts Act*, RSC 1985, c F-7, and the particular tribunal's governing statute. Often the governing statute sets out important limitation periods and procedures.

The Federal Court Trial Division hears reviews of most federal tribunals. However, the 16 tribunals listed in section 28 of the *Federal Courts Act* are reviewed by the Federal Court of Appeal. Examples of federal tribunals that are reviewed by the Federal Court of Appeal include the Canada Industrial Relations Board, Employment Insurance umpires, the Competition Tribunal, and the CRTC.

The procedures for a federal judicial review are set out in s 18.1 of the *Federal Courts Act*.

(2) Provincial Superior Courts

A tribunal under provincial jurisdiction can be reviewed upon application to a judge in the BC Supreme Court. The procedural rules are described in the *BC Supreme Court Civil Rules*, BC Reg 168/2009, available in the Acts, Rules & Forms section of the BC Supreme Court website: www.courts.gov.bc.ca/supreme_court [1].

Tribunals that can be reviewed under the *JRPA* include the Employment and Assistance Appeal Tribunal, the Workers' Compensation Board, and the Residential Tenancy Branch.

(3) Standing

In general, only the parties who had standing before the tribunal or who are directly affected by the tribunal's decision may apply for judicial review.

(4) Time Limits

The time limit to apply to the Federal Court for judicial review under section 18.1 of the *Federal Courts Act* is **30 days**, although it can be extended by the Federal Court (s 18.2(2)). However, other federal legislation may direct different timelines. For example, for decisions made pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27, appellants must look to both that statute and the *Federal Courts Act*.

For provincial tribunals, applicants must refer to the *Administrative Tribunals Act* [*ATA*], SBC 2004, c 45, and the specific statute governing the tribunal; **60 days** is the default (*ATA* s 57). Limitation periods may be extended pursuant to section 11 of the *JRPA*, unless another enactment provides otherwise or the delay will result in substantial prejudice or hardship to another person affected.

(5) Stay of Orders or Proceedings

While an application for judicial review is pending, existing orders from a tribunal must be obeyed, and the tribunal has discretion to continue with the proceedings. However, an applicant can ask the court to stay the tribunal's order or to prohibit the proceedings from continuing.

David Mossop, Kendra Milne & Jess Hadley, Representing Yourself in a Judicial Review, 2d ed (Vancouver: Community Legal Assistance Society, 2010), online: <https://judicialreviewbc.ca/>.

(6) Evidence

The primary evidence for judicial review is the tribunal's record of the hearing. Generally, the court does not allow new evidence to be introduced at a judicial review hearing. However, there is a narrow exception to this: a party may submit new evidence speaks to the procedural fairness or jurisdictional issue [*Davies v Halligan*, 2013 BCSC 2549].

(7) Filing Fees and Indigency Applications

Applicants who cannot afford the filing fees for judicial review may apply for an indigency order pursuant to Rule 20-5 in Appendix C, Schedule 1 of the BC *Supreme Court Civil Rules*. Indigency status affords the applicant relief from all court fees and is available to those with low income and limited earning potential. Note that the process for indigency applications is complicated.

David Mossop, Kendra Milne & Jess Hadley, *Representing Yourself in a Judicial Review*, 2d ed (Vancouver: Community Legal Assistance Society, 2010), online: <https://judicialreviewbc.ca/>.

c) Scope of Judicial Review

Assuming a party can resort to the courts to review the decision of a tribunal, there are limitations as to the scope of judicial review.

(1) Substantive Errors

An administrative body has only as much power as its governing statute grants to it. This grant of authority is limited in both the context and the manner in which the exercise of authority can be applied. If an administrative decision-maker exceeds his or her authority, the court can step in to provide a remedy.

(a) Errors of Fact

Findings of fact are generally reviewable only if they are not supported on the evidence. The appellant courts grant just as much deference to a tribunal's findings of facts as they would to a trial court's finding of facts in a judicial review. Nevertheless, the legislature is presumed not to have intended to give an administrative body the authority to act arbitrarily or capriciously. If the tribunal makes a finding of fact that cannot reasonably be drawn from the evidence, then it is exceeding the authority granted to it, and its decision can be set aside by the court.

(b) Errors of Law

Substantive law reviewable by the courts can be divided into two areas: statutory interpretation related to the powers of a tribunal, and interpretation related to other broader questions of law.

A tribunal can be overruled if it is acting without authority. A tribunal must generally act within the jurisdiction of the legislation that created it. Similarly, a tribunal must not misinterpret the rules that govern the way it exercises authority, since these rules represent a precondition to the exercise of that authority. The mandate of a tribunal is defined in large part by the intention of the legislature. If in the course of exercising its authority a tribunal misinterprets its mandate, a court may declare the tribunal's decision void upon judicial review.

Similarly, a tribunal can be overruled if it applies the law incorrectly in other contexts. The enabling statute which creates a given tribunal cannot grant it the authority to act illegally or to change the law.

(c) Standards of Review

Different standards of review may be imposed depending on the issue that is under review and the nature of the tribunal. The law relating to standards of review is quite complicated; thus, for a more detailed discussion of the issues pertaining to the standards of review, one should refer to *Dunsmuir*, above. See also the *ATA* for statutorily prescribed standards of review applicable to certain provincial tribunals.

Generally, for questions of law that go beyond the tribunal's specialized area of expertise, the standard of review will be **correctness —** i.e., the tribunal must get the law right.

If a tribunal is interpreting its own enabling statute or a closely related statute with which it has particular familiarity or expertise (e.g., the Workers' Compensation Board applying the *Workers Compensation Act*), then the court will generally show some deference to the tribunal's interpretation. The standard of review will generally be **reasonableness**.

Likewise, for questions of fact, and for exercises of discretion (e.g., with respect to the appropriate remedy), the court will usually show deference to the judgment of the administrative decision-maker who saw the evidence first-hand. The standard of review will generally be **reasonableness**. A court does not usually review a tribunal's discretionary decisions unless its discretion was not exercised in good faith, was exercised for an improper purpose, was based on irrelevant considerations, or was otherwise unreasonable. The appropriate degree of deference depends on a number of factors, including the nature of the discretionary decision, the knowledge and expertise of the decision-maker, and the amount of discretion that is given by legislation. See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker], and *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (for *Charter violations*).

A third, more deferential standard of review, patent unreasonableness, used to be applied in some circumstances. However, *Dunsmuir* has expressly done away with this standard of review, at least in the context of the common law. It is unclear at this time how *Dunsmuir* may have affected the standards of review dictated by the *ATA*, which still makes reference to "patently unreasonable" findings. However, Binnie J offered the following *obiter* (non-binding) comments in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]:

The expression 'patently unreasonable' did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of indicia of patent unreasonableness are given in s. 58(3). Despite Dunsmuir, 'patent unreasonableness' will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the BC courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.

Binnie J further stated that a "legislature has the power to specify a standard of review if it manifests a clear intention to do so. However, where the legislative language permits, the court (a) will not interpret grounds of review as standards of review, (b) will apply Dunsmuir principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based in part on Dunsmuir including a restrained approach to judicial intervention in administrative matters."

Most recently, the BC Supreme Court in *Wan v The National Dental Examining Board of Canada*, 2019 BCSC 32 applied the standard of reasonableness by referring to *Dunsmuir* factors while using the words "patently unreasonable" to summarize the history of the case. This finding suggests that since *Khosa*, courts will adhere to the high standard of reasonableness and give no significance to the word "patently".

d) Procedural Areas of Law

Generally, tribunals must follow procedural norms, although their procedures may be less formal than those of a court. Tribunals must follow any procedures required by statute or regulation. However, the legislation is often largely silent on procedural requirements, and tribunals are often given a wide discretion within which to operate. Nevertheless, the superior courts are constitutionally bound to uphold the rule of law and will not allow procedural laxity to result in unreasonable prejudice to those affected by administrative decisions. That is, the legislature is presumed to have intended that the administrative body follow certain procedural fairness minimums as a precondition to exercising its authority.

The content of the mandatory procedural fairness minimum will differ depending on the circumstances; see Baker, above. Determining the precise procedural requirements of a given case is rarely clear cut, and an extensive body of case law exists addressing these issues in various contexts.

Fundamental procedural rights include the right to know the case that must be met and to respond, and the right to an impartial decision-maker. In some cases, procedural fairness requirements might also include the right to advanced notice, the right to an oral hearing, the right to be represented by counsel, or the right to formal written reasons. In all cases, the prejudice to the accused from denying a procedural norm must be balanced against the need to make administrative decisions efficiently.

(1) Standard of Review

Generally, the tribunal's procedural decisions will be assessed on a standard of **fairness**. The court will show deference to the administrative body's discretionary choice of procedures, provided that the selection is fair in the circumstances. See e.g. *Baker*, above.

For provincial tribunals to which the *ATA* applies, the Act provides: "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted **fairly**" (ss 58(2)(b) and 59(5)).

(2) Duty to Act Fairly

Tribunals have a common-law duty to act fairly. At its most basic level, the doctrine of fairness requires that a party be given the opportunity to respond to the case against him or her. The circumstances determine whether this response is a written objection or a full oral hearing. As a corollary to the right to present one's case, the legal maxim that only the people who hear the case may decide on it applies to tribunals. The tribunal must meet quorum but need not be unanimous.

The extent of disclosure depends on what is fair to all parties involved and whether the information at issue is prejudicial to an individual's interests (i.e., failure to disclose inconsequential information may not be fatal). At the very least, a party must know which incidents and allegations will be at issue when the decision is made.

The courts will allow tribunals considerable latitude in establishing procedures; however, procedures must be consistently followed. Where a tribunal informs an individual that a certain procedure will be followed, it will generally be considered unfair to follow a different procedure.

No one has the right to an adjournment. Tribunals generally hold their hearings within reasonable time even when their statutes have no limitation period. Nonetheless, tribunals may grant an adjournment when necessary. In deciding whether to allow an adjournment, tribunals should consider the amount of notice, the gravity of the consequences of the hearing, the degree of disclosure, and the availability of counsel.

(3) Right to Be Heard

If there is a hearing, a party is entitled to be present while evidence or submissions are presented. The right to be present at a hearing normally includes a party's right to appear with counsel and his or her right to an interpreter, though normally a tribunal is not required to pay for these services. The tribunal has discretion as to whether the hearing is public or private (although there is a presumption in favour of public hearings). At any hearing, the tribunal must gather and weigh evidence. Relevance is the primary consideration when determining admissibility. Not all administrative decisions involve an oral hearing. A tribunal may have the power to make certain decisions solely on the basis of written submissions.

(4) Onus of Proof

The onus of proof is normally to a civil standard, i.e., that the events alleged occurred on a balance of probabilities (more than 50% likely). However, disciplinary hearings may be to a mixed standard requiring proof beyond a reasonable doubt for some elements.

(5) Duty to Act in Good Faith

All decision-makers are expected to act in good faith and not to discriminate on the basis of irrelevant criteria. Parties are entitled to a decision made by persons untainted by the appearance of bias or conflicts of interest. A tribunal has a duty to at least consider exercising any discretion it may have.

e) Remedies of Judicial Review

Several remedies are available through judicial review:

- a) an order in the nature of *mandamus* that requires a tribunal to exercise certain powers;
- b) an order in the nature of *prohibition* that prohibits a tribunal from exercising unlawful authority;
- c) an order in the nature of *certiorari* that quashes a tribunal decision;
- d) where there is an exercise, refusal to exercise, or a proposed or purported exercise of a statutory power, an injunction or declaration from the court; or
- e) a court-issued declaration to clarify the law.

A party may also challenge a tribunal decision via a civil action for a declaration or injunction. For non-statutory tribunals, this is the only method of challenge. This is also the only method of challenge wherein the court may grant damages.

2. Ombudsperson

The procedures created by the *BC Ombudsperson Act*, RSBC 1996, c 340, furnish an inexpensive means for reviewing decisions and practices of **provincial** government bodies. At present, there is no federal equivalent of the provincial Ombudsperson. However, as discussed later in the chapter, there are sectional equivalents in such fields as police enforcement and official languages.

The Act has the following main features:

- The Ombudsperson is empowered to investigate complaints against public sector bodies including provincial ministries and provincially appointed boards, commissions, Crown corporations, and other public institutions where the majority of the board is appointed by the provincial government or is responsible to the government.
- The Schedule to the *Ombudsperson Act* also empowers the Ombudsperson to investigate complaints against such entities as provincial corporations, municipalities and regional districts, universities and colleges, hospitals, and governing bodies of professional or occupational associations established by a provincial Act.
- The Ombudsperson does **not** have jurisdiction to investigate complaints in areas where the parties are private actors or where other specialized complaint procedures have been established. Examples include complaints regarding banks, private life and health insurance, consumer inquiries, doctors, employment issues involving private companies, federal programs, landlord and tenant (residential) inquiries, municipal police, and the RCMP. For instance, the Ombudsperson may not re-evaluate the merit of the adjudicator's decision just because either the tenant or landlord is not happy with the decision. However, the Ombudsperson has jurisdiction to investigate the administrative unfairness of the Residential Tenancy Branch.
- The Ombudsperson has broad powers of inquiry and may make recommendations, but has no power to enforce those recommendations.
- The complainant must exhaust review or appeal procedures within the agency against which the complaint was made **before** turning to the Ombudsperson.
- The Ombudsperson tables an annual report in the Legislature and may publicly disclose any findings if an agency is not complying with his or her recommendations.

Contact the current Ombudsperson, Jay Chalke, at:

The Ombudsperson

Online	Website [2]
Address	Second Floor - 947 Fort Street Victoria, BC V8V 3K3 Mail: PO Box 9039 STN PROV GOVT Victoria, BC V8W 9A5
Phone	(250) 387-5855 Toll-free: 1-800-567-3247 Fax: (250) 387-0198

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 13, 2019.

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References

[1] http://www.courts.gov.bc.ca/supreme_court
[2] http://www.ombudsman.bc.ca/

IV. Privacy or Access to Information

A. Introduction

Although the right to privacy is fundamental to the healthy exercise of democratic rights, recognition and practical enforcement of this right by legislators and the courts has been slow. This problem has many sources, but underlying it is the enormous difficulty jurists have found in coming to an understanding of what is meant and entailed by this right.

The right to privacy is often balanced against the right to access information, since these rights frequently collide (e.g., when an employer wishes to obtain information about an employee from a government agency). In some cases, a right of access to information may determine whether or not an individual's privacy has been violated. Legislation regulating access to government information is designed to ensure an informed citizenry; when someone seeks information that may injure the privacy interests of a third party, mechanisms exist to weigh privacy interests of the individual against the public interest in disclosure. The following provides a quick survey of the relevant privacy or access to information laws.

B. At Common Law

At common law, the torts of trespass, nuisance, defamation, and invasion of privacy may discourage some of the more blatant forms of invasion of privacy. However, these civil actions do not so much ensure privacy as retroactively provide compensation for its breach.

C. Wiretap Legislation and Lawful Access

Individuals interested in information on wiretapping and lawful access to information should contact the BC Civil Liberties Association, who specialize in dealing in these areas. The case law in this area is very complicated, and an experienced criminal lawyer should be consulted if issues regarding a wiretap arise.

D. Federal Privacy Act, Federal Access to Information Act

1. Introduction

The federal *Access to Information Act*, RSC 1985, c A-1, and the federal *Privacy Act*, RSC 1985, c P-21, both deal with freedom of information. The *Access to Information Act* allows for access to information in records under the control of federal government institutions. The *Privacy Act* protects the confidentiality of information about an individual held by federal government institutions, and provides individuals with a right of access to information about themselves held by such institutions. What follows is only a brief outline of the main provisions of these Acts. Individuals should consult the Acts themselves if they have a problem in this area.

2. Privacy Act

If an individual wants to obtain information relating to themselves, they should make an application under the federal *Privacy Act*, and should make their application directly to the agency that has the information. The *Privacy Act*, RSC 1985, c P-21, sets out the conditions under which a government institution may collect, maintain, and use personal information about individuals. The Act requires that:

- the information collected must relate directly to an operating program or activity of the institution (s 4);
- information used in a decision-making process that directly affects the individual should be, wherever possible, collected directly from the individual to whom it relates, or with his or her consent, and the institution shall inform the individual of the purpose for which the information is being collected (s 5);
- the institution shall ensure that information used to make a decision about an individual is accurate, up-to-date and as complete as possible, that it is retained long enough for the individual to have a reasonable opportunity to obtain access to it, and that it is disposed of in accordance with the relevant regulations and ministry directives or guidelines (s 6); and
- the information shall not, without the consent of the individual, be used for any purpose except that for which it was obtained, for a use consistent with that purpose, or for other purposes specified in the Act (s 7).

The Privacy Commissioner is authorized to oversee compliance by federal government institutions with the provisions of the *Privacy Act*. The Commissioner receives and investigates complaints from individuals, audits institutions' storage and use of information, makes recommendations to institutions and the Treasury Board regarding privacy issues, and presents an annual report to Parliament.

NOTE: Per amendments made to the Access to Information Act and the Privacy Act, a ministerial advisor and a member of a ministerial staff are excluded from the definition of "personal information".

The Commissioner cannot make orders requiring bodies to comply with the Act, but may investigate and make reports. Individuals who are refused access to their own personal information may, after the Commissioner has investigated and reported, apply to the Federal Court for an order requiring access to this information. The Privacy Commissioner may also take enforcement proceedings in Federal Court in relation to a refusal to give an individual access to his or her own personal information. For further information, contact:

BC Freedom of Information and Privacy Association

Online	Website [1]

Any complaints regarding your *Privacy Act* request should be submitted in writing to:

Office of the Privacy Commissioner of Canada

Online	Website [2]
Address	30 Victoria Street Gatineau, QC K1A 1H3
Phone	1-800-282-1376 Fax: (819) 994-5424

3. Access to Information Act

This Act gives Canadian citizens, permanent residents and any individual present or corporation in Canada the right to access any record under the control of a federal government institution.

NOTE: If you are seeking to obtain information about an individual person, see section IV.D.2 on the application of the *Privacy Act*.

Certain classes of information are exempt from the Act. These include confidential inter-governmental communications, information pertaining to law enforcement and investigations, trade secrets, personal information, and generally anything likely to be harmful to Canada's security interest.

On June 21, 2019, an Act to amend the *Access to Information Act and the Privacy Act* received Royal Assent and will become effective soon. Under the amended Act, a federal institution may decline to act on a request to access to a record for various reasons if approved by the Information Commissioner. In addition to this change, the amended Act clarifies the power of the Information Commissioner regarding the authority to refuse or cease to investigate and to examine disclosure subjected to solicitor-client privilege or professional secrecy

NOTE: In the Supreme Court of Canada decision in *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, the Court held that the guarantee of freedom of expression under subsection 2(b) of the *Charter* does not guarantee access to all documents in government hands. In that case, the Court adopted the test for whether freedom of expression was infringed found in *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, and determined that freedom of expression was not infringed by the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31. See both of these cases for more detailed information.

The procedure for obtaining a government record is as follows:

- Go to http://canada.justice.gc.ca/eng/trans/atip-aiprp for the Access to Information and Privacy website, which offers a brochure about using the Act, online access to Info Source, and online forms. Alternatively, any public library provides the same information. Info Source is a directory that describes each federal government institution and the information it holds, as well as the title and address of the appropriate officer to whom requests should be sent.
- Formally request the records by sending in the online or printed request forms, or by sending a letter. These options are available under "Options for Submitting an ATIP Request". Be as specific as possible citing subject, dates, events, and individuals. Enclose a $5.00 payment, but ask that this and any other fees be waived on the grounds that the release of records would be of "general public benefit" or that similar information has been released in the past. Note: Requests for information under the Privacy Act do not require a fee.
- Once the institution receives a request, it has 30 days to give notice of whether access will be given. Senior officials can extend this time limit if they give notice of extension. If third parties are involved, the time limit is 80 days. If access is refused, they must inform the person making the request of the right to make a complaint to the Information Commissioner.
  - **NOTE:** It can take up to one year to receive records to which access is given. There is no meaningful redress for delays of this nature.

- **NOTE:** The federal government has introduced changes to the Access to Information Act which will strengthen the powers of the Information Commissioner to make binding orders to government institutions.
- Complaints should be sent in writing to:

Office of the Information Commissioner

Online	Website [3] E-mail: general@oic-ci.gc.ca
Address	30 Victoria Street Gatineau, QC K1A 1H3
Phone	Toll-free: 1-800-267-0441 Fax: (819) 994-1768

A complaint must be made within 60 days from the date that you received a response to your request.

The Information Commissioner investigates complaints in private, and each party has the right to make representations. Similar to an Ombudsperson, the Commissioner can only make recommendations, and cannot directly compel the release of information. However, he or she can take the institution to Federal Court to compel the release of the information. The Commissioner is not obligated to take on a case, and if he or she refuses to do so, there is no right to appeal this refusal.

- NOTE: It is helpful to check to see if the organization you are requesting information about has a form of its own. It would cut down on time for the form to go directly to the organization.
- There is, however, a right to appeal the original denial of access; this appeal must be made to the Federal Court within **45 days** of the decision of the Information Commissioner (s 41). In court, the burden of proof is on the government to show that the information must be withheld.

E. Federal Personal Information Protection and Electronic Documents Act

1. Introduction

The federal *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*], is intended to remedy some of the problems encountered by consumers and by businesses when information relating to consumer habits is collected to be used internally or externally by private sector organizations. *PIPEDA* is a federal law governing:

- the collection, protection, and disclosure of personal information; and
- the use of electronic versions of official documents on paper, in the public and private sphere.

While *PIPEDA* is a federal act, the legislation claims to have jurisdiction over the provincially regulated private sector as well as the federal sector. However, subsection 26(2) of the Act gives the Governor-in-Council the power to exempt an organization where substantially similar provincial legislation exists. Almost all provinces have enacted their own version of the Act. In October 2003, BC passed the *Personal Information Protection Act*, SBC 2003, c 63 [*PIPA*], which has been declared substantially similar legislation.

For more information on *PIPEDA*, please see:

Stephanie Perrin, Heather Black & David Flaherty, *The Personal Information Protection and Electronic Documents Act: An Annotated Guide* (Toronto: Irwin Law, 2001).

F. BC Personal Information Protection Act

The BC *PIPA* is an attempt by the province to maintain jurisdiction over the regulation of private business, historically under the Province's control. The purpose of this Act is to govern the collection, use, and disclosure of personal information by **private** organizations. The Act has been in force since 2004 and has been declared substantially similar by the Governor-in-Council, thereby exempting PIPA-Applicable organizations in British Columbia to which *PIPA* applies from application of the federal *PIPEDA*.

G. BC Freedom of Information and Protection of Privacy Act

1. Introduction

The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 [*FIPPA*], is similar in some respects to the federal access and privacy legislation relating to **public** organizations. As a result of this provincial legislation, there is a consistent policy regarding access and privacy for BC government ministries and agencies. The Act is significant for two reasons:

- it has standardized decision-making criteria in regards to access and privacy; and
- it has established a uniform appeal process.

This Act is amended from time to time. It is advisable to consult the Act for certainty. Further information about the Act can be obtained from the following organization:

Freedom of Information and Privacy Association [1]

The BC Civil Liberties Association has also published a handbook on privacy that provides detailed information about various aspects of the law relating to privacy. It can be found online at: http://bccla.org/privacy-handbook.

2. Scope of Freedom of Information Rights

Section 3 of the *FIPPA* provides that the Act applies to all records in the custody or control of a “public body”, with notable exceptions in paragraphs 3(1)(a) to (k). In addition to the entities defined as public bodies in Schedule 1, including BC government ministries, municipalities, hospitals, and universities and colleges, Schedule 2 lists specific organizations that are covered by the Act, including BC Hydro, ICBC, Legal Services Society, *Mental Health Act* Assessment Committees, and the Workers’ Compensation Board.

In July 1993, an amendment to the *FIPPA* expanded the scope of the legislation to include governing bodies of various professions within the scope of the Act. These professions include lawyers, accountants, engineers, teachers, doctors, and nurses (see Schedule 3).

Sections 12 to 22.1 restrict the disclosure of information. The following may **not** need to be disclosed:

- cabinet and local public body confidences (s 12);
- policy-oriented information (s 13);
- legal advice (s 14);
- information harmful to law enforcement (s 15);
- information harmful to intergovernmental relations or negotiations (s 16);
- financially sensitive data (s 17);
- information harmful to heritage sites or endangered species (s 18)
- information harmful to public safety (s 19);
- information harmful to a third party's business interest (s 21);

- information harmful to a third party's personal privacy (s 22); and
- information relating to abortion services (s 22.1).

It is worth noting that some of the exceptions are mandatory (ss 21 and 22 on third-party business) and others discretionary (ss 13 to 19). There is also public-interest override in s 25, which requires disclosure of information about risk of significant harm to the environment, or public health or safety, or in other circumstances where disclosure is clearly in the public interest.

NOTE: In *Re South Coast BC Transportation Authority*, [2009] BCIPCD No 20, it was decided that Translink was a public body. Thus, public disclosure of employment records for Translink employees would not be an unreasonable invasion of third party privacy. However, this was based on a rebuttal of the presumption that a disclosure of personal information is an unreasonable invasion of a third party's personal privacy if the personal information describes the third party's finances, income, etc. A change of circumstances could change the outcome. In *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*,[2009] 2 SCR 295, Translink was found to be a government entity under section 32 of the *Charter of Rights and Freedoms* [*Charter*], and thus subject to *Charter* scrutiny.

3. Scope of Privacy Rights

Apart from allowing for access to information, *FIPPA* also has provisions restricting the collection, protection, and retention of personal information.

"Personal information" is defined in Schedule 1 of the Act as all recorded information about an identifiable individual other than contact information. The recorded information includes the individual's name, race, colour, religious or political beliefs, age, sex, sexual orientation, marital status, fingerprints, blood type, health care history, educational, financial, criminal or employment history, anyone's opinion about the individual, and the individual's personal views or opinions, except if they are about someone else.

Public bodies can collect personal information only when authorized by legislation, for law enforcement purposes, or when necessary to the operation of a program administered by the public body (s 26).

In general, a public body must collect personal information directly from the individual (s 27). Notable exceptions include: when an alternative method is authorized by the individual, by the Privacy Commissioner, or under another statute; and when the information is used for the purpose of collecting a debt or fine or making a payment. Except where the information is collected for law enforcement purposes, the public body must also tell the individual from whom it collects personal information the purpose and the legal authority for collecting it.

The public body has a duty to ensure the information it collects is accurate (s 28). An individual has the right to request correction if he or she believes there is an omission or error in the personal information (s 29).

Heads of public bodies must protect personal information by requiring reasonable security arrangements against unauthorized access, collection, use, disclosure, or disposal (s 30). Public bodies must ensure that information in their custody is stored only in Canada and accessed only in Canada unless an individual consents otherwise, or the disclosure is allowed under the Act (s 30.1).

Employees of a public body must notify the minister when a foreign demand for disclosure is requested (s 30.2). Section 30.3 provides whistle-blower legislation to protect employees fulfilling this obligation.

Public bodies that use an individual's personal information to make decisions that directly affect the individual must retain that information for at least one year after using it, so that the individual has an opportunity to obtain it (s 31). Further, a public body can only use personal information for the purpose for which that information was obtained, or for a use consistent with that purpose (s 32).

Sections 33 to 36 deal with disclosure of personal information by a public body. These sections empower a public body to disclose personal information only under certain circumstances, such as where there is consent of the individual; where the information is used for a consistent purpose or for the purpose of complying with another enactment; where the information is used for collecting a debt, payment, or fine owing by the individual to the provincial government or a public body; where the information is used in an audit; and where the information is used by a public body or a law enforcement agency to assist in an investigation in which a law enforcement proceeding is intended or likely to result.

4. Process of Making a Disclosure Request

Step One: Requesting Disclosure or Correction

An individual can send a letter to a public body asking for disclosure of information pertaining to that individual or for a correction of information. If the request is for access to information, the head of the public body then has 30 days to respond (this time limit can be extended under section 10). Section 8 requires that any response must either (a) inform the individual of where, when, and how the record will be disclosed, or (b) detail the reasons the request was denied.

If the request is for a correction of information held by the public body, the head of the public body must either (a) correct the record, or (b) annotate the information with the correction that was requested. The head of the public body must next notify all other parties to whom the information in question has been disclosed within the past year.

Always check with the organization itself to see if it has its own forms for requests; this makes the process much faster.

To obtain a copy of a police report, complete the form provided by the "Information and Privacy" section of the police department from which you are requesting the records (for the VPD, you will find the form here: http://vancouver.ca/police/assets/pdf/forms/vpd-form-foi-request.pdf). Include a copy of the person's driver's licence if possible and a cover letter explaining the details of the report you are looking for. If you are asking to receive documents on someone's behalf you will also need them to sign an authorization or release. Typically there is no charge if you are requesting documents that relate to an interaction you had with police.

If a person has been a victim of property crime, their insurance company might require them to obtain a copy of the police report. Sometimes the insurer will make the request for you. To obtain this record, fill out the request for property report form, or send in a written request with the following information: police file number, full name, current address, telephone number, location of incident, type of incident, and any other helpful details. There is a fee for this service, and the letter and payment ($53.33 including applicable taxes) should be placed in an envelope and mailed to the following address:

Attention Correspondent Unit

Vancouver Police Department

3585 Graveley St.

Vancouver, BC V5K 5J5.

See here for full details: http://vancouver.ca/police/organization/support-services/request-police-report.html

For further information on the process of making a disclosure request, contact:

The Information and Privacy Commissioner for British Columbia

Online	Website [4] Email: info@oipc.bc.ca
Address	PO Box 9038, Stn. Prov. Govt., Victoria, British Columbia, V8W 9A4
Phone	(250) 387-5629 Fax: (250) 387- 1696

NOTE: The public body to which a request is made may charge to not only provide a copy of the record and its shipping and handling, but for the time spent locating the record and preparing it for disclosure (*FIPPA* s 75(1)). They cannot charge, however, for the first 3 hours spent locating and retrieving a record and time spent severing information (s 75(2)). Likewise, these fees do not apply to a request for the applicant's own personal information (s 75(3)). If a request for payment is made, send a letter explaining that the fee should be waived because (1) you cannot afford payment; (2) it is fair to excuse payment, or; (3) the record relates to a matter of public interest (e.g., the environment, public health and safety, etc.).

Step Two: Filing a Complaint with the Information and Privacy Commissioner

If the public body refuses to disclose the information or make the requested correction, the next step is to file a complaint with the Information and Privacy Commissioner. Under section 42, the Commissioner oversees the administration of the Act. An individual can ask the Commissioner to review any decision pertaining to access or correction within 30 days of notification of the decision (although paragraph 53(2)(b) allows the Commissioner to extend this limitation period). Please refer to the *FIPPA* and its regulations for a detailed description of the review process.

The Commissioner has significant power to enforce judgment (much more so than the equivalent federal official). Generally, the burden is on the public body to justify its refusal to disclose information (although there are notable exceptions pertaining to third-party interests (see s 57)). The head of a public body must comply with an order of the Commissioner unless an application for judicial review is brought within 30 days (s 59). A person other than the head of a public body who is dissatisfied with a decision of the Commissioner may seek judicial review pursuant to the *Judicial Review Procedure Act*.

H. The BC Privacy Act

BC *Privacy Act*, RSBC 1996, c 373, makes it a "tort, actionable without proof of damages, for a person, wilfully and without claim of right, to violate the privacy of another". Subsection 1(2) of the Act entitles a person to the nature and degree of privacy that is "reasonable in the circumstances", but the Act itself gives limited guidance to the courts on what particular circumstances are deemed to be an unreasonable invasion of privacy. However, section 2 does set out a number of defences.

Most of the reported cases brought under the Act have been unsuccessful, largely because the courts have been reluctant to accept a broad view of what type of expectations of privacy are reasonable. One difficulty with the Act is that a person offended by an invasion of privacy is unlikely to seek redress through a public process that will have the effect of further airing the private matter.

Actions under the *Privacy Act* must be brought in the Supreme Court.

I. Police Information Checks (Criminal Record Checks)

Police information checks, also known as criminal record checks, consist of information which may be required by a potential employer or volunteer organization, in the later stage of their hiring process. Police information checks are conducted and provided by individual local police departments and the RCMP, who are supposed to play a neutral role in the hiring process.

Employment or volunteer candidates who are asked by their potential employer or volunteer organization to provide a police information check should be aware that potential employers and volunteer organizations may only use relevant information to determine the suitability of a candidate. In particular, the *BC Human Rights Code*, RSBC 1996, c 210, section 13 makes it illegal for employers to discriminate based on having been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of a person.

The British Columbia Provincial Policing Model Policy Guidelines operate to ensure that policies and practices align among police agencies in British Columbia so that citizens, employers, and volunteer organizations receive consistent Criminal and Police Information Checks. The following is a summary of the Guidelines.

If working with vulnerable persons, employment or volunteer candidates may be asked by their potential employer or volunteer organization to provide a vulnerable sector check. Vulnerable persons are individuals who, because of their age, disability, or other circumstances, whether temporary or permanent, are (a) in a position of dependence on others or (b) are otherwise at a greater risk than the general population of being harmed by a person in a position of authority or trust relative to them, as defined by the *Criminal Records Act*.

Vulnerable sector checks consists of screening designed to protect vulnerable persons from dangerous offenders by uncovering the existence of a criminal record, adverse police contact, and/or pardoned (or record suspension) sexual offence conviction. This level of screening is restricted to applicants seeking employment and/or volunteering with vulnerable persons.

The Guidelines stipulate that the board, chief constable, chief officer, or commissioner should ensure that:

Job applicants who work with the vulnerable sector will, at the request of their employer, receive a check that:

- includes a search of, at a minimum, Canadian Police Information Centre (CPIC), Police Information Portal (PIP), Justice Information (JUSTIN), and Police Records Information Management Environment (PRIME) records
- discloses to the applicant all warrants, outstanding charges, convictions and adverse contact
- does not include the disclosure of apprehensions under s. 28 of the Mental Health Act
- does include adverse contact involving the threat or actual use of violence directed at other individuals, regardless of, but without disclosing, mental health status
- does not include youth offences unless provided for under the Youth Criminal Justice Act
- does include information on a sexual offence conviction where a pardon or record suspension has been granted

Those who are not working with vulnerable persons may be asked instead to provide a non-vulnerable sector check. The Guidelines stipulate that applicants who are not working with the vulnerable sector will, at the request of their employer, receive a check that:

- includes a search of, at a minimum, CPIC, PIP, JUSTIN, and PRIME records
- discloses to the applicant all warrants, outstanding charges, and convictions
- does not disclose adverse contact
- does not include the disclosure of apprehensions under s. 28 of the *Mental Health Act*
- does not include youth offences unless provided for under the *Youth Criminal Justice Act*

In cases where non-disclosable information indicates a significant threat to public safety, police agencies may either refuse to complete the check or take action under their duty to warn responsibilities noted below.

Nothing in the Guidelines prevents a police agency from disclosing information under either a statutory or common law duty to provide warnings where the health, safety or wellbeing of an individual or individuals is at risk of significant harm.

Further information regarding the Guidelines, including a full list of information which should or should not be included in a Police Information Check, may be found at: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/publications-statistics-legislation/publications/police-information-checks-guidelines-for-police

Because police information checks are provided by individual police departments or the RCMP, one should consult the website of the particular police department or that of the RCMP to discover specific information, such as that pertaining to fees, accepted forms of identification, and further information on what will or will not be included in the police information check.

The following is a link to information on police information checks conducted by the Vancouver Police Department: http://vancouver.ca/police/organization/records-checks-fingerprinting/index.html

Please consult page 39 of Chapter 1: Criminal Law, located in the Law Students' Legal Advice Program's manual for information explaining the importance of consenting to disclosure, what information third parties may find out, the impact of having a criminal record, elimination of records, and record suspensions: http://www.lslap.bc.ca/lslap-manual-online.html

If an individual disagrees with a decision of the police officer, such as to not provide a police information check or with the information provided on the police information checks, the individual can appeal the decision internally within the police department. The individual can submit a request to the head of the records check department within the police department where they made the initial information check request for a review of the decision. If the individual still disagrees with the appealed decision, then the next avenue of appeal, if one is available, remains unclear. It is possible that an applicant may file for Judicial Review of the police department's decision (see III.C.1 on Judicial Review). The Privacy Commissioner's Office may possibly have jurisdiction over these matters, although their current position is that a police information check is different than a request for release of information, and is not covered by their legislation.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 13, 2019.

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References

[1] http://fipa.bc.ca/home/
[2] http://www.priv.gc.ca
[3] http://www.oic-ci.gc.ca/eng/
[4] http://www.oipc.bc.ca/

V. Complaints against the Police

A. Introduction

Individuals may be dissatisfied with the level of service given by the police. The following section outlines some of the informal and statutory procedures governing citizen complaints against police officers.

There are two main categories of police forces in BC: municipal police forces, which are governed by the BC *Police Act*, RSBC 1996, c 367, and the RCMP, which is governed by the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMPA]. The RCMP is the policing agency in all parts of BC not served by a municipal police force. Their status as the provincial police force is authorized under section 14 of the BC *Police Act*. Municipal police forces and the RCMP will be dealt with separately, as the complaint process for each is significantly different.

NOTE: In 2012 the province opened the Independent Investigations Office ("IIO"), an independent body that reviews police incidents of severe bodily harm or death. To begin an investigation, complaints are to be filed with the Police Complaint Commissioner, who forwards it to the IIO. For further information, please see: http://www2.gov.bc.ca/gov/content/justice/criminal-justice/policing-in-bc/complaints-against-police
http://iiobc.ca/

Complaints Against a Member of a Municipal Police Force

1. General Information

Filing a police complaint against a municipal police officer is different from filing a lawsuit against a municipal police officer. Generally speaking, complaints against a municipal police officer can only lead to the officer being disciplined, and do not compensate an individual for any loss they have suffered. Filing a lawsuit against the police in civil court can lead to compensation if a person's rights were violated, but does not necessarily lead to the officer being disciplined. Parallel actions can be launched if an individual desires both compensation and disciplinary consequences for the officer involved in the incident.

The *Police Act* sets out a framework for dealing with public complaints about municipal police forces in BC. The Office of the Police Complaints Commissioner (OPCC) was created as a body independent from all municipal police forces and government ministries. Complaints continue to be investigated by police departments, but the Police Complaints Commissioner monitors how police departments investigate and conclude complaints throughout all the municipal police areas. The process is outlined below. For further information and a more detailed description of the complaint process, please refer to the OPCC website at www.opcc.bc.ca, or see Part 11 of the *Police Act*.

NOTE: Filing a police complaint, or waiting for the conclusion of criminal charges, does not extend the limitation period for filing a civil claim. If an individual wants to start a civil claim, it must be done within **two years** from when the harm was suffered or discovered. Before beginning a civil claim for police misconduct, the individual must write a letter to the City Clerk's office relating the time, location, and nature of the alleged misconduct. This letter must be sent within 60 days of the cause of action (*Vancouver Charter*, SBC 1953, c 55, s 294). The letter provides the city with notice that a civil action will be filed, and allows a complainant to add the city as a party to the civil action at a later date. This letter does not start a complaint or a civil action in itself, but is a necessary first step that must be taken before launching a civil claim. If a letter has been sent to the City Clerk's Office within 60 days, the limitation date for filing a civil complaint is **2 years** after the cause of action.

For a more detailed discussion on launching civil claims against the police see **Section V.D.2**.

NOTE: If an individual is seeking a copy of their police report, they should make this request before filing a complaint. Otherwise they must wait until after the matter has been investigated.

NOTE: Based on recommendations made in the February 2007 Report on the Review of the Police Complaint Process in BC by Josiah Wood, the *Police Act* was amended and the new *Police Act* came into force on March 31, 2010. The OPCC website now provides an online complaint form to make the filing of complaints easier.

2. The Complaint Process

A member of a municipal police department engages in misconduct when they commit an offence under any provincial or federal act that would render them unfit to perform their duties or that would discredit the reputation of the municipal police department. For an exhaustive definition of misconduct, see section 77 of the *Police Act*, which governs policing standards for every police officer in BC regardless of department.

Additionally, each municipal police department will have their own policies regarding appropriate conduct by their police officers. Some departments, such as the Vancouver Police Department (VPD) will have their policies available online. The VPD's Regulations and Procedure Manual and other policies can be found online at the following link: http://vancouver.ca/police/about/major-policies-initiatives/index.html.

Individuals can make complaints about alleged misconduct by municipal police to the police complaint commissioner. Individuals do not need to have directly witnessed the misconduct; complaints can be brought on behalf of someone or even by third-party complainants. The complaint must generally be made within **12 months** of the misconduct, but if good reasons exist, and it is not contrary to the public interest, the police complaint commissioner can extend that period.

Step 1: Making a Complaint

There are two types of complaints: registered and non-registered. When someone submits a registered complaint, they will be kept informed about the investigation and its outcome, and they have a right to appeal the result. By contrast, someone submitting a non-registered complaint does not participate any further in the process and cannot appeal the outcome.

An individual can register a complaint by submitting it either directly to the OPCC or to an on-duty police member at the station who is assigned to receive *Police Act* complaints. A non-registered complaint can be submitted orally to any on-duty member in the station or on the road.

Both types of complaints can be made through the online complaint form on the OPCC website.

Step 2: Admissibility

Before investigating a complaint, the Commissioner must first determine whether it is admissible. A complaint is admissible if it is made **within 12 months** of the incident, is not frivolous or vexatious, and contains at least one allegation that, if proved, would constitute misconduct under section 77 of the *Police Act*. Complainants will be contacted to tell them whether their complaint is admissible or not. The Commissioner's determination of admissibility cannot be appealed.

Once the Commissioner determines a complaint is admissible, they will send a notice of admissibility to the complainant and to the chief constable of the department involved. The chief constable must notify the member or former member of the complaint that has been made against him or her, appoint an investigator and, depending on the circumstances of the misconduct alleged, determine whether the matter is suitable for informal resolution.

NOTE: Complaints about a municipal police department's policies or about the services it provides, rather than about a particular incident of misconduct, may still be admissible but should be submitted under a different process. Contact the

OPCC office directly about these complaints.

Step 3: Informal Resolution or Mediation

A complaint may be resolved informally at any time before or during an investigation if the matter is suitable and the complainant and the police officer agree in writing to the resolution. Informal resolution or mediation is a voluntary, confidential process that provides a non-confrontational opportunity for both parties to talk to each other and hear how their actions affected the other. If a complainant does not want to meet the police officer face to face, a neutral third party or professional mediator can facilitate and help the parties reach an agreement. Within **10 business days** after agreeing to the proposed informal resolution, either party may revoke the agreement by notifying the relevant discipline authority or the Commissioner in writing.

If a complainant strongly objects to his or her complaint being informally resolved, and would prefer it be investigated immediately, he or she should let the OPCC know and provide reasons. Common reasons include fear of intimidation by the officer, the wish to have it formally investigated and substantiated, and a lack of time to participate in an informal process due to economic or other circumstances. Usually this objection is sufficient to move the complaint directly to the investigation step.

A complaint may also be resolved by mediation. If the Police Complaint Commissioner agrees, a professional mediator may be appointed to assist the complainant and the officer in resolving the complaint. The mediator is selected by the administrator of the BC Mediator's Roster and is completely independent from any police department or the OPCC.

Step 4: Investigation

An investigation into a misconduct complaint is usually conducted by the originating department's Professional Standards Section. The Commissioner may, if the circumstances require, order that an external police agency conduct the investigation. The OPCC will assign the file to an analyst, who will oversee the investigation conducted by the Professional Standards investigator and ensure that the investigation is thorough, impartial, and completed in a timely manner. All investigations must be completed within six months. During the investigation, the complainant and member will be periodically updated about the investigation's progress. At the conclusion of the investigation, the investigator will submit a final investigation report to the discipline authority, who will then decide whether the allegations are substantiated and, if so, propose corrective or disciplinary measures.

What happens next in the process depends on whether the allegations are substantiated or not.

If the Complaint Is Substantiated

(1) Pre-Hearing Conference

If the discipline authority decides that the allegation of misconduct is substantiated and merits disciplinary or corrective measures, the discipline authority may conduct a confidential prehearing conference with the police officer, if doing so is not contrary to the public interest. At the hearing, the officer has an opportunity to admit the misconduct and accept disciplinary or corrective measures. If the officer and the discipline authority at the prehearing conference agree on disciplinary measures, and the Commissioner gives his or her approval, the matter is considered resolved. This resolution is final and cannot be reviewed by a court on any ground.

(2) Disciplinary Proceeding

If a prehearing conference is not held, or if it does not result in a resolution of each allegation of misconduct against the police officer, the discipline authority must convene a disciplinary proceeding to determine appropriate disciplinary or corrective measures within 40 business days of receiving the final investigation report. However, the discipline authority must cancel this proceeding if the Commissioner arranges a public hearing about the impugned conduct.

The complainant must receive at least 15 days' notice of a disciplinary proceeding. The complainant may provide written or oral submissions in advance of the hearing but cannot actually attend the proceeding.

The discipline authority must, if appropriate, choose measures to correct and educate officers rather than measures intended to blame and punish. Unless the Police Complaints Commissioner orders a public hearing, the resolution is final.

If the Complaint Is Not Substantiated

(1) Retired Judge

Previously, only a police commissioner would review the file. However, complainants can now request that the Commissioner appoint a retired judge to review the file and determine whether or not the decision was correct. The complainant must make the request in writing within **10 business days** of receiving the discipline authority's decision. It is rare to have a retired judge review the file in less serious cases due to limited resources. Note that there is a more realistic chance of success when the commission appoints a retired judge.

For further information, please see: http://www.opcc.bc.ca.

Public Hearing

The Office of the Police Complaint Commissioner ("OPCC") can order public hearings into matters involving misconduct by municipal police officers in British Columbia. After the investigation into the complaint has concluded, the complainant or the police officer may request a public hearing within 20 business days of receiving notice of the decision, or the OPCC may initiate a public hearing itself if a public hearing is necessary in the public interest. In *Florkow v British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92, the BC Court of Appeal found that under the current Police Act the OPCC can only hold a public hearing after certain stages of the complaint process — after the discipline authority has concluded its investigation, after the retired judge has reviewed the file, or after the disciplinary proceeding.

(1) Test for Ordering Public Hearing

In deciding whether such a hearing is necessary in the public interest, the Police Complaints Commissioner must consider all relevant factors, including:

- the nature and seriousness of the complaint;
- the nature and seriousness of the alleged harm caused by the police officer, including whether the officer's conduct has undermined public confidence in the police or its disciplinary processes;
- whether a public hearing would assist in ascertaining the truth;
- whether a case can be made that the investigation was flawed, the proposed disciplinary measures are inappropriate, or the discipline authority incorrectly interpreted the law.

After a public hearing takes place, the judge's decision is communicated to all interested parties. The parties can appeal questions of law, but not questions of fact, to the BC Court of Appeal.

For help writing a letter of complaint against the Police Department, please pick up an informational brochure from:

BC Civil Liberties Association

Address	900 Helmken Street, 2nd Floor Vancouver, BC V6Z 1B3
Phone	(604) 687-2919 Fax: (604) 687-3045

C. Complaints Against a Member of the RCMP

NOTE: In December 2014, the *Enhancing Royal Canadian Mounted Police Accountability Act*, SC 2013, c 18 [*ERCMPAA*], came into force. This legislation has significantly reformed the RCMP complaint process. The *ERCMPAA* made amendments to the *Royal Canadian Mounted Police Act* [*RCMPA*], which governs complaints against RCMP members.

1. General Information

Though the RCMP functions as provincial police in BC, the complaint process is governed by the Federal *RCMPA*. Under the Act, a Civilian Review and Complaints Commission has been established to monitor complaints against members, to conduct its own investigations into allegations of misconduct, and to hold public inquiries into such allegations where it deems them appropriate. All members of the Commission are civilians.

During an informal resolution attempt, or a formal investigation, the complainant will likely make oral or written statements. It is unclear whether such statements could be used against the complainant in other proceedings. If a complainant is facing criminal charges or a civil action regarding the same matter, the complainant should get the advice of counsel before making any statements.

The Commission can only make recommendations to the Commissioner of the RCMP regarding disciplinary action. However, if the Commissioner of the RCMP does not act on these recommendations, the Commissioner must give reasons for not doing so in writing to the Commission. Complaints against the RCMP in BC should be directed to:

Civilian Review and Complaints Commission for the RCMP

Online	Website [1] E-mail: complaints@crcc-ccetp.gc.ca
Address	National Intake Office P.O. Box 88689 Surrey, BC V3W 0X1
Phone	1-800-665-6878

2. The Complaint Process

Step 1: Making a Complaint

Individuals can make complaints orally or in writing to the relevant RCMP detachment, to the Commanding Officer of "E" Division, or to the Commission, either in Surrey or at the regional office. The complaint will be acknowledged in writing. A member of the detachment will contact the complainant, and may attempt an informal resolution of the complaint. The most effective method is generally to send a written complaint to the Commission's regional office.

Generally, a complaint must be made within one year after the day on which the conduct is alleged to have occurred (RCMPA s 45.3(5)). However, the Commission may extend the time limit for making a complaint if the Commission is of the opinion that there are good reasons for doing so and that it is not contrary to the public interest (s 45.3(6)).

Step 2: Informal Resolution

If no attempt is made to resolve the complaint informally, or if the attempt is unsuccessful, a formal investigation of the complaint will be carried out. The complainant must be informed in writing of the results of the investigation.

NOTE: Under section 45.53 of the *RCMPA*, the RCMP may refuse to investigate the complaint. If they refuse, the complainant may appeal this decision to the Commission for Public Complaints.

Step 3: Formal Resolution

A complainant who is not satisfied with the results of the investigation may request that the Commission review the handling of the complaint. As a result of this review, the Commission may refuse to conduct a further investigation, or may conduct a public inquiry into the complaint. There is no further appeal from the Commission's decision.

D. Civil or Criminal Proceedings

Other approaches to dealing with misconduct by the police force are:

1. Asking for a criminal investigation and acting as a witness; or
2. Suing in tort to get compensation for loss.

1. Criminal Proceedings

The *Criminal Code* [*CC*] limits the criminal liability of public officers who, in the course of conducting investigations or law enforcement activities, commit acts or omissions that would otherwise constitute offences. Under sections 25.1 to 25.4 of the *CC*, a public officer would be justified in committing an act or omission, or in directing another person to do so, that would otherwise constitute an offence, so long as the public officer:

- is investigating criminal activity or an offence under an Act of Parliament, or is enforcing an Act of Parliament;
- is designated as a public officer for the purposes of sections 25.1 to 25.4 by the competent authority (the Solicitor General of Canada in the case of RCMP officers; the provincial Minister responsible for policing in the case of police forces constituted under provincial laws); and
- believes on reasonable grounds that committing the act or omission, given the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances.

In deciding whether the officer's act or omission is reasonable and proportional, and therefore justifiable, the courts will look at the nature of the act or omission, the nature of the investigation, and the reasonable availability of other means for carrying out the public officer's law enforcement duties.

If the public officer's act or omission is likely to cause loss or serious damage to property, the public officer would need authorization from a senior law enforcement official who believes on reasonable grounds that the act or omission is reasonable and proportional.

However, these provisions do not permit officers to cause death or bodily harm to another person either intentionally or through criminal negligence, nor do they justify conduct that violates someone's sexual integrity.

Individuals should consult the *Criminal Code* (sections 25.1 to 25.4) for further details on the limited criminal liability of public officers.

Typically speaking, the only time a police officer will be charged is either if an internal investigation is launched, or a police complaint is filed and during the course of that investigation charges are recommended.

2. Civil Proceedings

Individuals may be able to sue police officers civilly, even when they have also made a complaint. Section 179 of the BC *Police Act* specifically states that the complaint proceedings outlined above do not preclude a citizen from taking, or continuing, civil or criminal proceedings against an RCMP officer or a municipal constable for misconduct. Outside of BC, the Supreme Court of Canada ruled in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19, that the result of the police complaint process calls for a case-by-case review of the circumstances to determine whether it would be unfair or unjust to prevent further litigation.

Typical actions that are launched against peace officers include tort actions in assault, battery, false imprisonment, or malicious prosecution. This could be helpful to individuals who have been mistreated or suffered monetary loss because of police misconduct. These actions may now be brought in Small Claims Court.

When suing the police, the complainant would usually want to sue both the police officer and the government body responsible for the officer (see ss 11 and 20 of the *Police Act*). For a municipal police force this is the municipality; for the RCMP it is the Minister of Justice of British Columbia.

EXAMPLE: An action brought by a complainant named John Smith could read "John Smith vs City of Vancouver, Constable Jane Doe, and Constable Richard Roe."

If the complaint is against a municipal police force, *special limitation periods* apply. The municipality must be informed by notice letter to sue within **60 days** (**NOTE:** filing a police complaint does **not** constitute notifying the municipality), and the notice of claim should be filed within **2 years** of the incident (see *Gringmuth v The Corporation of the District of North Vancouver*, 2002 BCCA 61). The regular Small Claims Court limitation periods apply if you are suing the RCMP or a private security guard.

NOTE: Even if a complainant has not sent a notice letter to the municipal government, the municipal government should still be named as a party. At trial, the claimant can argue they had a reasonable excuse for failing to deliver a notice letter to the city, and that the municipality has not been prejudiced by the failure to write the letter.

NOTE: Even if the 60 day limitation period has expired, a complainant should still send a notice letter to the Clerk. If the municipality was provided with notice shortly after the 60 day period expired, it will be more difficult for them to argue that they were prejudiced by the failure to send the notice letter within 60 days.

NOTE: If a municipal government or Minister of Justice is willing to accept liability on behalf of its officers where liability is proven, they may ask that the individual officers' names to be removed from the lawsuit. While there may be reasons to keep the individual officers on the lawsuit, if the court finds they were left on unnecessarily, costs may be awarded against the complainant.

Both municipal police and RCMP officers are partially immune from civil liability under subsection 21(2) of the *Police Act*. However, paragraph 21(3)(a) provides that this defence does not apply if the police officer has "been guilty of dishonesty, gross negligence or malicious or wilful misconduct". In *Ward v British Columbia*, 2010 SCC 27, it was held that intentional torts do not qualify as wilful misconduct for the purposes of subparagraph 21(3)(a).

For detailed step-by-step information on suing the police (as well as private security guards), please see David Eby & Emily Rix, *How to Sue the Police and Private Security in Small Claims Court* (Vancouver: Pivot Legal Society, 2007).

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 13, 2019.

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References

[1] http://www.crcc-ccrtp.gc.ca

VI. Complaints against Security Guards

A. Introduction

Complaints against licensed security guards can be filed with the Registrar of Security Programs Division, Ministry of Justice. Complaints can relate to the licensing of a security business or security employee, about the conduct or behaviour of a security employee, or about the use of equipment. Filing a complaint is free. Complaining against an unlicensed guard should be done directly to the employer. Most security guards in BC are now required to be licensed under the *Security Services Act*, SBC 2007, c 30.

B. Filing the Complaint

Complaints must be made in writing within one year of the incident. Complaint forms can be obtained by contacting the Ministry or online.

Ministry of Justice - Policing and Security Branch, Security Programs Division

Online	Website [1] Email: securitylicensing@gov.bc.ca
Address	PO Box 9217 Stn Prov Govt Victoria, BC V8W 9J1
Phone	1 (855) 587-0185 Fax: (250) 387-4454

Once a complaint has been filed, the Registrar will determine whether the matter is within its jurisdiction. If it is, then an investigator will be assigned. The complainant will be notified of the investigation by letter. Complaints can result in a warning notice, a violation ticket, or reconsideration of the officer's licence status.

Like police, licensed and unlicensed security guards can be sued civilly.

NOTE: The BC Court of Appeal recently reversed a human rights decision by the BC Supreme Court regarding alleged discriminatory conduct by security guards on the basis of social condition. The Vancouver Area Network of Drug Users (VANDU) filed a complaint to the BC Human Rights Tribunal against the Downtown Ambassadors, a program for

private security guards hired by the Downtown Vancouver Business Improvement Association to patrol public spaces, alleging that the Ambassadors had engaged in a discriminatory program intended to remove members of the homeless population from public spaces in Downtown Vancouver. As social condition is not a protected ground under the *BC Human Rights Code*, VANDU presented statistical information to demonstrate that Indigenous persons and persons with disabilities are disproportionately represented in the homeless population and submitted that the Ambassadors' actions were therefore discriminatory on the basis of race, colour, ancestry, and physical and mental disability, contrary to section 8 of the *BC Human Rights Code*.

NOTE: In *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal*, 2018 BCCA 132, rev'g 2016 BCSC 534, the BC Court of Appeal restored the BC Human Rights Tribunal's initial dismissal of VANDU's claim, finding that the statistical correlation provided by VANDU was insufficient to establish a causal link between membership in a protected group under the BC Human Rights Code (namely Indigenous persons and persons with disabilities) and the adverse treatment by the Downtown Ambassadors against the homeless population. The Court of Appeal's decision reversed the previous decision of the BC Supreme Court, which had quashed the Tribunal's dismissal on the grounds that the Tribunal had used too high a standard in finding a human rights violation, and that the statistical information presented by VANDU was sufficient to show discrimination on the prohibited grounds of race and disability.

Pivot Legal Society claims this case is an example of why social condition should be included as an enumerated ground. Please see the Pivot Legal blog [2] for further information.

NOTE: Individuals should be cautioned that this complaint process may not achieve satisfactory results. The Security Programs Division is limited in its ability to successfully review the conduct of security guards, both because of statutory limitations to its powers and budget constraints.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 13, 2019.

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References

[1] http://www2.gov.bc.ca/gov/content/employment-business/business/security-services
[2] http://pivotlegal.org/pivot-points/blog/tribunal-member-qualifies-downtown-ambassadors-decision

VII. The Right to Vote

A. Introduction

The right to participate in the selection of their elected representatives is a basic right enjoyed by the citizens of any democracy. While this has always been recognized to some extent in Canada, in 1982 the right to vote was entrenched in the constitution by section 3 of the *Canadian Charter of Rights and Freedoms*. Under section 3, "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein".

While this right is qualified by section 1 of the Charter, it is not subject to the overriding power provision (the "notwithstanding clause") of section 33. As a result, any government wishing to place restrictions on the right to vote must do so in a manner that is reasonable and demonstrably justified in a free and democratic society.

In this chapter, the discussion of voting rights will focus primarily on the requirements a person must meet to be eligible to vote in provincial, federal, and municipal elections.

B. British Columbia Provincial Elections

Eligibility requirements for BC provincial elections are outlined in the *Election Act*, RSBC 1996, c 106. A student should consult this Act if a client has a specific problem as the Act is too lengthy to be discussed in detail in this chapter.

1. General Information

The province is divided into various electoral districts, each represented by an elected Member of the Legislative Assembly (MLA). Each district has a registrar of voters whose duty is to ensure that the election of candidates in that district is carried out properly. The elections process is supervised by the Chief Electoral Officer. Elections BC can be contacted at:

Elections British Columbia

Online	Website [1]
Address	P.O. Box 9275 Stn Provincial Government Victoria, BC V8W 9J6
Phone	Toll-free: 1-800-661-8683 (250) 387-5305

2. Who Is Eligible to Vote

Section 29 of the *Election Act* sets out who is eligible to vote in provincial elections. It states that in order to be eligible to vote in an electoral district, an individual must be a Canadian citizen over the age of 18, must be a registered resident of the electoral district, must have been a resident of British Columbia for at least six months, and must not be otherwise disqualified.

Although the requirement for individuals to be resident in British Columbia for six months seems to constitute a violation of section 3 of the Charter, case law has held similar provisions to be constitutional. In *Re Yukon Election Residency Requirements*, [1986] 2 BCCR (2d) 50 (CA), BC's Court of Appeal sitting as the Yukon's Court of Appeal upheld a 12-month residency requirement imposed by the territorial government. The court found that this was a reasonable limit that was justified because of the desirability of having only persons familiar with local conditions voting for local representatives.

Section 30 disqualifies the following individuals from voting: the chief electoral officer, the deputy chief electoral officer, and anyone prohibited from voting under Part 12 of the *Election Act*.

Keep in mind that this is just a general guide, and is not meant to be an exhaustive list. Consult the *Election Act* for more detailed and extensive information.

Section 32 of the *Election Act* provides that individuals may only vote in an electoral district in which they are resident. The Act defines a residence as the place where a person's habitation is fixed, and to which, if he or she is absent, he or she intends to return. Note the following additional considerations:

- Leaving one's home temporarily does not affect one's residency status, but if a person leaves with the intention to remain away either indefinitely or permanently, that person loses their status as resident in BC.
- Persons entering the province temporarily are not considered to be resident for election purposes.
- Generally, a person's residence is the place where their family resides, but if a person moves out of the family home and does not intend to return, the person's residence will be the new place they have moved to.
- Single people reside where they sleep, regardless of where they eat or work.
- A change of residence occurs only if a person moves to and intends to remain in another place.
- Canadian military personnel who reside in BC do not lose their resident status by leaving the province for extended periods of time in the course of their employment. Spouses and children who accompany military personnel may also retain their BC residence status.

3. Registration and Voting Procedures

Eligible voters who are not presently on the voters' list in their district may obtain an application form from the registrar of the Electoral District in which they reside. Occasionally the Registrar General will hire Deputy Registrars to visit residences to obtain new applications.

Upon receiving an application and being satisfied that the application is valid and correct, the District Registrar will add the applicant's name to the voters' list. That person is then eligible to vote in the next provincial election.

An eligible voter may also register at a voting place on the day of the election. Amendments to the *Election Act* enacted in 2008 require that the applicant produce identification in the form of either:

- one document, issued by the Government of British Columbia or Canada, that contains the applicant's name, photograph, and place of residence;
- one document, issued by the Government of Canada, that certifies that the applicant is registered as an Indian under the *Indian Act* (Canada);or

- at least 2 documents of a type authorized by the chief electoral officer, both of which contain the applicant's name and at least one of which contains the applicant's place of residence.

Alternatively, section 41.1 allows eligible voters without documentation to be “vouched” for by a voter registered in the applicant’s electoral district with documentation, a family member, or “a person having authority under the common law or an enactment to make personal care decisions in respect of the applicant.”

NOTE: In the 2013 provincial election, prescription pill bottles or inhalers with the applicant’s name were accepted as a valid form of identification. This was done to address the unique challenges the homeless and those without government-issued identification face when exercising their right to vote.

When an election writ is issued, the District Registrar will advertise in newspapers announcing the closing day for applications to register.

According to the court in *Hoogbruin v BC (Attorney General)* (1985), 70 BCLR 1 (CA), individuals have a constitutional right to use absentee ballots. The procedure for absentee balloting is outlined in section 105 of the *Election Act*. Section 27 requires that general voting day for an election is the 28th day after the date on which the election is called. If that day is a holiday, the election will be on the next day that is not a holiday. Subsection 76(1) makes advance polls available from noon to 9 p.m. on the Wednesday, Thursday, Friday, and Saturday of the week **preceding** election day. On election day itself, polls are open from 8:00 a.m. to 8:00 p.m.

If a voter does not understand English, subsection 269(3) states that a sworn interpreter may be used to translate the required oath to the voter. Under subsection 269(4), before acting as a translator under subsection (3), an individual must make a solemn declaration that the person will be able to make the translation and will do so to the best of his or her abilities.

Section 109 deals with special circumstances whereby voters with physical disabilities or difficulties in reading or writing are able to get assistance in marking their ballots.

Employees are entitled by section 74 to four **consecutive hours** off during poll hours to attend a polling station, without loss of wages. However, the employer is entitled to choose which four hours are most convenient.

Upon arrival at the polling station, the voter must sign his or her name in a voting book (s 274), and confirm present address. Refusing to comply with this demand will disqualify the voter. Upon receiving a ballot, the voter proceeds to a screened compartment, marks the ballot and returns the ballot to the Returning Officer, who, in full view of the voter, must place the ballot in the ballot box. The voting must be by a secret ballot as per section 90. Each individual present at a voting place, including people such as voters and ballot counters, must not interfere with an individual marking a ballot, attempt to discover how an individual voted, or communicate information regarding how another person voted or marked their ballot. The voter is then required to leave the premises.

C. Federal Elections

The rules and regulations governing federal elections are set out in the *Canada Elections Act*, RSC 2000, c 9, and its subsequent amendments. Many of these rules and regulations are similar to those applicable to BC provincial elections discussed above. A brief survey of the federal Act is included below.

Canadian citizens who are 18 years of age or older on election day are generally eligible to vote in federal elections (s 3). Under the statute, persons can be disqualified from voting for a variety of reasons (e.g., for incarceration or for corrupt or illegal practices).

However, the Supreme Court of Canada struck down the prohibition preventing inmates from voting in *Sauve v Canada (Chief Electoral Officer)*, 2002 SCC 68. A key consideration in this decision was that, by denying the vote to all

prisoners, the Act failed to balance the right to vote against the seriousness of the conduct of prisoners. The Federal Court of Canada has held that people with mental disabilities do have the right to vote: see *Canadian Disability Rights Council v Canada*, [1988] 3 FC 622.

While federal residency requirements do exist, they are more relaxed than those applicable to BC provincial elections. A person may vote only once, in the area in which she is "ordinarily resident". This is defined in much the same way as "resident" is defined in section 32 of BC's *Election Act*. A person who moves between the enumerator's visit and the day of the election could be forced to vote in the former riding if ordinarily resident there when the enumeration occurred.

Provisions of the *Canada Elections Act* deny the vote to most citizens who have resided outside of Canada for more than five years. The Ontario Court of Appeal's decision in *Frank v Canada (Attorney General)*, 2019 SCC 1 confirmed that Canadian citizens who have resided outside of Canada for five or more years are generally not permitted to participate in Canadian elections. To regain the right to vote, these citizens must return to live in Canada.

All voters must present one piece of government-issued ID with a photograph and residential address before being allowed to vote. If a voter cannot provide the required photo ID, he or she may still be allowed to vote if he or she does one of two things (s 143):

1. provides two pieces of acceptable identification to establish the voter's identity, at least one of which establishes the voter's residence (a list of "acceptable identification" is to be published by the Chief Electoral Officer); or
2. provides two pieces of identification that establishes the voter's name, and then establishes his or her residence by swearing an oath in writing that attests to where they live. The voter must also be accompanied by an individual who is **registered to vote in the same polling division**, has **proper identification**, and vouches for the person without ID under oath and in the prescribed form. An individual can only vouch for one person at an election, and an individual who has been vouched for cannot vouch for someone else.

These requirements pose significant challenges to low-income individuals who may have no form of official identification. Further difficulties are created by the rule that an individual may only vouch for one other individual and the requirement that the voucher lives and is on the elector's list in the same polling station as the intended vouchee.

The provisions relating to vouching, as described above, were brought into force by the *Fair Elections Act* on December 2014. Under the new provisions, voters who have identification but cannot prove residence will be allowed to sign an oath attesting to where they live, which must then be corroborated by the oath of another voter. However, this leaves voters who have no identification whatsoever with little recourse. This controversial measure could significantly inhibit the ability of low-income citizens and students to vote.

The constitutionality of these requirements was challenged in the British Columbia Supreme Court and the BC Court of Appeal in *Henry v Canada (Attorney General)*, 2014 BCCA 30. In that case, the court found that the legislation was inconsistent with the electoral rights guaranteed in section 3 of the *Charter*, but constituted a reasonable limit prescribed by law and was demonstrably justifiable in a free and democratic society under section 1 of the *Charter*. In Ontario, the Council of Canadians and the Canadian Federation of Students have challenged this legislation in the Ontario Superior Court on the grounds that it violates section 3 of the *Charter*.

Many other provisions of the *Canada Elections Act*, such as an employee being entitled to receive time off work to cast a ballot, provisions for people with disabilities, and balloting procedures are very similar to BC provincial regulations and thus are not repeated here. Further inquiries can be sent to Marc Mayrand, the current Chief Electoral Officer, at:

Elections Canada

Online	Website [2]
Address	Chief Electoral Officer 257 Slater Street Ottawa, Ontario K1A OM6
Phone	1-800-463-6868

Note: Major changes to the *Canada Election Act* in June 2014 included provisions intended to increase penalties for offences, reduce voter fraud, and empower political parties to drive voter turnout. Specific changes include removing vouching in favour of an oath system where a voter has identification but cannot prove current residence; moving investigations from Elections Canada to the Director of Public Prosecutions; limiting the powers of Elections Canada; increasing donation limits; adding constraints on robocalls; and some changes to third-party advertising.

D. Municipal Elections

Municipal election procedures are outlined in the *Local Government Act*, RSBC 1996, c 323, beginning at section 33. Please note, however, that elections in the City of Vancouver are governed by a separate provincial act, the *Vancouver Charter*, SBC 1953, c 55.

To be eligible to vote, a person must normally be a Canadian citizen and 18 years of age or older on the day the election is held. A person thus qualified must be a Canadian citizen and a resident of BC for six months immediately before election day. Furthermore, to be qualified, the person must have been a resident of the jurisdiction (as per s 50) for at least 30 days immediately before election day.

A person who qualifies as outlined above with the exception that he or she does not reside in the municipality may still vote in an election if he or she is the owner or tenant of property in that municipality (s 51). The general residency rules are similar to those outlined in the *BC Election Act*.

Applications to register should be made to the clerk of the municipality.

Voters who are not yet registered on election day may apply to have their name added to the list on election day in a manner similar to that used in provincial elections (see ss 57-57.1).

A person who is unable to produce identification can be registered as a voter. In order to do so, the individual must complete an application for registration and be accompanied by someone who is a registered voter in the applicant’s electoral district, an adult family member, or someone who has the authority to make personal care decisions in respect of the applicant. The applicant and the voucher must both make a solemn declaration, in writing, as to the applicant's identity and place of residence. A person can only vouch for one person, and an individual who has been vouched for cannot vouch for another person.

NOTE: A literal interpretation of both the *Canada Elections Act* RSC 2000, c 9, and the *BC Election Act*, RSBC 1996, c 106, suggests that it is practically impossible for a homeless person to vote. However, the provincial electoral officer facilitates voting by homeless people through an administrative policy of allowing a flexible definition of “residence”.

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References

[1] http://www.elections.bc.ca
[2] http://www.elections.ca

VIII. Complaints regarding UBC

The Alma Mater Society (AMS) Ombuds Office and the AMS Advocacy Office work hand-in-hand to assist students who are in conflict with the University of British Columbia.

Each individual community colleges and university have their own complaints process regarding bullying, harassment, human rights, academic integrity and general student and faculty conduct. Visit each institution's websites regarding their policies and procedures regarding a resolution in these areas.

A. The AMS Ombuds Office

The AMS Ombudsperson can assist both graduate and undergraduate students who feel that they have been treated unfairly or need to approach the University or the AMS to resolve a conflict. The Ombudsperson acts impartially, is independent of any administrative body, and provides confidential service. The Ombuds office is an excellent resource for resolving disputes with the university and university authorities such as Campus Security, Campus RCMP, the Dean's Office, and Booking Services. The office provides the following services:

- Conflict management services to AMS clubs and constituencies undergoing internal conflicts;
- Facilitating and negotiating resolutions between students and the University;
- Receiving and investigating complaints about the AMS;
- Preparing students for meetings with university representatives;
- Helping students with appeals;
- Providing conflict resolution workshops;
- Advising students about their options and resources;
- Assisting students with academic disputes (disputing grades, disputes between graduate students and supervisors, withdrawals, quality of instruction, etc.); and
- Assisting students with non-academic disputes (housing appeals, financial aid, and registration issues).

Appeals may be filed at the office or online. The current Ombudsperson is Osaso Obaseki. The Ombuds Office is staffed 30 hours per week and may be contacted at:

The AMS Ombuds Office

Online	Website [1] Email: ombudsperson@ams.ubc.ca
Address	NEST 3119 - 6133 University Boulevard Vancouver, BC V6T 1Z1
Phone	(604) 822-4846 Fax: (604) 822-9019

B. The AMS Advocacy Office

In situations where a student needs to appeal a final decision made by a department, faculty, or University representative, the AMS Advocacy Office can provide assistance by giving the student advice on their rights and responsibilities, assisting them with drafting letters and documents and representing students who must go before formal hearings at the University. Some of the specific issues the Advocacy Office helps with are:

- Student discipline cases (plagiarism, cheating, and non-academic discipline);
- Academic appeals;
- Residence or other UBC housing issues;
- Parking disputes;
- Requests for information under the *Freedom of Information and Protection of Privacy Act*; and
- Library fine appeals.

The current representative, Angus Shaw, can be contacted at:

The AMS Advocacy Office

Online	Website [2] Email: advocate@ams.ubc.ca
Address	AMS NEST 3118 Vancouver, BC V6T 1Z1
Phone	(604) 822-9855

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References

[1] http://www.ams.ubc.ca/services/advocacy-ombuds/ombuds-office
[2] http://www.ams.ubc.ca/services/advocacy-ombuds/%20advocacy-office/

IX. Complaints regarding SFU

A. The SFU Office of the Ombudsperson

Similar to the AMS Ombudsperson at the University of British Columbia, and performing most of the same functions, the SFU Office of the Ombudsperson can assist students in resolving conflicts with Simon Fraser University. Contact the current Ombudsperson at:

Contact the current Ombudsperson at:

The SFU Office of the Ombudsperson

Online	Website [1] E-mail: ombuds@sfu.ca
Address	Laura Reid, Ombudsperson 2266 Maggie Benston Centre Burnaby, BC V5A 1S6
Phone	(778) 782-4563

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References

[1] http://www.sfu.ca/ombudsperson.html

X. Complaints against Doctors

If you wish to file a complaint against your doctor, there are four options:

1. Talk to your doctor
2. File a complaint with the College of Physicians and Surgeons of BC (this is the regulating body for doctors in BC)
3. Speak to a lawyer or the police for advice if you believe your doctor has violated a criminal law
4. Speak to a lawyer for advice about suing the doctor (i.e., medical malpractice)

NOTE: Even if you file a complaint with the College, you are still able to take steps 3, 4, or both.

There is no specific time frame in which to file a complaint; however, the sooner it is filed, the easier it will be to investigate.

To file a complaint, there are three steps:

1. Complete and submit a Complaint Form (found on the College's website).
2. Make the complaint in writing; include your name, address, telephone number, the name and address of the doctor, the facts of the incident, and permission to send a copy of the complaint to your doctor.
3. Send the written complaint to:

Complaints Department - College of Physicians and Surgeons of BC

Address	300– 669 Howe Street Vancouver BC V6C 0B4
Phone	604-733-7758

Once the College reviews the written complaint, it will begin an investigation. This includes obtaining further relevant information and, potentially, relevant medical records. The physician will respond to the complaint. The College's Inquiry Committee (made up of senior doctors and members of the public) will conduct a review of your complaint. If the College finds the complaint is valid, the physician may be expected to change aspects of his or her practice, or undertake further education. The College may also issue remedial advice or reprimand the physician if there is a significant departure from the CMA Code of Ethics. In extreme cases, the College may prohibit a physician from practising medicine.

Please note that there is a special procedure for sexual misconduct complaints. You can either phone the College immediately at 604-733-7758 or submit a letter outlining the incident.

For further information:

Canadian Bar Association https://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Health-Law/423

College of Physicians and Surgeons of British Columbia https://www.cpsbc.ca/for-public/file-complaint

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XI. Complaints against Lawyers

If you wish to file a complaint against your lawyer, there are several options. First, before taking any legal action, you may wish to talk or write to your lawyer about the issue. If speaking directly with your lawyer fails, you can file a complaint with the Law Society of British Columbia, the body that regulates lawyers in BC. Send complaint letters to 845 Cambie Street, Vancouver BC, V6B 4Z9, fax them to 604-605-5399, or submit them online at the Law Society of BC's website [1].

The Professional Conduct Department will review the complaint against the lawyer. If they find they have no authority to investigate the complaint, they will close the file. Otherwise, they will contact the lawyer for a response.

The Law Society discipline hearings are similar to court hearings. A hearing can lead to a reprimand of the lawyer, a fine up to $20,000, conditions set upon the lawyer, suspension of the lawyer, or disbarment of the lawyer. Law Society decisions are not always final and can be appealed.

For further information on the complaint process, phone the Law Society at 604-669-2533 or 1-800-903-5300.

If it is the lawyer's fee that is the problem, there are two solutions:

1. Consult the Registrar of the BC Supreme Court to review the bill. If you have not already paid for it, you have one year from the date of the bill to apply to the registrar. However, if you have paid for it, you only have three months to apply. The registrar will hold a hearing where you and your lawyer are present. The registrar will decide the fee.
2. Use the Law Society's free fee mediation service. The mediator will help all parties reach a settlement.

The Law Society cannot help with disputes over money or property. If you believe your lawyer has acted negligently, you can seek legal advice from another lawyer about your options.

The Law Society of BC https://www.lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings/complaints/ https://www.lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings/faq-complaints-and-discipline/

Canadian Bar Association https://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Lawyers-Legal-Services-and-Courts/436

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References

[1] http://www.lawsociety.bc.ca

Appendix A: Glossary

Certiorari

- a formal request to a court challenging a legal decision of an administrative tribunal, judicial official, or organization, in which the requester alleges that the decision has been irregular or incomplete, or that there has been an error of law

Indigency

- lack of ability to pay; it is a legal reason to have certain fees waived in the purpose of fairness

Mandamus

- a writ which commands an individual, organization, administrative tribunal, or court to perform a certain action, usually to correct a prior illegal action or failure to act

Ombudsman

- a person who acts as a trusted intermediary between an organization and its body of citizens or constituents

Onus of proof

- one's duty or responsibility to prove one's case

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Appendix B: Sample Letter of Intent

July 19, 2017

Reply to: [Name]

Direct Line:

E-mail:

City of Vancouver

453 West 12th Avenue

Vancouver, BC V5Y 1V4

Attention: City Clerk

Dear Sir/Madam,

Re: [NAME] – Incident with VPD – [DATE OF INCIDENT]

I am writing this letter to give you notice of the time, place and manner of damages caused to me by Vancouver Police Department officers pursuant to section 294(2) of the Vancouver Charter.

On [DATE OF INCIDENT] at approximately [TIME OF DAY] .. [enter a brief description of the events]

Because of the actions of the VPD officers, I have suffered the following injuries:

1.

2.

3.

I am now contemplating a civil suit against the officers involved and the City of Vancouver for [enter a brief description of the legal cause of action, i.e. assault and battery, negligence, or breach of Charter rights].

The VPD incident number in this matter is [ENTER INCIDENT # IF KNOWN – IF UNKNOWN THEN DELETE]

Sincerely,

[NAME]

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Chapter Six - Human Rights

I. Introduction

A. Federal and Provincial Legislation

The first step when faced with a human rights issue is to determine whether the provincial legislation, the BC *Human Rights Code*, RSBC 1996, c 210 (HRC), applies or whether the problem falls within federal jurisdiction under the Canadian Human Rights Act, RSC 1985, c H-6 (CHRA).

Section 91 of the *Constitution Act, 1867* 30 & 31 Victoria, c 3 (UK), reprinted in RSC 1985, App II, No 5, lists out the bodies that fall under federal jurisdiction. If the complaint is covered by federal legislation, the matter would be handled under the CHRA by the Canadian Human Rights Commission (CHRC). The limitation date for Federal jurisdiction is **1 year**. If the complaint against the respondent (the party who is being alleged to have contravened the Code) is based on an action they undertook in their capacity as an agent or employee of a body that falls under federal jurisdiction, then that complaint would also be governed by federal legislation. However, a complaint involving a federally regulated employee who is alleged to have discriminated against a provincially regulated employee in a shared workspace may possibly be brought under the provincial HRC, depending on the circumstances. For more information, see the Supreme Court of Canada's decision in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 in which the court confirmed that discrimination in the employment context "may include discrimination by [the complainant's] co-workers, even when those co-workers have a different employer": para 3

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Examples of some industries that are federally regulated and therefore fall within the federal human rights jurisdiction are:
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- Banking – but not credit unions.
- Telecommunications (internet, television and radio) – but not call centres.
- Transportation that crosses provincial or international boundaries (airlines, trains, moving companies, couriers).

See **Section IV** for more on matters under federal jurisdiction.

Section 92 of the *Constitution Act, 1867* lists the bodies that fall under provincial jurisdiction, including property and civil rights in the province, as well as generally all matters of a merely local or private nature in the province. If a complaint is covered under the HRC, the matter will come before the British Columbia Human Rights Tribunal (BC HRT). Human rights violations that have taken place in BC will tend to fall under the provincial legislation. The limitation date under provincial jurisdiction was recently extended to 1 year from the previous 6-month limitation period. This change was introduced through the *Human Rights Code Amendment Act* 2018, which received Royal Assent on November 27, 2018. See **Section III** of this chapter for more on matters under provincial jurisdiction in BC.

In either case, because human rights legislation is considered to be "quasi-constitutional" in nature, the legislation must be given a liberal and purposive interpretation to advance the broad policy implications underlying it. The CHRC has a useful assessment tool that can assist in determining if an entity falls under federal jurisdiction. It can be found at www.chrc-ccdp.gc.ca/eng/make-a-complaint [1]. This tool is not always accurate, so if an entity is not found there but you have reason to believe that it is federal, follow up with further inquiries and analysis

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References

[1] http://www.chrc-ccdp.gc.ca/eng/make-a-complaint

II. Governing Legislation and Resources

A. Legislation

Human Rights Code, RSBC 1996, c 210, as amended [HRC]

Canadian Human Rights Act, RSC 1985, c H-6, as amended [CHRA]

Civil Rights Protection Act, RSBC 1996, c 49 [CRPA].

B. Resources

B.C. Human Rights Tribunal

An independent, quasi-judicial body created by the B.C. *Human Rights Code*, responsible for accepting, screening, mediating and adjudicating provincial human rights complaints. Its website is very helpful. Their Guides and Information Sheets provide thorough procedural information in English, Chinese, and Punjabi. The Tribunal's decisions dating back to 1997 are available online.

Online	Website [1] E-mail: BCHumanRightsTribunal@gov.bc.ca
Address	1170 - 605 Robson Street Vancouver, B.C., V6B 5J3
Phone	(604) 775-2000 TTY: (604) 775-2021 Toll-free in B.C.: 1-888-440-8844 Fax: (604) 775-2020

The B.C. Human Rights Clinic

The BC Human Rights Clinic is operated by the Community Legal Assistance Society (CLAS) and is funded by the BC Ministry of Justice. The Clinic provides free legal representation to low-income claimants or those unable to represent themselves before the BC Human Rights Tribunal due to lack of capacity or disability. It also provides a free short service Drop-In Clinic at the Labour Relations Board on Mondays between 9:30am and 4:00pm.

Online	Website [2]
Address	300 – 1140 West Pender Street Vancouver, B.C., V6E 4G1
Phone	(604) 622-1100 Toll-free in Canada: 1-855-685-6222 Fax: (604) 685-7611

The B.C. Civil Liberties Association (BCCLA)

If the client's legal issue also extends to *Charter* rights, the BCCLA may provide assistance.

Online	Website [3] E-mail: info@bccla.org
Address	550 - 1188 West Georgia Street Vancouver, B.C. V6E 4A2
Phone	(604) 630-9748 Fax: (604) 687-3045

The Canadian Human Rights Commission

Online	Website [4]

Western Region

Address	Canada Place, Suite 1645, 9700 Jasper Avenue P.O. Box 21, Edmonton, Alberta T5J 4C3
Phone	(780) 495-4040 Toll-Free: 1-888-214-1090 TTY: 1-888-643-3304 Fax: (780) 495-4044

National Office

Address	344 Slater Street, 8th Floor Ottawa, Ontario K1A 1E1
Phone	(613) 995-1151 Toll-free: 1-888-214-1090 6-2 TTY: 1-888-643-3304 Fax: (613) 996-9661

The Commission can independently initiate federal human rights complaints, but normally assists in their drafting and investigates complaints lodged by individuals or organizations. If insufficient evidence of discrimination is presented, the Commission can dismiss the complaint. If the Commission finds that the allegations of discrimination warrant mediation or adjudication, it can refer the case to conciliation or to the Canadian Human Rights Tribunal for a hearing.

The BC Human Rights Commission – FORTHCOMING

The *Human Rights Code Amendment Act* recently re-established a Human Rights Commission in British Columbia. The province's original human rights commission was dismantled in 2002. To date, a Human Rights Commissioner has been appointed and the Commission is in the process of setting up its offices. The Commission will promote human rights, undertake research and offer public education and outreach. It will also examine human rights implications of any policy, program or legislation and make recommendations if aspects of policy, programs or legislation are inconsistent with the *Human Rights Code*. Finally, although the Commission will not have the power to file human rights complaints, it will have the power to intervene in complaints before the Human Rights Tribunal.

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References

[1] http://www.bchrt.bc.ca/
[2] http://www.bchrc.net
[3] http://www.bccla.org/
[4] http://www.chrc-ccdp.ca

III. BC Human Rights Code

The *B.C. Human Rights Code* ["*HRC*"] is the legislation currently applicable in BC and is administered by the B.C. Human Rights Tribunal.

The *HRC* applies to matters within the provincial constitutional heads of power, and covers both public and private bodies and individuals. For example, the *HRC* applies to provincially regulated employers, unions, professional associations, most commercial businesses, Crown corporations, landlord-tenant relations, as well as the provincial government itself.

> **NOTE:** The Tribunal's decisions are available online at http://www.bchrt.bc.ca/decisions.They are indexed by year dating back to 1997 and searchable based on a variety of criteria. They are also available on CanLII BC (www.canlii.org/en/bc [1]/).

A. Framework of a Discrimination Complaint

The following outlines the six-part test that governs human rights complaints.

1. Complainant

As outlined in *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33, the complainant must prove the following three elements on a balance of probabilities to establish their case:

1. That they have a characteristic that is protected under the HRC; 2. That they experienced an adverse impact with respect to an area protected by the HRC; and 3. That their protected characteristic was a factor in the adverse impact they experienced.

If any one of the three elements are missing, there is no discrimination. If the complainant proves the three elements, then the burden shifts to the respondent to justify its conduct. If the respondent proves its conduct was justified, then there is no discrimination. If the respondent's conduct is not justified, discrimination will be found to occur.

2. Respondent

In *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 at para 54 [Meiorin], the Supreme Court of Canada set out the three-stage analysis for determining whether a standard is a bona fide occupational requirement (BFOR):

1. The employer adopted the standard for a purpose rationally connected to the performance of the job; 2. The employer adopted the particular standard with an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and 3. The standard is reasonably necessary to fulfil its purpose. The employer must show that it could not accommodate individual employees with the protected characteristic without experiencing undue hardship.

In *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 2 SCR 868 [Grismer] at para. 20, the Supreme Court of Canada considered the application of the *Meiorin* test to a public services complaint and set out the three-stage analysis for determining whether the respondent had a *bona fide* and reasonable justification for its conduct:

1. The respondent's behaviour was for a purpose or goal that is rationally connected to the function being performed; 2. The respondent behaved in good faith; and 3. The respondent's behaviour was reasonably necessary to accomplish the purpose or goal, in the sense that the respondent cannot accommodate the complainant without undue hardship.

Note that most legal disputes arise in regard to the third part of the test – that is, whether the respondent reasonably accommodated the complainant to the point of undue hardship.

The Chart below illustrates how the HRC's protected grounds apply to each area of protection.

Protected Grounds	Protected Areas						
	Publications	Public Services & Accommodation	Purchase of Property	Tenancy	Employment Advertisements	Employment	Unions & Associations
Race	v	v	v	v	v	v	v
Colour	v	v	v	v	v	v	v
Ancestry	v	v	v	v	v	v	v
Place of Origin	v	v	v	v	v	v	v
Political Belief	x	x	x	x	v	v	v
Religion	v	v	v	v	v	v	v
Marital Status	v	v	v	v	v	v	v
Family Status	v	v	x	v	v	v	v
Physical or Mental Disability	v	v	v	v	v	v	v
Sex	v	v	v	v	v	v	v
Sexual Orientation	v	v	v	v	v	v	v
Gender Identity or Expression	v	v	v	v	v	v	v
Age	v	v	x	v	v	v	v
Criminal or Summary Conviction	x	x	x	x	x	v	v
Source of Income	x	x	x	v	x	x	x

B. Protections, Exceptions and Exemptions

The HRC provides protection against discrimination in several different contexts, which are listed in sections 7–14. These sections will be further detailed in order below. Please refer to **Section III.A.1-7**. However, for many of these protected areas, the HRC provides certain exceptions for which discrimination is not prohibited.

Additionally, section 41, commonly referred to as the group rights exemption, allows what might otherwise be deemed prohibited discriminatory conduct. It allows charitable, philanthropic, educational, and other not-for-profit organizations to act in a discriminatory manner, if action is taken with the aim of promoting the interests and welfare of a group of people that share a common identifiable characteristic, such as religion, race, or marital status. For more information, please see *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601 at paras 43-59.

Furthermore, under section 42, it is not discriminatory to plan, advertise, adopt, or implement an employment equity program that has the objective of ameliorating the conditions of individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, sex, sexual orientation, or gender identity or expression. Such special programs may obtain prior approval by the BC Human Rights Tribunal and, if pre-approved, will not be deemed to be in contravention of the HRC. Ultimately, section 42 gives the Tribunal jurisdiction to approve

special programs that are aimed at improving the situation of individuals or groups that have suffered historical disadvantage.

Finally, section 43, often referred to as the "retaliation" section, prohibits discrimination against a person because that person complains, has been named, gives evidence, or otherwise assists in a complaint or related proceeding under the HRC. This section was recently amended to include protection of a person who is planning to commence, but has not yet filed a human rights complaint. Please refer to *Gichuru v Pallai*, 2018 BCCA 78 at paras 50-58, which provides the test for proving retaliation under section 43.

1. Discriminatory Publication

Section 7 deals with forms of discrimination against individuals or groups of individuals, which are published, displayed, or made public. This section prohibits hate literature and other such communications that expose or are likely to expose someone in a protected group to hatred or contempt. Please refer to *Oger v Whatcott* (No 7), 2019 BCHRT 58 at paras 93-97.

Exception: Section 7 does **not** apply to communications that are intended to be private and are related to activities otherwise permitted under the *HRC*.

2. Discrimination in Facilities "Customarily Available to the Public"

Section 8 states that any accommodation, service, or facility customarily available to the public may not be denied to an individual for reasons based on that person's race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression and/or age.

University of British Columbia v Berg, [1993] 2 SCR 353 at paras 59-63 [Berg] provides the definition of "customarily available to the public". A service is customarily available to the public if the nature of the relationship is public. Courts look at the relationship between the facility and the complainant, as well as the nature of the service itself. In *Berg*, the court found that a university has its own public and that the relationships between students and professors, who present the public "face" of the university, are public in this context. Please refer to *HMTQ v McGrath*, 2009 BCSC 180 at paras 89–93 for a more recent case that cites the definition for what is "customarily available to the public".

Additionally, courts have found that services provided to members of a group who come together as a result of a private selection process, based on their personal attributes do not qualify as services "customarily available to the public", and are therefore not subject to section 8 of the HRC. Please refer to *Marine Drive Golf Club v Buntain et al and BC Human Rights Tribunal*, 2007 BCCA 17 at paras 48–56.

While there is no enumerated list of relationships that count as public, locales such as pubs, night clubs, hotels, theatres, transportation services, education facilities, insurance, medical treatment in hospitals, strata council and property management services in condominiums, government services and participation in sporting events have all been found to entail public relationships. Licensing services and facilities may also involve public relationships. For example, discrimination prohibited by section 8 was ultimately found when the BC Motor Vehicle Branch maintained a blanket refusal to issue drivers licenses to those with certain visual impairments regardless of actual driving ability. Please refer to *BC (Superintendent of Motor Vehicles) v BC (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*], which applied the three-part "*Meiorin*" test in the context of a services complaint (see **Subsection 6: Discrimination in Employment and the Duty to Accommodate**).

For a recent case that applied the three-part "*Meiorin*" test, see *Moore v British Columbia (Education)*, 2012 SCC 61, a Supreme Court of Canada case about a school district that cancelled a special education program, requiring a dyslexic student to enroll in specialized private school. The Supreme Court of Canada reviewed whether the school district

discriminated against the student by failing to provide necessary remediation, and ultimately restored the BC Human Rights Tribunal's finding of discrimination.

Ultimately, in the context of services customarily available to the public, section 8 of the HRC states that it is discriminatory if a person, without a *bona fide* and reasonable justification, arbitrarily precludes someone from the benefit of such a service based on an enumerated ground of discrimination. See *Moore v British Columbia (Education)*, 2012 SCC 61 at para 26.

Exceptions: There are a number of circumstances where discrimination is permitted, if it can be shown to be supported by "bona fide and reasonable justification" (BFRJ) (as per the wording of s 8(1)). For the most authoritative perspective, see the "*Grismer*" case (cited above), which applied the three-part "*Meiorin*" test to: *British Columbia (Public Service Employee Relations Commission) v British Columbia Government Service Employees' Union* [1999] 3 S.C.R. 3, a Supreme Court of Canada case that created a unified test to determine if a violation of human rights legislation can be justified as a bona fide occupational requirement (BFOR).

Section 8(2) also contains certain built-in exceptions. Discrimination based on sex is permitted insofar as it relates to the maintenance of public decency. Discrimination based on sex, physical or mental disability, or age is permitted insofar as it relates to the determination of premiums or benefits under life or health insurance policies.

3. Discrimination in Purchase and Rental of Property

Section 9 provides that a person or class of persons must not be denied the opportunity to purchase real property due to their race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sex, sexual orientation and/or gender identity or expression.

Section 10 states that a person shall not be denied the right to occupy any space that is represented as being available for occupancy, or be discriminated against with respect to a term or condition of the tenancy on the basis of race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or lawful source of income. Please refer to *Hunter v LaViolette* (No 2), 2007 BCHRT 415.

Exceptions: This section does not apply if the tenant is sharing any sleeping, bathroom, or cooking facilities with the person making the representation (e.g. as a roommate). Furthermore, the reserving of specific residences for individuals aged 55 or older does not constitute discrimination (HRC, s 2(b)(i)).

4. Discrimination in Employment Advertisements and Interviews

Section 11 prohibits employment advertisements that express limitations or preferences based on race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sexual orientation, sex, gender identity of expression and/or age. Refer to *Anderson v Thompson Creek Mining Ltd Endako Mines*, 2007 BCHRT 99.

Exception: Discrimination in employment advertisements may be permitted if such limitations are based on "*bona fide* occupational requirement(s)" as per the wording of s 11.

For case law on discrimination during the interview process, please refer to *Khalil v Woori Education Group*, 2012 BCHRT 186 at para 29-45. An employer, under s 13, cannot refuse to employ someone on the ground mental or physical disability unless there is a *bona fide* occupational requirement (see subsection 6: Discrimination in Employment and the Duty to Accommodate).

5. Discrimination in Wages

Section 12 states that wage parity between sexes is required for similar or substantially similar jobs. Please refer to *Kraska v Pennock*, 2011 BCSC 109. Most of the remedies under this section are also available under section 13, which does not have a limitation on the period of time during which wages can be claimed.

Limitation Dates: Section 12 of the HRC states:

- (a) the action must be commenced no later than 12 months from the termination of the employee's services, and
- (b) the action applies only to wages of an employee during the 12 month period immediately before the earlier of the date of the employee's termination or the commencement of the action.

This seems to be in keeping with the 1-year limitation period for all human rights complaints. Issues arose when section 12(5) conflicted with the previous general 6-month limitation period for bringing human rights complaints, but the extension has eliminated any confusion.

Exception: A difference in the rate of pay between employees of different sexes based on a factor **other** than sex is allowed, provided that the factor on which the difference is based would reasonably justify the difference.

6. Discrimination in Employment and the Duty to Accommodate

Section 13 provides that no person shall refuse to employ another person or discriminate against a person with respect to employment or any term or condition of employment on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or because that person has a criminal record that is unrelated to the employment. Please refer to *Ratzlaff v Marpaul Construction Ltd*, 2010 BCHRT 13. This section might extend to volunteers depending on the circumstances (*Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1). When determining whether a volunteer is captured under the definition of “employee” in the HRC, the Tribunal will consider the following:

1. If there is a formal process to recruit volunteers;
2. If there is a training process with defined tasks;
3. Whether volunteers have to agree to follow the organizations policies and practises;
4. If there are requirements about when or how often a volunteer must be available; and
5. The role of volunteers in the organization.

For more information, see *Ferri v Society of Saint Vincent de Paul and another*, 2017 BCHRT 123 at paras 29-33.

In addition, because all individuals over 19 are protected by the ground of age, individuals in both the public and private sector are able to choose the age at which they wish to retire and are protected from discrimination based on age (HRC, s 1).

Bona Fide Occupational Requirement (BFOR) Exemption: In the case of discrimination on the basis of disability, section 13(4) permits discrimination in employment if the basis for discrimination concerns a “bona fide occupational requirement” (BFOR). In *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*, [1999] 3 SCR 3 at para 54 [*Meiorin*], the Supreme Court of Canada established a three-part test for establishing a BFOR. An initial investigation determines whether the standard, policy, or practice has the direct or indirect effect of excluding or negatively affecting individuals protected by the HRC; the onus of establishing sufficient evidence of the complainant’s case lies with the complainant. Please see *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l’Hôpital général de Montréal*, 2007 SCC 4 at paras 47-53.

Only once evidence has been established by a claimant that there is a case of discrimination (see Section III.C.3 below), is the onus of proving a BFOR defence transferred to the respondent. The respondent must justify the standard by

satisfying three elements:

1. The fundamental purpose of the standard must be rationally connected to the performance of the job;
2. The standard must have been adopted in good faith and with the legitimate belief that it is necessary in order to satisfactorily and safely perform all job related tasks; and
3. The standard is reasonably necessary to performing the job and it is impossible to accommodate the specific claims of the plaintiff without the employer incurring undue hardship.

For a specific example of a BCHRT case that applies the BFOR test in a disability context, please refer to *Kerr v Boehringer Ingelheim (Canada) Ltd (No 4)*, 2009 BCHRT 196.

The BFOR exception applies to age discrimination as it relates to mandatory retirement. Thus, if the employer can establish one or more BFORs related to age, then mandatory retirement can still be imposed.

Undue Hardship: What may be considered "undue hardship" varies by employer depending on the circumstances. In *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970 at paras 21–23, the Supreme Court of Canada noted that it is more than a minor inconvenience, and that actual interference must be established. Factors the court may consider are financial cost, health and safety, and flexibility and size of the workplace. For a more exhaustive guide for employers and employees seeking accommodation, please see the BC Human Rights Clinic's "FAQ – Duty to Accommodate" at: www.bchrc.net/duty_to_accommodate [2].

Other Exemptions: Distinctions based on age are not prohibited insofar as they relate to a bona fide seniority scheme. Distinctions based on marital status, physical or mental disability, sex, or age will continue to be allowed under bona fide retirement, superannuation, or pension plans, and under bona fide insurance plans, including those which are self-funded by employers or provided by third parties (HRC, s 13(3)). Mandatory retirement may also not constitute a breach of the HRC when it is part of a bona fide pension plan as long as it is not done in order to circumvent the rights of individuals.

7. Discrimination by Unions, Employer Organizations or Occupational Associations

Section 14 states that trade unions, employers' organizations, or occupational associations may not deny membership to any person or discriminate against a person on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, and/or unrelated criminal record. Please refer to *De Lima v Empire Landmark Hotel and Major*, 2006 BCHRT 440.

Since "persons" are not covered by section 14, protection against denial of membership has been held to apply only against an implicated union, organization, or association, and not against an individual. Please refer to *Ratsoy v BC Teachers' Federation*, 2005 BCHRT 53 at para 23. This differs from other protections granted by the HRC, which, in appropriate circumstances, generally do allow an action to be brought against both an organization (e.g. an employer) and its individual members (e.g. a manager).

There are two limited ways in which unions can be held liable for discrimination. The first is by creating or participating in formulating a discriminatory workplace rule, and the second is by impeding an employer's efforts to accommodate a disabled employee (*Chestacow v Mount St Marie Hospital of Marie Esther Society*, [2018] BCHRT No 44 at para 32 [*Chestacow*]). In respect of the latter, a union may be required to waive seniority rights or other collective agreement obligations in order to facilitate the accommodation of an employee with a disability.

C. Prohibited Grounds of Discrimination

1. General

Prohibited grounds of discrimination include race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age (for those 19 and over), criminal record (that is not relevant to the employment, union or occupational association), and lawful source of income. Note that not all of the areas listed in sections 7–14 of the HRC are afforded protection against all forms of discrimination. For example, the HRC does not prohibit landlords from discriminating on the basis of a tenant's political beliefs. The grounds of discrimination that apply depend on the section of the HRC in question. One must first decide which section is involved and then check to see which grounds are associated with that section. Please refer to the helpful chart on page 6-3 above.

To determine whether a violation of the HRC has occurred, consult the relevant section of the HRC and review recent case law. Case law can be found on the BC Human Rights Tribunal website (www.bchrt.bc.ca/law-library/decisions [3]), indexed by year, and searchable based on a variety of criteria. The decisions are also available on CanLII BC.

It should be noted that one might file a complaint on a combination of grounds. Discrimination does not need to have been the sole or primary motivating factor to establish a case on a particular ground, as long as discrimination was a contributing factor to the impugned action. Please refer to *Quebec* ***('Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*****, 2015 SCC 39 at paras 45-52.**

Discrimination need not be intentional (HRC, s 2). Any policy or action that has an adverse effect on a protected group might be considered discriminatory. Please refer to *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at para 14. The policy or act does not have to affect every person in the group for it to be considered discriminatory. For example, if a policy discriminates against only women that are pregnant it would still be considered sex discrimination. It is also possible that an act or policy may affect men as well as women, but affect one sex to a disproportionate degree, in which case it could also qualify as sex discrimination.

Discrimination can also be established on an "intersectional" basis. This means that the discriminatory action had an adverse impact on the basis of multiple protected grounds, occurring simultaneously, which cannot easily be separated from one another. It is not always necessary to establish that each individual ground has been met where intersectional discrimination can be established. Please refer to *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302 at paras 463–467.

If, after reading the HRC, you are still unsure whether the impugned action lies within the ambit of the HRC, contact the BC Human Rights Clinic (see Section I.B:Resources).

2. Ancestry, Colour, Place of Origin and Race

The grounds of race, colour, ancestry and place of origin are included in the HRC as a means to combat racism and racial discrimination. Each of these grounds are protected in the HRC and may be cited individually in connection with a discriminatory incident or grouped together in order to better illustrate a particular situation. For further information on how the above grounds interact, please refer to *Torres v Langtry Industries Ltd, 2009 BCHRT 3*.

Discrimination on the basis of race, colour, ancestry and place of origin can also be established where the respondent caused harm to the claimant by taking advantage of a vulnerability caused by the claimant's race, colour, ancestry or place of origin. For more information, see *PN v FR and another (No 2)*, 2015 BCHRT 60. In BC, the grounds of race, colour, ancestry and place of origin are protected in the areas of publication; public services such as schools, government programs, restaurants and stores; purchase of property; tenancy; employment advertising, employment; and membership

in a trade union, employer's organization, or occupational association. For a recent case concerning discrimination on the basis of race in the employment context, please see *Francis v. BC Ministry of Justice (No. 3)*, 2019 BCHRT 136.

Note that the Tribunal has recognized that racism can be subtle and is sensitive to this fact. Please refer to *Mezghrani v Canada Youth Orange Network Inc*, 2006 BCHRT 60 at para 51.

3. Political Belief

The HRC provides protection from discrimination due to political beliefs and/or affiliations in the areas of employment; employment advertising; and membership in a trade union, employer's organization or occupational association.

In BC, few human rights cases have been decided on the ground of political belief and, as such, a comprehensive definition of what constitutes a political belief under the HRC has not been established. The Tribunal has, however, identified two key principles in determining whether a claimant's belief should be protected under the HRC:

1. Political belief is to be given a liberal definition; it is not confined to partisan political beliefs. Hence, political beliefs are not limited to beliefs about recognized or registered political parties.
2. Political belief is not unlimited; for example, views about matters such as business or human resources decisions an employer may make do not come within its ambit.

Please refer to *Prokopetz and Talkkari v Burnaby Firefighters' Union and City of Burnaby*, 2006 BCHRT 462 at para 31 and Fraser v British Columbia (Ministry of Forests), [2016] BCHRT No 124. See *Bratzer v Victoria Police Department*, [2016] BCHRT No 50 for a unique example of how political belief can be framed. Albeit unsuccessful, an officer of the Vancouver Police Department attempted to argue that his stance against the criminalization of illicit drugs and his involvement in a not-for profit that advocates for such views amounted to a political belief.

In *Wali v Jace Holdings*, 2012 BCHRT 389 at para 117, the Tribunal determined that free speech regarding matters affecting the regulation of a profession could constitute a political belief. This was narrowed to the particular legislative framework and mandate of the College of Pharmacists. The Tribunal member took into account that the issue was a legislative initiative involving public welfare and was being debated in the pharmaceutical community in determining that the belief was a protected political belief.

4. Religion

Religious discrimination cases have helped to define several of the fundamental ideas and standards that comprise human rights law in Canada. Matters before the courts have routinely addressed discriminatory incidents concerning religious faith, beliefs, customs, and practices. In BC, protection from discrimination based on religion is provided in the areas of publication; public services; purchase of property; tenancy; employment advertising; employment; and membership in a trade union, employer's organization or occupational association. A claimant must show that their religious belief or practice is sincere, but not that it is objectively required or recognized by a particular religious faith. Please refer to *Friesen v Fisher Bay Seafood Limited*, 2009 BCHRT 1, at para 57. Atheism is encompassed within the protected ground of religion: *Mangel and Yasué obo Child A v. Bowen Island Montessori School and others*, [2018] BCHRT No 281 at para 210: *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 70; *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 32; *R v Big M Drug Mart Ltd*, [1985] 1 SCR at paras 346-347)

The duty to accommodate has been firmly established in case law and obliges employers to accommodate the religious practices of their employees as long as doing so does not cause undue hardship. These practices may be linked to customs involving prayer, dietary restrictions, clothing requirements, and time off on religious holy days. Please refer to *Renaud v Central Okanagan School District No 23*, [1992] 2 SCR 970 at para 16.

5. Family Status and Marital Status

Family status generally refers to parent-child relationships, but can and does encompass other family relationships including those between siblings, in-laws, aunts and uncles, nieces and nephews, and cousins. For case law on the definition of family status and the test for discrimination on that basis see *Miller v British Columbia Teachers' Federation*, 2009 BCHRT 34 at para 17.

Marital status normally refers to couples with a 'spouse-like' relationship. The HRC extends protection to all individuals regardless of their status (i.e. married, common-law, single, separated, divorced or widowed). Issues involving family and marital status may often overlap and may be cited concurrently to fully illustrate a certain situation.

In BC, the grounds of family and marital status are protected in the areas of publication; public services; tenancy; employment advertising; employment; and membership in a trade union, employer's organization, or occupational association. Only marital status is protected in the area of purchase of property.

The law regarding the test that applies in the context of family status discrimination cases involving childcare obligations is unsettled in Canada. In BC, the present test for family status discrimination in employment is set out in *Health Sciences Assn. of British Columbia v Campbell River and North Island Transition*, 2004 BCCA 260 [*Campbell River*] at para 39. Per that test, in order to establish discrimination on the basis of family status, the complainant must show:

1. A change in a term or condition of employment imposed by the employer; and
2. That the change results in a serious interference with a substantial parental or other family duty or obligation.

The Federal Court of Appeal rejected the *Campbell River* test and set out its own four-part test in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, at para. 93. Under *Johnstone*, a complainant must show that a child is under their care and supervision; the issue engages the individual's legal responsibility for that child as opposed to a personal choice; they have made reasonable efforts to find alternative solutions and no reasonable alternative solution is available; and the impugned workplace rule interferes with the childcare obligation in a more than trivial or insubstantial way.

In Ontario, *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229 [*Misetich*] is the leading authority. *Misetich* criticized both *Campbell River* and *Johnstone* as creating too narrow of a test. The *Misetich* test requires a complainant to establish a negative impact that results in a real disadvantage to the parent/child relationship, parent/child responsibilities, or to the employees' work.

In Alberta, in *SMS Equipment Inc. v. Communications, Energy and Paperworkers Union*, Local 707, 2015 ABQB 162, the Court of Queen's Bench upheld a labour arbitration decision rejecting the *Campbell River* test. The court held that there were problems with both *Campbell River* and *Johnstone* and ultimately concluded that the correct test for determining discrimination based on family status is the Supreme Court of Canada's general test for establishing discrimination set out in Moore. The Moore test was recently reaffirmed by the Supreme Court of Canada in *Stewart v Elk Valley Coal Corp*, 2017 SCC 30.

The BC Court of Appeal recently affirmed that the *Campbell River* test is the law in British Columbia: *Envirocon Environmental Services, ULC v Suen*, 2019 BCCA 46. Mr. Suen applied for leave to appeal to the Supreme Court of Canada, but this request was dismissed.

6.Physical or Mental Disability

Disability is not defined in the HRC. However, the concept of physical disability, for human rights purposes, generally indicates a "physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life" (*Boyce v New Westminister (City) (1994)*, 24 CHRR D/441 at para 50 [*Boyce*]). See *Beckett v Strata Plan NW 2603*, 2016 BCHRT 27 at para 120 for a more recent case that refers to the definition of physical disability from *Boyce*. In *Morris v BC Rail*, 2003 BCHRT 14 at para 214 [*Morris*], the Tribunal

set out the following three aspects for assessing whether an individual has a physical or mental disability:

1. "[T]he individual's physical or mental impairment, if any;
2. "[T]he functional limitations, if any, which result from that impairment; and
3. "[T]he social, legislative or other response to that impairment and/or limitations… assessed in light of the concepts of human dignity, respect and the right to equality."

Furthermore, according to *Morris* at para 207, proof of impairment and/or limitation, while relevant, will not be required in all cases. See *McGowan v Pretty Estates*, 2013 BCHRT 40 at para 26 for more information.

The protection of the HRC extends to those who are perceived to have a disability or to be at risk of becoming disabled in the future. As such, the Tribunal has rejected the application of strict criteria to determine what constitutes a physical or mental disability. This has led to a somewhat expansive definition. For example, protection has been specifically applied to persons with AIDS, persons who are HIV positive, and persons believed to be HIV positive, all of whom are considered to have a physical disability. Please refer to *McDonald v Schuster Real Estate*, 2005 BCHRT 177 at para 24 and *J v London Life Insurance Co* (1999), [1999] BCHRTD No 35 at para 42 [*London Life Insurance*].

As noted above, protection from discrimination due to physical disability extends to discrimination on the basis of a perceived propensity to become disabled in the future. In *London Life Insurance* at para 46, the Tribunal found that the HRC prohibited discrimination against a person based on the fact that his spouse was HIV positive. Protection under this ground has also been extended to those who are suffering from addictions issues. For example, *Handfield v North Thompson School District No 26*, [1995] BCCHRD No 4 at paras 139–143 recognized alcoholism as both a physical and mental disability.

Where a behaviour or policy adversely affects a protected group or person, either directly or indirectly due to their disability, there is a duty to accommodate, meaning that all reasonable efforts must be taken to accommodate the group or person up until the point of undue hardship. Examples include installing wheelchair access (*Walsh v Pink*, 2018 BCHRT 174 at paras 104-111) and safety handrails (*Ferguson v Kimpton*, 2006 BCHRT 62 at para 68). The duty to accommodate also includes allowing workers to take days off on religious holidays.

7. Sexual Orientation

The HRC prohibits discrimination based on sexual orientation. Such discrimination does not require a complainant to prove their sexual orientation or that a given respondent believed them to have a particular orientation. In *School District No 44 (North Vancouver) v Jubran*, 2005 BCCA 201, Mr. Jubran was a high school student, subjected to homophobic insults and harassment from other students. This conduct was found to constitute discrimination, even though Mr. Jubran did not identify as homosexual and his harassers denied believing that they in fact thought he was homosexual. For a case regarding discrimination on this basis against patrons of a restaurant in the context of services customarily available to the public, please see *Pardy v. Earle* and others (No. 4), 2011 BCHRT 101.

In BC, protection on the basis of sexual orientation is provided in the areas of publication; public services; purchase of property; tenancy; employment advertising; employment; and membership in a trade union, employer's organization, or occupational association.

8. Sex (includes sexual harassment, pregnancy discrimination)

Discrimination on the basis of sex, which is prohibited under the HRC, includes sexual harassment. Sexual harassment is defined as "unwelcome conduct of a sexual nature that detrimentally affects a work environment or leads to adverse job-related consequences for the victims of the harassment" (*Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at para 56 [*Janzen*]).

In *PN v FR and another (No 2)*, 2015 BCHRT 60, the HRT increased the damages available for cases of sexual harassment by awarding $50,000 for injury to dignity to a domestic foreign worker who was sexually harassed and assaulted. This case also involved allegations of discrimination based on family status, race, age, colour, and place of origin.

Sexual harassment can take a number of forms. One such form may occur when the employer or a supervisory employee requires another employee to submit to sexual advances as a condition of obtaining or keeping employment or employment-related benefits. It may also occur when employees are forced to work in an environment that is hostile, offensive, or intimidating, such as where an employer allows pornography to be posted in the workplace. It is not generally necessary for an employee to expressly object to their harasser before filing a complaint. There is also no requirement of continuing harassment; a single incident may be sufficient if is egregious.

The test for whether sexual harassment occurred requires the application of an objective standard. It must be shown that the alleged discriminatory conduct is "reasonably perceived to create a negative psychological and emotional environment for work" (*Janzen*). The test must also take into account the customary boundaries of social interaction in the circumstances. There may not be an action if the complaint arises due to the claimant's innate sensitivity or defensiveness. Factors that are examined to determine the limits of reasonableness in a particular context include the nature of the conduct, the workplace environment, the type of prior personal interaction, and whether a prior objection or complaint was made. It is no defence to harassment, however, to show that harassing behaviour was traditionally tolerated in a workplace.

> Please refer to *Mottu v MacLeod*, 2004 BCHRT 76 at para 41, where the Tribunal found that dress code requirements based on sex could constitute discrimination on the basis of sex. In *Lund v Vernon Women's Transition House Society*, 2004 BCHRT 26, the Tribunal found that an employer's refusal to allow a female employee to breastfeed her child at work could also constitute sex discrimination.

For a more recent case involving discrimination on the basis of sex, and more specifically sexual harassment in the employment context, see *Araniva v RSY Contracting and another (No. 3)*, 2019 BCHRT 97.

9. Gender Identity or Expression

This protected ground has been in force since 2016, and therefore few decisions relating to this ground are currently available.

For a recent Tribunal decision issued under the new ground of gender identity or expression, please refer to *Oger v Whatcott (No 7)*, 2019 BCHRT 58.

Prior to the inclusion of gender identity or expression in 2016, the Tribunal had found that being transgender was a protected characteristic under the ground of sex. Please refer to *Dawson v Vancouver Police Board (No 2)*, 2015 BCHRT 54. Dawson establishes that transgender discrimination includes misgendering of trans individuals (addressing a trans person using a pronoun, name, or gender marker other than that which the trans person uses to identify themselves). It

can also include the denial of trans-specific medical services.

10. Age (19 or over)

Age can refer to an individual's legal age, membership in a specific age-category, or a generalized characterization of a specific age. In BC, age is a protected ground of discrimination in the areas of employment; employment advertising; membership in a trade union, employer's organization, or occupational association; public services; tenancy and publications. Please refer to *Miu v Vanart Aluminum and Tam*, 2006 BCHRT 219 at para 18.

In each of these areas, age protection is restricted to those 19 years of age and over. However, those under 19 years are still able to bring complaints to the BCHRT based on grounds other than age.

11. Criminal or Summary Conviction

BC's HRC protects individuals convicted of a criminal or summary conviction offence, or a perceived conviction (i.e. arrest or stayed charges) as long as the offence is unrelated to the employment or the intended employment of the individual. Please refer to Purewall v ICBC, 2011 BCHRT 43 at para 21, Clement v Jackson and Abdulla, 2006 BCHRT 411 at para 14 and Korthe v Hillstrom Oil Company Ltd (1997), (BCHRT) at para 23-28. In an effort to establish whether or not a conviction may affect an employment decision, courts require an assessment of the relationship between the conviction and the job description. As such, employers must take into account the circumstances of the conviction in order to determine whether or not the charge relates to the employment. In *Woodward Stores (British Columbia) v McCartney* (1983) 43 BCLR 314 at para 7-9, Justice MacDonald laid out a list of criteria to be considered in making this determination. These criteria are as follows:

- Does the behaviour which formed the basis of the charge, if repeated, compromise the employers' ability to conduct business safely and effectively?
- What were the circumstances and details of the offence, e.g., what was the person's age at the time of the offence and were there any extenuating factors?
- How much time has passed since the charge? What has the individual done since that time and has there been any indication of recidivism? Has there been evidence of the individual's desire for rehabilitation?

12. Source of Income

BC's HRC protects against discrimination in tenancy on the basis of an individual's source of income. This safeguards the tenancy rights of individuals on social assistance or disability pensions who might otherwise be denied safe housing. Please refer to *Tanner v Vlake*, 2003 BCHRT 36 at paras 22–26 for further discussion on this protected ground. For a more recent case, please see *Day v Kumar*

and another (No 3)*, 2012 BCHRT 49.*

D. Procedural Options for Employees

The HRC is particularly useful for those who have been discriminated against in the employment context. Since the BC Human Rights Clinic may potentially be able to handle much of the legal work free of charge, a complaint under the HRC may provide a valuable alternative to proceeding with a claim at the Employment Standards Branch or Small Claims Court for individuals who cannot afford a lengthy wrongful dismissal suit. Additionally, claimants may choose to pursue a wrongful dismissal suit alongside a human rights complaint. Claimants who pursue dual claims will not be able to benefit from "double recovery." An employee who believes that they were discriminated against in relation to their employment may have more than one procedural option to choose from. These include:

1. Employer's Internal Complaint Procedure

Assuming one exists, this is the most immediate way to obtain a remedy. However, there is typically a heavy burden on the employee, as witnesses may be reluctant to come forward and legal counsel is usually not retained at this stage.

2. Grievance and Arbitration (Union)

Unionized workers are entitled to representation by their union. If the union backs out of its obligation, the worker may wish to file a human rights complaint and may even decide to name the union as a party if the worker has grounds to believe the union is complicit in the alleged discrimination. Generally, alleging that the union has failed to provide adequate representation will not be sufficient to qualify as a breach of the HRC on its own, the union must have engaged in the discrimination. However, initiating the grievance procedure is a good starting point, and can be followed by initiating a human rights complaint. A grievance and a complaint can also be filed in tandem. If the matter is not resolved during the initial stages of the union grievance procedure, an arbitration hearing may be held, and an arbitrator will determine liability and relief.

As previously stated (see **Section III.B.7**: Discrimination by Unions, Employer Organizations, or Occupational Associations), there are two ways in which a union may be found liable for discrimination. First by creating or participating in formulating a discriminatory workplace rule, and second by impeding an employer's efforts to accommodate a disabled employee (*Chestacow* at para 32)

3. Human Rights Complaint

Another option is, of course, to file a human rights complaint with the BC Human Rights Tribunal (see above for the grounds, areas, exemptions, complaint process, etc.) or, under federal jurisdiction with the Canadian Human Rights Commission (see below for the grounds, areas, exemptions, process, etc). The Tribunal can award lost wages and damages for injury to dignity, feelings and self-respect. However, note that if a claimant is also seeking severance pay and/or punitive damages in a civil suit, they will not be allowed to recover the same damages from both proceedings.

4. Employment Standards Branch

Employees may choose to file a complaint through the Employment Standards Branch (ESB) if their employer has breached the *Employment Standards Act* (see **Chapter 6: Employment Law**). There is a 6-month limitation period from the date of the breach. A complainant can claim from both the ESB and Small Claims for employment related issues, including wrongful dismissal. These actions do not bar the complainant from also bringing a human rights complaint relating to the same matter. Remedies awarded by the Employment Standards Tribunal are intended to make the employee "whole" financially by way of compensation rather than reinstatement. It is important to note that the ESB does not deal with alleged discrimination.

5. Civil Action

A final option is to bring a civil action for wrongful dismissal either in Small Claims Court (see **Chapter 20: Small Claims** of the LSLAP Manual) or the BC Supreme Court, depending on the amounts claimed. However, a recent Supreme Court of Canada decision clarified that the common law will not provide a remedy for discrimination per se in the employment context. Please refer to *Keays v Honda Canada Inc*, 2008 SCC 39 at para 67 [Keays].

The court in *Keays* held that breaches of the HRC must be remedied within the statutory scheme of the HRC itself. Thus, even if the reason for dismissal was discriminatory, in a civil action, the claimant will generally only be able to recover damages based on their wrongful dismissal and/or inadequate notice (severance pay). See **Chapter 9: Employment Law** of the LSLAP Manual. Accordingly, compensation for the discrimination itself must be awarded by the Tribunal.

The court may further compensate the claimant in a civil action if the employer has acted unfairly or in bad faith when dismissing an employee. The basis for these additional damages is a breach of the implied term of an employment contract that employers will act in good faith in the manner of dismissal (i.e. payment for such damages can be deemed to have been in the contemplation of the parties at the formation of the contract). In Keays the Supreme Court of Canada held that any such additional award must be compensatory and must be based on the actual loss or damage suffered by the employee, which can include expenses related to mental distress stemming from the manner of dismissal. Compensable conduct might include, but is not limited to, attacking the employee's reputation at the time of dismissal, misrepresentations regarding the reason for the dismissal, or dismissal meant to deprive the employee of a pension benefit or other right such as permanent resident status. However, normal distress and hurt feelings arising from the dismissal itself are not grounds for additional damages.

The courts are even more conservative in their approach to awarding punitive damages meant to punish the employer for their conduct in dismissal. Punitive damages will only be awarded if the employer’s conduct was harsh, vindictive, reprehensible, malicious, and extreme in its nature. Thus, if the claimant is primarily concerned with being compensated for injuries to their dignity and/or denouncing their employer’s discriminatory behaviour, then they should file a complaint with the Human Rights Tribunal alongside a civil action for wrongful dismissal.

Whatever procedural route an employee ultimately chooses to pursue, if said employee is experiencing on-going harassment on a prohibited ground of discrimination, he or she should maintain records or a journal with dates, times, places, witnesses, details of particular incidents, and even a description of the emotional effects of the harassment.

E. The Process for Human Rights Complaints

The BC Human Rights Tribunal handles complaints made under the HRC. The first step in filing a complaint with the Tribunal is to fill out a Complaint Form, which are available from the Tribunal at its office address, on its website (http://www.bchrt.bc.ca) or from other local Government Agent offices. There are helpful self-help guides to filling out complaint and response forms on the Tribunal’s website.

1. Who Can Lodge a Complaint

A complaint may be made by an individual, on behalf of a group or class, or by someone acting as a representative of named person(s). If the Complaint Form is being filled out on behalf of another person, group, or class of persons, then a secondary form called the Representative Complaint Form must also be filled out and must accompany the Complaint Form when sent to the Tribunal. The person filling out the Complaint Form is the complainant. The person or organization who has been filed against is called the respondent.

2. How to File a Complaint

The Complaint Form must be filed with the Tribunal via mail, fax, or e-mail. Complainants may access the Complaint Form and other valuable resources at the BC Human Rights Tribunal website (see **Section II.B: Resources**). The party filing the complaint should be aware of the time limits. There is a general 1-year limitation period, which may be extended under certain very limited circumstances.

3. Review Process

Once the Complaint Form is filed, the Tribunal will review the form to determine if it fits under the HRC and if it appears to meet the 1-year limitation period. If the Tribunal believes that it may not have the power to deal with the complaint in substance or believes that the complaint has been filed out of time, the complainant will be given a chance to respond before the Tribunal decides whether or not to proceed with the complaint. If the Tribunal believes it can proceed, it will send the Complaint Form to the respondent for a response to the complaint.

A complainant must set out a case of discrimination under the HRC on their initial complaint form. If the elements are not set out, then the Tribunal might not accept the complaint. Even if accepted, it could still be vulnerable to an application to dismiss under section 27 of the HRC at a later stage. In order to set out the complainant's case, the complainant must allege facts that, on their face (that is to say, assuming they are all true), satisfy the following three elements:

1. That they have a characteristic that is protected under the HRC;
2. That they experienced an adverse impact with respect to an area protected by the HRC; and
3. That their protected characteristic was a factor in the adverse impact they experienced.

It is important to note that a complainant need not establish that their protected characteristic was the sole or primary reason for their adverse treatment. It is sufficient to establish that it was a reason for their adverse treatment.

For greater analysis of this topic please refer to *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39; and *Moore v British Columbia (Education)*, 2012 SCC 61.

4. Settlement Meeting

Parties may agree to a settlement meeting at any time after the complaint has been filed. Guides for settlement meetings and hearings are available from the Tribunal at its office address or on its website. At the settlement meeting, a neutral and impartial mediator who is knowledgeable in human rights law will work with the parties in order to help them try to reach an agreement. This process allows for quicker resolution of the issue in a more informal setting, where information is kept confidential. The process is voluntary, and the Tribunal cannot force the parties to enter into a settlement agreement. If the parties do voluntarily agree to settle their dispute, as part of the terms of settlement, the complainant will file a Complaint Withdrawal Form.

F. Remedies

Remedies should be considered first when deciding whether or not to pursue a claim in any administrative tribunal. Available remedies for a justified complaint are listed in section 37(2) of the HRC.

Non-pecuniary (not financial) remedies include: an order that the respondent cease the discriminatory conduct; a declaratory order that the conduct complained of is, in fact, discriminatory; and an order that the respondent take steps to ameliorate the effects of the discrimination, such as the implementation of human rights policy and training. People seeking advice on drafting should be directed to the BC Human Rights Tribunal website, which provides detailed information on the availability and applicability of specific remedies (see **Section II.B: Resources**).

Pecuniary (financial) remedies include: compensation for lost wages/salary or expenses, re-instatement of a lost benefit, and compensation for injury to dignity. Unlike severance pay, compensation for lost wages is not based on the concept of reasonable notice. A successful claimant may recover lost wages for the entire period between their dismissal and the hearing date if they can show that they have been making reasonable efforts to find new employment. Damages awarded for injuries to dignity have increased over the last decade. Currently the highest award in BC is $75,000 (*University of British Columbia v Kelly*, 2016 BCCA 271). However, most damages in this category are under $10,000. It is difficult to predict what level of damages the tribunal will award, as this determination depends on many factors, which are assessed on a case by case basis. Importantly, while injury to dignity awards commonly follow in cases where discrimination is established, this is not guaranteed, as seen in *Holt v Coast Mountain Bus Company*, 2012 BCHRT 28 at para 233. For further information regarding compensation for injury to dignity, feelings and self-respect, please visit http://www.bchrt.gov.bc.ca/human-rights-duties/remedies/compensation/index.htm

Remember, to claim any type of damage, the claimant must lead evidence. If the claimant fails to lead strong evidence as to the effect the discrimination had on their emotional state and dignity, the Tribunal may not find any damage. Provided that the respondent is able to prove that the claimant has failed to mitigate his or her losses, the failure to mitigate one's losses can lead to the loss of a claimant's entitlement to wage loss compensation.

There is no maximum limit on damage awards. Note, however that if a claimant seeks a remedy at both the Human Rights Tribunal (e.g. for lost wages) and in civil court (e.g. for severance pay), and is successful with both proceedings, he or she must forfeit one of the awards, as they are not entitled to double recovery. There are several cases where the award for loss of wages was in the range of $300,000. See *Kelly* and *Kerr, supra*.

The pecuniary remedies available under the HRC are meant to be compensatory in nature, not punitive. Section 37(4) of the HRC gives the Tribunal authority to order costs against either party as condemnation of improper conduct during the Tribunal processes. This order is independent of a finding that the complaint is justified. Additionally, section 37(2) gives the Tribunal the right to award compensation for expenses that are directly caused by the discrimination found, which may include expenses such as wage loss due to the need to attend a hearing.

The Tribunal will not provide remedies in every situation where there has been real or perceived discrimination. For example, the Tribunal will not award damages for lost wages/salary following a discriminatory dismissal during a period for which the claimant was medically incapable of working. Please refer to *Senyk v WFG Agency Network (No 2)*, 2008 BCHRT 376 at para 434. This is because, even absent the discrimination, the claimant would not have been able to earn wages or a salary.

A final order of the Tribunal may be registered in the BC Supreme Court so that it is enforceable as though it were an order of the court. No appeal procedure is provided for in the HRC, but the Judicial Review Procedure Act, RSBC 1996, c 241 may be of some assistance if an individual is dissatisfied with the Tribunal's decision (see **Chapter 5: Public Complaint Procedures** of the LSLAP Manual).

G. Costs

The general rule is that costs will not normally be awarded in a human rights case. However, pursuant to section 37(4) of the HRC, the purpose of awarding costs has been to penalize a party who acts improperly during a hearing, thereby interfering with the objectives of the Tribunal. In these cases, costs are awarded punitively and do not necessarily reflect the actual expenses suffered by the other party due to the improper conduct.

H. Dismissal of a Complaint Without a Hearing

As mentioned above, the Tribunal may refuse to accept a complaint for filing if it does not have jurisdiction due to the nature of the complaint or when it was brought. Once a complaint has been filed, however, the Tribunal may nevertheless dismiss it prior to a hearing, on application from the respondent or on its own motion, for a variety of reasons (HRC, s 27). The following outlines some of the reasons why the Tribunal may dismiss a filed complaint (check the HRC for a complete list):

1. Complaint Outside the Tribunal's Jurisdiction

The Tribunal will not proceed with a complaint where it is persuaded that the complaint is not, in fact, based on a form of discrimination enumerated by the HRC, or that the complaint falls within federal jurisdiction. In addition, even if the Tribunal accepts a complaint for filing, the respondent may still have the option to dispute jurisdiction.

2. Substance of Complaint Dealt with by Another Proceeding

Where another proceeding, such as a labour arbitration, has adequately resolved the substance of a complaint, it will usually be dismissed. A complaint may also be deferred if such an alternative proceeding is pending. The number of other proceedings capable of adequately dealing with a human rights complaint is however, quite limited.

3. No Reasonable Basis for Holding a Hearing

The Tribunal may discontinue proceedings where the Tribunal is persuaded that the complaint is made in bad faith, would be of no benefit, would not further the purposes of the HRC, and/or has no reasonable prospect of success. The most recent Annual Report from the BCHRT indicates that applications to dismiss under section 27 of the HRC succeeded in fully dismissing the complaint 49% of the time. Please refer to *Marquez v Great Canadian Casinos*, 2011 BCHRT 117 at paras 29–38. No reasonable prospect of success is the most common reason for dismissing a complaint.

4. Complaint Brought Outside Limitation Period

As mentioned above, there is a 1-year limitation period. The 1-year period begins from the last instance of any continuing discrimination. If at least one alleged incident of discrimination in a complaint falls within the one-year limitation period, other alleged incidents of discrimination dating back farther than one year may be accepted as a "continuing contravention" of the Code. The issue of whether, or how many, multiple instances of discrimination will be considered to constitute a "continuing contravention" (thus effectively extending the 1-year limitation period) is often disputed. See *Bjorklund v BC Ministry of Public Safety and Solicitor General*, 2018 BCHRT 204 at paras 13-14 for a recent discussion of how to define a "continuing contravention"; see also *District v Parent obo the Child*, 2018 BCCA 136 at paras 46 – 65.

Additionally, under section 22(3) of the HRC, the Tribunal has discretion to accept late-filed complaints regardless of whether there is a "continuing contravention", if it is in the public interest to accept the late complaint, and no substantial prejudice will be caused to any party because of the delay in filing: *Chartier v Sooke School District No 62*, 2003

BCHRT 39 at para. 12 Whether it is in the public interest to accept a complaint filed outside the 1-year time limit is a multi-faceted consideration, which is governed by the purposes of the HRC, and done on a case-by-case basis. Factors that may be important considerations in determining whether it is in the public interest to accept a late-filed complaint include the reasons for the delay, the length of the delay, the significance of the issue raised in the complaint and fairness in all the circumstances. The list of factors that the Tribunal may consider is non-exhaustive:. *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite*, 2014 BCCA 220; *Hoang v. Warnaco and Johns*, 2007 BCHRT 24.

I. Judicial Review

If an individual disagrees with a decision of the Tribunal, he or she may ask the Supreme Court of British Columbia for a "judicial review". A judicial review differs from an appeal to a higher court. In an appeal, the court has the authority to decide whether or not it agrees with a decision. In a judicial review, the BC Supreme Court simply decides whether or not there is a "ground" for review and may only disturb the Tribunal's decision if it can demonstrate that the Tribunal:

- Made an "error of law", e.g., an incorrect interpretation of the HRC;
- Made a finding of fact that is unreasonable or based on a lack of evidence;
- Acted unfairly with regards to the rules of procedure and natural justice; or
- Disregarded legislative requirements; used its discretion arbitrarily, in bad faith, or for an improper purpose; and/or based its decisions on irrelevant factors.

The applicable "standards of review" applicable to the Tribunal's decisions is set out in s. 59 of the Administrative Tribunals Act.

If the Tribunal has made any of these errors, the Court may set aside the decision and will usually direct the Tribunal to reconsider the matter. Section 57 of the *Administrative Tribunals Act* mandates that an application for a judicial review must be submitted within **60 days** of the date the Tribunal's decision was issued. In order to seek a judicial review, an individual is required to prepare a petition and affidavit, file the petition and affidavit at the BC Supreme Court, and serve a copy of the filed petition and affidavit on the Tribunal, the Attorney General of British Columbia, and any person whose interests may be affected by the order you desire the Court to make.

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References

[1] http://www.canlii.org/en/bc
[2] http://www.bchrc.net/duty_to_accommodate
[3] http://www.bchrt.bc.ca/law-library/decisions

IV. Canadian Human Rights Act

The *Canadian Human Rights Act* (CHRA) prohibits certain forms of discrimination under federal jurisdiction. As mentioned above in **Section I** of this chapter, that jurisdiction is set out in section 91 of the Constitution Act, 1867. The CHRA applies to both public and private bodies, as well as individuals. It covers federal departments and agencies like federal Crown corporations, chartered banks, the broadcast media, airlines, buses and railways that travel between provinces, First Nations, and other federally regulated industries such as mining operations.

A. Prohibited Grounds of Discrimination

The prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability (mental or physical, including previous or present alcohol dependence), and conviction for an offense for which a pardon has been granted or in respect of which a record suspension has been ordered. These grounds apply to all activities covered by the CHRA. Section 3(2) explicitly makes discrimination on the grounds of pregnancy illegal, and section 14(2) explicitly prohibits sexual harassment.

Note that the federal equal pay provisions are broader than the provincial ones since it is discriminatory practice to pay different wages to female and male employees for work of "equal value", even if the work itself is not similar. Factors considered when defining "equal value" include skills required, responsibilities, and working conditions. Pursuant to section 65(1), employers are liable for the discriminatory acts of their employees.

B. Activities Where Discrimination is Prohibited

The activities where discrimination is prohibited include:

1. The provision of goods, services, facilities or accommodation customarily available to the general public (s 5)
2. The provision of commercial premises or residential accommodation (s 6)
3. Employment, employment application advertising, and membership in, or benefit from, employee organizations (ss 7-10)
4. Unequal wage payment for male and female employees unless justified under s 27(2) (s 11)
5. Publication of discriminatory notices, signs, symbols, emblems or other representations (s 12)
6. Harassing an individual on prohibited grounds of discrimination (s 13)
7. Situations where an individual filed a complaint under the CHRA (s 14)

C. Exceptions

Under section 15, there are general exceptions to practices considered discriminatory, comparable but not identical to those found in BC's HRC, such as those relating to bona fide occupational requirements, pension plans, and insurance schemes. Retirement policies are still exceptions under sections 9 & 15 of the CHRA, which now represents a significant difference from the HRC, where mandatory retirement is now generally prohibited.

Section 16 of the CHRA (similar to section 42 of the BC HRC) states that an equity plan designed to reduce the disadvantage suffered by a group of individuals, where that disadvantage is related to one of the grounds discussed above, is not discrimination in and of itself.

Previously, section 67 of the CHRA stated that the CHRA did not apply to the Indian Act, with the result that any action taken by band councils or the federal government under the Indian Act was exempt from the CHRA. Section 67 has since

been repealed, but this was a contentious move amongst some First Nations leaders.

D. Filing a Complaint Under the Act

Any individual or group may file a complaint with the Canadian Human Rights Commission. If someone other than the alleged victim files a complaint, the Commission may refuse to proceed without the victim's consent. The Commission itself may lay a complaint or it may discontinue an investigation if it deems the complaint to be frivolous or if other alternative proceedings would be more appropriate.

The Commission will provide advice and assistance in proceeding with the complaint. Correspondence may be addressed to the Ottawa office, but in practice it is generally preferable to deal with the Commission's Vancouver office. Please consult the Commission's website for a detailed description of the complaint process (see Section I.B:Resources, above).

1. How Complaints are Handled

In most cases, it is possible and preferable for complaints to be resolved through discussions leading to mutual agreement. To facilitate this, the CHRA provides for an investigation stage and where necessary, a conciliatory stage. By law, the complaint investigator cannot also be the conciliator, although in practice the investigator attempts to resolve the dispute whenever possible.

Instead of or subsequent to these stages, the Commission may refer the complaint to a quasi-judicial Canadian Human Rights Tribunal. The Commission has the power to assist the claimant at all stages of the process, and usually represents the claimant at the hearing stage. However, it acts in a more neutral fashion at the investigation and mediation stages. The Tribunal may award damages and relief similar to an injunction. An order of the Tribunal is enforceable as if it were an order of the Federal Court. Any judicial review is governed by the limitation period set out in the *Federal Courts Act*, RS 1985, c F-7 (see **Chapter 5: Public Complaints Procedures** of the LSLAP Manual). It is an offence, punishable by summary conviction, to obstruct any investigation under the CHRA (s 60).

The CHRA can award punitive damages in the amount of $20,000 where they believe that the discriminatory conduct was carried out recklessly or with wilful disregard. This represents a difference between the CHRA and the HRC, as the HRC's focus is remedial rather than punitive.

2. Reasons Why Complaints May Not Proceed

Section 41 of the CHRA lists the most common reasons for the termination of an investigation. The reasons are very similar to those discussed under the HRC, including:

- a) the complaint is beyond the jurisdiction of the Commission;
- b) the complaint could more appropriately be dealt with under another Act;
- c) the complaint is trivial, frivolous, vexatious, or made in bad faith;
- d) the complainant has not exhausted all reasonable alternative grievance or review procedures (if collective agreement or arbitration procedures are available, the client will be expected to pursue them); and
- e) the complaint was not filed within **one year** of the alleged act of discrimination (the Commission has the power to extend this period in certain circumstances).

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V. BC Civil Rights Protection Act

The Ministry of the Attorney General of British Columbia administers the *Civil Rights Protection Act* (CRPA), which defines prohibited acts and civil remedies or damages that may be available for victims of such acts. The types of actions and remedies available under the CRPA may not be suitable for all complainants, as the prohibited acts are tortious in nature and such cases are often heard in the Supreme Court of British Columbia. Usually the HRC or CHRA, whichever applies, will provide more useful protection for complainants who have suffered discrimination.

The more pertinent points of the legislation are:

- “Prohibited act” is defined as conduct or communications that interfere with civil rights by promoting hatred or contempt or by promoting the inferiority or superiority of groups classified by colour, race, religion, ethnic origin, or place of origin (s 1).
- The Attorney General may choose to intervene in such actions, but, in any case, the Attorney General must be notified within 30 days of the start of an action (s 3).
- Types of damages: general or exemplary. The court may order other types of relief such as an injunction in addition to or in lieu of damages (s 4).
- For an offence under the Act, a person may be liable for a fine up to $2,000 and/or six months imprisonment. A corporation or other public body may be liable for a fine of up to $10,000, and any directors or top personnel who were or should have been aware of the offending conduct may be found personally liable (s 5).

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VI. Rights of the Child

In addition to any claim under the federal or provincial codes, various protections exist for children under provincial statutes and the Criminal Code, RSC 1985, c C-46, concerning educational and medical issues.

A. School

1. Compulsory Attendance and Registration

The *School Act*, RSBC 1996, c 412, states that all children must be enrolled by the first school day of a school year if, on or before December 31 of that school year, the child will have reached the age of 5 years (s 3(1)(a)). Parents may, however, defer enrolment until the first school day of the next school year (i.e. until age 6) (s 3(2)). Once enrolled, children must remain in an educational program until they are 16 (s 3(1)(b)). Whether children attend public or private schools, they must be registered on or before September 30 in each year either with a school or with the Minister of Education (s 13). Students must also comply with the rules, code of conduct, and policies set by the Board of Education or by their particular school (s 6).

Under section 12 of the *School Act*, parents are authorized to educate their children at home or elsewhere provided they register their children pursuant to section 13.

2. Discipline

The *Criminal Code* (s 43) allows a school teacher to use discipline that is reasonable in the circumstances. This section refers to the use of The Criminal Code (s 43) allows a schoolteacher to use discipline that is reasonable in the circumstances. This section refers to the use of reasonable force. The definition of reasonable force is "the substantial social consensus on what is reasonable correction supported by comprehensive and consistent expert evidence on what is reasonable". Please see *Canadian Foundation for Children, Youth and the Law v Canada*, 2004 SCC 4. However, the School Act specifically states that discipline of a student must be similar to that of a kind, firm, and judicious parent, but must not include corporal punishment (s 76(3)).

3. Rights of Parents and Students

Students and parents have the right to consult with a teacher or administrative officer (*School Act*, ss 4 and 7(2)). As well as having the right to information regarding the attendance, behaviour and progress of their children in school (s 7(1)(a)), parents may request an annual report on the general effectiveness of the program their children are enrolled in, without their children's consent. They are also entitled to belong to a parent's advisory council (s 7(1)(c)). The councils can be formed by application to the Board or Minister of Education, and can advise the Board and staff of the school (s 8).

4.School Records

Individual students and their parents are entitled to examine, on request, all records pertaining to that student while accompanied by the principal or a person designated by the principal (*School Act*, s 9). Student records identifying the student will not be released to other parties except when required by law, or if the student or parent consents to the disclosure in writing.

5. Language of Instruction

Every student in B.C. is entitled to instruction in English (*School Act*, s 5). However, under the *Canadian Charter of Rights and Freedoms*, students whose parents are citizens of Canada have the right to receive primary and secondary school instruction in either English or French if:

- their parents' first language is that of the English or French linguistic minority population of the province in which they reside, and they still understand that language; or
- their parents received their primary school instruction in Canada in English or French and the parent resides in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province.

6. Other Concerns

The *School Act* states that public schools must be conducted on strictly secular and non-sectarian principles (s 76(1)), meaning they cannot be religiously affiliated..

Moore v British Columbia (Education), 2012 SCC 61 at para 36 determined that the BC government had discriminated against a dyslexic boy when it cut the special needs program during a financial crisis. The Supreme Court of Canada found that he was denied a service customarily available to the public. The service denied was meaningful access to education generally, not specific access to a special needs program. Discrimination was found because the cuts disproportionately affected special needs programs and there was no evidence that the BC government considered other options.

Parents are jointly and severely liable for intentional or negligent damage to school property caused by their children (s 10). There is no action against a school board or its employees unless the actionable conduct included dishonesty, gross negligence, malicious or wilful misconduct, or the cause of action is libel or slander (s 94(2)). Note section 94 limits liability, but does not absolve a board from vicarious liability.

Any person who believes a child, whether registered or not, is not enrolled in an educational program can make a report to the superintendent of schools (s 14(1)). An action lies against that person only if the report is made maliciously (s 14(3)).

School boards have a duty to provide an educational environment that is free from discriminatory harassment. This rule was affirmed by the Supreme Court of Canada on October 20, 2005, when it upheld a BC Human Rights Tribunal finding of discrimination against a BC school board in the homophobic harassment of one of its students (see *North Vancouver School District No 44 v Jubran*, [2005] SCCA No 260 at paras 91–102 (with costs and without reasons)). Note that while the student was found to have been discriminated against on the basis of sexual orientation, it was irrelevant whether he identified himself as homosexual, or whether his harassers knew or believed him to be homosexual.

B. Medical Attention

1. Obligation to Provide Treatment

The *Criminal Code* (s 215) imposes criminal sanctions on parents who fail to provide their children with the necessaries of life until they reach the age of 16. This has been held to include adequate medical treatment, and a court may also extend the duty to an older child who cannot become independent of their parent(s) due to factors including age and illness. Section 218 of the *Criminal Code* imposes criminal sanctions on any person who abandons or exposes a child less than 10 years of age to the risk of permanent injury, damage to his or her health, or risk to his or her life.

Under the *Child Family and Community Service Act*, children under the age of 19 may be removed if they are deprived of necessary medical attention, but only by a court order (s 29). Where a child is removed, emergency medical care can be given at the Director's authorization (s 32). In cases where the only issue is the parents' refusal of necessary medical attention, the Director can apply for a court order authorizing the medical care without removing the child from the parents' custody (s 29).

2. Consent to Treatment

In Canadian case law, the courts have found that a minor can consent to treatment as a "mature minor" if that particular person has the mental capacity to understand the nature and risks of that particular treatment (see also *Infants Act*, s 17). A minor, who is living away from home, working, or married, may be found to be autonomous, and free from parental control, and thus capable of consenting to or refusing treatment on his or her own behalf.

Under the *Infants Act*, (s 17), a minor can consent to surgical, medical, mental, or dental treatment without the agreement of their parents, so long as the health care provider has:

1. Explained to the minor and has been satisfied that the minor understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care; and
2. Has made reasonable efforts to determine and has concluded that the health care is in the minor's best interests. This includes requests for birth control advice and products, and for abortions.

A court of competent jurisdiction may order medical treatment for any child if the court is satisfied that such treatment is required, and that parental consent is being unreasonably withheld. This is part of the inherent *parens patriae* (guardian of persons under a legal disability) jurisdiction of the Supreme Court and is now codified under section 29 of the CFCSA.

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VII. LSLAP's Role

A. LSLAP's Role in Provincial and Federal Proceedings

In provincial proceedings, clinicians may assist clients in completing the Complaint or Response Forms at the initial stages. We may also be able to provide full representation to clients at the BC Human Rights Tribunal, but are usually limited to less complex cases where the scheduled hearing is set for two days or fewer. Where LSLAP cannot help directly, we can refer claimants to the BC Human Rights Clinic, who may be able to assist. The BC Human Rights Clinic assists hundreds of people every year. This lawyer-run program ranges from providing summary advice to full representation for hearings at the BC HRT.

The BC Human Rights Clinic accepts applications for assistance made within thirty days after a complaint has been accepted for filing. However, they may be able to offer assistance for those who are applying beyond the thirty-day limit.

In the federal system, the Canadian Human Rights Commission (CHRC) has been set up to assist individuals with drafting complaints and to facilitate mediation. Students should therefore refer clients to the CHRC for assistance, though they can remain involved in the process by providing representation at mediation.

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Chapter Seven - Workers' Compensation

I. Introduction

This chapter covers basic legislation, policy, and procedures associated with appeals under *Workers' Compensation Act*, RSBC l996, c 492 [WCA].

The WCA is a provincial statute creating a regulatory body called the Workers Compensation Board of B.C. Since 2003, this body works under the name of "WorkSafe B.C." and is referred to as "the Board" or WCB in this section. The Board has exclusive jurisdiction over compensation for injured workers for workplace injuries amongst other duties. The Board's origins are perhaps more interesting than its current form suggests.

Some of the earliest forms of workers' compensation started with pirates in the pre-Revolutionary Americas. A pirate who lost an eye was entitled to 100 pieces of eight, roughly one year's pay. With the industrial revolution, more evolved workers' compensation schemes followed in Europe and eventually spread back to North America where they are now mandatory across Canada and the United States.

Today's workers' compensation schemes, including BC's, are based on the historic trade-off: employers fund a no-fault insurance scheme for injured workers, to compensate them and assist in their medical treatment, vocational rehabilitation (retraining), and in pension for disability. In return, workers give up their right to legal action against their employer for work-related injuries and occupational diseases [WCA s 10]. Ideally, this approach offers several benefits. It takes workplace injury claims out of the courts, reducing clutter for them and cost and delay for the workers. It gives greater certainty of coverage to workers and streamlines the compensation process. Finally, like any insurance scheme, it spreads losses amongst employers and eliminates the concern about ruinous claims. Unfortunately, reality often falls short of these ideals and, especially in light of changes since 2002, injured workers often require help and even representation.

Aside from compensation, The Board's other duties consists of:

Regulation of Occupational Health and Safety (OH&S): In BC, the Board is responsible for workplace health and safety regulations, investigations and enforcement as set out in Part III of the WCA and in the *Occupational Health & Safety Regulation*. While most enforcement orders and penalties are against employers for safety violations, orders may also be issued against workers. Under the WCA, workers are entitled to refuse unsafe work and to be protected from retaliation for reporting unsafe work practices.

Employer Assessments: The WCA grants specific powers to the Board to set rates and collect assessments from employers to create an Accident Fund. The Accident Fund must be sufficient to finance the compensation system and each employer is assessed annually based on a complex formula (see below). The WCA requires the Board to operate a fully funded system.

A. Scope of This Section

This section advises workers and their representatives on the overall structure and basic procedures of the Board and its appeal body, the Workers Compensation Appeals Tribunal [WCAT]. It is intended to assist in working on cases and appeals arising from Board decisions made under the WCA. The vast majority of appeals involve Board decisions denying injured and disabled workers particular compensation benefits. This is not surprising given that current Board policies are often complex and difficult to understand and that about 100,000 compensation claims are filed by injured

workers every year, with about half of these claims involving a serious injury or disability.

Therefore, the primary focus of this material is on Compensation matters which may be at issue in appeals. Assessment and OH&S issues are addressed briefly at the end of the chapter. The Appendices provide information for referrals and community resources, and helpful links for finding law and policy. In particular, the WCA requires the Board, through its Accident Fund, to support the Employers Advisors and Workers Advisors who can provide employers and workers with free legal assistance. However, the extent of the assistance provided by these Advisors changes from time to time and between locations.

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II. Governing Legislation and Resources

A. Legislation

The *Workers Compensation Act* **[WCA]** is the legislation which creates and governs the Board. In 2002 and 2003, the WCA was substantially amended and the key transition date is **June 30, 2002**. Workers who were injured before or on June 30, 2002 (with a few exceptions), have the former WCA apply to their claims whereas workers who were injured after this date are under the amended or “new” WCA.

The new WCA revised sections 99 and 250 of the Act to make Board policy binding on all Board decision-makers and appeal bodies (i.e. Review Division and WCAT). The courts have since determined that the effect of these provisions is to give Board policy a legal status equivalent to subordinate legislation (see below).

The WCA amendments also changed the appeal structure for Board decisions. Since March 1, 2003, there are two levels of appeal for most Board decisions:

- i. an internal review at the Review Division (RD); and
- ii. an external de novo appeal at the Workers Compensation Appeal Tribunal (WCAT), which is an independent tribunal.

In 2004, the *Administrative Tribunals Act*, **SBC 2004**, **c 45 [ATA]** came into effect. The ATA applies to all administrative tribunals in B.C., including WCAT. The ATA sets out certain procedural requirements for WCAT and also sets a 60 day time limit for filing a judicial review from a WCAT decision. The ATA does not apply to Claim or Review Division decisions.

Citations for the WCA, key amendments and other relevant legislation are attached in the Appendix. All legislation and Board policies are available on the Board website [1]. Applicable ATA provisions and their effect on WCAT procedures are also incorporated in WCAT’s **Manual of Rules, Policy and Procedures** [MRPP], available on the WCAT website [2].

B. Binding Policy for Compensation Claims and Appeals: RSCM II

Section 99 of the WCA requires the Board to apply any applicable Board policy which has been passed by the Board of Directors. This means that published Board policy is binding on all Board decision-makers, including the Review Division; a similar provision makes Board policy binding on WCAT [section 250].

Section 99 of the WCA also states that all decisions "shall be given according to the merits and justice of the case and where there is a doubt as to any issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favourable to the worker". This means that in WCB cases there is a unique standard of proof: the "as likely as not" standard. This is less than the balance of probabilities ("more likely than not") and, properly applied, should favour compensation for the injured worker.

In practice, Board policy confines, or attempts to confine, the nature of relevant evidence and to provide the framework for how evidence is to be assessed and weighed. Therefore, in appeals, it is important to identify the correct applicable Board policy whether or not it is identified in the initial Board decision.

Compensation policy is set out in the **Rehabilitation Services and Claims Manual, Volume II [RSCM II]**. The current RSCM II is available at the WCB site [1] under the "Law and Policy" tab, followed by the "Compensation Policies" link under "Claims & Rehabilitation". On the sidebar, there are tabs for both RSCM Volumes I and II. Volume I applies to claims initiated before June 30, 2002 [RSCM I] and Volume II applicable to any claims initiated after June 30, 2002.

The RSCM II has eighteen chapters. Each chapter focuses on a particular entitlement issue or benefit and contains the policies relating to that issue. Each policy is numbered and dated and is typically 1-3 pages long. The RSCM II index (also available through the RSCM II link) is very helpful for locating any relevant chapter and policy.

Board policies change frequently. Each new version of a policy is passed by the Board of Directors and is published with both a specific effective date and a determination as to whether or not the changes apply to appeals. This information is set out at the end of each policy. Each new Board policy is incorporated into the electronic version of the RSCM II available on the Board website. When handling an appeal, students should determine the relevant applicable policy (especially for old claims) and should also review the electronic version of newer policy to ensure that it is still current. The Board website also contains all the former or "archived" policy manuals so that any relevant policy is accessible, even for old claims.

If a particular Board decision quotes part of a policy, it is good practice to read the whole policy and also to look at the surrounding policies to understand the full framework for that type of benefit. Also, although a particular policy may be quoted in a decision, the decision-maker may or may not have applied the right policy. It is best to assess the worker's issue and determine whether or not alternative policies may be the correct applicable policies.

Lastly, Board policy must be consistent with the WCA. If someone considers that a Board policy is inconsistent with the WCA, they are entitled to challenge that policy in a WCAT appeal in which it is relevant. If the WCAT panel agrees that the policy is not supported by the WCA, the panel will refer the matter to the WCAT Chair; if the Chair agrees, they will refer the policy to the WCB's Board of Directors for ultimate determination and possible policy change (s. 251, WCA).

C. Non-Binding Practices

Both WCB and WCAT also provide useful interpretive guides that combine policy, important decisions, and best practices. WCB issues Practice Directives (PD) that advise on many particularly complex issues such as chronic pain, mental disorders, and overpayments. These are accessible through the "Law and Policy" tab at the WCB site [1] under the title "Compensation Practice Directives and Reference Guides". WCAT's guidelines are published in the MRPP discussed above. These publications can be extremely useful and are worth exploring though neither are binding on their respective bodies.

D. Arguing Medical Evidence

As in any legal arena, at all stages of the Workers' Compensation process it is vital to support claims with evidence. Often this can be especially challenging when dealing with medical issues for many reasons. These issues require specialised knowledge, they often do not lend themselves to certainty even for professionals, and most injured workers have limited time and money to spend collecting evidence. Conversely, WCB has salaried Board Medical Advisors (BMA) and WCAT is "presumed to be an expert in all matters over which it has exclusive jurisdiction" (*Fraser Health Authority v. Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 (*Fraser Health*)). Nevertheless, WCB and WCAT are not presumed to have medical or scientific expertise and as such they are not permitted to ignore uncontradicted expert advice (*Page v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493) particularly in light of the "as likely as not" standard. While it may be useful to document subjective claims of injury, pain, and limitations, workers should bring as much objective expert evidence as possible. This may include physiotherapists, massage therapists, chiropractors, and dentists in addition to a family doctor. If necessary and possible, ask to be referred to a specialist.

Also recall that medical diagnosis and medical causation does not need to be proved to the level of scientific certainty and that the finder of fact is permitted to make common sense inferences (*Snell v Farrell*, [1990] 2 SCR 311; *McKnight v. Workers' Compensation Appeal Tribunal*, 2012 BCSC 1820).

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References

[1] http://www.worksafebc.com
[2] http://www.wcat.bc.ca

III. Limitation Periods

WCB deadlines are both short and generally strict so while there are reminders throughout this section outlining relevant deadlines, they are all collected here for quick reference. Steps 3-7 are only as applicable.

1. Report the claim to employer: Do this **as soon as possible**. Even small delays can prejudice your claim.
2. File a claim with WCB: Any claim must be filed within **1 year** of the date of injury. If a claim is filed later than one year, it may be accepted if it meets criteria of "special circumstances" under Section 55 (see below).
3. Reconsideration of Board Decision: The Board may change any past decision so long as it the inquiry is completed within **75 days**.
4. Appeal to Review Division (RD): **The time limit for applying for an Internal Review is 90 days.** Workers seeking appeal must always file a Request for Review to the RD within 90 days of the date of the decision. Workers are not required to submit arguments of evidence at the Request for Review stage, but only to file the Request for Review form, which includes some basic information and a brief description of what denied benefits they are seeking and why. Therefore, if the 90-day limit is approaching, it is far more important to submit the Request for Review on time than it is to ensure you have fully stated your reasons for review – those could always be added to later. If a worker has missed the 90-day time limit, they should file the review and request an extension of time providing reasons why they are late—the Chief Review Officer may grant an extension of time if good reasons are shown, but Extension of Time applications are not commonly successful **Most Internal Review Decisions must be made within 5 months (150 days).** The WCA now requires that the internal review officers complete their review of the Board's decision within **150** days of the date when the request for review was made.
5. Reconsideration by Review Division: Limited inquiry but **must be completed within 23 days** of original RD decision VII.A.
6. Appeal to WCAT: **The time limit for appealing to WCAT is 30 days.** If a worker or employer is unhappy with the outcome of the internal review of the RD decision being issued, they must appeal to WCAT within 30 days of the RD decision being issued. **Most WCAT Decisions must be made within 6 months (180 days) of receiving the Claim File from the Board.** This general time limit can be extended by the chief review officer due to the complexity of the matter, a request by the worker or employer, or the need to await a pending decision on another claim raising similar legal or policy issues. **Appeals from WCB to WCAT (90-day time limit).** There are certain types of appeals which go directly to WCAT without the decision first being reviewed internally. These include appeals over a decision regarding alleged discrimination by an employer against a worker for making a claim, or reporting a safety violation.
7. Amendments by WCAT: WCAT may amend to correct minor clerical errors. Request for correction of a clerical error **must be completed within 75 days** of the original decision.
8. Reconsideration by WCAT for new evidence of procedural unfairness has no time limit.
9. Judicial Review: Party must file a petition for Judicial Review within **60 days** of date of a WCAT decision being appealed.

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IV. Compensation Claims

A. Introduction

Sections 96 and 113 of the WCA give the Board exclusive jurisdiction over workers' compensation matters. The courts have generally respected this strong privative clause.

Section 96 specifically grants the Board the exclusive jurisdiction to inquire into, hear, and determine:

- a) whether an injury has arisen out of or in the course of an employment;
- b) the existence and degree of disability by reason of an injury;
- c) the permanence of disability by reason of an injury;
- d) the degree of reduction of earning capacity by reason of an injury;
- e) the average earnings of a worker, for the purpose of levying assessments, and the average earnings of a worker for purposes of payment of compensation;
- f) the existence of the relationship of a member of the family of a worker as defined by the Act;
- g) the existence of dependency;
- h) whether an industry is within the scope of the Act, and the class to which an industry should be assigned for the purposes of the Act;
- i) whether a worker is in an industry within the scope of the Act and entitled to compensation under it; and
- j) whether a person is a worker, a subcontractor, a contractor or an employer within the meaning of the Act.

Section 113 similarly grants exclusive jurisdiction to the Board to inquire into and determine health and safety matters under Part 3 of the Act.

Once an injured worker applies for compensation, the Board will begin to assess whether or not to accept the claim. Once the claim is accepted, the Board will then adjudicate the worker's entitlement to the type of compensation benefits listed above.

The nature of the worker's injury will generally determine the relevant law and policy. The main types of injuries are:

- a) Personal Injury (physical or physical psychological)- Section 5 of the WCA
- b) Psychological injury (only mental stress)-Section 5.1 of the WCA
- c) Occupational Disease- Section 6(1) and Section 6(3) of the WCA
- d) Hearing Loss- Section 7 of the WCA

B. Overview: Initial Acceptance or Denial of A Compensation Claim/Disclosure & Appeals

After a worker makes an application for compensation, a Board officer issues a decision (usually in writing) accepting or denying the claim. For a compensation claim to be accepted, the Board must generally find:

- a) STATUS: The applicant is a "worker" covered under the Act.
- b) DISABILITY: The applicant suffered a personal injury or an occupational disease, causing disability.
- c) CAUSATION: The worker's disabling injury or disease was caused by work.
- d) TIME LIMITS AND PROCEDURES: The worker submitted a timely and proper application.

If a claim is denied by the Board, it is typically because one or more of the above conditions was not met. The Board decision typically sets out the reason why the claim was denied and cites the relevant policy from RSCM II. However, the evidence on which the decision is based may or may not be summarized in the decision.

All the evidence on which the decision is based will be in the claim file, which may also include memos from case managers (CMs) and clinical opinions from Board Medical Advisors (BMAs). The claim file may also contain detailed phone memos providing the CMs with a summary of the worker's evidence. The claim file evidence as a whole provides the basis for the Board's decision and is evidence which will be available and considered by the appeal bodies, RD and WCAT.

Workers are entitled to a copy of their claim file (paper or CD) on request and will also automaticallybe sent a copy of the claim file if they file an appeal. In addition, the worker may obtain online access to parts of their claim file by calling the Board. These matters are covered in the section below on Access to Files (see section VII). Disclosure may be given directly to the worker's representative if the disclosure request or appeal notice is accompanied by a valid authorization of representation, signed by the worker. [Authorization forms are available on the Board website].

If the worker (or the employer) disagrees with the Board's decision, he or she may appeal the decision to the Review Division (RD) **within 90 days of the Board decision**. The RD is a review body internal to the Board; links to RD material, including RD appeal forms, are available on the Board website [1]. The RD must issue a decision within 180 days of the appeal being filed. The RD decision may then be appealed to an independent tribunal, the Workers' Compensation Appeal Tribunal (WCAT) within **30 days of the RD decision**. WCAT appeal forms are available on the WCAT website [2]. See Section VII: Appeals for more details.

Section 55 of the WCA requires that generally, a worker must apply for compensation **within one year** of the date of injury. The one year deadline to claim under Section 55 provides three exceptions when late applications may be accepted:

1. If exceptional circumstances exist which precluded the worker from making an application within one year and the application is less than three years after the injury and the application is more than three years old (s.55(3.2)); or
2. Death or disablement is due to an occupational disease, sufficient scientific evidence did not exist at the time of the application and there is new scientific evidence regarding the occupational disease causation; in addition, the worker has made an application not more than three years after this new date (s.55 (3.2)); or
3. The Board may reconsider an old occupational disease decision that meets the Section 55 (3.2) criteria. If a worker's application has been denied because of a late application, please consult section 55 of the WCA and Policy #93 of the RSCM II to assess what evidence of "exceptional circumstances" may be relevant in that case.

C. Overview: Worker Disability and Compensation Benefits

Of the 100,000 workers injured on the job in B.C. every year, about half suffer minor or inconvenient injuries and return to their pre-injury employment in quick order. Most of these claims are accepted by the Board for health care benefits only (medical treatment, medication, etc.). After a worker makes an application for temporary disability, the Board determines whether the worker is totally temporarily disabled (TTD) and if so, pays full wage loss benefits under Section 29 of the Act. If the worker is only partially temporary disabled (TPD) i.e. can work some hours or some duties, the Board will pay partial wages under Section 30 of the Act. If the worker is hurt but not disabled from work, the Board will pay no wage loss but may accept his claim for health care benefits only.

Of those workers whose injuries are more serious, there are several common profiles of disability and recovery. The following examples are to illustrate common compensation benefits and scenarios for disability.

- The worker suffers a broken wrist in his dominant hand and cannot perform his job duties as a result. His doctor recommends a certain number of weeks to recover after which he is cleared to return to work (RTW) full duties. The worker makes an application for compensation. If his claim is accepted, the Board sets a short-term wage rate (STWR) on his claim (based on his average earnings) and the worker is paid temporary wage loss benefits (TWL) at

this rate for his days of lost work. The Board also covers any health care costs such as treatment or medication. If there are no permanent medical consequences to this injury and the worker returns to work full duties, the Board issues a decision that the injury is "resolved" and his claim is closed. The worker is not referred for any other benefits such as Disability Awards (DAs) or Vocational Rehabilitation (VR).

- The worker suffers a more serious injury to his hand (e.g. a crush injury). If his claim is accepted, he again receives TWL for his time away from work. However, after 10 weeks, the Board issues a new long-term wage rate (LTWR) based on a more complex formula in law and policy. At a discretionary point, the Board considers that the worker's condition is no longer "temporary" and must make one of the following decisions about the worker's medical condition. Either:
  - a. His injury has "**resolved**" with no permanent impairment and he can RTW and perform full duties. In this case (as above), the Board will issue a "resolve" decision ending his TWL benefits and his file will be closed; or
  - b. His injury is not fully resolved and he is left with some permanent functional impairment. In this case, the Board will issue a "plateau decision", setting a date at which it considers that the worker's condition is no longer temporary but it has reached a medical "plateau" (that is, the condition will not significantly change in the next year). This "plateau" decision also ends TWL benefits on the plateau date but will also refer the worker to DAs to assess the nature and severity of this permanent impairment. In a separate decision, the DA will rate his impairment according to a schedule and award the worker "permanent functional impairment" (PFI) pension (impairment % compared to a healthy person) in a "PFI decision". The PFI pension is awarded regardless of whether the worker returns to work or not as it is compensation for the physical impairment, not for lost wages.

The plateau decision also sets out whether the Board thinks that the worker can return to his pre-injury job, performing full duties, with the impairment. If the worker can return to his pre-injury work, the Board does not need to retrain him and there is no referral made to VR.

However, if the Board considers that the worker cannot return to full duties with his impairment, the "plateau decision" will state this and the worker will be referred to VR for further help with employment.

The VR process is set out below and goes through five phases:

- **Phase One**: Tries to have the worker return to the same job with the same employer
- **Phase Two**: If unable to return to the same employer, works with worker andemployer to modify or identify job opportunities within the same company
- **Phase Three**: If unable to return to the same company, tries to help identify suitable job options related to workers experience and skills.
- **Phase Four**: If the worker is unable to return to the suitable work in the same or related industry, tries to help worker identify options in other injuries
- **Phase Five**:If the worker needs additional skills in order to return to suitable work, they may cover the cost of training to help develop skills

The first phase is to see if the employer can or will accommodate the worker and his impairment. If there is no accommodation and the worker does not have a job to return to, VR goes through further phases to assess what VR assistance the Board should provide to help the worker become unemployable, given his permanent injury. VR benefits are discretionary but typically include a VR plan for the worker to retrain and/or have a job search and wage loss benefits for this period of VR time. If successful, VR results in the injured worker successfully adapting to employment with a permanent injury.

It is possible that VR is not successful or that a seriously injured worker is simply too disabled to ever be competitively employable. In these cases, the Case Manger must decide if the impact of the worker's disability is "so exceptional" that a PFI pension is inadequate financial compensation for the worker's loss of employability. In such cases, the worker may

be entitled to be assessed for a wage replacement pension, known as a "loss of earnings" or LOE pension. The "LOE pension decision" is issued by the case manager, either as part of the plateau decision or after a VR process. If awarded, full LOE pension benefits are equivalent to ongoing TWL benefits. However, the criteria for having an LOE assessment are quite onerous under the new WCA and they are rarely awarded.

D. Overview: Claims Procedures & Process

Reporting the Injury

All injuries that cause a loss of work (or which could lead to a future claim) should be reported **as soon as possible** by the worker or, if death results, by the Worker's dependants, to the superintendent of the place of employment, first aid attendant, or other official. Claims have been denied (at least until an appeal took place) because a worker waited even a few days, hoping the pain would go away. In all but the most minor cases, workers should also seek medical attention promptly.

The employer must complete a report to the Board **within three days** of receiving the worker's report, or immediately if death results. The attending physician also completes a Physician's First Report within three days of first seeing the worker, and fills out progress reports after each visit.

Making a Claim

A worker has **one year** to make a claim for compensation under s. 55 of the WCA. This may be extended to three years in certain circumstances. In extreme cases, the Board may consider even longer extensions.

Workers can call the WCB directly to report an injury and file a claim. Teleclaim is available to workers across the province, Monday to Friday, from 8 a.m. to 4 p.m. See the Board website for current contact details. Teleclaim is designed to simplify the process, reduce the amount of paperwork and provide a personalized service based on each individual's needs. Before calling the Board to report an injury, the worker should write down the key information about the job, how the injury occurred, and what the doctor has said about the condition. The worker's statement during a Teleclaim report will form part of the claim file, and could be used as evidence in a future appeal proceeding. The Teleclaim transcript may be sent to the worker. If it is not sent, the worker should request a transcript.

Exception: Electing to Proceed Outside the WCB

In certain circumstances, a worker may choose to sue the person or company responsible for causing a work injury rather than making a claim for Workers' Compensation. This is most common if the injury arises out of a motor vehicle accident. For example, if the injury is caused by a person not covered by the WCA (i.e. a delivery driver injured by a private citizen in a motor vehicle accident), then the worker can elect to sue a non-covered "third party" instead of claiming compensation. The Board can also sue the third party in the worker's name; this is termed "subrogation". If the worker claims compensation, the Board has exclusive jurisdiction to decide if it will take legal action against a third party. If it does take action and recovers more than the total value of the work benefits, the worker receives the difference minus the 29% administration fee. If the Board recovers less than the total value of benefits, the worker will keep the full compensation. A worker cannot waive or assign his or her right to compensation. An "election" is an important and complex decision (see s. 10 of the WCA)and workers should be referred to the Worker's Advisors Office website at http//www.labour.gov.bc.ca/wab or assisted before deciding whether to claim compensation. If a worker chooses to pursue court action and is unsuccessful, or the award is less than he or she would have received under the compensation regime, the worker may still be able to claim compensation. However, the original claim for compensation must have been made within the time limits outlined above.

Procedure After Application

The family doctor plays a crucial role in the worker's claim as well as his or her treatment. The WCA requires that the doctor file an initial report with the Board, as well as progress reports for each visit. Doctors are also required to give all necessary advice and assistance to a worker making an application for compensation, including furnishing proof that may be required. Some doctors are very helpful to injured workers, while others refuse to get involved in what they consider to be a legal issue. Such an attitude can be very harmful if there is a medical dispute between the Board and the worker.

The Board has extensive inquiry and investigative powers. It may require the worker to be medically examined by a WCB staff doctor or by independent consultants. WCB officers called Claims Adjudicators, Disability Awards Officers, and Rehabilitation Consultants decide whether to accept the claim and what benefits, if any, should be paid. Although rarely used, the Board has the authority to conduct a formal inquiry at which the claimant and other witnesses are compelled to appear and be questioned. Important decisions occur at various times as a result of the interaction and correspondence between various WCB officers, the worker, the family doctor, and any specialist.

The Case Management Process

The WCB operates under a case management process in cases where the individuals are recovering from complex and costly injuries and illnesses. The key features of case management include a case manager who oversees the delivery of services for the entire life of the claim. It is also supposed to include regular multidisciplinary team meetings, clinical care planning, site visits, and a return to work plan, which sets out expectations surrounding medical treatment, physical rehabilitation, and a return to work option. In theory, the worker, union or other representative, the worker's doctors, and the employer are all expected to participate. Advocates for injured workers have found that this crucial part of the case management model is rarely followed.

Claims Management Solutions

On May 11 2009, WCB launched a "Claims Management Solutions"(CMS) system to streamline and manage the claims process more effectively, and improve service to customers. CMS manages all data related to previous, current and future claims and helps integrate services throughout the life cycle of a claim. It is supposed to result in faster case handling and claim payments, more support for injured workers, and less administrative work for employers and service providers. Workers can obtain real-time access to their claim file by registering online, and can authorize a representative to have access as well.

Initial Decision Making Process

Most decisions are made by frontline WCB officers. The major issues to be decided are: whether the worker is covered by the WCA; whether the injury arose out of and in the course of employment; and what benefits the worker is entitled to. The most important WCB officers, and the decisions that they make, are as follows:

a) Case Manager (CM)

- accepts or rejects claims;
- approves wage loss benefits, determines the initial wage rate, and terminates or reduces wage loss benefits;
- investigates and decides "long term" average earnings, which are implemented ten weeks after the injury (eight weeks for injuries occurring before June 30, 2002);
- approves or rejects operations or other major treatments;
- approves workers' expenses for WCB payment;
- determines when to terminate wage loss benefits because the worker's disability is considered to have "plateaued";

- generally, makes most decisions involving workers including whether to register the worker for vocational rehabilitation services and pension assessments; and
- determines whether the worker qualifies for an LOE pension because he or she has suffered a loss of earnings that is “so exceptional” that the functional pension does not adequately compensate for it.

b) Vocational Rehabilitiation Consultant (VRC)

- Works with the worker, employer, and union (if any) to get the worker back to work as soon as medically possible, perhaps to a modified job;
- approves job retraining courses;
- determines training allowances (usually paid at wage loss levels) and expenses for attending courses;
- can agree to subsidize a new employer for a limited time;
- determines “continuity of income” benefits to bridge the gap between termination of wage-loss benefits and determination of a permanent pension; and
- assesses a worker’s long-term employability, and the earnings he or she is considered capable of achieving after the worker has “maximized” his or her earning capacity in a suitable and available job. This assessment is the core of the Disability Awards Officer’s decision concerning a loss of earnings pension. While the decision is made by the Officer, who can reject the recommendation of the consultant, the consultant’s assessment is a crucial step in the pension process.

c) Disability Awards Officer

- Determines the degree of permanent disability on a physical impairment basis; for workers whose permanent disability is considered to have occurred on or after June 30, 2002, this will determine the pension in the great majority of cases.

These WCB employees, together with a number of other WCB “players”, interact considerably during initial decision processes. For example, a projected loss of earnings assessment, while made by a Disability Awards Officer, is based on a report from the Rehabilitation Officer stating which jobs are suitable and available to the worker, and what earnings can be anticipated. Throughout a claim, the Board’s salaried medical staff (doctors, psychologists etc.) are consulted regularly regarding medical issues, and their advice is regularly accepted by the Board over that of the worker’s own family doctor and specialist if there is a dispute.

d) EXCEPTION: Electing to Proceed Outside the WCB

In certain cases, a worker may choose to sue the person or company responsible for causing a work injury rather than making a claim for Workers’ Compensation. If the injury is caused by a person not covered by the WCA (i.e. a delivery driver injured by a private citizen in a motor vehicle accident), then the worker can elect to sue a non-covered “third party” instead of claiming compensation.

The Board can also sue the third party in the worker’s name; this is termed “subrogation”. If the worker claims compensation, the Board has exclusive jurisdiction to decide if it will take legal action against a third party. If it does take action and recovers more than the total value of the worker’s benefits, the worker receives the difference minus a 29% administration fee. If the Board recovers less than the total value of benefits, the worker will keep the full compensation. A worker cannot waive or assign his or her right to compensation.

An “election” is an important and complex decision (see s. 10 of the WCA) and workers should be referred to the Workers’ Advisors Office [3] before deciding whether to claim compensation. If a worker chooses to pursue court action and is unsuccessful, or the award is less than he or she would have received under the compensation regime, the worker

may still be able to receive compensation. However, the original claim for compensation must have been made within the time limits outlined above.

Acceptance or Denial of Claim

As noted above, there are several key issues involved in determining whether an injured worker's claim is accepted or denied.

a) Is the Applicant a "Worker" under the Act?

(1) General

The WCA was amended on January 1, 1994 to expand the range of workers covered. **All workers are now covered, unless specifically exempted**. Chapter 2 of the RSCM II sets out the general principles of inclusion and the exceptions. Even certain volunteers are covered, as are students engaged in work study programs that are approved by the Board. Before this amendment, most office workers and other white-collar workers were not covered. Since the amendment, only a few exceptions have been recognized, such as professional athletes who have accepted a high level of risk, casual baby sitters, and non-residents. Requests for exemptions may come from workers and employers, or may be initiated by the Board. Decisions regarding exemption status may be appealed.

One of the unintended consequences of this universal coverage is to further limit the injured worker's right to sue for damages, since it is most likely that the person responsible for the injuries will also be an employer or worker covered by the system. An extreme example of this was found in a malpractice case, *Kovach v Singh (Kovach v WCB)*, [2000] SCJ No 3 [*Kovach*]. In this case, and in a similar Saskatchewan appeal, the Workers' Compensation Boards held that doctors treating an injured worker could not be sued for malpractice under the tort system because the injured worker was in the "course of employment" while undergoing treatment. The SCC found that the decision of the Boards in those cases was not unreasonable. The Board has responded strongly to cases that stray from this position. They will not allow any recourse to the tort system and have reaffirmed this bar to lawsuits in the policy directives.

Some special cases are set out below, but at all times, the most recent version of policies in Chapter 2 of the RSCM II should be consulted if "worker status" is an issue.

(2) Workers in Federally Regulated Industries

While working in BC, workers in federally regulated industries are directly subject to the workers' compensation system.

(3) Federal Government Employees

Federal government employees are governed by the *Government Employees Compensation Act*, RS 1985, c G-5 which provides that injured federal government workers in a given province are to have their claims addressed by the provincial administrative body in that province, and are entitled to be compensated at a rate determined under the provincial workers' compensation scheme of the province in which they are employed (but paid out of a federal fund).

(4) Workers Who Suffer an Injury While Working Outside BC

Workers who suffer an injury while working outside BC may be covered, if:

- a) they work in a compensable industry;
- b) BC is their place of residence and usual place of employment;
- c) the extra-provincial work lasts less than six months;
- d) the work is a continuation of their BC employment; and
- e) they are working for a BC employer (WCA s 8(1)).

(5) Workers Under the Age of Majority

Section 12 of the WCA states that a worker under the age of 19 is sui juris for the purpose of Part 1 of the Act, which means that workers who are minors are under no legal disability and are considered, for purposes of the Act, capable of managing their own affairs as if they were adults.

(6) Self-Employed

If a person is self-employed, the Board distinguishes between a principal of an incorporated company, a principal of an unincorporated business, including a family business, and a labour contractor.

In general, a principal of an incorporated company is considered a worker and the wage rate is set accordingly.

In general, a principal of an unincorporated business and a labour contractor are entitled to seek coverage with the Board by voluntarily registering with the Board and paying premiums for their own work activities. This is known as "Personal Optional Protection" or POP. When a self-employed person with POP is injured, their claim is processed as if they were a "worker" under the Act (section 33.6) and their wage rate is set according to their level of POP coverage (policy #67.20, RSCM II). A labour contractor who does not have POP may be covered, as a worker, by the prime contractor.

The key issues in the acceptance of claims from self-employed persons tend to be the exact nature of their employment, their coverage and the appropriate wage rate. Practice Directive #C9-1 "Coverage and Compensation for Self-Employed Persons" sets out a helpful chart on the different types of self-employment and their coverage under the Act.

(7) Employers

Employers are also covered by and have duties under the WCA, including contributing to the Accident Fund based on compulsory assessments. The Board sets an assessment rate for each employer based on a complex system of classification relating to type of business and previous accident rates. Employers should be referred to the Employers' Advisors Office for specialized assistance, without charge, in these matters (see Appendix on Referrals).

b) Types of Claims

Before a compensation claim can be accepted, the Board must find the worker's injury, death, or disease was disabling and that the disability occurred as a result of the employment. The WCA addresses these matters differently for different types of injuries and conditions.

Section 5 : personal injury (physical or physical/psychological)

Section 5.1: psychological injury only ("mental stress")

Section 6.1: occupational disease – no presumption of work causation

Section 6.3: occupational disease – presumption of work causation

Section 7: hearing loss

Detailed policies regarding each of these conditions are set out in the RSCM II. Chapter 3 sets out policy for personal and psychological injuries and compensable consequences. Chapter 4 sets out policy for all occupational disease (OccD), including repetitive strain injuries and hearing loss. Students handling appeals should note that most causation disputes come down to matters of evidence, and the policies provide important guidance on what evidence is required in each case.

(1) Injury or Disease or Both?

Because the statutory and policy requirements for an injury and OccD are different, it is important to consider the worker's disability under the correct relevant category. Sometimes this is not clear.

Policy #C3-12.00 has a helpful section on the distinction between an "injury"and a "disease". Some conditions, like tendonitis or hearing loss, can be either an injury or a disease, depending on the circumstances of the injury. For example, hearing loss from a single occurrence like an explosion is treated as an injury while gradual loss of hearing due to occupational noise is treated as a disease.

Sometimes, a worker is disabled by a combination of a slow developing disease followed by a single event. The combination results in a significant disability, although neither event by itself would have been disabling. This is a difficult causation case. While the single event may not be sufficient to injure a healthy person, the worker is "working hurt" so a minor event is sufficient to disable him. This is the compensation version of the "thin skull" victim in tort law. The Board will likely not accept work causation in the initial decision and deny the claim as not meeting the causal standard under section 5. On appeal, the best way to address this matter is to have good evidence, preferably medical evidence, of the worker's medical condition prior to the single event. The concept for a finding of work causation under s.5 is "causative significance". Further, it is noted in court decisions that only if personal or non-employment factors are so dominant or exclusive that the compensable injury is not a significant causal factor would compensability be denied (WCAT #2009-02226).

In some cases, the worker's pre-existing condition is actually a developing OccD, such as gradual onset repetitive strain or gradual hearing loss. In these cases, you may wish to ask the Board to accept the pre-existing condition as a compensable OccD under section 6. If the Board denies this aspect as well, you may appeal this denial and join the two appeals together at the RD or WCAT so an appeal panel may consider the "whole worker".

(2) Compensable Aggravation

For both injuries and OccD, it is also recognized that the worker can have a pre-existing condition which is aggravated or activated by the compensable injury or disease. For injuries, the relevant policy is set out in#16.00 RSCM II; for OccD, policy is set out in #26.55. It is necessary to distinguish between injuries and death resulting from employment (which are compensable), and injuries resulting from pre-existing conditions or diseases (which are compensable). There must be something in the employment activity or situation that had **causative significance** in producing the injury or death. In adjudicating these types of claims, the Board considers:

- The nature and extent of pre-existing injury;

- The nature and extent of the employment activity; and
- The degree to which the employment activity may have affected the pre-existing injury.

If the pre-existing condition meets the test for compensable aggravation, this requires an “aggravation" decision separate from a simple acceptance "decision”. For example, the Board may deny that a slip and fall was sufficient to cause a meniscus knee tear in a healthy worker; however, if the worker had pre-existing knee problems, the same claim could have a separate decision accepting an “aggravation” type injury.

An “aggravation” approach applies when the worker has a pre-existing but non-disabling condition. After acceptance, the worker’s injury is dealt with like any other claim and the whole disability is compensable.

If the worker has a pre-existing but non-disabling condition, and is accepted, the worker's injury is dealt with like any other claim and the whole disability is compensable.

However, if the worker has a pre-existing disabling condition, and becomes further disabled in the same body part through a work injury, the Board will apply section 5(5) of the WCA or "proportionate entitlement" whereby compensation is paid only for the increase in disability, rather than the whole disability.

(3) Jurisdiction

Work outside of BC is regarded as non-work exposure for compensation purposes. However, workers’ compensation boards across Canada have entered into an “interjurisdictional agreement” that provides for reciprocal coverage of some disabilities arising from work exposure or activities indifferent jurisdictions, and also enables the ruling Board to administer a claim in another province. The Board may try to apportion benefits in cases where the disability is partially caused by non-work or out-of-jurisdiction factors according to the percentages of causation – at least when assessing a pension – although it is not clear that the Act authorizes this.

c) Is the Disability Caused by Work?

Under section 5 of the WCA, personal injury or death must **arise out of**, and **in the course of**, employment in order to be compensable. It is important to check policies and WCAT decisions for qualifying factors, as they change.

“Arising out of employment” relates to causation and means that the work must have causative significance to the injury. According to the well-established jurisprudence, this means that the work does not have to be the sole cause or even the dominant cause of the injury; it must be only causative significance greater than being trivial or **de minimus**:*Chima v. Worker's Compensation Tribunal*, 2009 BSC 1574 [4], *Schulmeister v. British Columbia (Worker's Compensation Appeal Tribunal)*, 2007 BCSC 1580 [5], and *Albert v. British Columbia (Worker's Compensation Appeal Tribunal)*, 2006 BCSC 838 [6]. Not all injuries at work are caused by work, as some are naturally occuring conditions which would have happened in any event. For example, a worker with heart disease, who is working in a sedentary job, may have a heart attack in the office. There is likely nothing in the work activity which would have causative significance for this injury.

“In the course of employment” relates to the employment relationship at the time of injury. It generally refers to whether the injury or death happened at the time and place and during an activity reasonably related to the duties and expectations of employment. Time and place are not strictly limited to the normal hours of work or on the employer's premises.

> **NOTE:** There is a statutory presumption that if an injury is caused by **an accident** at work, the injury is presumed to have occurred in the course of employment [section 5(4) of the WCA]. An accident can include someone else’s intentional act.

The determination of whether an injury arose out of and in the course of employment is set out in policy C3-14.00 and can be made with reference to factors such as:

- whether the injury occurred on the premises of the employer;
- whether it occurred in the process of doing something for the benefit of the employer;
- whether it occurred in the course of action taken in response to instructions from the employer;
- whether it occurred in the course of using equipment or materials supplied by the employer;
- whether the risk to which the worker was exposed was the same as the risk to which he or she is exposed in the normal course of production;
- whether the injury occurred during a time period for which the worker was being paid;
- whether the injury was caused by some activity of the employer or of a fellow worker;
- whether the injury occurred while the worker was performing activities that were part of their regular job duties; and
- whether the injury occurred while the worker was being supervised by the employer.

This list is not exhaustive, and alone, none of the above factors are conclusive.

Chapter 3, RSCM sets out further and detailed criteria for acceptance of a claim under section 5 of the WCA. Current policy states that the injury need not occur while the worker is engaged in specific productive acts, so long as it occurs within the broad circumstances of carrying out the employment duties. An injury which is incurred while commuting is generally not a compensable injury; however, travelling may be considered an activity in the course of employment if travel is part of the worker's duties or if the accident occurs on the employer's property or on a "captive road" provided and controlled by the employer, such as logging roads used by forestry workers.

If serious and willful misconduct on the part of the worker is the sole cause of the injury, no compensation is paid unless death or severe disability results.

d) Secondary Conditions

Where the worker suffers consequences from the injury, in addition to the injury, these may be "compensable consequences". Some common compensable consequences of injury include chronic pain and the development of psychological conditions after the initial injury (unless they arise due to the WCB process).

The test for whether a secondary condition is compensable is also **"causative significance"**, meaning that the initial injury does not have to be the sole cause or dominant cause of the secondary injury, it must only be causative significance greater than being trivial.

As discussed above, if the worker suffered from a pre-existing condition and the injury aggravates, accelerates or activates this condition, the resulting aggravation may also be compensable. (NOTE: this policy is complex and should be consulted for specific details).

The *Kovach* decision (supra) upheld the Board's policy that a worker who is undergoing treatment for a work injury remains in the course of employment, even if the treatment takes place long after the job itself has ended (even years after). This decision means that workers undergoing treatment for an injury or disease generally cannot sue negligent medical providers for medical malpractice.

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V. Occupational Diseases

A. Overview of Compensable Occupational Diseases

An Occupational Disease (OccD) is a particular disease or medical condition which is recognized by the Board as likely or possibly caused by work, based on scientific evidence. The Board "recognizes" an OccD formally by listing it in policy and these lists are updated as new scientific evidence becomes available. A "disease" is a broad category which includes exposures, cancer, poisons, repetitive strain injuries, hearing loss and contagious and respiratory diseases.

To determine if a worker's medical condition is a recognized OccD, consult the two policy provisions listing the recognized OccDs: **Appendix 2/Schedule B**, which sets out OccDs recognized as qualifying for a presumption of work causation for certain industries, and **Policy #26.03** in Chapter 4 of the RSCM II, which sets out additional OccDs recognized by Regulation. Each type has different tests for work causation, which must be met if the OccD is to be accepted by the Board as compensable.

B. Occupational Diseases listed in Schedule B (Appendix 2) of the RSCM II

OccDs listed in Schedule B are matched with the particular industries in which they commonly occur. If the worker has that disease and works in the listed industry at the time of disablement, the OccD is presumed to have been caused by that work unless the contrary is proven [section 6(3) of the Act]. A presumption of work causation only arises for diseases mentioned in Schedule B when the worker is working in the listed industry immediately before the date of disablement. Otherwise, no presumption applies. Also, the contrary may be proven in an individual case. For example, where a worker was employed as a coal miner at or before the date of disablement, silicosis is compensable unless it is proven to have been caused by non-work factors such as smoking.

OccDs in Schedule B include certain kinds of cancers, respiratory diseases including asbestosis, and repetitive strain injuries. If a worker has a Schedule B disease but does not work in the listed industry, the worker's OccD can still be compensable if work causation can be proven under section 6(1). In addition, section 6.1 of the Act sets out a special work presumption for firefighters who suffer a heart attack on the job.

Policy #26.21 of the RSCM II provides a helpful guide to the special rules for a Schedule B presumption.

C. Occupational Diseases listed in policy #26.03 RSCM II

Additional OccDs are listed in Policy #26.03, including many repetitive strain injuries and specific conditions such as plantar fasciitis and Lyme Disease. These diseases must be adjudicated under s. 6(1) of the WCA, where work causation must be proven in each case.

Section 6(1) states that if:

- a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which he or she was employed; or
- the death of a worker is caused by an industrial disease; and
- the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments; then:

compensation is payable as if the disease were a personal injury arising out of and in the course of that employment.

In addition to these statutory provisions, policy #26.20 sets out guidance for establishing work causation for OccDs in general, and policy #26.22 sets out the Onus of Proof for non-presumptive OccD causation. These policies can be helpful guidance when framing a submission on causation for a s. 6(1) OccD case.

There are also particular policies applying to particular conditions, organized by type of condition, which are usually referenced in decision letters involving those conditions.

Policies numbered #27 apply to particular repetitive strain injuries (ASTDs). NOTE: most ASTDs can be injures or diseases, and many are listed in Schedule B (i.e. may or may not qualify for the work presumption).

Policies #28 for Contagious Diseases (e.g. scabies)

Policies #29 for Respiratory Diseases (e.g. asthma, silicosis, asbestosis)

Policies #30 for Cancers

Policies #31 for Hearing Loss

Special Issues for all OccD cases:

1. Date of Disablement

For an OccD, **the first date of disablement is treated as the "date of injury"** for the purpose of calculating the one year time period to submit a compensation application (s. 55, WCA). Special rules apply for OccD late applications and for Federal Workers. (see policy #32.5)

2. Timely Application & Health Care

For diseases with a long latency period such as asbestosis and most cancers, a timely application may result in only receiving health care benefits at first. These healthcare benefits can include, for example, medical benefits, necessary adjustments to the residential home, and home-care. These benefits may also be claimed if the worker has died.

3. Standard of Proof

Schedule B diseases and the diseases recognized by regulation (#26.22) have an "as likely as not" standard of proof for causation (s. 99, WCA). This means that where the evidence is equally weighted for different interpretations, the interpretation that favours the worker should be preferred. For example,*Fraser Health* [1], supra, upheld a WCAT decision that an unusually high rate of cancer in a group of lab technicians was an OccD and therefore compensable. Though experts found little positive evidence supporting this link, the cancer rate in this group was unusually

high.Combined with the significant possibility of non-trivial exposure to harmful substances in the workplace, WCAT decided that was enough to satisfy the "as likely as not" standard.

4. Survivor Benefits

If a worker's disease causes death, the worker's spouse may be entitled to survivor benefits, even if the worker was not eligible for compensation.

NOTE: WorkSafeBC has developed the Exposure Registry Program, which is designed to be a forum for workers, employers or others to report work-related exposures. This registry is intended to track incidents of exposure to substances which are known to be harmful (such as asbestos), as well as exposures which may in the future be shown to cause disease (such as power line emissions). The information obtained through the registry will create a permanent record of a worker's exposure and will assist WorkSafeBC in establishing that the manifestation of a disease was due to the nature of the employment in which the worker was employed (a requirement under s. 6(1)(b) of the WCA). This will simplify the adjudication of future claims for occupational diseases caused by workplace exposure.

D. Psychological Injuries

A worker can claim for acceptance of diagnosed psychological conditions which arise as a consequence of physical injuries or OccDs which are accepted under s. 5 or s. 6 of the Act. Common psychological consequences include chronic pain and difficulties adjusting to a new disability. In practice, psychological limitations and restrictions can often be an overlooked aspect of an injured worker's reduced employability. However, they are important to recognize, diagnose and treat as this may be the difference between a successful rehabilitation and a failed one. When seeking acceptance of a psychological consequence of a compensable physical condition, the causal threshold is the same standard of "causative significance": Is the accepted physical injury a significant contributing cause of the psychological condition, meaning something more than a trivial or insignificant factor? If so, the psychological consequence is compensable as well, including treatment. The physical injury does not need to be the sole or even most significant cause.

However, a worker may suffer a psychological injury alone, with no accompanying physical condition. Common examples include Post Traumatic Stress Disorder (PTSD) or Major Depressive Disorder (MDD). In such cases, the worker can claim for purely psychological injuries from their work under section 5.1 of the WCA and policy item #13.00.

Section 5.1 of the Act provides for two types of psychological injuries, each with a different causation test. A worker can claim for a psychological injury that is either:

- A reaction to one or more traumatic events arising out of and in the course of employment; or
- Predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of such stressors, arising out of and in the course of employment.

A psychological injury which arises from a traumatic event must meet the usual causation test that employment was "as likely as not" the cause of the condition. However, a psychological injury which is caused by "stressors" (vs. "traumatic events") must meet the "predominant cause" standard. This is a significant hurdle for workers with pre-existing psychological conditions who become disabled after work stressors, such a bullying or harassment.

Section 5.1 also requires that a psychological condition be diagnosed as a mental disorder by a registered psychiatrist or psychologist. Section 5.1 also provides that mental stress arising from a decision by the worker's employer related to the employment (e.g. a change in job description or working conditions, or termination of employment) is specifically excluded from compensation. However, an employer may not communicate a management decision in any way it wants and communication that humiliates, intimidates, or amounts to bullying, harassment, threats or abuse may be beyond

5.1(1)(c) protection.

Psychological injuries that result from interaction with WCB and the claims process are also not compensable (Noteworthy Decision: WCAT-2015-01459). Though they would not happen but for the workplace injury they are too remote to be compensable. Exceptions may arise in special circumstances, e.g. where the Board has acted negligently, or in bad faith.

E. Hearing Loss

Significant hearing loss caused by exposure to industrial noise in the course of employment is compensable. The worker must submit tests showing the loss of hearing and complete a special application form listing all employment and non-employment noise exposure. See s. 7 and Schedule D of the WCA.

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VI. Claim Benefits

A. Benefits

In a sense, BC has **two** Workers' Compensation Systems that work in tandem. One system pertains to injuries which occurred before June 30, 2002 and the other to injuries which occurred on or after June 30, 2002. The following section will discuss injuries that occurred on or after June 30, 2002. **If you or your client were injured prior to June 30, 2002, be aware that different rules apply.** Refer to the *Rehabilitation Services and Claims Manual* for more information. Volume I of the Manual applies to most injuries that occurred prior to June 30, 2002, while Volume II applies to injuries that occurred on or after June 30, 2002.

B. Short Term and Long Term Wage Rates

When a compensation claim is accepted, the Board sets the worker's wage rate at two different points in the claims process. All claims benefits (e.g. LOE, PFI, TWL) are paid according to these rates. If you or your client believe your benefits do accurately reflect your income before your injury, it is vital that you try to correct this as soon as possible.

At the beginning of the claim, the Board sets a short-term wage rate (STWR). After 10 weeks, if the worker is still on benefits, the Board sets a long-term wage rate (LTWR). Both the STWR and LTWR are set at 90% of net earnings but the calculation of these earnings are different (in most cases) for the two wage rates.

Except for "casual workers" (see below), a worker's STWR is based on his gross earnings at the time of the injury with deductions assumed to be 1.5 times the basic personal deduction allowed under the Income Tax Act, RSC 1985, c 1 (5th Supp.) for a single taxpayer, plus the standard EI and CPP contributions. This results in a STWR that equates to 90 percent of the worker's take home pay for a single worker. For workers who have several dependants or much lower actual tax deductions, this calculation results in a lower wage rate than if the Board had used actual figures. However, because the STWR is only set for the first 10 weeks of the claim and generally reflects their current wages, many workers do not dispute this issue or appeal the STWR decision.

The determination of a STWR for “casual workers” is different. The WCA requires that where WCB determines that a worker’s pattern of employment at the time of injury was “casual in nature”, that the STWR be based on that worker’s earnings over the immediately preceding 12 months of employment. The result is that a “casual worker” who is earning a good wage at the time of the accident will likely be eligible for less compensation during the initial payment period than his or her counterpart in a “permanent” job. Where the “casual worker” designation has been made in the STWR decision but is not correct, this may be an important appeal issue.

> **NOTE:** Practice Directive #C9-9 currently describes a two-step investigation procedure to determine whether a worker's pattern of employment is casual in nature. If the job at the time of injury is scheduled to last for three months or longer, the worker will not be considered a casual worker. If the job is scheduled to last for less than three months, the worker may be considered a casual worker if he or she has a history of short term jobs (less than three months in length) with significant absences from employment between them (greater than the time spent employed). However, as PDs are updated and changed on a regular basis, the electronic version should be consulted.

The LTWR is based on a calculation of a worker’s “average earnings” in the previous year and the worker’s actual deductions. A worker’s “average earnings” is a somewhat complex and careful calculation, subject to changing law and policy.

> **NOTE:** Chapter 9 of the RSCM II is entirely on “Average Earnings” and there are about 10 Practice Directives on these calculations. Rather than summarize this complexity, it is best to recognize that the Board’s LTWR decision is based on an “average earnings” decision and that the “average earnings” decision is important to review on its particular facts.

Once the LTWR is set, the Board uses this LTWR figure to calculate the amount of any awarded WCB benefits, including pensions, on that worker’s claim, for the life of the claim, except in the case of “re-openings” (see below).

Finally, for ongoing benefits, such as pensions, while the initial amount is determined on the basis of the LTWR, the benefit itself is adjusted annually according to inflation, at a rate 1 percent less than the actual inflation rate with a 4 percent cap on inflation adjustments, regardless of whether the actual inflation rate is higher. This applies to all workers, including those injured before June 30, 2002.

Recurrence or Deterioration and Wage Rates

A claim may be “re-opened” if a worker suffers a new period of temporary disability and/or an increased degree of permanent disability from a recurrence or deterioration of a previously accepted condition.

Under s. 35.1(8) of the current Act, a **recurrence** of an injury is treated as a new injury for any new period of temporary disability. In addition, if the re-opening is more than 3 years after the initial injury, the Board may reset the LTWR for the purpose of calculating additional benefits under the re-opening.

The applicable policy on re-setting LTWR for re-openings over 3 years is Policy #70.20. This policy is complex and it is best to consult this policy in light of the particular facts of each case. This policy affects all workers with long-term disabilities, where their condition recurs or deteriorates.

The re-opening provisions also have particular significance if the worker was injured prior to June 30, 2002, where the LTWR was calculated as 75% of gross and the definition of “average earnings” was different. For this worker, his re-opening TWL benefits would be calculated under the new policy provisions (90% of net average earnings).

It should be noted that a “recurrence” must be distinguished from a “**deterioration**”. In *Cowburn v Worker’s Compensation Board of British Columbia*, 2006 BCSC 722 [1], the court found that it was patently unreasonable to treat a deterioration in a worker’s disability as a recurrence of an injury. Accordingly, when a worker’s permanent disability

that began before June 30, 2002 becomes worse, the increased benefits are based on the older provisions that were in force when the disability first arose (such as pension entitlement). However, a new applicable wage rate may still have to be determined under policy #70.20.

C. Average Earnings

As noted above, the Board determines a worker's LTWR based on its calculation of his annual "average earnings" and because of this, "average earnings" is an important decision on the worker's claim.

In general, "average earnings" is set as the worker's employment income over the one-year period before the injury. Section 33 of the Act provides that the Board must use the exact previous one-year earnings unless the worker meets one of the few exceptions set out in the Act. If a worker has regular earnings in this one year period before his injury, this is not difficult. However, if a worker has irregular earnings in this period (for any reason), it is important to consider whether his employment falls within one of the statutory exceptions; if not, it will be difficult for that worker to get a LTWR comparable to his actual earnings at the time of injury.

One exception is for "casual workers'. As noted above, "casual workers" already have their "average earnings" (over the previous year) calculated at the outset of the claim and for these workers, their STWR will be the same as their LTWR; both wage rates are likely significantly lower than the worker's actual wages at the time of injury. This section is rigidly applied.

Another exception is a "new" worker, defined as where the worker was permanently employed by the accident employer for less than 12 months before the injury. For this type of worker, section 33.3 of the WCA allows the "average earnings" to be calculated based on what a person of similar status employed in the same type and classification of employment would earn in 12 months. However, section 33.3 is not applicable where the worker's employment is deemed casual or temporary.

Under section 33.4 of the Act, the Board may also determine average earnings differently in "exceptional" circumstances, if the one-year average would be "inequitable" . This provision does not apply to cases of "casual" workers) or to "new" permanent workers as described above. Practice Directive #C9-12 states that an exceptional case is one that is "truly extraordinary", "unusual", or "irregular", such that "the worker's circumstances in the year prior to the injury fail to provide any meaningful measure of their employment history". Examples might include a non-compensable illness or injury, or maternity/paternity obligations.. Under this exception, an officer has discretion to seek a long-term average earnings figure that better reflects the worker's real income loss, possibly by excluding a significant atypical disruption (i.e. one lasting more than six weeks) or basing the worker's "average earnings" on a longer or shorter period of time.

Under WCA s. 33(3.2), EI benefits are included in the calculation of the worker's earnings for the year if the worker was, in the Board's opinion, employed in "an occupation or industry that results in recurring seasonal or recurring temporary interruptions of work". For a seasonal worker, this is an important distinction as can be seen by the example of a worker injured at work in his first week, after returning from a six month lay off. If this worker is designated as a "casual worker", the Board would simply calculate his earnings over the last year (including the period of the long layoff but without counting EI payments) to arrive at the "average earnings" over the one year period before the injury. This figure would set both his STWR and LTWR and the only argument for a higher rate would be through section 33.4 of the Act. However, if the worker is found to be in a "highly seasonal" occupation, his EI benefits would add to the calculations of his "average earnings" and greatly increase his LTWR. In addition, his STWR (for the first 10 weeks) would be set in the usual manner as being his wages at the time of injury.

Where a worker has two jobs and is unable to work at either due to an injury at one, the worker's benefits will be calculated based on his or her combined earnings at both jobs, up to the statutory maximum. This applies even if the

worker's other job is not otherwise protected by the WCA (Policy #65-02).

D. Temporary Wage Loss Benefits (TWL)

The WCA does not define "disability" although it uses this term throughout the Act. Section 29(1) of the Act states that if a worker has a temporary total disability (TTD), the Board must pay full TWL benefits (calculated according to the steps above), also referred to as "s. 29 benefits". Section 30 states that if a worker has a temporary partial disability (TPD), the Board must pay the difference between the worker's average net earnings before the injury and either their average net earnings after the injury OR the average net earnings in some deemed "suitable" occupation. These are referred to as "s. 30 benefits".

If a worker has an injury but can perform the full duties of the pre-injury job, the claim is accepted for health care benefits only (see below). If the injury is such that the worker **cannot** perform full duties, the Board makes an entitlement decision on an accepted claim regarding additional benefits, especially wage loss (#34.10). For most claims, the Board finds that there is some type of temporary disability:

TTD - worker not working at all: TWL paid under s. 29 of the Act;

TPD – worker working part-time work at a suitable occupation or deemed suitable occupation and paid Partial Wage Loss (PWL) under s. 30 of the Act; OR

Temporary Disability (of any kind) but the employer gives the worker given suitable light duties a as per policy #34.11. In this case, the Board usually does not pay the worker any TWL but the worker's other benefit entitlement (such as health care) is adjudicated under s. 30 of the Act. Policy #34.11 applies to any adjudication of these light duties, including where the worker refuses light duties on the grounds that they are unreasonable.

> **NOTE:** Light duties is meant to be a temporary arrangement during a period of temporary disability. Even though no TWL is paid to a worker, it is still an accepted period of "disability" under the Act. During this period, a worker is entitled not only to health care benefits but also to a decision regarding the outcome of the accepted condition. All periods of "light duty" should conclude with a formal "resolve" or "plateau" decision (see below).

A temporary disability ceases when the worker's medical condition either resolves entirely or is not expected to change significantly in the next 12 months. At this point, the medical condition is said to have "plateaued" and is considered permanent. In either case, the Board ceases to pay further TWL under s. 29 or s. 30 at this point.

E. Health Care Benefits

Health care benefits are payable under s. 21 of the Act for the period of the worker's disability, and thereafter to "cure and relieve from the effects of the injury or alleviate those effects". Chapter 10 of the RSCM II greatly expands the Board's regulation and control of particular health care benefits including all forms of treatment, medical investigation with specialists, medical aids and medications. As noted above, if a worker has an impairment but can perform their full pre-injury job, the claim is accepted for health care benefits only (as long as there is a short episode of disability: policy #34.10).

There is now a general Board practice to not provide injured workers with medical treatment (such as physiotherapy or counselling) past the "resolve/plateau" point. This may be an issue for workers who are able to RTW with permanent injuries, especially in accommodated positions. Such worker may be suffering from the effects of their injury but are not considered "disabled". Likely they are entitled to on-going treatment under s. 21 of the Act but it may require an appeal to obtain such benefits.

The Board must pay for necessary medical treatment, including physicians and hospital bills, physiotherapy, drugs, artificial limbs, hearing aids, and special transportation. Allowances for personal care and for structural alterations to the home may also be paid to paraplegics and other severely disabled workers. Practice derivative #C10-1 addresses pain medication, sedatives and hypnotics and was updated in 2017. Compensation for prescribed opioids and other potentially addictive medications are generally limited to four weeks coverage.

The Board has the right to supervise a worker's treatment (s. 21) and to authorize any surgery. If a worker decides to undergo surgery or other treatment that is not authorized by the Board, the costs may not be paid, and if the injury is worsened by the treatment, benefits may be cut off or reduced. The Board usually agrees to pay for surgery recommended by the worker's own doctor, but the doctor should ask for the Board Advisor's approval. The Board often refuses to pay for drugs or physiotherapy considered unnecessary by its advisors. Notwithstanding the 75-day time limit on Board reconsideration (WCA section 96(5)), the Board now agrees that each Medical Aid decision can be appealed.

F. Income Continuity Benefits

Although classified as VR benefits (described below), income continuity benefits are payments to provide interim support for the worker after TWL is terminated at plateau but before the amount of a permanent disability pension is determined. A worker's advocate should always request these benefits as they are often the only source of income that a worker will have between the time the worker's condition stabilizes and the time the pension benefits are assessed. These are short-term, temporary benefits.

If a worker refuses employment or to participate in a Board issued VR plan, he or she may be refused income-continuity benefits. See Policy C11-89.10 of the RCSM for more information regarding the assessment of income continuity benefits.

G. Vocational Rehabilitation Benefits

The Board usually assesses whether a worker needs assistance to return to work (RTW) at or near the end of his or her temporary disability. If the worker has a permanent impairment and is not able to safely RTW without assistance, he or she is referred to Vocational Rehabilitation (VR).

If a worker is struggling or unsafe near the end of the period of wage loss, an advocate should review the file to ensure a referral to VR is made. If there is no referral, the advocate may make a direct request to the CM and/or appeal the "resolve" or "plateau" decision on the basis that these decisions do not contain a VR referral, when one is needed. Policy #85.00 and #86.00 set out the principles, goals, and eligibility criteria for VR benefits. Once a VR referral is made, the Board may provide a large variety of VR services to injured workers. These are discretionary benefits under s. 16 of the Act, governed by the policy set out in Chapter 11 of the RSCM II. Generally, the extent of VR services generally depends on the nature of the worker's disability.

The policy requires that the assigned Vocational Rehabilitation Consultant (VRC) consult with the worker and issue a written VR plan identifying a suitable occupational goal and the VR services required. In identifying a suitable VR plan, the VRC works through five VR phases, set out in Policies C11-85.00 to 91.00. In fatal cases, a surviving spouse may be eligible for retraining.

In brief, the phases are:

1. Phase One: The VRC will make an effort to assist the worker to return to the same job with the same employer (the "accident employer"). This may require some phased in work programs such as a gradual RTW or work conditioning.
2. Phase Two: If the worker cannot return to the same job, the VRC works with the accident employer to make worksite accommodations and job modification, or to provide alternative in-service placement, with a view to finding the

worker a new position within the accident employer's business.

3. Phase Three: If the employer is unable or unwilling to accommodate the worker, the VRC identifies suitable occupational options in the same or related industry. This may require the worker to obtain additional skills or training or to be supported in periods of job search.
4. Phase Four: If the worker is unable to return to employment in the same or related industry, the VRC explores opportunities in all industries, with emphasis placed on the worker's transferable skills, aptitudes and interests.
5. Phase Five: If the worker's existing skills are insufficient, the VRC may utilize additional training programs to help the worker acquire new skills and may also assist the worker in a job search once training is complete.

The particular VR benefits which are authorized for the worker are be spelled out in detail in the formal VR plan, which should be provided to the worker. The worker's VR plan is first published as a document, discussed with the worker, and then is set out in a formal appealable decision.

VR services can include:

- monthly compensation (in the same amount as wage loss benefits) to support a worker during a rehabilitation program;
- payment of tuition, books, and other costs of the course itself;
- employability assessments
- a job search allowance (also in the same amount as wage loss benefits) to support the worker while looking for suitable employment if he or she cannot return to the pre-injury job; and
- a training on the job allowance or wage subsidy to encourage an employer to allow the worker to learn new employment skills, or gain experience in a new field.

In practice, the Board will only issue one VR plan and ask the worker to agree to it. The plan must be reasonable. If the worker thinks a VR plan is not reasonable, they should appeal the VR decision setting out the VR plan and ask for a new plan, being as specific as possible as to why the VR plan is unreasonable, and if possible, what a reasonable VR plan may be.

If a worker is cooperating with VR re-training, they should continue to receive benefits at the full wage loss rate. If a worker is appealing a VR plan as unreasonable, the worker may wish to keep cooperating with the challenged VR plan during the appeal period in order to continue receiving benefits.

VR benefits, under a formal VR plan, may be terminated for reasons set out in Policy #88.00. These reasons include if the worker is not cooperating or if he withdraws for personal reasons or refuses suitable employment or is prevented from participating by non-compensable factors alone. If the worker believes that the Board's reasons for terminating VR benefits are inaccurate or wrong, the termination decision should be appealed. This is particularly important if the worker is failing in VR due to some aspect of his medical condition.

At the end of the VR process, the VRC issues a decision about the worker's future earning capacity in a suitable occupation and whether VR has restored it to near its pre-injury level. Based on this final VR decision, the Board then determines whether the worker should be considered for a loss of earnings (LOE) pension.

Rehabilitation decisions can be reviewed only by the WCB's Review Division; the RD decisions on VR cannot be appealed to the Workers' Compensation Appeal Tribunal.

While the Board routinely relies on the VRC's decision regarding the worker's employability, WCAT does not consider these VR decisions as binding on them when adjudicating an LOE pension issue on appeal. EXAMPLE: A VRC finds that a worker can adapt to working full-time in a particular occupation, when he cannot. The worker may still raise this issue and provide evidence about disability in his appeal of a denial of an LOE pension, both at the Review Division and WCAT.

> **NOTE:** Many difficulties in this area arise from different concepts of disability and employability. The Board tends to assess a worker's permanent disability in terms of impairment and to limit its assessment of impairment to "medical restrictions and limitations" (R&Ls) i.e. specific activities which the worker cannot do or should not do at all because of potential harm. R&Ls may or may not include other aspects of limited ability such as tolerance or endurance (such as an inability to sit for more than 10 minutes) which are key elements of work function. Also, disabled workers often face discrimination and other barriers to employment. Court decisions have been clear that VR processes must address the whole worker, including any pre-existing disabilities or factors affecting employment (*Young v. WCAT* 2011 BCSC 1209) but this remains a contentious area and one that the Board does not consider part of the "compensable" condition.

H. Permanent Disability Pensions

Once a worker's condition has stabilized or "plateaued", i.e. is not likely to get significantly better or worse in the next 12 months, temporary wage loss benefits will cease. If the worker continues to have some disabilty, they will be assessed for a permanent disability pension. A disability pension is possible if WCB determines that the worker has been left with a permanent disability.

A case manager will determine which conditions or injuries are permanent and refer the worker for assessment. Decisions not to refer a worker at all or to exclude certain injuries or conditions are appealable to the Review Division and, if necessary, WCAT.

A WCB "pension" is how the Board compensates an injured worker for a permanent disability. There are two possible methods for calculating a pension – compensation for permanent functional impairment (PFI) or compensation for loss of earnings (LOE).

All permanent disability pensions are paid until age 65, unless if the worker can convince the WCB otherwise (discussed in detail below).

> **NOTE:** Workers who also qualify for Canadian Pension Plan (CPP) disability benefits will have one-half of those benefits deducted from their WCB pensions (this could amount to as much as $577 per month, half of the $1153 maximum currently payable by CPP). This deduction represents the employer's share of the benefits paid for the same disability as the WCB claim. If a CPP pension is partly based on non-compensable disabilities, no deduction will be made for that portion of the CPP.

Functional Impairment Method

The first calculation for permanent partial disability pensions (called "Permanent Functional Impairment") compares the worker's degree of physical impairment to that of a totally disabled person. The percentage of impairment is usually based on the RSCM's Permanent Disability Evaluation Schedule (PDES).

Generally, only disabilities that could reduce earning capacity receive compensation, and there are no payments for pain and suffering or loss of enjoyment of life. The Board's policy manual contains detailed schedules of percentage disability for different types of disabilities. Types not listed are estimated, and there is usually some degree of discretion in the process.

Policy item #39.10 says that the PDES is meant to be a guideline and not a rigid formula. The WCB is free to apply other variables in arriving at a final award, but they must relate to degree of impairment and not social or economic factors, or rules established in other jurisdictions. In practice, the PDES is applied with little discretion.

Note that loss of function awards for chronic pain are capped at 2.5% per area of pain.

Projected Loss of Earnings Method

This second calculation for permanent partial disability pensions compares the long-term wage rate that a worker was able to earn per year before the injury to what the worker is able to earn after the injury, based on occupations that are suitable for and reasonably available to that worker.

Loss of earnings pensions will only be paid where the amount determined under the loss of function method would leave the worker with a significant loss of earnings, i.e. where the disability resulting from the work injury makes it unlikely that a worker can continue in the occupation at the time of injury or adapt to another suitable occupation without incurring a significant loss of earnings (See WCA s 23(3.1) and Item #40.00 in the RSCM). Practice Directive #C6-2 further defines “significant loss of earnings”. A 25% or greater percentage differential between pre-injury and post-injury earnings is usually considered significant. A 5% or less percentage differential is not considered significant. Anything in between could be considered significant, depending on the individual circumstances of the case. Note that the Practice Directive is not binding law, but is still persuasive.

Where workers are unable to replace their pre-injury earnings, the WCB often “deems” them capable of earning significantly more post-injury than they actually are earning or can earn following an injury. For example, a worker who cannot return to a pre-injury job that paid $4000 per month may find new employment for $2000 per month. Instead of accepting the worker’s own experience, the Board may decide that over the long term the worker can find a different kind of job that pays $3000 per month, and calculate the benefits accordingly. Instead of getting a loss of earnings pension representing the actual $2000 per month the worker is losing, he or she would receive a pension based on the $1000 the Board “deems” him or her to be losing. Common problems workers face in these situations are that the Board may underestimate the actual extent of physical or psychological limitations they have due to their injury and/or pre-injury background, underestimate the demands of the deemed occupations the Board says they can perform, and/or overestimate what they are actually capable of earning over the long term in the deemed occupations, therein deeming them capable of theoretical earnings that far exceed what is reasonably suitable for and available to them. On appeal of a loss of earnings decision (and often a VR rehabilitation plan decision), the worker should provide evidence to counter these common problems.

Given the above, the vast majority of workers will only receive a Permanent Functional Impairment (PFI) award for their **permanent partial disability**. For exceptional cases where the PFI award is inadequate, an additional Loss of Earnings (LOE) award will be provided. In cases of severe disability, a worker may have a **permanent total disability** equal to 100% PFI. In these cases, the WCB will pay the worker a monthly payment equivalent to a 100% LOE pension. Some examples of permanent total disability are paraplegia, quadriplegia and total or near blindness.

I. Benefits after Age 65

Policy item #41.00 states that payments for permanent disability pensions end at age 65 unless the WCB is satisfied that the worker would have retired at a later date. The worker is asked to provide independent verifiable evidence at the time of the permanent disability award (or on appeal) that he or she had plans prior to injury to work beyond age 65. This type of evidence can often be unavailable. A series of WCAT and RD decisions have held that if independent verifiable evidence is not available, the available evidence including workers’ statements should be considered to determine whether the worker had plans prior to the work injury (or in some cases prior to the time of the permanent disability award). See WCAT-2014-00467, identified as “noteworthy” on the WCAT website; if for example the worker had sincere plans to continue working past age 65 due to some combination of emotional and financial need, this may be sufficient to extend the pension.

J. Benefits in Fatality Cases

For deaths that occurred on or after June 30, 2002, the following rules apply. Different rules may apply to deaths that occurred prior to June 30, 2002.

A child eligible for compensation includes a child under 19 years of age, an invalid child of any age, and a child under 25 years of age who attends a school.

Spousal benefits are not lost upon re-marriage, and survivors' pensions are not terminated when the worker would have reached age 65 (s. 19.1). In older cases, a spouse of a deceased worker who remarried might have lost their benefits. Under the new legislation, there are no such exclusions. Instead, s. 19(2) states that a person whose payments were discontinued under a former section is entitled to complete payment of all benefits that he or she would have been entitled to – as though the section had not applied.

Where death results from a compensable injury or industrial disease, the surviving dependents may receive lump-sum payments or monthly pensions based on the deceased worker's earnings. These pensions cannot exceed the statutory maximum, and are adjusted in accordance with changes in the Consumer Price Index. The amount of the pension for spouses without dependent children depends on the surviving spouse's age (s. 17(3)(d)).

A separated spouse may receive benefits based on the amount of support the deceased worker would likely have contributed had he or she survived (s. 17(9)). A common law spouse is entitled to benefits after three years of cohabitation or after one year if there are children. However, compensation may not be paid, or may be reduced, if there is a separated spouse as well.

K. Suspension of Benefits

Benefits may be suspended:

- a) if a worker persists in unsanitary or injurious practices, which tend to **prevent or slow recovery**;
- b) if a worker refuses to submit to medical or surgical treatment, which, in the opinion of the WCB, is **reasonably essential** in promoting recovery;
- c) if a worker fails to attend a medical examination arranged by the Board; or
- d) if a worker is in prison, in which case benefits will cease, or be paid to his or her dependents.

The Board may also divert compensation from a worker for the benefit of his or her dependents if the worker is not supporting them.

Under s. 57.1 of the WCA, the Board may withhold or reduce benefits for any period the worker does not provide requested information (unless the Board finds that it was unclear in communicating the requirement or erroneously concluded that the worker was being uncooperative). However, such benefits will be paid when the worker provides the necessary information.

L. Emergency Assistance

Many workers need immediate income if they are waiting to be accepted or their benefits have been disallowed or terminated. They should consider alternate sources: social assistance, which may provide a crisis grant for immediate temporary relief or longer term relief if a decision is being appealed; EI sickness benefits; CPP disability pensions; any plans available through their place of work or union; ICBC (if an automobile was involved); or private disability insurance.

M. "Resolved/Plateau" Decision Letters

There are key decisions in a worker's claim including the initial decision to accept or deny a claim and any VR or pension decision. However, it is important to note the decision which is issued at the end of a period of temporary disability. This decision, referred to as a "resolved/plateau" decision, usually embeds several key decisions, each of which may be appealed.

Briefly, the decisions usually embedded in the "resolve/plateau" decision include:

Has the Worker's Injury/OccD Stabilized

The first key issue is an accurate medical assessment of the worker's compensable condition at the critical point of a "resolve/plateau" decision. As noted above, if a work injury or OccD has resolved entirely, the Board issues a "resolve" decision and the claim file is closed. If the injury has only stabilized, then the Board issues (or should issue) a "plateau" decision. If the injury has not yet stabilized, the Board should continue to treat it as a temporary disability with temporary benefits (WL and/or health care benefits).

An appealable matter arises if the Board issues a "resolve" decision but the worker or the medical evidence indicates that there are ongoing effects, conditions or impairments from the injury (e.g. chronic pain). In this case, both the medical evidence and the Board's adjudication should be assessed. The medical evidence should be assessed to determine if the compensable conditions are still temporarily disabling (i.e. the worker is not able to fully return to pre-injury work) so that the worker continues to be entitled to temporary ongoing benefits, or if the compensable conditions have reached a "plateau" as defined by policy #34.35 and the worker is entitled to a referral to Disability Awards and (sometimes) Vocational Rehabilitation (VR).

The issue of "fully resolved" vs. plateau is a medical issue. "Fully resolved" means that there is no permanent or ongoing residue or impairment from the injury. If the claim is concluded on the basis that the compensable condition has "fully resolved", then no further benefits flow and it will be very difficult to reopen the claim later. If the injury is not fully resolved medically, the file should not be closed. Just because a worker returns to pre-injury employment (no disability so no WL) does not mean that the injury is "fully resolved"; the injury may have stabilized into a permanent impairment which is not disabling. If the worker is issued a "resolve" letter and there are ongoing medical issues or symptoms, the "resolve" decision should be appealed.

If the condition has not resolved but you are unsure whether it is still a temporary or permanent disability, policy #34.54 gives the criteria for making a determination between temporary and permanent conditions in this context. Basically, the policy states that a medical condition is "stabilized" when there is little potential for improvement or where any changes are in keeping with the normal fluctuations for that condition. Most doctors know the term "plateau" in this sense and the worker's GP may well address this matter in the last report on the claim file (found in the medical section).

Plateau Date

If the worker has plateaued, there should be a particular date identified in the decision letter as being the date of "stabilizing" or "maximum medical recovery" (MMR) or "plateau". You can assess whether this date is appropriate, considering:

- a) Have all the compensable conditions been considered? And
- b) Is it appropriate given the criteria in policy #34.54 and the medical evidence?

EXAMPLE: If further treatment (physiotherapy or surgery) is likely to make a significant change in the worker's condition within three months, then the condition should continue to be temporarily disabling and the worker should get TWL until then.

What Permanent Conditions are Accepted and what Conditions are Denied?

In the plateau decision letter, the case manager sets out which exact conditions are accepted as permanent. These permanent conditions may be somewhat different than those originally accepted on the claim. For example, if a worker falls and suffers multiple injuries, some of the injuries are likely to fully resolve (sprains) while others can potentially leave a residual impairment (broken leg which mostly heals but leaves the worker with a limp). Other injuries will leave a very significant permanent impairment (mild brain injury). It is also possible that the worker has developed additional conditions during the temporary period (infections, psychological conditions, chronic pain, addiction, etc.).

Typically, as a worker nears plateau, the case manager (CM) refers the claim to a Board Medical Advisor (BMA) to assess whether the worker has reached plateau, and to determine the likely plateau date and what permanent conditions should (and should not) be accepted on the claim. The BMA assessment may or may not be explicitly referenced in the plateau decision. The complete BMA opinion can be found as a "Clinical Opinion" in the Medical section of the claim file.

a) Accepted and Denied Conditions

It is **very** important to carefully assess which conditions are accepted and denied as permanent on the claim as these conditions will likely govern all future benefits. All plateau decisions should include a referral to Disability Awards (DA) for assessment of the permanent disability.

The plateau decision may also set out why certain medical conditions are denied as compensable permanent conditions. For example, if the Board finds that the identified conditions have resolved and the worker disagrees, this is a very important appeal. Sometimes the medical evidence on the claim file is sufficient to establish that the condition has not resolved; if not, the worker will likely need additional medical evidence.

Another common reason for denying permanent conditions is that the Board considers that the conditions pre-existed the injury and were not permanently aggravated by the injury, even if there was a temporary aggravation. There are two distinct types of pre-existing conditions:

The pre-existing condition or disease was **non-deteriorating**:

As set out in policy #16.00 (Chapter 3) for injury and policy #26.55 (Chapter 4) for OccD, if the post-plateau condition is not significantly worse than before the injury, then the condition was not permanently aggravated by the work injury/OccD. This is an issue for which medical records are important; or

The pre-existing condition or disease was **deteriorating**:

If the worker had a pre-existing deteriorating condition, the test is whether the work injury "significantly accelerated, activated or advanced" the condition more quickly than would have occurred in the absence of the work injury (policy #16.00). The Board commonly denies permanent disability on the basis that it arises from a natural degeneration of a

pre-existing condition such as degenerative disc disease or osteoarthritis.

b) Missing Conditions

The plateau decision (accepted and denied conditions) may not fully encompass the medical conditions which are noted by the worker or by the medical practitioners. This is best seen by comparing the DL with the medical evidence. If the decision is silent on a medical condition, you can ask for a new or additional decision from a case manager. Alternatively, if you are appealing the plateau decision on other grounds, in the appeal you can ask for a remedy that additional conditions be accepted on the claim.

Can the Worker Return to the Pre-Injury Job? (not appealable)

A case manager’s decision that a worker can return to their pre-injury job is considered to be a finding of fact and not an appealable decision. In the context of a plateau decision, this RTW finding means that the Board considers that the accepted permanent conditions do not impair or disable the worker from their pre-injury job.

If this is not the case, this is a very important issue to challenge. Since an appeal of a plateau decision often involves seeking additional TWL, a new plateau date, additional permanent conditions, etc., the RTW finding of fact can be addressed in the context of these additional issues.

However, if there are no other issues in the plateau decision except this RTW finding, the plateau decision should be appealed on the grounds that the worker cannot to his pre-injury job and is entitled to additional VR benefits. Framing the appeal issue in this way ensures that the RD has an entitlement decision to address.

If Not, Referral to Vocational Rehabilitation (VR)

If the Board finds that the worker cannot return to his pre-injury job, then the case manager will most often refer the case to VR for VR benefits.

Did the Worker Suffer an Exceptional Loss of Earnings?

There is a varied Board practice on whether the plateau letter will contain a decision on a worker’s entitlement to a Loss of Earnings (LOE) assessment or whether this decision will be deferred, pending the outcome of VR. However, all plateau letters should be assessed for whether they contain an LOE decision (express or implied) and if so, if this decision should be appealed.

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References

[1] http://www.courts.gov.bc.ca/jdb-txt/sc/06/07/2006bcsc0722.htm

VII. Appeals

For most issues, the first level of appeal is to the Review Division of the WCB. Certain issues may undergo a second level of appeal to the Workers' Compensation Appeal Tribunal (WCAT).

Section 96(4) does allow the Board to "reconsider" **any** past decision, on its own initiative, but s. 96(5) prohibits it from doing so if a decision is more than **75 days old** unless there has been fraud or misrepresentation (such as when a videotape may show that the worker is less disabled than claimed). The Board interprets this to mean that the reconsideration **must be completed**, not just initiated, by the 75th day, and staff have been advised that they cannot correct even an error of law after that time, or change a decision to give effect to persuasive new medical evidence not available when the original decision was made.

A. Internal Review - Workers' Compensation Review Division

A worker, a deceased worker's dependent, or an employer may request a review of any of the following decisions of the Board:

- a decision respecting a compensation or rehabilitation matter (e.g. denial of benefits, or quantum of benefits);
- a decision levying payment by the employer for failure to comply with the statute; or
- a decision respecting an occupational health or safety matter.

The Review Division may also reconsider its own decisions in some cases. It can only undertake such a reconsideration during the first **23 days** after the decision is made, and only if no appeal has yet been filed to the WCAT. The Internal Review Division's powers are slightly greater than the Board's – it can change a decision on the basis of new evidence that didn't exist or couldn't have been presented previously with "due diligence" on the part of the applicant. Even that authority, however, ends on the 24th day. This means that for decisions that cannot be appealed to the WCAT, like vocational rehabilitation issues and many pension amounts, there will be no way for anyone in the system to change an incorrect decision based on new evidence, even if it could not possibly have been presented earlier and shows conclusively that the decision was wrong.

B. Appeal to Workers' Compensation Appeal Tribunal (WCAT)

A worker, a deceased worker's dependent, or an employer may appeal most decisions of the Review Division to WCAT. The following classes of decisions may **not** be appealed to WCAT (s. 239 and *Workers Compensation Act Appeal Regulations*, BC Reg 321/2002):

- decisions respecting vocational rehabilitation (s. 16);
- amount of a functional pension if the possible range is 5% or less, and commuting a pension into a lump sum payment (ss. 23 and 35);
- decisions applying procedural time limits specified by the Board under s. 96(8) of the Act;
- decisions refusing to allow an extension of time to file a request for review (s. 96.2 (4));
- decisions relating to the conduct and procedural policies implemented by the Review Division for the internal review (ss. 96.4(2) to (5) and 96.4(7));
- orders by the chief review officer as to whether or not to suspend the operation of a decision pending completion of the review (s. 96.2(5));
- decisions about whether or not to refer a decision back to the Board following completion of the Review Division hearing (s. 96.4(8)(b)); or

- decisions respecting the conduct of a review in respect of any matter that cannot be appealed to WCAT under s. 239(2)(b) - (e) of the Act.

As an administrative Tribunal, WCAT is subject to the expectations of procedural fairness common to all such bodies (i.e. appellant's right to be heard, right to a decision from an unbiased decision maker, right to a decision from the person who hears the case, and a right to reasons for the decision). As an independent body, WCAT is not bound by any WCB findings and has exclusive jurisdiction to make any findings of fact it deems relevant to the appeal (WCA s. 254 as interpreted in *Preast v. Workers' Compensation Appeal Tribunal*, 2015 BCCA 377). Additionally, WCAT is not bound by its own previous decisions unless departing from them is clearly irrational (*Macrae v. Workers' Compensation Appeal Tribunal*, 2016 BCSC 133).

WCAT's *Manual of Rules of Practice and Procedure* (MRPP) is accessible online [1] as are appeal forms, guidelines and information about filing appeals.

C. Access to Files

Under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 (FIPPA), all workers have the right to receive a copy of their file. Employers have the right to obtain a copy of the Board's file if an appeal is pending or if a decision is made. The Act, however, limits an employer's ability to use this information in non-employment related issues. An employer, for example, may not use the information contained in the worker's file for disciplinary purposes.

A worker's WCB claim file that is disclosed for purposes of an appeal or a Freedom of Information request should contain all of the information pertaining to the Board's decision, as well as copies of any decisions regarding the claim.

Prior to May 2009, a file was divided into various sections such as: Claims, Medical, Accounts, and Memo. Usually the papers were filed in chronological order. Files are organized differently under the CMS data management system. Now, the preferred method of disclosure is by way of an encrypted .pdf file on a CD. The first disclosure will be a complete copy of the file, not just an update.

Overall, the adoption of electronic (E-file) rather than paper files has reduced administrative delays due to files being in use by other departments at the WCB or WCAT, but it has also decreased the detailed information explaining how decisions were reached, as handwritten notes and other documents are sometimes omitted. A request for disclosure under the FIPPA usually results in a more thorough search for such records, and is advisable in cases where all information is needed. At times, the Board may not disclose all of the relevant evidence in its possession. One reason is that certain departments at the Board, such as the Vocational Rehabilitation Department, keep unofficial sub-files or documents in draft form, which may not be fully incorporated into the worker's electronic "claim file". Some of the missing information may be helpful for appeals, such as the actual observations of the Board's staff during a functional evaluation, rather than just a final report.

D. Appeal Procedure – Workers' Compensation Review Division

A complete account of the review process goes beyond the scope of this chapter. A good starting point in preparing a review of the Board's decision is to go to http://www.worksafebc.com and look for the "Manage a Claim" section, under the "Claims" menu. Follow the link under the heading "If you Disagree with a Decision". There is a Policy and Procedures Manual that describes the process in detail, as well as provides the necessary forms and applications. Limitations as to what kinds of decisions can be appealed, and what persons can appeal them, are clearly stated within this section.

To request a review, the worker must complete and submit a two page Request for Review form (available online). This form may be submitted by mail or by fax. See Appendix D: Checklist for Review Division Appeals.

E. Appeal Procedure – Workers' Compensation Appeal Tribunal

Similarly, the best starting point to prepare an appeal to the WCAT is to go to the WCAT website [1]. The "How to Appeal" section provides information regarding the appeal process, enables access to various appeal forms, and provides internet links to WCAT publications as well as other resources that can assist in the appeal process. The WCAT site also contains a detailed manual. Parties applying for reconsideration must write to the Tribunal Counsel Office. WCAT will not accept applications for reconsideration by telephone. Note that WCAT can reimburse workers for the cost of acquiring medical reports that are reasonably useful to the hearing.

F. Clarifications, Corrections, Missed Issue

WCAT may **correct** accidental errors or omissions (such as typographical or numerical) if the appellate requests it. The appellate should request corrections. The appellate should request clerical corrections as soon as possible and WCAT aims to have it amended within 90 days. WCAT may **clarify** their decision if it is not clear. The appellate must request clarification in writing within **90 days**of the date that the decision was served, and the panel will decide if clarification is necessary. If WCAT did not **decide** on an issue in the appeal, the appellate must request this is writing to the Tribunal Counsel Office. If the panel that made the decision agrees that they did not decide on an issue in the appeal, then they will complete the decision by writing an annendum to the decision.

G. Reconsideration of WCAT Decisions

WCAT may reconsider a final decision for very limited reasons after its powers were considered by both the BCCA and *Fraser Health*, supra. Under the WCA, a WCAT panel may change the outcome of a WCAT decision if there is new evidence. In addition, WCAT may still reconsider a WCAT decision under common law grounds if there is procedural unfairness or a true **jurisdictional error.** On these grounds, WCAT may rehear all or part of the appeal and come to a different conclusion. However, WCAT **cannot** change the outcome of a WCAT decision because it is incorrect, unreasonable, or patently unreasonable. In this respect, the WCAT is final, reviewable only by a court on judicial review (the time limit to apply for JR is 60 days, under the *Administrative Tribunals Act*).

Information regarding reconsideration of WCAT decisions is available on the Post-Decision Information Guide on the WCAT website. There is **no time limit** on applying for reconsideration. To apply for reconsideration, a worker may fill out the Application for Reconsideration form and send it to the Tribunal Counsel Office. A worker can also apply for reconsideration by writing a letter to Tribunal Counsel Office explaining how they meet the grounds for reconsideration.

WCAT makes a **jurisdictional error** if it:

- Decided on something it had no power to decide (Example: if WCAT tried to make a binding decision on a residential tenancy issue when it only has authority to make decisions on workers compensation issues).
- Failed to decide on something it was supposed to decide (Example: WCAT was unfair in its decision making process, such as refusing to allow a worker to make submissions for an appeal).
- Was procedurally unfair (Example: WCAT was unfair in its decision making process, such as refusing to allow a worker to make submissions for an appeal).

Section 256(3) of the WCA allows for a party to a completed appeal to apply for reconsideration of a decision based on evidence which:

- is substantial and material to the decision, and
- did not exist at the time of the appeal hearing or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

If you apply for reconsideration based on new evidence, you **must explain**:

- why the new evidence is substantial (has weight and supports a different conclusion);
- how it is material (is relevant to the decision);
- whether or not the evidence previously existed; and
- if it did exist previously, why you did not discover (and submit) it at the time of the original hearing.

A claimant can only apply once for reconsideration on new evidence. They will not be able to re-apply multiple times for any new evidence that might become available in the future.

The first stage of reconsideration results in a formal written decision, issued by a WCAT panel, determining whether there are grounds for reconsideration. If the panel concludes that there are no grounds for reconsideration, WCAT will take no further action on the matter. If a panel decides that there are grounds for reconsideration, the original decision will then be found void (in whole or in part) and the application will proceed to the second stage at which a WCAT panel will hear the appeal once again. The WCAT will decide whether the second stage will be conducted by oral hearing or written submission.

WCAT has the authority to reconsider both WCAT and the former Appeal Division decisions. WCAT does not, however, have the authority to reconsider decisions by the former Review Board or the current Review Division. Objections to those decisions will be treated as appeals, or applications for extensions of time to appeal. It is important not to apply for reconsideration until you are ready to proceed as a party may apply for reconsideration of the original WCAT decision on each ground on one occasion only. Additionally, WCAT cannot reconsider its own decisions for unreasonableness or patently unreasonableness (*Fraser Health*, supra).

It is important not to apply for reconsideration until you are ready to proceed as a party may apply for reconsideration of the original WCAT decision on each ground on one occasion only.

In view of the finality of these provisions, especially where a decision has not been appealed, any worker who is not completely satisfied with a decision should request a review by the Review Division and if allowed, an appeal to the WCAT. This will preserve a residual right to present new evidence in the future, even if the appeal is unsuccessful.

WCAT decisions are accessible on the website under “research”. If you want to view previous WCAT decisions made on applications for reconsideration, you can select “reconsideration grounds,” under “type of decision”.

G. Judicial Review (JR)

A party may apply for judicial review of a WCAT decision by the British Columbia Supreme Court **within 60 days** of the date on which a decision is issued. Under certain circumstances the court may extend the time for applying. Due to clear language in the ATA, JR of WCAT decisions are held to the standard of patent unreasonableness on most questions (constitutional issues and questions of so-called true jurisdiction are exceptions). This is the highest level of judicial deference and limits the courts ability to interfere unless the decision was “openly, evidently, clearly wrong” (*Canada (Director of Investigation and Research) v. Southam Inc* [2]., [1997] 1 S.C.R. 748; *Fraser Health, supra*). **Possible judicial review cases should be referred to lawyers as it is very difficult to file and conduct a judicial review without a lawyer’s assistance.** See **Chapter 5: Public Complaints Procedures for more information about judicial review.**

Note that if judicial review and reconsideration are both possible, it is advisable for the worker to file their paperwork for judicial review within the 60-day time limit and then apply for reconsideration. This ensures that they will still be able to pursue judicial review if their reconsideration is denied.

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References

[1] http://www.wcat.bc.ca
[2] http://canliiconnects.org/en/summaries/41327

VIII. Health and Safety Regulations

The WCB is also responsible for enacting and enforcing health and safety regulations under Part Three of the Act. The *Industrial Health and Safety Regulations* have been replaced with the WCB's *Occupational Health and Safety Regulation*, BC Reg 296/97 (OHS). These regulations can be found online [1]. Workers or employers interested in the regulations can be referred to the Board's Health and Safety Department. The date of enactment should always be checked to determine which version was in effect at the time of injury.

A. A Worker May Refuse Unsafe Work

Under the existing OHS, Part 3, a worker may refuse work that is unsafe. The worker must not carry out any work process if they have reasonable cause to believe that it would create an undue hazard to the health and safety of any person.

The right to refuse continues until the employer has taken remedial action to the satisfaction of the worker, or an officer has investigated the matter and advised the worker to return to work.

A worker who has exercised their right to refuse unsafe work must immediately report the refusal and the reasons for it to his or her supervisor or to the employer. The worker must remain available at the workplace during normal working hours until the investigation is complete. The employer may give the worker different duties to perform until the matter is resolved, and it may assign another worker to the job in question if the risk is specific to the worker (such as a person with a bad back being told to lift heavy boxes, or an untrained person being told to operate equipment).

B. Prohibition Against Discriminatory Action

Section 151 of the WCA states that an employer or union must not take or threaten any retaliatory action against a worker for exercising any of his or her rights under Part Three of the Act. A non-exhaustive list of such discriminatory actions is provided in s. 150. This list includes: suspension, lay-off or dismissal; demotion; reduction in wages; transfer of duties or of location; coercion or intimidation; and the imposition of any discipline, reprimand, or penalty.

Note that the “bare filing of a claim,” that is, filing a claim that is a request for compensation only and does not allege OHS violations does not engage the protection of s. 151 (WCAT-2015-01946).

Complaints should be made in writing to the Board within the time limits set out in s. 152. Section 152(2) places the burden of proving that the alleged discriminatory action did not occur on the employer or union as applicable. The Board has been given a wide range of remedies under s. 153. It is important to note that this section is not for human rights complaints, but only for retaliation against a worker for exercising the rights provided by the WCB system.

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References

[1] http://www.worksafebc.com/publications/OHSRegulation/home.asp

IX. Assessments of Employers

The theory behind the workers' compensation system is that the risk of loss through occupational disease or injury resulting from the workplace should be borne by industry as a cost of doing business. The WCA is administered by the WCB, which is an independent administrative agency created by the provincial government. The program is funded by compulsory assessments on employers, which make up the Accident Fund. These assessments must be paid by the employer and cannot be deducted from the worker's pay (s. 14). The Board gets preferential treatment in its power to collect from an employer. An employee whose employer is subject to the WCA is covered by the WCA regardless of whether or not the employer pays premiums.

Industries are divided into classes and sub-classes. The total assessments for each class are fixed according to the principles of collective liability; the Board is to collect sufficient money to cover the past and estimated future costs of all the claims from workers in each sub-class. Each employer then pays its share, based on the size of its payroll and adjusted for the number of claims against the employer under the Board's "experience rating" scheme. One negative effect of the experience rating system is that employers obviously have an economic interest in contesting their workers' claims. This makes the system more adversarial, which might be seen to contradict the principles of Workers' Compensation.

Some self-employed contractors are considered employers under the Act and therefore are assessed as such. These self-employed workers can purchase "personal optional protection" (POP) to cover their own risk of injury, in addition to the assessments they are required to pay to cover their risk as employers. This arrangement is common in the logging, transportation and construction industries.

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X. Fair Practices Officer

The WCB has a Fair Practices Officer (Formerly "Chief Complaints Officer" and before that "Ombudsman"), who has been assigned to deal with issues of alleged unfairness related to the WCA. A claimant who has a complaint about a decision must first pursue all available routes of appeal. The Fair Practices Officer may investigate a complaint after all routes of appeal are exhausted. Individuals or groups with complaints about the fairness of WCB decisions, recommendations, actions, procedures, practices, or regulations may contact the WCB Complaints Officer by phone, fax, mail, or in person.

The WCB Fair Practices Officer should not be confused with the province's Ombudsman, who still has authority to investigate complaints against the WCB. The BC Ombudsman's policy is to suggest that all complaints go first to the WCB Chief Complaints Officer, but a worker may ask that the provincial Ombudsman intervene immediately if the Fair Practices Officer is unable to resolve the problem. Advocates are beginning to make more complaints to the BC Ombudsman recently, and students can insist that this be done if the complaint process seems ineffective. See **Chapter 5: Public Complaints Procedures**.

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XI. LSLAP's Role

LSLAP students may only assist workers with a few formal procedures at the initial decision level. However, the student's role at this point is still important. If the initial claim is done well, appeals may be avoided. These types of inquiries are usually done by correspondence, but may be in person at the worker's request.

One important aspect of the CMS data management system is the "portals" which allow workers, employers and representatives to access claim files directly. The worker needs to call the Board and obtain an ID and PIN in order to do this. Such access allows an advocate or advisor to see exactly how the claim has been handled.

Students should get a copy of the file and review the relevant documents with the worker. They may also request that the Board provide an opportunity to make submissions prior to the final decision. Some officers will comply with these requests.

It is important to help a client prepare the best possible case at this level. For example, a projected loss of earnings assessment always includes an extensive interview between the Vocational Rehabilitation Consultant and the worker regarding the types of employment that are suitable and available to the worker. The worker should be prepared for this interview, and should be ready to explain issues such as what they are capable of doing, what job activities they cannot perform, and why this is the case. The Board rarely decides that a worker is 100 percent disabled, and workers should therefore be discouraged from expecting such a ruling, unless thereis very strong medical evidence of unemployability.

In addition to filing an appeal, a student can contact the officer who made the decision to request that it be reconsidered on the basis of significant new evidence, or to seek further explanation of the officer's reasons. Note that this must take place within 75 days of the original decision.

Initial decision-making at the Board level is extremely important, and very informal in its procedure. In general, if a representative doesn't understand how or by whom a decision will be made, or what factors will be considered, it is always possible to call the Board and ask. The Claims Manual, Workers' Advisors Office, and other sources of information mentioned in Section I: Introduction of this chapter can also help prepare a successful claim. See Appendix

B for a checklist for a student conducting a client interview.

A. Limited Scope Retainers

It is vital that LSLAP students assisting workers provide clear and limited scope of work letters. Given the tight deadlines it is essential that clients understand when students are no longer providing them with assistance so they do not miss an appeal or review date. Students should carefully consider their own availability as well as that of the supervising lawyer before promising legal assistance.

Additionally, any student providing representation must be sure to inform the Board and/or WCAT if they are no longer representing a client. Section 6.3.1 of the MRPP establishes a presumption in WCAT that a worker's representative will remain as representative until they either declare otherwise or at the end of 2 years, whichever is longer. This means the representative will receive correspondence related to the claim, even if it is the result of a deterioration of an OccD long after the initial claim is settled. This presumption means it is essential to be clear with the client **and** WCB/WCAT as to when LSLAP has withdrawn as counsel.

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Appendix A: Abbreviations

- ASTD: Activity-related Soft Tissue Disorder
- ATA: *Administrative Tribunals Act*, SBC 2004, c 45
- BMA: Board Medical Advisor
- CM: Case Manager
- CMS: Claims Management Solutions
- DA: Disability Awards
- EI: Employment Insurance
- FPO: Fair Practices Officer
- LOE: Loss of Earnings pension
- LTWR: Long Term Wage Rate
- MMR: Maximum Medical Recovery
- MRPP: Manual of Rules, Policy and Procedure
- OccD: Occupational Disease
- OHS: *Occupational Health and Safety Regulation*, BC Reg 296/97
- PD: Practice Directives
- PDES: Permanent Disability Evaluation Schedule
- PFI: Permanent Functional Impairment
- POP: Personal Optional Protection
- R&L: (Medical) Restrictions and Limitations
- RSCM: Rehabilitation Services and Claims Manual (Volumes I and II)
- RTW: Return to Work
- STWR: Short Term Wage Rate
- TPD: Temporary Partial Disability
- TTD: Temporary Total Disability

- TWL: Temporary Wage Loss benefits
- VR: Vocational Rehabilitation
- VRC: Vocational Rehabilitation Consultant
- WCA: *Workers' Compensation Act*, RSBC l996, c 492
- WCAT: Workers' Compensation Appeal Tribunal
- WCB: Workers' Compensation Board/the Board/Worksafe BC

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Appendix B: Referrals

Unions

Unions provide more representation for injured workers than all other sources combined. If a worker was engaged in employment under a collective agreement when injured, his or her union or former union should be the first resource. Some unions will even help former members with claims arising out of injuries suffered in non-union employment.

Workers' Advisors Offices (WAO)

Online	Website [1]

Lower Mainland Regional Offices:

Address	500-8100 Granville Avenue Richmond, BC V6Y 3T6
Phone	(604) 713-0360 Toll-free within BC: 1-800-663-4261 Fax: (604) 713-0311

Address	204 - 32555 Simon Avenue Abbotsford, BC V2T 4Y2
Phone	(604) 870-5488 Toll-free: 1-888-295-7781 Fax: (604) 870-5494

- This is the primary resource for non-union workers having difficulties with the Board. The advisors have direct access to the claim file and provide workers with detailed, confidential advice about the claim. They also offer very readable written information for claimants.
- The WAO only takes referrals by internet. Claimants must fill out the online inquiry form at the following website: https://www.labour.gov.bc.ca/wab/inquiry/.They will be contacted within 2 business days to set up a telephone appointment with an Intake Administrator.

Employers' Advisors Office

Online	Website [2]
Phone	(604) 713-0303 Toll-free within BC and Alberta: 1-800-925-2233 Fax: (604) 713-0345

Community Legal Assistance Society (CLAS)

CLAS may be able to help if a client has lost their appeal to the Worker's Compensation Appeal Tribunal (WCAT) and wants the WCAT to reconsider their decision, or a court to overturn the decision; and if the advocate who helped the client at WCAT cannot assist anymore.

Online	Website [3]
Address	300 – 1140 West Pender Street Vancouver, BC V6E 4G1
Phone	(604) 685-3425 Fax: (604) 685-7611 Toll-free: 1-888-685-6222

WCB Main Inspection Office

Complaints about violations of health & safety regulations should be directed here.

Address	6951 Westminster Highway Richmond, BC V7C 1C6
Phone	(604) 273-2266 Toll-free (outside Vancouver): 1-800-661-2112

WCB Fair Practices Office

- This office can be contacted when all internal remedies have been unsuccessful or if the worker has a complaint about matters that are not subject to appeal, such as rude conduct by WCB staff, failure to answer letters, or unfair procedures.
- Most lawyers who do WCB applications or WCAT appeals require payment in advance. For more information please see the lawyer referral section.

Address	**Street Address:** 6951 Westminster Highway, Richmond, BC V7C 1C6 **Mailing Address:** P.O. Box 5350 Stn. Terminal, Vancouver, BC V6B 5L5
Phone	(604) 276-3053 Fax (604) 276-3103

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References

[1] http://www.labour.gov.bc.ca/wab
[2] http://www.labour.gov.bc.ca/eao
[3] http://www.clasbc.net/

Appendix C: Resources

Print Resources

Heather MacDonald and Marguerite Mousseau. *Workers' Compensation in British Columbia*, (LexisNexis Canada, 2009)

- A comprehensive overview of the workers' compensation system in British Columbia, written by two members of the WCAT, the senior appeal tribunal.

Internet Resources

WorkSafe BC [1]

- The Board's own site contains a wealth of material, including the complete Claims Manual, Appeal Division decisions (since January 1, 2000), the complete Reporter series of decisions, and most of the reports and documents listed above. It also has decisions of the old Appeal Division and the Review Division, and statistics and resources.
- A policy and legislation page is located at http://www.worksafebc.com/law_and_policy with links to an online version of the Act, recent amendments, and various policy and practice materials. This is the most practical way to research current policies and practices, including the Board's two-volume compensation policy manual, which has the force of law.

Workers' Advisor's Office [2]

- This site, which is part of the Ministry of Labour, contains excellent plain language summaries of the key aspects of the system written for the average claimant, and other material as well. This service is free for anyone who is not represented by a union.

Workers' Compensation Appeal Tribunal [3]

- This site provides information about WCAT and various aspects of Workers'Compensation appeal matters. The "How to Appeal" section provides information on how to appeal, enables access to various appeal forms and provides internet links to WCAT publications as well as other resources that can assist in the appeal process. It also contains WCAT decisions, as well as forms required for appeal.
- The Post Decision Guide on the website provides information on what can happen after WCAT makes a decision and how to request reconsideration. You can find previous decisions here [4].
- All of WCAT's previous decisions are public, and can be found at: here [5].
- To apply for reconsideration, visit this page [6].

Organizations

Workers' Compensation Advocacy Group

An informal organization open to all advocates for injured workers, including union representatives, private and legal aid lawyers, workers' advisors, injured workers' group leaders, and others. The group meets monthly, and as a recognized stakeholder for injured workers, is regularly consulted by WCB and government about WCB matters.

Address	300 - 1140 West Pender Street Vancouver, BC V6E 4G1
Phone	(604) 685-3425 Fax: (604) 685-7611

PovNet's wcb-bc Email List

- For more information, contact Jim Sayre at jsayre@clasbc.net, or Penny Goldsmith at penny@povnet.org.
- PovNet sponsors an interactive, confidential email list for workers' advocates. The list enables members to post questions and information about WCB cases and matters, and to respond to other members' postings.

BC Federation of Labour

The BC Federation of Labour represents more than half a million workers through affiliated unions in more than 800 locals, working in every aspect of the BC economy.

Online	Website [7]
Address	# 200-5118 Joyce Street Vancouver, BC V5R 4H1
Phone	(604) 430-1420 Fax: (604) 430-5917

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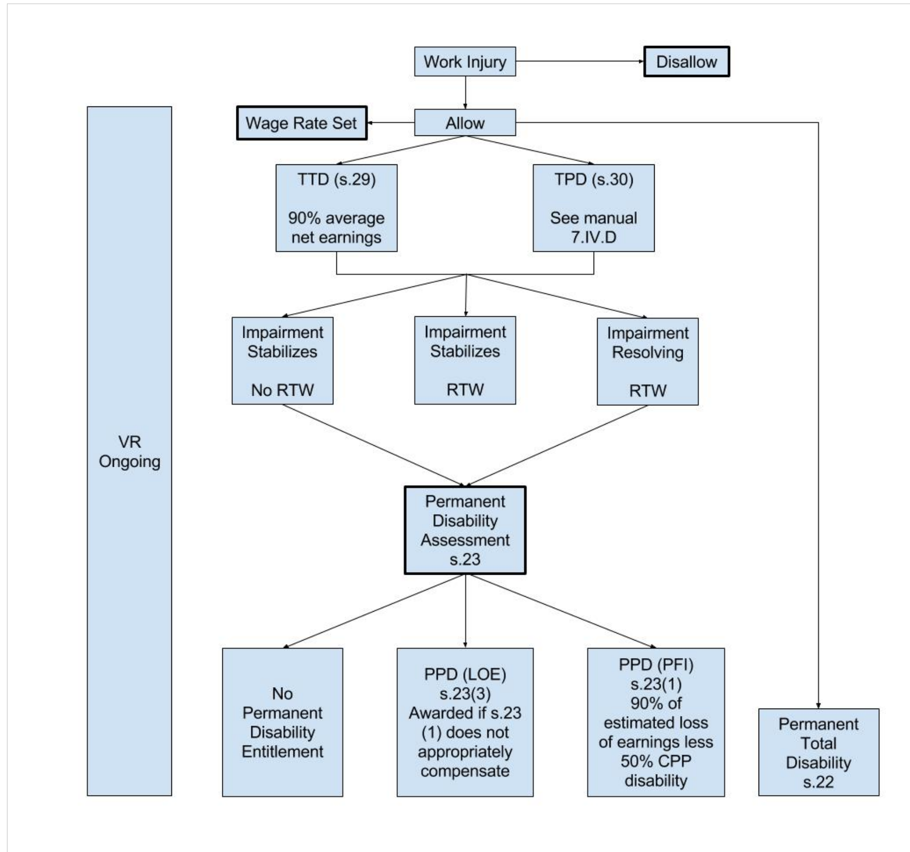
References

[1] http://www.worksafebc.com
[2] http://www.labour.gov.bc.ca/wab/
[3] http://www.wcat.bc.ca
[4] http://www.wcat.bc.ca/research/WCAT_publications/appeal_guides/pdf/post_decision_guide.pdf
[5] http://www.wcat.bc.ca/search/decision_search.aspx
[6] http://www.wcat.bc.ca/appeals/after/reconsideration.html
[7] http://www.bcfed.com

Appendix D: Claims Process



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Appendix E: Checklist for Interviews

☐ Obtain basic client information

☐ Note WCB claim number

☐ Determine worker's claim status:

- a) Present benefits
- b) On what basis
- c) Pending changes
- d) Relevant decisions
- e) Pending appeals

☐ Review worker's claim in full detail:

- a) Date of injury
- b) Nature of injury
- c) Circumstances of injury
- d) Client's job
  - i) Remuneration
  - ii) Duties - job description
  - iii) Length of Employment

☐ If claim was accepted, determine:

- a) Initial benefit rate
- b) Did benefit rate change after 10 weeks?
  - i) Evidence of long-term earnings given to WCB
  - ii) Client's actual work and earnings history

☐ Any medical treatment and diagnosis

- a) Client's position
- b) Doctor's advice
- c) Board's position

☐ Permanent disability

- a) Return to previous job
- b) Return to another job with same employer
- c) Retraining

☐ Long-term loss of earnings?

- a) Other advisor or representatives
- b) Workers' advisor? Trade Union? Other?

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Appendix F: Checklist for Appeals

- [ ] Interview client
- [ ] Review his or her documents
- [ ] Immediately take note of time limits applicable – they are always to be adhered to
- [ ] Contact the WCB for necessary clarification, reconsideration based on new evidence, etc.
- [ ] Advise client on alternatives such as an application for reconsideration based on new evidence, keeping in mind that the decision is not more than 75 days old since that would prohibit a Board from reconsidering it.
- [ ] File Request for Review application form if instructed by client. Ensure the time limit is met.
- [ ] Request copy of file from Board (this can be done before an appeal is filed if time permits).
- [ ] Review client's file with him or her

- a) Any correspondence
- b) Medical file
- c) Memoranda

- [ ] Identify key issues leading to the decision - examine all aspects
- [ ] Research important issues

- a) Medical - consult family doctor, specialist, etc.
- b) Policy - read Claims Manual, relevant Reporter decisions, etc.

- [ ] Decide on the basic grounds for appeal and relief sought
- [ ] Apply for permission to make a late appeal of a related decision, if necessary
- [ ] Prepare and gather the evidence

- a) Client's testimony
- b) Other witnesses
- c) Documents:
  - i Medical legal reports
  - ii Affidavits or letters from unavailable witnesses
  - iii Income tax returns, etc.
    - Ask Review Division to subpoena non-cooperative witnesses

- [ ] Prepare submissions - do this in writing, as with a trial book
- [ ] Hearing
- [ ] Receive and review Review Division findings with client
- [ ] Consider further appeal to Workers Compensation Appeal Tribunal

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Appendix G: Sample Authorization Form

	This appendix is available on Clicklaw Wikibooks for download in PDF. A permanent archive version is also available at https://perma.cc/SP9M-DS43. Readers of the print edition please see the "Supplementary Documents for Appendices" section.

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Chapter Eight - Employment Insurance

I. Introduction

A. Keeping Up to Date on Changes to Employment Insurance

When working with an Employment Insurance claim, always ensure that you are working with the most updated information. Consult Service Canada's Employment Insurance website before proceeding.

B. General

Under the Employment Insurance Act, SC 1996, c. 23 [EI Act], both employees and employers are required to contribute to the payment of premiums. A claimant is not automatically entitled to benefits for loss of employment because they paid premiums. Certain criteria (see Section IV: Qualifying for EI) must be met before benefits are payable.

The EI regime is a multistage system. The list immediately below shows the progression of decisions and appeals under the regime:

a) decision made by an agent of the Commission affecting the Claimant, employer, and the Commission itself;

b) party applies to the Commission for Reconsideration of the Commission's decision;

c) party appeals to the Employment Insurance section of the General Division of the SST (Social Security Tribunal of Canada);

d) party appeals decision of the General Division to the Appeal Division of the SST;

e) in exceptional cases, claimant applies to Federal Court of Appeal to set aside decision of SST;

f) in exceptional cases, claimant appeals court's decision to the Supreme Court of Canada. (Cases will usually only proceed to the Supreme Court of Canada if the disputed issue is of national significance).

A separate appeal structure exists for cases concerning the insurability of employment. This structure is set out in **Section XII. A. 3 Insurability Decisions**.

C. Deadlines for Appeals

• For Requests for Reconsideration: **30 days**

• For appeals to the General Division: **30 days** from the date the Reconsideration decision was communicated to the applicant

• For appeals to the Appeal Division: **30 days** from the time the decision was communicated to the applicant

• For judicial review to the Federal Court of Appeal: **30 days** from the date of the decision was communicated (Federal Courts Act, RSC 1985, c F-7, s 19.1).

For rulings that must be decided by the CRA:

• For a claimant's requests for rulings to the Canada Revenue Agency (CRA): Before **June 30th** in the year following the year to which the question relates. Note that the CRA rules on insurability issues.

• For appeals to the Minister of National Revenue from a CRA decision: **90 days** from the date of the notification of the ruling (EI Act, s 91).

Note that for all deadlines, requests for an extension of the deadline may be made to the governing body.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 15, 2019.

II. Governing Legislation and Resources

A. Employment Insurance Act, 1996, c 23 and Regulations

Ensure that you are working with the most recent version of the Act. The legislation is published in the *CCH Labour Law Reporter and the Employment Insurance Regulations*, SOR/96-332 P.C. 1996-1056 28 June, 1996 (*EI Regulations*) are updated by publications in the Canada Gazette. The legislation can also be found online at: http://laws-lois.justice.gc.ca/eng/index.html

The SST website also provides a list of common issues and their reference to relevant legislation:

1. Earnings and allocation of earnings (*Employment Insurance Regulations* - sections 35 and 36)
2. Hours of insurable employment (*Employment Insurance Act* - section 7)
3. Interruption of earnings (*Employment Insurance Act* - section 7; *Employment Insurance Regulations* - section 14)
4. Late initial claims/antedate (*Employment Insurance Act* - subsection 10(4))
5. Maximum number of weeks of benefits (*Employment Insurance Act* - section 12)
6. Misconduct (*Employment Insurance Act* - sections 29 and 30)
7. Outside of Canada (*Employment Insurance Act* - section 37; *Employment Insurance Regulations* - section 55)
8. Penalties (*Employment Insurance Act* - sections 38 and 39)
9. Rate of weekly benefits (*Employment Insurance Act* - section 14; *Employment Insurance Regulations* - section 23)
10. Violations (*Employment Insurance Act* - section 7.1)
11. Voluntarily leaving (*Employment Insurance Act* - sections 29 and 30)
12. Week of unemployment (*Employment Insurance Act* - section 11; *Employment Insurance Regulations* - sections 29 to 31)
13. Availability for work (*Employment Insurance Act* - section 18; *Employment Insurance Regulations* - sections 9.001-9.004)

B. Carswell’s Annotated Employment Insurance Statutes

Lavender, T.S., Carswell (20010-). Updated every year, Carswell’s *Annotated Employment Insurance Statutes* is an excellent tool for detailed legal research. It contains the entire *EI Act* and *Regulations*, with extensive annotations after each provision describing the history of the section, and the decisions interpreting and applying it.

C. EI Jurisprudence Online

The EI homepage [1] has links to legislation, a jurisprudence library, and to the SST and Umpires sections. This site is a good place to start, though one should be aware that that certain sections may be dated or not have the information most useful to building a good case for a claimant. The Jurisprudence Library has decisions by the Umpires, the Federal Court

of Appeal and the Supreme Court of Canada. These decisions can be searched via a [www.ei-ae.gc.ca/en/library/search.shtml search engine].

Canlii has a database of SST decisions [2].

A very useful resource can be found in the "Employment Insurance Appeal Decisions Favourable to Workers" decisions database. The database makes available a collection of Employment Insurance jurisprudence where decisions were favourable to workers. One should be aware, however, that this section has not been updated to reflect some recent rulings favourable to workers. At the time ofwriting, this section was last updated in September 2012. More information and a link to the database can be found at: http:/ / www. ae-ei. gc. ca/ eng/ board/ favourable_jurisprudence/ favourable_decisions_toc.shtml

> **NOTE:** According to the SST website, the SST is not legally bound to follow its own decisions or those of the “legacy tribunals” (Board of Referees, Umpires). A prior decision may beat most persuasive, especially where the facts are similar. The tribunal must however follow rulings of the Federal Court, Court of Appeal, and the Supreme Court of Canada.

D. Tax Court Decisions

There is a separate site for Tax Court decisions (on insurability issues, etc.). The search page is located at: http:/ / cas-cdc-www02. cas-satj. gc. ca/ portal/ page/ portal/ tcc-cci_Eng/ Search. Searches can be limited to UI and EI decisions.

E. Digest of Benefit Entitlement Principles

This two-volume policy manual is published by the Commission and is amended periodically. It contains a summary of general law and policy for each subject matter, with references to the relevant sections of the *EI Act* and *Regulations* and refers to many decisions of the Umpires and Federal Court. However, it is written by the Commission, and many chapters do not accurately describe the cases. It must therefore be used with caution, and not as the sole reference. However, the online version is the most reliable source; few printed versions are fully up to date. The manual can be found online at: here [3]

F. Human Resources and Skills Development Canada

Human Resources and Skills Development Canada maintains an extensive web site with many tools, which is located at https://www.canada.ca/en/employment-social-development.html.

For general information regarding EI claims contact:

> **Vancouver Service Canada Centre**
>
> 1263 West Broadway
>
> Vancouver, BC
>
> Toll-free: 1-800-206-7218

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 15, 2019.

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References

[1] http://www.servicecanada.gc.ca/eng/sc/ei/index.shtml

[2] http://www.canlii.org/en/ca/sst/

[3] http://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml

III. Qualifying for EI

A. Insurable Employment

Sections 5(1) and (2) of the EI Act set out what is and what is not insurable employment. Please note that s 5(2) outlines specific instances of employment that are not insurable (i.e. employment in Canada by an international organization, by a foreign government, or by Her Majesty in right of a province). When in doubt, the reader should consult s 5 of the *EI Act*, and s 3 of the *EI Regulations*.

Generally, if the employer has deducted EI premiums, then the employment is insurable. However, it is the nature of the employment, and not the premiums paid, that is determinative.

Some disputes are determined solely by the Canada Revenue Agency (CRA). These disputes concern s 90(1) of the *EI Act*, and include:

a) whether employment is insurable;

b) how long employment lasts, including the dates on which it begins or ends;

c) the amount of any insurable earnings;

d) how many hours an insured person has had insurable employment;

e) whether a premium is payable;

f) the amount of a premium payable;

g) who is the employer of an insured person;

h) whether employers are associated employers; or

i) what amount shall be refunded under s 96(4) - (10);

Appeals of decisions by the CRA are made first to the Minister of National Revenue (within 90 days of being informed of the decision), and then to the Tax Court of Canada (EI Act, s 103). Tax Court decisions can be appealed to the Federal Court of Appeal under s 27 of the *Federal Court Act*, RSC 1985, c. F-7.

Workers with insurable earnings below $2,000 will have their premiums refunded.

B. Qualifying Period

1. General

To qualify for EI benefits, a claimant must have worked a certain number of hours of insurable employment during the claimant's qualifying period. The required number of hours may vary according to the location of the claimant, and the unemployment rate in the region they live. The definition of qualifying period is set out in s 8(1) of the *EI Act*. This is usually the shorter of either:

a) the 52 weeks immediately before the benefit period commences under s 10(1); or

b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under s 10(1). I.e., the period between the beginning of a prior claim and the beginning of the present claim.

2. Extensions of the Qualifying Period

However, the qualifying period may be extended (i.e. the Commission will look further back in time) up to a maximum of 104 weeks, as set out in ss 8(2)(a)-(d). It may be extended if the claimant can prove that they was unable to work during any of the weeks of the qualifying period because of:

a) illness, injury, quarantine, or pregnancy;

b) confinement in a jail, penitentiary or other similar institution and was not found guilty of the offence for which the person was being held or any other offence arising out of the same transaction;

c) receiving assistance under employment benefits; or

d) the claimant has left the job due to hazardous work or working conditions. This covers situations where the claimant has ceased to work because to continue would have entailed danger to the worker, the worker's unborn child, or a child whom the worker is breast-feeding.

NOTE: The extension under (d) is limited to situations where a worker would receive payments under provincial law. Many provinces, including BC, do not yet provide for such payments. Consequently, BC workers cannot use (d) as a ground to extend the qualifying period.

Section 8(3) allows the Commission to extend the qualifying period for persons who were receiving compensation arising from the "complete severance" of a previous employment relationship during the benefit period (e.g. severance pay paid following dismissal).

The absolute **maximum extension** of a qualifying period is **104 weeks** (two years). After 104 weeks, no extensions can be made to the claimant's qualifying period.

NOTE: The same insurable hours can never be used for two separate claims.

C. Minimum Hours of Employment Required

1. Types of Claimants (As Defined By the EI Act)

Claimants are classified differently depending on their prior “attachment” to the labour market. Major attachment claimants will be able to receive special benefits (See Section VI: Types of Benefits).

a) Major Attachment Claimants

A major attachment claimant is defined in s 6(1) as a claimant who qualifies to receive benefits and who has 600 or more hours of insurable employment in their qualifying period.

Major attachment claimants are eligible for all types of “special” benefits (e.g. pregnancy, parental, and sickness).

b) Minor Attachment Claimants

A minor attachment claimant is defined in s 6(1) as a claimant who qualifies to receive benefits and has fewer than 600 hours of insurable employment in their qualifying period.

Minor attachment claimants cannot receive most special benefits.

2. Youth and EI

As long as a minor is employed in insurable employment and is paying into the plan, a minor is eligible in the same manner as an adult.

3. Hours Required

For claimants to receive the regular benefits, they must meet their **s. 7 Table** requirements during the qualifying period.

The number of hours required to qualify for benefits is based on the unemployment rate of the region in which the claimant lives. ESDC relies on Statistics Canada’s Labour Force Survey and its “seasonally adjusted average unemployment rate”. Note that several features of the Labour Force survey make the official unemployment rate appear lower or higher than it actually is based on the use of three-month averaging. The current rate of unemployment for each region can be found at: http://srv129.services.gc.ca/ei_regions/eng/rates.aspx?id=2010.

EI Act, s. 7 **Table**

Regional Rate Of Unemployment	Required Number of Hours of Insurable Employment in the Qualifying Period
6.0% and under	700
over 6.0% to 7.0%	665
over 7.0% to 8.0%	630
over 8.0% to 9.0%	595
over 9.0% to 10.0%	560
over 10.0% to 11.0%	525
over 11.0% to 12.0%	490
over 12.0% to 13.0%	455

over 13.0%	420

For EI purposes, British Columbia is divided into six regions:

a) Southern Interior consisting of Thompson-Nicola, Columbia-Shuswap, Okanagan and Kootenays Regional Districts;

b) Abbotsford, consisting of Mission and Abbotsford;

c) Vancouver, consisting of Greater Vancouver, West Vancouver, North Vancouver, Richmond, Surrey, Delta, Burnaby, Langley, Maple Ridge, Coquitlam, Pitt Meadows and New Westminster;

d) Southern Coastal British Columbia, consisting of Comox-Strathcona, Powell River, Squamish-Lillooet, Fraser Valley, Sunshine Coast, Nanaimo, Alberni-Clayoquot, Cowichan Valley and Capital Regional Districts;

e) Victoria, including Saanich, Metchosin, Oak Bay, Sooke and Esquimalt; and

f) Northern British Columbia.

For more details on the regions, refer to the *EI Regulations*, Schedule I, s 7. Or, you can refer to this map [1] of BC's economic regions.

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The monthly seasonally adjusted regional rate is available from Statistics Canada online.
```

> **NOTE:** The Commission reviews the boundaries established for the purposes of employment insurance at least once every five years (EI Regulations, s 18(2)).
>
> **NOTE:** A claimant who does not qualify at the time of his or her application may subsequently qualify if the regional unemployment rate should rise into a higher category. However, the converse does not apply. That is, once a claimant meets the requirements, they will not be cut off if the rate subsequently goes down.
>
> **NOTE:** The number of hours that an insured person (other than a new or re-entrant to the labour force) needs under s 7 to qualify for benefits is increased to the number shown under s 7.1(1) if one or more violations has occurred in the 260 week period prior to the initial claim (see Section IX: Keeping Out of Trouble).

D. Interruption of Earnings

To establish a claim, the worker must have an "interruption of earnings." An interruption of earnings is defined as:

> **Seven or more consecutive days** during which the employee performs no work and for which the employee will **receive no earnings**. (*EI Regulations*, s.14)

Layoff, the end of a contract and dismissal can all be causes of an interruption of earnings.

A substantial reduction in the hours of work (for example, from full time to one day a week or less) does **not** meet this definition. Consequently, a worker whose hours are drastically reduced cannot establish a claim unless they have a full week of unemployment. The only exception is for special benefits. However, if there is an interruption of earnings from one of two part-time jobs with the same employer, then the claimant could qualify.

In the case of special benefits, an interruption of earnings occurs when a worker experiences a reduction in earnings of more than 40% of the person's normal weekly earnings.

1. Weeks of Unemployment

"Week of unemployment" is defined in s 11(1) of the *EI Act*: "A week of unemployment for a claimant is a week in which the claimant does not work a full working week". However, the following subsections of s 11 describe situations which do not amount to an interruption of earnings as defined in s 14.

E. Record of Employment

An employer who completes a paper form must provide an employee with a Record of Employment (a ROE) five days after the first day of the interruption of earnings, or the day on which the employer becomes aware of the interruption of earnings.

If the ROE is completed in electronic form, it must be sent to the Commission no later than 5 days after the end of the pay period in which the first day of the interruption of earnings fell. The rules for this are set out in s 19(3.1) of the EI Regulations. If there are 13 or fewer pay periods in a year, then the ROE must be sent to the Commission no later than 15 days after the first day of the interruption of earnings. An employer who completes a ROE in electronic form is not required to send a copy to the employee.

The ROE contains information important to the EI claim. It sets out the first and last dates of work, the total hours worked and the total earnings, which are used to determine the amount of benefits payable and it also sets out the reason for separation. If it says that the claimant quit or was fired, the Commission must investigate the reasons. Depending on the conclusions of the Commission, the claimant may be disqualified from all regular benefits (see Section V.D: Effect of Earnings).

> **NOTE:** It is important that claimants who have worked more than one job during the qualifying period retain the ROEs from each employer.

If the claimant disagrees with statements in the ROE, he or she can ask the employer to correct them. The claimant should also bring the errors to the Commission's attention at the time of application.

F. Filing an Application

Applications should be filed during the first full week of unemployment (see Appendix A: Checklist for Initial Application for EI Applications). However, as a matter of policy, applications will be automatically "antedated" (see Section IV.B: Antedating) for up to four weeks. If the claimant delays longer than this, they may lose benefits unless he or she is able to show "good cause" for the delay. Because of this, if a claimant cannot get a ROE immediately, they should still go to the nearest Canada Employment Insurance Commission office and complete an application. Usually, the Commission will want to have an ROE before they process the claim, however, claimants should always ensure they apply on time even if they do not yet have their ROE. The Claimant should make efforts to get the ROE from the employer, however if the Claimant is unsuccessful the Commission will contact the employer if the record is not completed on time. If necessary, a claimant may prove his or her employment history and insurable earnings by filing an application supported bypay slips and cheque stubs, etc.

> **NOTE:** Applications may be filed online through the HRDC web site. Applicants filing online must still submit their ROE(s) by mail or in person. If the claimant's ROE has a "W" or "S" serial number, his or her employer has provided ROE electronically to the local office and the claimant is not required to submit the paper copy. Claimants may review and edit their claim information online by using the "MyEI Information on-line" service provided by service Canada.

For general information about filing an application and about the EI system visit: https://www.canada.ca/en/services/benefits/ei/ei-apply-online.html.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July, 2019.

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References

[1] https://srv129.services.gc.ca/ei_regions/eng/bc.aspx

IV. Types of Benefits

A. Regular Benefits

EI benefits are calculated using your highest weeks of earnings over the qualifying period (generally 52 weeks): http://www.servicecanada.gc.ca/eng/ei/vbw/index.shtml (this applies to both regular and special benefits).

Regular EI benefits are payable during the benefit period to a claimant who:

- has had the requisite number of hours of insurable earnings during the qualifying period;
- has had an interruption of earnings from employment;
- is capable of and available for work
- has made “reasonable and customary efforts” ; and
- is unable to find suitable employment.

The maximum number of weeks of regular benefits available to a claimant varies according to the claimant’s hours of insurable employment in the qualifying period, and the regional rate of unemployment. See Schedule I, s 12(2) of the *EI Act*.

B. Special Benefits

This category includes sickness, compassionate care, pregnancy, parental benefits, and benefits for parents caring for a critically ill child (s 12(3)). More than one type of special benefit can be claimed within one benefit period. Similarly, special and regular benefits claims can be combined. However, s 12(6) sets out the maximum for such a combination. If a claimant has not collected any regular benefits and is just combining different special benefits to which they are entitled, the maximum number of weeks the claimant can collect is the combined maximum for each of the special benefits they are collecting. To ensure they have time to collect all these combined weeks, their benefit period will also be extended to the combined maximum number of weeks of special benefits they can collect.

If the claimant has collected regular benefits but is also entitled to collect special benefits during their benefit period, then the claimant can combine weeks of benefits, but the maximum number of combined weeks cannot be higher than 50.

C. Sickness Benefits

1. Entitlement

To qualify for sickness benefits, the claimant must be able to prove that they are unable to work due to illness, injury, or quarantine. This normally requires that the claimant obtain a medical certificate completed by a doctor or medical practitioner stating the expected duration of incapacity (*EI Regulations*, s 40(1)). The claimant must also show that they would have been available to work if they had not fallen ill, gotten injured or placed in quarantine. The illness, injury, or quarantine must be that of the claimant personally.

a) Major Attachment Claimant

Up to 15 weeks of sickness benefits are payable to a claimant who is incapable of work due to a prescribed illness, injury, or quarantine (s 12(3)). Major attachment claimants can receive sickness benefits even if the illness is the reason for ceasing work.

b) Minor Attachment Claimant

A minor attachment claimant may qualify for up to 15 weeks of sickness benefits if the injury, illness, or quarantine was not the reason for the claimant's interruption of earnings, but is the reason that they cannot return to work. For example, if a claimant is laid-off due to shortage of work and begins collecting regular EI benefits, the claimant may be entitled to sickness benefits if they later fall ill, even if they qualified for regular benefits with less than 600 hours.

In some cases, a claimant who loses previous employment – due to injury for example – may not immediately qualify for regular benefits if he or she is capable of performing other jobs and is actively seeking such employment.

2. Sickness Benefit Rate

The sickness benefit rate is the same as the regular benefit rate and is subject to reduction due to "earnings", which are allocated to weeks of sickness. In contrast to regular claimants, all "earnings" are deducted (s 21(3)). See Section V.D: Effect of Earnings, above.

3. Prescribed Illness, Injury or Quarantine

Sickness benefits are only available for a "prescribed illness, injury or quarantine that renders a claimant incapable of performing the functions of his or her regular or usual employment or other suitable employment" (**EI Regulations**, s 40(4)). The onus is on the claimant to prove entitlement. A medical certificate is usually required, and the Commission may also require a claimant to undergo a medical examination at their direction pursuant to s 40(2) of the EI Regulations. In those situations, the Commission must pay travel and other expenses for the examination (**EI Regulation**, s 40(3)).

> NOTE: For more information on claiming sickness benefits, please refer to the ESDC website: https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/sickness.html.

D. Compassionate Care Benefits

Compassionate Care Benefits may be paid up to a maximum of 26 weeks to a major attachment claimant who has to be absent from work to provide care or support to a gravely ill family member and is at risk of dying within 26 weeks. The benefits for compassionate care must be claimed within a 52-week period that generally starts on the day the doctor certifies the family member is likely to die. Unemployed persons on EI can also apply for this type of benefit.

To be eligible for Compassionate Care Benefits a claimant must apply and show that:

- his or her regular weekly earnings from work have decreased by more than 40 percent; and
- he or she has accumulated 600 insured hours in her qualifying period.

The EI Act's expanded definition of "family member" includes a claimant's:

- own child or the child of the spouse or common-law partner;
- wife/husband or common-law partner;
- father/mother or father's wife/mother's husband, if parent is remarried;
- common-law partner of father/mother, if there has been no remarriage;
- other relatives; and
- anyone that the gravely ill person considers to be like a family member .

To establish a claim for compassionate care benefits in order to care for a gravely ill person who considered you to be like a family member, medical proof is required. This includes an Authorization to Release Medical Certificate form signed by the gravely ill person or their legal representative and a Medical Certificate for Employment Insurance Compassionate Care Benefits form signed by the medical doctor.

1. Sharing Compassionate Care Benefits

Compassionate care benefit can be shared with other family members as long as each one of the family members is also eligible. Family members can claim the benefits at the same time or at different times as long as the number of weeks claimed for compassionate care benefits does not exceed 26 weeks altogether.

There is still a one-week waiting period before benefits can be claimed. However, if the benefit is to be shared with other family members, only the first family member to claim compassionate care benefit has to serve the one-week waiting period.

> NOTE: For more information on claiming compassionate care benefits, and for a comprehensive list of persons included under the term "family member," please refer to the ESDC website: http://www.servicecanada.gc.ca/eng/ei/types/compassionate_care.shtml#Definition.

E. Benefits for Parents of Critically Ill Children (PCIC)

Eligible family members who take leave from work to provide care or support to a child with a life-threatening illness or injury can receive up to 35 weeks of benefits. The benefits must be collected in the 52-week window beginning on the day a medical certificate is issued showing that the child is critically ill or, if the claim is made before the certificate is issued, from the date a specialist medical doctor certifies that the child is critically ill or injured. The child must be under the age of 18 at the time that the beginning of the benefit window; if the child turns 18 at any time during the benefit window besides the beginning, the claimant will remain eligible to claim PCIC benefits.

As with other special benefits, the claimant must have an interruption of earnings (for special benefits, a 40% reduction in earnings) and have 600 hours in their qualifying period.

These benefits are not available to family members of a child with a chronic illness or condition that is their normal state of health. There must be a significant change from the child's normal or baseline state of health at the time they are assessed by a specialist medical doctor.

PCIC benefits can be shared between both eligible family member. Eligible family members can claim for PCIC benefits at the same time or at different times as long as the sum of the weeks claimed does not exceed the 35 weeks.

> **NOTE:** For more information on claiming PCIC benefits, please refer to the ESDC website: https://www.canada.ca/en/services/benefits/ei/family-caregiver-children.html.

F. Benefits for Family Members of Critically Ill Adult (PCIA): the Family Caregiver Benefit for Adults

Eligible family members who take leave from work to provide care or support to a family member with a life-threatening illness or injury can receive up to 15 weeks of benefits. The benefits must be collected in the 52-week window beginning on the day a medical certificate is issued showing that the adult is critically ill or, if the claim is made before the certificate is issued, from the date a specialist medical doctor certifies that the adult is critically ill or injured. The adult must be over the age of 18 at the time that the beginning of the benefit window.

As with other special benefits, the claimant must have an interruption of earnings (for special benefits, a 40% reduction in earnings) and have 600 hours in their qualifying period.

These benefits are not available to family members of an adult with a chronic illness or condition that is their normal state of health. There must be a significant change from the adult's normal or baseline state of health at the time they are assessed by a specialist medical doctor.

PCIA benefits can be shared between more than one eligible family member. Family members can claim for PCIA benefits at the same time or at different times as long as the sum of the weeks claimed does not exceed the 15 weeks.

> **NOTE:** For more information on claiming PCIA benefits, please refer to the ESDC website: https://www.canada.ca/en/services/benefits/ei/family-caregiver-adults.html.

G. Pregnancy Benefits

Pregnancy benefits are paid to an expectant or newly delivered mother. A mother can be entitled to both pregnancy benefits and parental benefits. Like sickness benefits, pregnancy and parental benefits can be distinguished from regular EI benefits, because they are paid even though the applicant is not available for work.

1. Entitlement

A claimant for pregnancy benefits must:

a) be a major attachment claimant;

b) prove her pregnancy. This entails furnishing a certificate completed by a physician that sets out the expected date of birth, or providing such other evidence as the Commission may require, and

c) have an interruption of earnings.

> **NOTE:** Pursuant to s 40 (5) of the *EI Regulations*, a claimant who terminates her pregnancy within the first 19 weeks is entitled to collect sickness benefits.

2. Benefit Period and Duration

Benefits can only be paid for a maximum of 15 consecutive weeks. The period can start no more than 12 weeks before the week when the claimant's due date is expected or the week when the birth actually occurs, whichever is earliest (EI Act, s 22(2)).

The maximum period in which benefits may be collected ends 17 weeks after birth or due date, whichever is later. If the child born from the pregnancy is hospitalized, the benefit period may be extended by one week for each week or part of a week that the child is hospitalized (*EI Act*, s 22(6)). However, benefits may last no longer than 15 weeks total, even if extensions have been granted. As with claims for regular benefits, there is a one-week waiting period after the claim is made before benefits become payable.

3. Pregnancy Benefit Rate

The pregnancy benefit rate is the same as the regular benefit rate. All earnings received from other sources reduce benefits. However, no proof of availability is necessary. Money received under an employer's sickness or maternity plan, other than a SUB plan, is regarded as earnings, and will be deducted. For a comprehensive list of what is and is not, regarded as earnings, see s 35 of the *EI Regulations*. See also Section V.C: Effect of Earnings, above.

> *NOTE:* For more information on claiming pregnancy benefits, please refer to the ESDC website: https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental.html.

H. Parental Benefits

There are two options available to parents; they may choose to get 55% of their wage for 40 weeks or they may choose to receive 33% of their wage for up to 69 weeks. These benefits are available to any parent, including adoptive parents, who experience an interruption of earnings to care for their new child. However, birth mothers can collect parental benefits in addition to their pregnancy benefits.

Should parents elect to receive benefits for up to 40 weeks, parents can share the 40 weeks of benefits between them. However, each parent cannot individually claim more than 35 weeks.

Should parents elect to receive benefits for up to 69 weeks, parents can share the total benefit between the them as they choose. However, no parent may receive more than 61 weeks of benefits individually.

In either case, only parents who are major attachment claimants (i.e. have at least 600 insurable hours in their qualifying period) can qualify. In other words, each parent must qualify individually, and one parent cannot qualify on behalf of the other. For example, if one parent claims 35 weeks of benefits, then the other parent may claim a maximum of 5 weeks.

The period during which parental benefits can be claimed begins on the day the child is born, or placed with the parent for the purposes of adoptions, and ends 52 weeks later. The 40 weeks of parental benefit do not need to be collected in consecutive weeks and can be collected at any time during this period. Like other EI benefits, the claimant will receive 55% of their average weekly earnings.

I. Provisions for Low Income Families

For claimants with children and low family incomes, there is a family supplement that could raise their benefit rate to a maximum of 80 percent. Low-income families are defined as those who qualify for the Canada Child Benefit, with a combined annual income of less than $25,921.

J. Employment (Training) Benefits

The EI budget includes discretionary funding for retraining. Eligibility for these benefits is determined by the criteria in s 58(1) of the EI Act, and includes anyone whose benefit period ended within the last 60 months. Section 9 of the EI Act lists out certain types of benefits that could be conferred to claimants that meet the criteria in s 58(1). The Commission has discretion to approve funding for benefits during training, and decisions on this matter cannot be appealed (EI Act, s 25(2)).

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V. Benefit Period

A. Introduction

When a claim is established, the claimant's "benefit period" will begin. Under s 10(1) of the *EI Act*, the benefit period begins on the Sunday at the beginning of the week in which the interruption of earnings occurs, or on the Sunday of the week in which the initial claim for benefit is made, whichever is later, though this is subject to antedating. Benefits will only be paid during the benefit period.

B. Antedating

If an application for EI benefits was not filed within the first four weeks after the week in which the claimant experienced their interruption of earnings inter, they can ask that the claim be antedated back to the first date when it could have been filed under s 10(4). The claimant must establish that good cause existed for the delay in filing. "Good cause" must be demonstrated for each day until the date of application was actually made. If the claim is filed within the first four weeks, it is automatically antedated to the first date of eligibility.

> **What is "Good Cause"?** Good cause has typically been interpreted narrowly. In one case, the applicant was in the hospital and the Commission denied his application for antedating on the grounds that his wife should have made the claim on his behalf. Simple ignorance of the requirements of the EI Act has not been considered good cause either, though reasonable reliance on bad advice from the employer, union, a legal advisor or the Commission itself usually meets the requirements.
>
> In *Attorney General v Burke*, 2012 FCA 139, a claimant asked for his application to be back dated because he had expected to be rehired and hence did not apply for EI until after the regular deadline. The Federal Court of Appeal upheld the previous decisions granting an antedate on the basis that the claimant had done what a reasonable person would do.

C. Income That is Treated as Earnings

Section 35(2) of the EI Regulations defines what will be considered earnings for EI purposes.

Income that counts as "earnings" includes, but is not limited to:

- a) severance pay;
- b) retirement payments and retirement leave credits or payments in lieu;
- c) most bonuses and gratuities;
- d) wages in lieu of notice; and
- e) vacation pay.

See section 35(2) of the EI Regulations for more detail.

It is important to note some income, while generally considered earnings, will not prevent an interruption of earnings. For example, the fact that a worker receives severance, pay in lieu of notice, or vacation pay after getting laid off will not delay the interruption of earnings. The claimant should still apply for EI as soon as possible after they stop working to make sure their application is not late, even if the money they get from the employer due to the layoff may delay the start of their actual EI benefits..

Income regarded as earnings is "allocated" pursuant to s 36 of the EI Regulations. This is usually done at the claimant's regular weekly rate of pay. Such allocation may delay the start of benefits by the number of weeks the earnings can be allocated to. For example, if a person normally earns $500 per week, and receives $1000 severance pay, their claim will be delayed for an additional 2 weeks after they stop work. This is because it will notionally take two weeks to "use up" the $1000, as the claimant usually makes this amount in two weeks.

Though the claimant will need to wait until the money is used up before being eligible to receive benefits, they **must still apply for EI immediately**. The benefit period will be extended to make up for the weeks it takes to use up these earnings.

D. Income That Is Not Treated As Earnings

Section 35(7) exempts certain sources of income from being regarded as earnings. These include:

- a) Disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;
- b) Payments under a sickness or disability wage-loss indemnity plan;
- c) Relief grants;
- d) Retroactive increases in wages or salary.

For more details, see section 35(7) of the EI Regulations.

Recent cases suggest that in certain circumstances some earnings may not delay the start of an EI claim. In *Attorney General of Canada v Doreen Myers*, 2006 FCA 57, the court found that the claimant's vacation pay did not delay the start of a claim because it was not a payment made by reason of a separation, thus allowing benefits to be received earlier, and possibly at a higher rate. See also the case of *Attorney General of Canada v Bielich*, 2005 FCA 363. In this case the court allowed a $24,000 payment to be exempted from the claimant's allocation of earnings because the purpose of the payment was to compensate the claimant for giving up his right to seek reinstatement, not to compensate for lost pay.

> **NOTE:** A retirement pension will not delay the start of a claim. Retirement pensions are generally considered income and are deducted from EI benefits. However, if the claimant accumulates all the hours needed to qualify

for EI after the date their pension starts, then their pension money will not be deducted from their EI benefits (see EI Regulation, s 35(7)(e).

E. The Waiting Period

Before receiving any EI benefits, a claimant must serve a one week "waiting period" during which they are unemployed and otherwise eligible for benefits (EI Act, section 13).

This waiting period also applies to pregnancy, parental, caregiver and sickness claims. For caregiver benefits, it can be deferred for the second family member if benefits are split, but the first person must serve it. If a claimant works during the waiting period, 100 percent of his or her earnings will be deducted from the first three (and no more than three) weekly benefit cheques.

F. Length of Benefit Period

The benefit period for regular EI benefits is 52 weeks. However, this period can sometimes be extended to more than 52 weeks, The criteria for this are set out in s 10(10) of the EI Act. The benefit period can be extended when a claimant proves that for any week during that benefit period the claimant was not entitled to benefit by reason of:

- a) receiving earnings paid by reason of the complete severance of the relationship between the claimant and the claimant's former employer (i.e. "using up" severance pay, vacation pay, etc.);
- b) receiving Workers' Compensation payments for a total disability; or
- c) receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have entailed danger to the claimant, the claimant's unborn child, or a child the claimant is breast-feeding. However, under BC law, BC residents are not entitled to these payments, and this does not apply to them.

The benefit period can be further extended under s 10(11) where a claimant can prove that for any week during the extension period, he or she was not entitled to benefit, again for any reason stated in s 10(10).

The length of any benefit period extended for these reasons cannot exceed 104 weeks (*EI Act*, s 10(14)).

G. Payment of Regular Benefits

Where a benefit period for regular benefits has been established for a claimant, benefits may be paid to the claimant for each week of unemployment that falls in the benefit period, subject to the maximum benefit periods established in *EI Act*, s 12.

The maximum number of weeks for which benefits may be paid in a benefit period (other than special benefits) are determined in accordance with the table in Schedule I of the *EI Act* by reference to the regional rate of unemployment that applies to the claimant and the number of hours of insurable employment of the claimant in their qualifying period.

Refer to Canada's EI Economic Region map to determine whether the claimant was living in one of the economic regions: http://srv129.services.gc.ca/eiregions/eng/canada.aspx.

H. Termination of Benefit Period

Once a benefit period is established, it continues to run notwithstanding that the claimant may have returned to work (though full benefits will not actually be paid in this case), unless the benefit period is terminated.

Section 10(8) states that a benefit period terminates when:

1. no further benefits are payable to the claimant in his or her benefit period;

2. the benefit period would otherwise end under this section; and

3. the claimant:

a) asks that the benefit period end;

b) makes a new initial claim for benefit; and

c) qualifies to receive benefit under this part of the *EI Act*.

NOTE: The way benefit rates are calculated under the *EI Act* can make the timing of the decision to end one claim and start a new one crucial. Therefore, it may be better for a claimant to terminate an existing benefit period prior to its expiration and establish a new one, in order to use working periods during the benefit period that may improve his or her benefit rate or attachment.

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VI. Quantifying Benefits

A. Benefit Rate

The benefit rate is set out in s 14 of the EI Act. The benefit rate is either:

- 55% of the worker's weekly insurable earnings (see next section); or,
- if (1) the claimant or the spouse of the claimant has dependents and (2) the benefit rate of 55% amounts to less than $225 a week or the family income is less than $25,921, then the claimant may also be entitled to a family supplement.

The current ceiling for the maximum weekly benefits is $547 per week. Always check Service Canada's "Employment Insurance Regular Benefits" webpage to ensure this information is up-to-date at https://www.canada.ca/en/services/benefits/ei/ei-regular-benefit.html.Effective January 1, 2018, the maximum yearly insurable amount is $51,700.

B. Weekly Insurable Earnings

A claimant's weekly insurable earnings are their insurable earnings in the calculation period divided by the number of weeks in the calculation period.

1. The Calculation Period

The calculation period is the number of weeks, consecutive or not, determined based on the applicable regional rate of unemployment as below, in which the claimant received the highest insurable earnings.

Regional Rate of Unemployment	Number of Weeks
not more than 6%	22
more than 6% but not more than 7%	21
more than 7% but not more than 8%	20
more than 8% but not more than 9%	19
more than 9% but not more than 10%	18
more than 10% but not more than 11%	17
more than 11% but not more than 12%	16
more than 12% but not more than 13%	15
more than 13%	14

2. Insurable Earnings

Insurable earnings include:

- Insurable earnings from insurable employment including employment that has not ended
- Insurable earnings paid or payable to the claimant during the qualifying period by reason of lay-off or separation from employment, unless the lay-off or separation from employment occurred during the qualifying period.

C. Effect of Earnings

The benefit payable to a claimant may be reduced if the claimant has "earnings" during the benefit period. It may be possible both to work part-time and receive EI benefits at the same time, but all income must be reported on the report cards.

The Employment Insurance Working While on Claim pilot project is a way to help claimants stay connected with the labour market (*EI Regulations* ss 77.95-77.96).. It applies to claimants earning money while collecting any of the following types of EI benefits:

- regular benefits
- fishing benefits
- parental benefits
- compassionate care benefits
- parents of critically ill children
- family members of critically ill adults

As soon as a claimant completes the one-week EI waiting period, the pilot project will automatically apply to any money the claimant earns while the claimant is collecting EI benefits.

How it works

The Commission sets a threshold which is 90% of the claimant weekly insurable earnings. Below this threshold, for every dollar, a claimant earns 50 cents will be deducted from their benefits. Above this threshold, a dollar of benefits will be deducted for every dollar earned. This is referred to as the "default rule".

The claimants may choose to opt for the "optional rule". The optional rule allows the claimant to keep the equivalent of roughly one day's work which is defined as $75 or 40% of the claimant's benefit rate (whichever is greater) without any deduction to the EI benefit they receive. Any earnings after this amount will be deducted dollar to dollar from the EI benefits the claimant is receiving.

Example from Service Canada Website:

Melissa got laid off when the construction company where she was working lost a major contract. Her weekly earnings averaged out to $800, so her weekly EI benefits are $440. She then finds a part-time job at another construction company where she works one day and earns $160 per week.

Automatically under the "default rule", she is allowed to keep 50 cents of EI benefits for every dollar she earns, so she takes home $520 per week in combined EI benefits and wages ($360 of EI benefits + $160 in wages).

If she chooses the "optional rule", she can earn up to the greater of $75 or 40% (176) of her benefit rate, without any deductions from her benefits. In this scenario, she will choose to keep 40% ,as she only earns $160 per week from her work while on claim, so she can keep all of her EI benefits. Under this option, she would take home $600 per week in combined EI benefits and wages ($440 of EI benefits + $160 in wages).

In this example, Melissa would likely choose the "optional rule" if she never worked more than one day per week as she takes home $80 more per week.

Important reminders

If a claimant is receiving EI sickness benefits or EI maternity benefits, this pilot project does not apply. Any earnings the claimant has will continue to be deducted dollar for dollar from benefits. If the claimant works a full working week, the claimant will not receive any EI benefits, regardless of the amount the claimant earns.

Claimants do not have to apply to the Working While on Claim pilot project as it will automatically be applied to their claim. The "default rule" will be the method of calculation that automatically applies. However, claimants must request to opt for the "optional rule" in order to have their benefits calculated accordingly.

What if the claimant works or lives outside Canada?

If the claimant is living in the United States and works in Canada, or if the claimant crossed the Canada–United States border between the claimant's residence and workplace and the claimant is receiving EI benefits, this pilot project will apply. Visit the Employment Insurance and Workers and/or Residents outside Canada Web page for more information: https://www.canada.ca/en/services/benefits/ei/ei-outside-canada.htm

1. Earnings During the Waiting Period

All earnings during the waiting period are deducted dollar for dollar from the benefits payable in respect of the first three weeks for which benefits are otherwise payable. There is thus little incentive to work during the waiting period.

2. Earning of Sick Claimants

In contrast to regular claimants, all "earnings" are deducted, dollar for dollar, for claimants receiving sickness benefits – whether they are earned during the waiting period or afterward. (s 21(3)).

3. Earnings of Parental Claimants

Claimants receiving parental benefits are entitled to claim an exemption of earnings (See Section V.C: Effect of Earnings)

4. Earnings of Sick or Pregnant Claimants under Supplemental Employment Benefit Plans

Amounts paid to the claimant during periods of illness or pregnancy under an approved Supplemental Employment Benefit plan will not be deducted from EI benefits. These plans allow the employer to "top up" the regular EI benefits without reductions.

Individual Supplemental Employment Benefit plans must be approved by the Commission, which ensures that they meet the requirements of s 37(2).

An employee normally benefits from these plans while drawing EI benefits. If the worker is ineligible for EI, he or she may still qualify for Supplemental Employment Benefits that do not count as earnings for the purpose of determining waiting periods.

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VII. Benefit Entitlement

Once a claim is established, the basic requirement for receiving weekly benefits is that the claimant be "capable of and available for work and unable to obtain suitable employment". To prove this in the event of a dispute, the claimant should keep a "job search record" (see Section IX.A: Job Search Record).

A. Capable and Available

A claimant will be disentitled if the Commission has evidence (often supplied inadvertently by the claimant) to show that the claimant was not capable and available for work during a given period. For example, if a claimant volunteers the fact that they are only applying for jobs paying $20 per hour or more, the Commission could disentitle the claimant if there are few if any such jobs for which the claimant would be suitable. For an example of how unforeseen events can affect availability, see *Canada (Attorney General) v Leblanc*, 2010 FCA60. In this case, a desire to work was insufficient to establish availability because the claimant lacked proper clothing and a means to get to work as the result of a house fire.

1. Vacation and Travel

A claimant cannot collect benefits for times they are on vacation, as they must be ready for work to collect benefits. However, they can collect up to the day they leave, and from the day they return, if they become immediately available again. To avoid potentially onerous penalties, vacations – including short ones – **must** be properly recorded and reported.

The Customs Match program allows Human Resources and Skills Development Canada (HRDC) to match data from Canada Customs and Revenue Agency's Customs Declaration form to determine whether an EI claimant has been out of Canada without notifying HRDC. Under the *EI Act*, a claimant is **not allowed to collect regular or sickness benefits while not in Canada**, except under certain circumstances.

2. Sickness

A claimant may receive up to 15 weeks of sickness benefits where they can prove that they were "incapable of work by reason of prescribed illness, injury or quarantine on that day, and that they would otherwise be available for work" (s 12(3)(c)). In theory, if the claimant is already receiving regular benefits from EI and is ill for even one day, that day must be recorded as a day on which they are not capable of or available for work, if that is indeed the case.

3. Attending Courses

Most claimants taking a full-time course will be considered unavailable for work unless the Commission-or an agency authorized by the Commission-specifically referred the claimant to the program. Even if the course is part-time and improves the claimant's chances of finding employment, the claimant may still be disentitled because he or she is considered unavailable for work. In these circumstances a claimant may attempt to prove availability, if the course does not interfere with the job search and he or she would immediately be able to accept an offer of employment.

According to s 25(2) of the EI Act, a decision refusing to refer a claimant to a course is not reviewable under s 112. However, a claimant who takes a course without the Commission's approval can still appeal a finding that he or she is disentitled for not being available for work while taking the course.

Persons attending full-time courses not approved by the Commission may still be entitled to EI benefits if they have established their eligibility by working part-time while attending classes and if they are still available for their previous

hours of work on virtually no notice.

4. Starting a Business

Claimants who are trying to start a business are generally considered to be working full-time, regardless of whether they are receiving any income from the business. They are therefore not eligible for any benefits. The only escape for such claimants is to convince the Commission, or the SST in an appeal, that the self-employment was so minor in extent that a person would not normally rely upon it as a principal means of livelihood.

5. Working Part-time

A claimant who worked part-time may be able to claim an earnings exemption. If the claimant receives any benefits at all, the week counts toward the maximum number of weeks that can be paid under that claim. Thus, it may be in a claimant's interest not to claim benefits for a week in which only a small amount would be paid.

B. Suitable Employment

A claimant must accept suitable work but is not required to take work considered not suitable. Most of the criteria that define 'suitable work' are contained in the EI Regulations s 9.002(1). They are as follows:

- a) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work;
- b) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and
- c) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.

1. Proof of Search for Suitable Employment

Section 50(8) of the EI Act requires that a claimant prove he or she is making "reasonable and customary" efforts to obtain suitable employment. Again, this emphasizes the importance of keeping a job search record, which the claimant should update daily. The criteria are further elaborated in EI Regulations, s 9.001:

- a) the claimant's efforts are sustained;
- b) the claimant's efforts consist of:
  - i. assessing employment opportunities;
  - ii. preparing a resume or cover letter;
  - iii. registering for job search tools or with electronic job banks or employment agencies;
  - iv. contracting prospective employers;
  - v. submitting job applications;
  - vi. attending interviews; and,
  - vii. undergoing evaluations of competencies; and
- c) the claimant's efforts are directed toward obtaining suitable employment.

C. Disqualification

Disqualification can be imposed under s 27(1) and s 30(1) of the *EI Act*. The effects of disqualification differ depending on what category the disqualification falls into:

Section 27(1) and 28(1) of the *EI Act* state that a claimant may be disqualified from receiving benefits for 7 to 12 weeks if, without good cause, they:

- refuses a suitable employment offer;
- refuses to apply for suitable employment when aware that a position is vacant or is becoming vacant;

A claimant can be disqualified from receiving benefits for up to 6 weeks

- neglected to avail oneself of an opportunity for suitable employment;
- failed to attend an interview recommended by the Commission; or
- under s 27(1.1), has failed to attend a course of instruction or training referred to by the Commission.

The disqualification will be deferred if the claimant is otherwise entitled to special benefits. In other words, a disqualification under section 27(1) of the *EI Act* will disqualify a claimant from receiving regular benefits, but the claimant may still collect any special benefits to which they are entitled.

NOTE: In these cases the length of disqualification is appealable.

Section 30(1) of the *EI Act* states that a claimant is disqualified when they are fired due to his or her own misconduct or when they quit without just cause. However, s 35 states that s 30(1) does not disqualify a claimant from receiving benefits if remaining in or accepting employment would interfere with the claimant's membership in a union or the claimant's ability to observe a union's rules.

The effect of a s 30 disqualification is a cut-off of all regular benefits in a benefit period. Such a disqualification is imposed if the claimant has lost any job in the qualifying period for the reasons set out in s 30, even if the claimant had other work before applying for EI (s 30(5) and (6)). Only if the claimant has worked enough hours since the disqualifying loss of employment to meet the hourly requirements to establish a claim will the disqualification not be imposed. For example, if a worker is employed in a job for five years, and gets fired for misconduct, the worker would be totally disqualified under s 30 from all regular benefits. If the worker subsequently finds a second job, and gets laid off from that second job after 10 weeks, the total insurable employment would be calculated as the number of hours worked during those 10 weeks after the earlier s 30 disqualification. The worker's previous five years of insurable employment would not count unless the worker had enough hours in the 10-week period to qualify under the s.7 table. In that case, the previous hours would count toward the number of weeks of payable benefits.

A disqualification under section 30(1) of the *EI Act* is suspended for any week the claimant qualifies for special benefits. In other words, the claimant will disqualified from receiving regular benefits if they leave their employment without just cause or lose their job due to their own misconduct, but the disqualification will not prevent the claimant from collecting special benefits to which they are entitled.

1. Just Cause for Voluntarily Leaving Employment

"Just cause" is defined under s 29(c) as follows: "having regard to all the circumstances, the individual had no reasonable alternative to leaving the employment". Where an employee had "just cause" for leaving his or her employment, he or she will not be disqualified. The onus is on the worker to show "just cause". The Commission must show that leaving was voluntary and that the claimant took the initiative in severing the employer-employee relationship; the worker must then prove just cause.

The Decisions of the Umpires and the SST provide examples of what is and is not considered voluntary. Once the facts have been established to show voluntary leaving, the onus then shifts to the claimant to show that he or she had just cause. When the evidence of the employee and the employer contradict one another, and the evidence is evenly balanced, s 49(2) of the *EI Act* provides that the claimant shall receive the benefit of the doubt.

a) Statute & Case Law

Whether the employee had "just cause" for leaving his or her employment is decided with statutes and case law.

Sections 29(c)(i) – (xiv) of the *EI Act* provide a list of the circumstances that can constitute "just cause". **This list is neither exhaustive nor conclusive.** In other words, circumstances not described in s 29(c) can also be just cause if they satisfy the main definition in s 29(c). On the other hand, circumstances listed in s 29(c)(i) – (xiv) will not be considered "just cause" if the conditions in s 29(c) are not met (if, for example, the claimant had a reasonable alternative).

To date, the only prescribed circumstance under s 29(c)(xiv) is *EI Regulations* s 51. This states that leaving employment when the employer is downsizing the business and the claimant's decision preserves the employment of another worker does constitute just cause.

For a claimant to prove just cause, he or she must show:

- a) a genuine grievance, or other acceptable reason for leaving the employment;
- b) proof of taking all reasonable steps to alleviate the grievance; and
- c) proof of a search for alternate employment before the termination, unless circumstances are so immediate that a proper search is impossible.

In *Canada v Hernandez*, 2007 FCA 320 the claimant was disqualified for quitting his job after a public health nurse advised him that the silica dust which was a main material in the factory was a carcinogen. The court decided he did not exhaust his alternatives because he should have asked the employer to change its business or find him a new job somewhere else. While this case is an aberration, it shows the importance of being able to prove that the worker did everything possible to avoid quitting.

There are thousands of decisions by the Umpires, SST and Federal Court of Appeal addressing "just cause" issues that may help determine whether just cause existed. CUB 21681 (23 Sept. 1992) confirms that just cause may result from all of the circumstances together, although no single factor would be sufficient: "When the statute says 'having regard to all the circumstances', it imposes a consideration of the totality of the evidence." Thus, if the claimant's reason for leaving is not one of the listed factors under s 29 but the claimant feels that they had no reasonable alternative to quitting or that they were fired without committing intentional misconduct, a case could still be made that the totality of the claimant's circumstances gives rise to just cause.

b) Importance of Evidence

Detailed evidence like records or diaries is exceptionally important in the determination of a claim. An employee should try to remember as many specific incidents, dates and times as he or she can. Though the older Umpire decisions or SST decisions may provide an indication of what "just cause" means, they are not determinative.

c) Returning to School

Please refer to https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/courses-training.html#Declaring for the rules and the form for declaring your training. Please note that the Federal Court of Appeal continues to find that voluntarily leaving one's employment to return to school, except for programs authorized by the EI Commission, does not constitute "just cause" and is a ground for disqualification

In the case of *Attorney General of Canada v Mattieu Lamonde*, 2006 FCA44, the court held that the claimant should be disqualified from benefits because he took a year's leave from his full time job to attend school in another community, although he immediately found part time work when he arrived there.

> **NOTE:** While nothing in the legislation indicates that improving one's qualifications can never be just cause, the Court of Appeal continues to set aside decisions on this basis.

2. Misconduct

Section 30(1) states that a claimant is **disqualified** when they are fired due to their own misconduct.

a) Determining Misconduct

"Misconduct" is not defined in the *EI Act*, but previous decisions have stated that the word must be given its dictionary meaning.

The Federal Court of Appeal in *Mishibinijmia v Canada (Attorney General)*, 2007 FCA 36, provided a definition stating: "there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."

The alleged misconduct must be the real or the actual and direct cause for the dismissal, not merely an excuse for it. An employer cannot invoke previously forgotten or forgiven incidents to justify a dismissal.

The onus of establishing a misconduct allegation rests on the party alleging it. The Commission or employer must prove positively the existence of misconduct and must prove the misconduct caused the loss of employment. Refer to the Umpire decisions for examples of what constitutes misconduct justifying lawful dismissal.

b) Dishonesty

In its decision in *McKinley v BC Tel*, [2001] S.C.R. 38, the Supreme Court of Canada held that an employee's dishonesty does not automatically constitute a blanket grounds for dismissal. Dishonesty is only grounds for dismissal "where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer". This decision places a duty on the trial judge to determine whether the dismissal was warranted by the nature and degree of the dishonesty, or alternatively, whether lesser sanctions were appropriate. It is likely that the same principle could be applied to EI appeals. For an example of a situation where dishonesty did not amount to just cause see *Fakhari v Canada (Attorney General)*, A-732-95.

c) Theft

In the case of *Attorney General of Canada v Linda Caul*, 2006 FCA 251, the court decided that the claimant stealing from her employer, particularly given that the employee was in a position of trust, amounted to misconduct eventhough the employee acted foolishly or in desperation and the employer's response was 'overkill'.

d) Addiction

In *Mishibinijima v Attorney General of Canada*, 2007 FCA 36, the court examined whether an addiction has the element of willfulness necessary for a finding of misconduct. The court found that the applicant's evidence was too weak to support the claim that he was not acting willfully. The court left open the possibility that with stronger evidence of compulsion due to addiction a claimant might succeed in rebutting misconduct.

See also *Attorney General of Canada v Brent Pearson*, 2006 FCA 199, where despite his addiction the claimant was disqualified for misconduct. In that case, the employee knew that his absences were unacceptable and notwithstanding his employer's offers to help with the addiction the employee refused to take any such measures.

In *Canada v McNamara*, 2007 FCA 107, the claimant was fired from his job because he failed a random drug test due to trace amounts of marijuana. As a result of test, the company operating the worksite refused to allow the claimant access to the worksite because in was in violation of a drug and alcohol policy. The court declined to overturn the disqualification, despite the argument that such illegal but decriminalized conduct - smoking a joint on the previous weekend - could not amount to misconduct for EI purposes. The case leaves open the question of whether there would have been misconduct if he had tested positive for marijuana, but because of the zero tolerance policy denying him access to the worksite this amounted to misconduct.

> **NOTE: Determinations of "just cause" and "misconduct" by the Commission can be appealed** and where disqualification is imposed, a client should be advised to appeal. Many claimants mistakenly believe that they are automatically disqualified from EI if they have been fired, however unfairly. Unfortunately, many such claimants do not apply for EI benefits at all, or if disqualified do not realize that they can challenge the Commission's decision until their 30-day period to appeal expires.

D. Disentitlement

Disentitlement means that the claimant is not eligible to receive benefits. This may be due to any of a number of reasons including:

- illness of a minor attachment claimant (s 21(1));
- the claimant is an inmate of a prison or similar institution, except when on parole (s 37(a));
- the claimant is absent from Canada, unless he or she falls within the category set out in s 55 of the *EI Regulations* (s 37(b));
- the claimant does not have child care in place; or
- loss of employment due to a labour dispute (i.e. either a strike or lockout (s 36)).

However, the most common basis for disentitlement is that the claimant failed to prove that he or she is "capable of and available for work and unable to find suitable employment" s 18(a)). As such, claimants should understand that they **must keep a job search record.**

Disentitlements can last indefinitely until the situation is remedied. Further, a disentitlement can be retroactive, which can lead to decisions of overpayment (see below). The *EI Act* places the onus on the claimant to prove entitlement on the balance of probabilities (s 49). In cases where the evidence as a whole indicates that the claimant's availability was doubtful, it might be held that the claimant had failed to prove that they were available for suitable employment. For example, if a person is disentitled because they have no child care arrangements, they may need to give the Commission the name of a relative or friend who will care for the child until permanent arrangement can be made.

As discussed above, the longer the period of unemployment, the less "picky" the claimant can be in their employment search: see section VII(B) for details. When claimants fill out EI application forms, they should not be too restrictive, especially about the wages they are willing to accept, or the distances they are willing to commute. Further, the Commission is likely to disentitle a claimant who is searching for a job that is virtually non-existent in the area the claimant is searching. Also, a former employee searching for a job in a field where the wages were atypically high can be disentitled if he or she restricts the search to jobs with similar wage levels. This can often be the case with formerly unionized workers.

What it comes down to in the end is that the Commission will make a judgment call about whether the claimant genuinely wants to find work and whether his or her current strategy maximizes the chances of success.

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VIII. Penalties, Violations, and Offences

A. Imposing Penalties

Sections 38 and 40 of the *EI Act* allow the Commission to impose a penalty of up to three times the weekly rate of benefit on a claimant who **knowingly** makes a false or misleading representation to the Commission in relation to his or her claim for benefits. The claimant must actually know that the statement is false or misleading, and the onus of proving this is on the Commission.

The court applies a subjective knowledge test to decide whether the claimant intended to make false statements to the commission. Following *Canada v Gates* (1995), 125 D.L.R. (4th) 348, the Court in *David Moretto v AG Canada*, [1998] F.C.J. No. 438, confirmed that even if a claimant's statement is found to be false, no penalty should be levied unless the finder of fact is satisfied that the claimant "subjectively knew" the statement was false. It is not enough to say that they should have known, or should have asked someone, or that a reasonable person would have known.

B. Types of Penalties

Types of penalties include warning letters, penalties, monetary penalties, prosecutions, and violations (discussed below). Most often, the Commission chooses to issue a monetary penalty (a fine). For relatively minor cases, they may issue a warning letter.

Alternatively, a claimant could be prosecuted criminally (summarily). Section 135(3) of the *EI Act* sets the minimum fine at $200 for fraud relating to a person's employment and Record of Employment. The maximum fine is $5,000 and where appropriate, twice the amount of benefits falsely obtained, or the fine plus imprisonment for a term of up to six months (s 135(3)). In practice, criminal court cases are very rare, even when a claimant asks to be prosecuted. The Commission need only write a decision letter to the claimant to impose a very large penalty, which is much simpler than proceeding with a court case, and the standard of proof is much higher in a criminal court than for the Commission

1. Appealing a Decision to Impose a Penalty

If the Commission imposes a **penalty under s 38** (or s 39 in the case of employers), **a client should be advised to appeal** in all but the clearest of circumstances. Regardless of what the Commission says, it has the burden of proving that the claimant knew that the statement was false or misleading at the time it was made. If the claimant has a reasonable explanation (e.g. confusion regarding the intent of the question), the appeal should be allowed.

> **NOTE:** The Commission cannot impose a penalty under ss 38 or 39 if 36 months have elapsed since the act or omission. For a case that discusses when time limits start to run see *Attorney General of Canada v Kos*, 2005 FCA 319. The key issue here was whether file notes by an insurance officer constituted a "decision" that triggered the time limit. The court ruled that it did not, in part because the notes were not communicated to the claimant.

2. Appealing the Amount of a Penalty

The SST has jurisdiction over the amount of the penalty assigned. While the amount of the penalty can also be appealed, a penalty cannot be reduced simply because the SST considers it a bit too high. However, they can reduce a penalty if the decision is unreasonable, e.g. where Commission has erred by ignoring relevant circumstances such as the claimant's ability to pay, or health problems, or where it took irrelevant circumstances into account. It is not necessary to prove that the Commission was unfair, just that it was not made aware ofall the relevant circumstances.

C. The Violation System

Section 7.1 of the *EI Act* outlines the increased qualifying requirements for claimants who are found to have committed fraud after June 30, 1996. These requirements increase depending on how the violation is classified (minor, serious, or very serious). If the Commission chooses to simply issue a warning letter (possibly accompanied by a fine), then as per s 7.1(5), no such classification is made.

1. Increased Number of Hours Required to Qualify

Section 7.1(1) provides that an insured claimant (other than a new or re-entrant) must have a greater number of hours to qualify if that person has accumulated one or more violations in the 260 weeks before making their claim. This adds a significant barrier for receiving benefits. The increased hours required to qualify after a violation are outlined in the **s 7.1(1) Table**, on the following page:

Section 7.1(1) Table

Regional Rate Of Unemployment	**Violation Severity**			
	Minor	**Serious**	**Very Serious**	**Subsequent**
6.0% and under	875	1050	1225	1400
over 6.0% to 7.0%	831	998	1164	1330
over 7.0% to 8.0%	788	945	103	1260
over 8.0% to 9.0%	744	893	1041	1190
over 9.0% to 10.0%	700	840	980	1120
over 10.0% to 11.0%	656	788	919	1050
over 11.0% to 12.0%	613	735	858	980
over 12.0% to 13.0%	569	683	796	910

over 13.0%	525	630	735	840

NOTE: Violations should always be appealed.

2. Issuing Violations

Pursuant to s 7.1(4), the Commission may issue a violation notice for:

- a) one or more penalties imposed under ss 38, 39, 41.1 or 65.1 as a result of acts or omissions mentioned in ss 38, 39 or 65.1;
- b) a finding of guilt for an offence under ss 135 or 136; or
- c) a finding of guilt of one or more offences under the *Criminal Code* as a result of acts or omissions relating to the application of the *EI Act*.

3. Classifying Violations

If a violation is found to have occurred, as determined by the above criteria, it must be classified for purposes of the **s 7.1(1) Table**, and also for new and re-entrants. The *EI Act* classifies violations in the following manner under s 7.1(5)(a):

- a) Minor violation: if the value of the violation is less than $1,000;
- b) Serious violation: if the value of the violation is less than $5,000 (but more than $1,000), it is a serious violation;
- c) Very serious violation: if the value of the violation is over $5,000, it is a very serious violation.

Under s 7.1(6), the value of a violation for purposes of classification is the amount of overpayment of benefits resulting from acts on which the violation is based. If the claimant is disqualified or disentitled, the value is the total amount of benefits they would have collected, divided by two.

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IX. Keeping Out of Trouble

A. Job Search Record

Once a claim is established, the basic eligibility requirement to receive regular EI benefits is that claimants be able to prove that they are "capable of, and available for work and unable to find suitable employment". To help prove this, the claimant should keep a job search record. This may make disentitlement less likely, and improve the chances of success should an appeal be necessary. In fact, the Commission may send to the claimant a form that is essentially a job search record. This is called an "active job search statement". The statement will require the claimant to provide:

- names of the businesses applied to and the names of the persons who interviewed the claimant;
- type of employment applied for;
- date of the application or contact;
- results of applications

Potential employers need not sign the statement or record. They, however, may be contacted by the Commission to confirm the facts reported. If the form is not returned, disentitlement may follow.

Even though an "active job search statement" may not be required, the claimant should keep a job search record with this same information. The job search record should include everything done to look for work. It should be made clear that every attempt or type of attempt counts (including such things as contacting family members about employment opportunities, "cold calling," etc.). The difficulty is that many claimants do not keep such records even though they have been warned to do so. In such cases, the claimant's representative can only do the following:

- a) advise the claimant to keep such lists in the future; and
- b) (if true) argue that the claimant did not know that they had to keep such a list, and that any list now composed from memory is not a complete one, as the claimant cannot remember the details of all the employment opportunities they pursued.

Every regular benefit claimant must also register with the Commission. Claimants should visit the job board at least once a week and record these visits. Many EI offices now maintain electronic job boards that can be accessed from computer kiosks in the offices, or from home, like the Canada Job Bank.

Claimants should also keep a record of all telephone calls and any other kind of contact for further evidence of job searching. An example "job search record":

> June 12– 15: Checked The Sun and The Province want ads every day.
>
> June 12: Phoned Ajax Plumbing: George Brown, Manager, said not to send in a written application, but to call back in a month.
>
> June 13: Checked bulletin board at the Canada Employment Centre and copied down one possible job: phoned XYZ Deliveries, but position already taken.
>
> June 14: Wrote letter to Acme Amigos: no response.
>
> June 15: Searched Internet job sites from Frank's house. Printed out some likely prospects.

The claimant should make the job search record as detailed and complete as possible. Include friends contacted regarding job openings, and **all efforts** made to look for a job. The claimant must at all times try to convince the Commission that they are making a great effort to find a job.

B. Interviews with an Investigation and Control Officer

At some point, the claimant may be summoned to the local EI office for an interview regarding his or her job search. Typically the Investigation and Control Officer asks the claimant questions and makes a "Report of Interview," which is later reviewed by an Insurance Officer who will, on the basis of the Report, decide whether or not benefits are to continue. The claimant does not need to sign or affirm the report, though it is supposed to be read to him or her, and a copy should be provided for the claimant's records.

The Commission can disqualify a claimant for 7-12 weeks if the claimant fails to attend, without good cause, an interview the Commission asks him or her to attend (*EI Act*, s 27(1)(d)). The claimant must either attend the interview or phone to make a new appointment and confirm the new appointment in writing.

1. Keeping the Record Straight

To protect against a potentially misleading report, the claimant should try to be as general as possible in his or her report. However, telling the truth during the interview is imperative. For example, the client should state, if true, that he or she would accept the going rate rather than stating his or her desired wage.

If the claimant decides, after the Report is read to them, that it is incorrect or misleading, the claimant should tell the Officer immediately because the Officer may correct the report immediately. If the Officer refuses or if the claimant later decides that they disagree, the claimant should write a letter stating their position. This is important since an appeal may be necessary and such an immediate reaction by the claimant may convince the Board of his or her honesty and integrity. It may also lead to the earlier reinstatement of a claimant who is disentitled for unreasonably restricting his or her job search.

2. Disputing the Report at an Appeal

If there is a disentitlement based on the Report of Interview and an appeal follows, the SST may be willing to accept explanations and modifications of the report. There must be evidence to support these modifications. Further, their usual position will be that since the statement was read to the claimant, it must be true. There is an established principle supported by several court decisions to the effect that "statements made before disentitlement are to be believed more than statements made after disentitlement," the latter suspected of being self-serving. One effective way for a claimant to demonstrate willingness to accept wages lower than the figure stated on the application form or in an interview report is to prove that they actively pursued a job possibility paying a lower amount after learning what the salary was.

C. Reporting

In order to receive continued benefits, individuals must send in reports on a regular basis. They are usually due and cover every two calendar weeks (from Sunday to Saturday). There are three ways to send in these reports:

1. the Telephone Reporting Service;
2. the Reporting Service by Internet at http://www.servicecanada.gc.ca/eng/ei/service/interdec_report.shtml#How; and
3. the paper "Report Card" system.

The timing and due dates of these reports depends on each individual claim. This information will be available to each claimant shortly after applying to EI when the Benefit statement and Access Code is received in the mail.

> **NOTE:** The paper "Report Card" method is only available to a claimant who cannot otherwise transmit his or her report card online or by phone. The standard ways of processing and paying EI benefits are the Reporting Service

by Internet and the Telephone Report Service.

1. What to Include in Reports

Be careful to include the following in each report:

- gross income;
- earnings for the week they are earned, not the week they are received; and
- all money received and declared should include some reference to the source and reason for the payment since it may or may not count as earnings (*EI Regulations*, s 35).
- Money received from a private or individual insurance plan paid for by the claimant should not be included.

The information given must be accurate, otherwise the claimant could be accused of a false or misleading statement. If the claimant needs to update a report, for example to change the amount of earnings reported, they should call the Telephone Reporting Service immediately. The Commission has a policy that they will not charge or prosecute a claimant for giving false or misleading information if the claimant volunteers the correct information before an investigation begins.

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X. Timing for Reporting

Individuals should pay special attention to report due dates. Each claim has its own due dates, and the specific timing for meeting these due dates can differ between the telephone, internet and paper systems. For example, all Telephone Reporting Service reports made on the weekend are processed at 3:00 p.m. Sunday.

Claimants must complete their reports throughout the claim period whether or not they are receiving benefits (for example, during the waiting period or a period of disqualification). When an appeal is pending, reports must continue to be made because if the appeal is successful, the claimant may find that there will be no payment for any week for which no report has been made (*EI Regulations*, s 26).

Individuals on pregnancy, parental, and sickness benefits should continue to make reports.

> **NOTE:** Workers whose weekly income amounts tend to fluctuate (e.g. trade workers) should try to estimate as carefully as possible when providing an income figure. Those claimants who either err on the side of caution by declaring an amount that is too high or those who under-declare their actual income may be deemed by the Commission as providing “false or misleading information” and may incur penalties. The best way to avoid penalties is to always inform the Commission of the exact amount as soon as it is known to be correct. Also, an appeal should be filed immediately if a claimant is penalized for an inaccurate estimate of weekly earnings. The test for a penalty is that the claimant knew that the information they were giving was false. Honest attempts to predict actual earnings should not lead to penalties, even when it results in an overpayment of benefits.

A. Documents

It is generally a good idea to fill in all the documents the Commission requires and to return them immediately, since failure to do so may involve delay, if not disentitlement. **Keep copies of all documents in chronological order.**

B. Delays

One of the greatest difficulties with EI is delay. Often the delays are related to report cards, and in certain cases it is possible to get the insurance officer to use his or her “backup manual pay system” rather than waiting for the computer. If this is done, the claimant may get his or her money quickly.

Another solution to delay may often be to hassle the Commission. In extreme cases, you may wish to consider writing to the Minister (Employment and Immigration) with copies, to the claimant’s Member of Parliament, or to opposition critics. See Chapter 5: Public Complaints Procedure.

C. Self-Employment While Claiming EI

Unlike employees, self-employed people and independent contractor are not automatically covered by the EI system. These workers have the option of opting in to the EI system, in which case they may be entitled to receive certain special benefits, but not regular benefits.

Even though self-employed people and independent contractors are not automatically covered by the EI system, claimants may get into trouble if they try to start up a business while collecting EI after losing their job. Contrary to many claimants’ belief, self-employment amounts to “working” within the meaning of the question on the weekly reports even if the person has no expectation of receiving any income from it. Section 30 of the EI Regulations provides that, in most cases, a claimant engaged in self-employment is deemed to have worked a full week, unless the self-employment is “so minor in extent that a person would not normally follow it as a principal means of livelihood”. Failure to report such activity will usually lead to overpayments and penalties or charges for misrepresentation. Decisions by the Commission on overpayment and/or the imposition of penalties should always be appealed

If a claimant wishes to start a business while on EI, they should contact the Commission **before** doing anything to pursue self-employment. Special benefits may be available if the claimant enters an approved self-employment agreement for the development and implementation of a business plan.

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XI. Overpayment and Collections

A. Overpayments

If the Commission pays a claimant more than that claimant is entitled to, whether through the claimant's fault or the Commission's, the Commission is entitled to recover the overpayment (*EI Act*, s 43). The Commission may deduct the overpayment from any benefit payable to the claimant, or Commission's Collections Branch may contact the claimant to recover the overpayment (*EI Act*, s 47). The Commission must send written notice, stating the existence of the overpayment and why it occurred, as well as explaining the right to appeal within 30 days.

If the overpayment results from a reconsideration of a decision involving an element of judgment or discretion by the Commission (often as part of a random "audit"), an appeal should be filed. Umpires have ruled that the Commission does not have the right to second-guess its previous determination of such questions (such as just cause, misconduct, and availability) unless there are significant new facts it could not have learned about when the initial decision was made.

1. Interest Regulation

EI claimants are required to pay interest on outstanding overpayments and penalties arising from what the Commission considers fraud or misrepresentation.

No interest will be charged on debt that arises from the Commission's errors in benefit payments. Where the claimant has appealed the decision that establishes the overpayment or penalty, no interest will be charged during the appeal process, and claimants will be reimbursed interest payments made before the appeal if the Referees or Umpire decide that there was no fraud or misrepresentation.

B. Time Limits

The statutory limitation on collection of overpayments is six years after declaring the overpayments, excepting the periods during which an appeal is pending. The Commission has three years to discover the debt. Periods of appeal do count in this assessment. If an overpayment is due to fraud, the Commission has six years to discover and six years to recover the amount. However, the Commission is not allowed to impose a penalty more than 36 months after the offence.

C. Write-off of Overpayment or Other Amounts Owed

Section 56 of the EI Regulations specifies various circumstances in which a benefit wrongly paid may be written off and not be recollected. The most useful provision allows a write off when in all circumstances:

- the sum is not collectable; or
- repayment would result in undue hardship to the claimant (s 56(1)(f)(ii)).

EI Regulation s 56(2) provides for an almost automatic write-off of amounts paid more than a year before notification of the claimant and resulting from the Commission or employer's error.

Claimants seeking information about the amount of repayment debt may contact Service Canada.

Service Canada Information Line

1-800-206-7218

For information about collections and repayment, claimants can contact the CRA:

CRA

1-866-864-5823

A claimant may not apply for reconsideration of a decision refusing to write off overpayment.

However, according to the Digest of Benefit Entitlement Principles, the claimant or their representative may ask for an appraisal of the situation when a write-off is not granted, or a further appraisal at a higher level in the case of further complaint (20.9.0). This does not amount to a formal reconsideration and the decision cannot be appealed to the SST.

D. Benefit Repayment

Under s 145(1) of the *EI Act*, a claimant whose income for the taxation year exceeds one and one-half times the maximum yearly insurable earnings is liable for the repayment of the lesser of:

- 30 percent of the total benefits paid to the claimant in the year; or
- 30 percent of the amount by which the claimant’s income exceeds one and one-half times the maximum yearly insurable earnings.

The benefit repayment scheme is administered and enforced by the Minister of National Revenue (s 148). A claimant will estimate on his or her tax form the amount of benefit repayment payable by him or her (s 147).

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XII. Reconsideration

Before appealing to the Social Security Tribunal, a claimant must first submit a Request for Reconsideration to the EI Commission within 30 days. Upon receipt of a Request for Reconsideration, a Service Canada employee, other than the one who made the original decision, will review your case, including any new information provided in the Request. The Service Canada employee will also conduct any additional investigation that may be required, including clarifying the circumstances, and obtaining relevant documents related to the employment. The Service Canada employee will use this information to make the EI Commission’s final decision on the claimant’s claim.

The Request for Reconsideration form can be found at the following link:

http://www.servicecanada.gc.ca/eforms/forms/sc-ins5210%282014-04-007%29e.pdf

This request must be submitted to Service Canada within 30 days after the date the decision was communicated to the claimant. If the 30-day period has passed, a claimant may still submit a request for reconsideration with an explanation for the delay. The EI Commission will consider the reasons for the delay and decide whether to allow the request. This process is free.

The Commission will not provide a copy of the claimant’s EI file when a Request for Reconsideration is submitted. Instead, the claimant must make a request for their file under the Privacy Act. This can be done in one of the following ways:

By mail: http://www.tbs-sct.gc.ca/tbsf-fsct/350-58-eng.asp

Online: https://atip-aiprp.apps.gc.ca/atip/welcome.do

Obtaining a copy of the claimant's file may be the only way to see material submitted by the employer, which will be especially important in cases where misconduct or just cause for leaving employment are the subject of the appeal.

The claimant will be informed in writing of the decision following the Reconsideration. If the decision is unfavourable to the claimant, a Service Canada employee will provide a verbal explanation.

A. What can be Reconsidered (and later appealed)

Most decisions of the Commission may be Reconsidered. For example, claimants are eligible to request a Reconsideration if the original decision:

- Refused EI benefits;
- Ordered that EI benefits received be repaid;
- Issued a warning letter or notice of violation; and/or
- Imposed a penalty.

B. What cannot be Reconsidered (and later appealed)

The following issues cannot be Reconsidered:

- certain discretionary benefits, such as training courses, special employment benefits and work-sharing, see above and the *EI Act* ss 24, 25, and 64; and
- insurability issues, which are subject to a separate decision-making and appeal process that must be appealed to the Minister of National Revenue, the Tax Court. (see Section III.A: Insurable Employment, and ss 90–105 of the *EI Act*).
- decisions concerning the write-off of debt from overpayment or penalty (*EI Act*, s 112.1)
- decisions concerning the election between the old and new pilot project formula for earning while on claim (*EI Regulations* 77.96(8))

1. Insurability Decisions

Certain decisions concerning “insurable employment” must be appealed to the CRA or the Minister of National Revenue. These appeals can be found in s.90(1)

For an example of the appeal process, consult *McPhee v Minister of National Revenue*, 2005 TCC 502. In deciding whether the claimant was an employee or an independent contractor, the court allowed a consideration of the parties' intentions.

It is crucial to analyze the dispute and file the correct type of appeal. In doubtful cases, it can be wise to do both – file an appeal and ask the CRA for a ruling.

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XIII. Social Security Tribunal

If the claimant is unhappy with the decision following the Reconsideration, the claimant may file an appeal to the SST. General information about the Tribunal appeal process can be found at: http://www.canada.ca/en/sst/index.html

A comprehensive guide to appeals to the General Division and Appeals Division called "Challenging A Decision About Your Employment Insurance Claim: Reconsideration and the Social Security Tribunal" can be found on the Community Legal Assistance Society website at: http://www.clasbc.net/self_help_guides.

A. General Division

The SST must receive a claimant's appeal within 30 days of the claimant's becoming aware (including being told in a phone call) of the Reconsideration decision. There are two ways to file an appeal:

1. Fill out the Notice of Appeal to the SST General Division – EI form and mail or fax it to the SST. The form can be filled out on the computer and then printed or printed and filled out by hand. This form is accessible at the following link: https://www1.canada.ca/en/sst/ei/eiprocess.html.If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.
2. Write the SST a letter of appeal containing all the information required in the form. If the claimant fails to provide all of the information required, the appeal may not be accepted.

Upon receiving an incomplete appeal, the Tribunal will send a letter to the applicant asking them to file all missing information within 30 days of the date of the letter. If the applicant does this, the Tribunal will consider the appeal to have been filed the date of the original incomplete application for the purposes of meeting the deadline to file an appeal.

Once the SST receives a completed notice of appeal, it will notify Service Canada of your appeal.

If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately the Tribunal's as to whether to grant the extension.

When a Notice of Appeal is received, a Tribunal Member will be assigned to the claimant's file. The Member will review the file and will dismiss any file which the Member decides has no reasonable chance of success. The SST will notify the claimant if they are considering summarily dismissing an appeal, and provide the claimant with an opportunity to make additional submissions before the appeal is dismissed. The application to appeal a dismissal can be found here: https://www1.canada.ca/en/sst/forms/sst-lta-ad-is-e.pdf.

If the appeal is proceeded with, there are several types of hearings available:

- Written: The Member will ask the claimant questions and request a written response by a certain date
- Telephone
- Videoconference
- In-Person

The Member will choose the type of hearing to be used. The Tribunal will telephone or write to the claimant to arrange the hearing. Following the hearing, the Member will send the claimant a copy of the decision.

1. Discretionary Decisions

Discretionary decisions such as the Commission's refusal to extend time, or its decision regarding the length of disqualification, can only be reversed if it is decided that the original decision:

- a) ignored or failed to consider a relevant factor, including something the Commission was unaware of, such as health problems or other mitigation;
- b) acted on an irrelevant factor;
- c) committed a jurisdictional error; or
- d) acted against the principles of natural justice, such as acting with bias or bad faith.

The issue is whether the Commission's exercise of discretion in the original decision was reasonable. However, where the Commission has failed to consider relevant evidence, or where there is new evidence presented for the first time by the claimant, the reviewer can exercise remedial authority by making the decision that should have been made. It is rarely difficult in a deserving case to show that the Commission has disregarded some relevant fact.

2. Amount of Penalty

Courts have also determined that the amount of a penalty for making false statements may also be appealed only to the extent that in coming up with the amount of penalty, the Commission committed an error, such that the decision or the decision making process was unreasonable. That said, as above, one can often find some relevant "fact" that the Commission failed to consider.

Keep in mind that the decision to apply a penalty can always be appealed.

B. Appeal Division

The Appeal Division of the SST must receive a claimant's appeal within 30 days of the claimant's receipt of the General Division's decision. There are two ways to file an appeal:

1. Fill out the Notice of Appeal to the SST General Division – EI form and mail or fax it to the SST. The form can be filled out on the computer and then printed or printed and filled out by hand. This form is accessible at the following link: https://www1.canada.ca/en/sst/forms/sst-noa-gd-is(2016-10).pdf.If the claimant is unable to print the form, the claimant may contact the SST and the Tribunal will send the form to the claimant.
2. Write the SST a letter of appeal containing all the information required in the form. It is important to ensure that all of the required information is included.

If a claimant submits an appeal form after the 30 days, the claimant can request an extension in the form. However, the decision is ultimately the Tribunal's as to whether to grant the extension. When a Notice of Appeal is received, a Tribunal Member will be assigned to the claimant's file to decide whether or not to grant permission to allow the appeal to proceed. The grounds for appeal to the Appeal Division are:

- The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction
- The General Division erred in law in making its decision
- The General Division based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the evidence before it

A claimant will be informed in writing if their application for permission to appeal is dismissed. Permission is not required when appealing a General Division decision to summarily dismiss the appeal.

If permission is granted for the appeal, the parties have 45 days to provide submissions. If no submissions are received, the Member will decide whether to allow the appeal to proceed based on the documents or submissions on file.

In some cases the Appeal Division will decide solely on the basis of the written record and submissions, and the Member will decide if a hearing is necessary. The hearing process is the same as the general division

Following the hearing, the Member will send the claimant a copy of the decision. The decisions of the Appeal Division are subject to review under the Federal Courts Act.

C. Re-opening a Decision

A claimant can apply to the Commission or the SST to rescind or amend a decision if there are new facts or the decision was made without knowledge of, or was based on a mistake as to, some material fact. This application can only be made once and must be submitted within one year of the decision. For more information, use the following link: http://www1.canada.ca/en/sst/ap/eigd-rescind-amend.html.

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XIV. Appeals

A. Appeal Docket

The Commission receives and reviews the appeal letter and, unless convinced to reverse its decision by the information contained in it, will set the place and date of appeal and send the claimant and the employer an “Appeal Docket”. The docket contains all documents from the Commission’s file regarding the claim that it considers relevant to the issue. The docket is given to the claimant, the General Division, and to the employer if the employer asks to participate.

The docket should be carefully reviewed, as the appeal must meet the Commission’s argument and evidence. The docket includes the “Representations of the Commission to the General Division”, which is basically the Commission’s written argument supporting its decision. Otherwise, the Commission usually does not appear at the hearing.

> **NOTE:** All adverse decisions should be listed under item no. 2 of the appeal form. There have been cases where claimants who claimed they were appealing a letter of overpayment without mentioning the penalty imposed in a different letter were told at the hearing that the Referees have no jurisdiction over the penalty by reason of this omission.

B. Preparation for Appeal to the General Division

When reviewing the docket and preparing for the appeal, the claimant and their representative should consider the:

1. "Representations of the Commission to the General Division" (this is the Commission's justification for its decision);
2. evidence relied upon by the Commission; and
3. Umpire decisions or now SST Appeal Division decisions cited by the Commission.

The docket contains most of the relevant documents and also summarizes all statements made by the claimant to the Commission, as well as the Insurance Officer's decision and comments. Read the docket carefully and be prepared to comment on it.

In many cases, the claimant may have to explain that the statement does not accurately reflect what they really intended to say. For example, the claimant did not mean to say that they would only work for $12.50 per hour and no less. Rather, the claimant meant that they would prefer $12.50 per hour, but would work for the going rate. The claimant will have to overcome the SST's inclination to believe what the claimant said in their statement as opposed to what is being said now, after disentitlement. The claimant must convince the SST of his or her honesty.

Under the *Privacy Act*, R.S, 1985, c. P-21 a claimant has a right to access the entire claim file, whether there is an appeal pending or not. This may include the documents that are not part of the docket because the Commission did not consider them relevant. If details of the Commission's record may be important to the outcome, the advocate should ask for full disclosure of all relevant files.

The jurisprudence on EI includes more than 80,000 decisions of the Umpire, along with perhaps a thousand or so decisions of the Federal Court of Appeal and the Supreme Court of Canada. Most of these decisions can be found (and searched by key words) on Canlii or the Social Security Tribunal Website at https://www1.canada.ca/en/sst/ad/index.html.A claimant or representative should always read the cases upon which the Commission is relying. Often the quoted excerpt is taken out of context, and the facts are so different that the case can be easily distinguished, or even used to support the appeal.

Any exhibits, cases, or written arguments should be submitted to the General Division ahead of the hearing date, if possible. This will give the Tribunal a chance to familiarize themselves with the materials, and make more efficient use of the hearing. The Tribunal will accept new evidence at the hearing, but may adjourn it if the material is lengthy.

Service Canada's EI website contains links to the legislation, the jurisprudence library an index of jurisprudence, as well as the General and Appeal division website. The website is available at: http://www.servicecanada.gc.ca/eng/sc/ei/index.shtml.

C. Hearings Before the General Division

1. Claimant's Preparation

The claimant should be neat in appearance, be prepared to submit a job search if relevant, and be prepared to present the facts of his or her situation. The claimant should also be prepared to answer questions directly and clearly.

In cases where credibility is crucial, claimants may consider preparing a sworn affidavit or statutory declaration of the evidence if the facts are in dispute, since sworn evidence carries greater weight. The affidavit or declaration can also form a useful "record" of the claimant's case and is especially useful in cases where there are contradictory statements.

2. Representative's Preparation

The representative should also be neatly dressed, which in the case of LSLAP clinicians means courtroom clothing. The representative should:

- a) prepare a legal basis to allow the appeal, using the *EI Act*, *EI Regulations*, Digest, and jurisprudence;
- b) spend some time before the hearing with the claimant reviewing facts, explaining legal arguments and anticipating questions;
- c) meet with witnesses, explain Tribunal procedure, and review with them the questions that will be asked of them at the hearing;
- d) prepare a written list of points to be made in the claimant's favour. This is to ensure that if and when "sidetracked" by the General Division, none of the points will be forgotten. It will also be helpful in "making a record" to give to the General Division, ; and
- e) prepare a written submission summarizing the main points of evidence and arguments. This fills in the gaps in the oral arguments, and becomes part of the "record" for later appeals to the Appeal Division or the Federal Court.

3. Procedure at the Hearing

The General Division generally takes a "common sense" approach rather than a highly legal approach to the proceedings, and is usually interested primarily in the evidence. The claimant's appearance, attitude, and presentation of facts are all important. An hour spent familiarizing the claimant with procedure and preparing him or her for the types of questions the General Division will ask is usually more valuable than an hour spent mulling over the nuances of the EI Act. That said, the Tribunal will not allow an appeal if they do not believe they have the authority to do so, whatever sympathy they may have for the worker.

Rules of evidence generally do not apply to General Division hearings. An objection on a "technicality" may upset the General Division and jeopardize the claimant's success. However, the General Division will agree that the hearing is only to decide the questions placed before it and may accept an objection that a question is irrelevant to the issue before the Tribunal. Often decision-makers find that the evidence of a claimant that appears before them is entitled to more weight than the hearsay statement of the employer to an EI agent in a telephone conversation.

In most cases, the hearing will be taped. In the absence of a request to not tape the hearing, the General Division will typically have the hearing taped. The claimant may request to have the hearing taped if the General Division chooses not to. It is **strongly advised** that every claimant ensure that the hearing be taped, as this provides a record of the evidence, and also shows whether the General Division gave a fair hearing.

4. Evidence at the Hearing

a) Claimant's Evidence

The claimant should then be asked to tell the General Division his or her version of the relevant facts. The advocate may ask leading questions (requiring a simple "yes" or "no" answer) for all matters not really in dispute, or relate the non-controversial facts directly to the General Division members. However, it is important to let claimants tell crucial facts in their own words. At any point, the General Division itself may ask questions of the claimant or witnesses, or may query parts of the legal argument that it does not understand. A well-prepared claimant can make a good impression if answers are given in a clear, straightforward manner. The claimant should be sure to make eye contact with the General Division members when addressing them.

Ryan v Attorney General of Canada, 2005 FCA 320 is a useful case because the court reconsidered the weight of some claimant evidence. The court contradicted the general line of reasoning that evidence given by a claimant in response to

the Commission's accusations is inherently less believable.

b) Submissions: Disputing the Commission's Case

Following the presentation of documents, the claimant's evidence, and any other witnesses, the representative should summarize the facts and evidence in the client's favour and make legal arguments if applicable. The representative should point out fallacies in the Commission's argument and distinguish the cases relied upon by the Commission.

c) Payment of Benefit Pending Appeal: Not Recoverable

Benefits are not payable in accordance with a decision of the General Division SST if, within 21 days after the day on which a decision is given, the Commission makes an application for leave to appeal to the Appeal division on the ground that the General Division has erred in law, according to s 80 of the EI Regulations. If benefits are paid to the claimant and the Appeal Division allows the Commission's appeal, the benefits cannot be recovered. In practice, however, when the Commission appeals it always alleges an error of law, and files within 21 days. This avoids the need to pay benefits while the appeal is pending.

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XV. Payment Pending Appeal

Benefits are not payable in accordance with a decision of the General Division SST if, within 21 days after the day on which a decision is given, the Commission makes an application for leave to appeal to the Appeal division on the ground that the General Division has erred in law, according to s 80 of the EI Regulations. If benefits are paid to the claimant and the Appeal Division allows the Commission's appeal, the benefits cannot be recovered. In practice, however, when the Commission appeals it always alleges an error of law, and files within 21 days. This avoids the need to pay benefits while the appeal is pending.

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XVI. Judicial Review

If a claimant disagrees with the decision of the Appeal Division of the Social Security Tribunal, the claimant can file an originating Notice of Motion in the local Federal Court Registry for judicial review by the Federal Court of Appeal, on grounds set out in ss 28 and 18.1(4) of the current *Federal Court Act*. These are very similar to the grounds for appeal to the Appeal Division of the Social Security Tribunal.

The application must be made within **30 days** of the time that the decision was communicated to the applicant, or within such further time as the Court of Appeal may allow. At this stage, qualified counsel is almost essential. Contact the Community Legal Assistance Society if this situation arises. See Chapter 5: Public Complaints for more information regarding judicial review.

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XVII. Authorization for Representatives

A. What LSLAP Can Do

The following is a summary of what LSLAP students can help with:

- Assist a client with an initial application;
- Assist a client with an application for training benefits or write-off of debt;
- Assist a client with an application for Reconsideration
- Appeal any unfavourable decision by the Commission:
    1. write a Notice of Appeal;
    2. prepare for an appeal to the General Division;
    3. appear at hearing before the General Division;
- Assist a client with an appeal to the Minister of National Revenue;
- Appeal unfavourable decisions by the General Division to the Appeal Division; and
- Help clients cut off from EI benefits write a letter of complaint to their MP.

B. What LSLAP Cannot Do

LSLAP cannot represent clients seeking judicial review of decisions made by the Appeal Division, because these are argued in the Federal Court of Appeal (and then, in the event of a further appeal, the Supreme Court of Canada). LSLAP students cannot appear before these courts. Clients can be referred to the Community Legal Assistance Society (CLAS), as qualified legal counsel will be required.

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Appendix A: Initial Application Checklist

I. Advise If Client Has Not Yet Applied for EI:

A. Apply Immediately

- Apply during the first full week of unemployment when possible.
- Do not miss your deadline to apply simply because you do not have the ROE. If necessary, apply without the ROE.
- If the application was not filed in the first week, then the claimant should ask for the claim to be "antedated" to the date it should have been filed. "Good cause" must exist to justify each day itwas delayed prior to applying (see [[Benefit Period of Employment Insurance (8:IV) | Section IV: The Benefit Period).

B. Warning

- Statements made unwittingly over the phone can be used to disqualify the claimant.

C. How Long Does It Take to Process the Application?

- Generally 4 weeks, depending on administrative delay. Benefits can be retroactive if there is an administrative delay.
- **Emergency financial support** can be obtained from income assistance: this is a **loan** and it must be **repaid** when the client receives EI

D. Reason for Leaving

1. Did You Leave Voluntarily?

- Why did the claimant leave?
- Was there "just cause" (see Section VII.C.1: Just Cause for Voluntarily Leaving Employment)?
- The Commission's determination of "just cause" can be appealed to the General Division.

2. Were You Fired?

- Why was the claimant fired?
- Was there "misconduct" by the claimant (see Section VII.E.2: Misconduct).
- The determination of "misconduct" can be appealed to the General Division.

E. Qualifying for EI

1. Availability

a) Are you available for work?

- Caring for others may mean you are **not** available for work. What arrangements for childcare, for instance, have you made when you obtain work?
- Studying full time will likely mean you are not available for work.
- Studying part time may also mean you are not considered available for work. You will have to prove availability, i.e. that a course does not interfere with the job search (see Section VII: Benefit Entitlement).
- You cannot be on vacation.

- Narrowly restricting your salary expectations, the type of work sought, the work location, or your work schedule can result in a determination that you are not available for work.

2. Capability

a) Are you capable of working?

- You cannot be ill or injured or otherwise incapable of working to qualify (see Section VI.C: Sickness Benefits and VI.F: Pregnancy Benefits).

3. Unable to Find Suitable Employment

a) Were you offered employment that was unsuitable?

- Were you offered employment in the same occupation for **lower pay**, in **poorer working conditions**?
- Were you offered employment in a different occupation, but at **lower pay** in **poorer working conditions**?

b) Keep a Job Search Record (see Section IX.A: Job Search Record)

- Where have you sent resumes? Write down the date, and the names, addresses, and phone numbers of companies contacted.
- Names of people who you spoke with.
- What dates did you check the job postings board?
- Have you participated in any job search clubs?

F. Appeal Any Unfavourable Decision

- Begin with a request for the unfavourable decision to be reconsidered by the CEIC.
- If the reconsideration decision is still unfavourable, submit a written application to the General Division of the SST. Appeal applications must be submitted within 30-calendar days of receipt of the reconsideration decision. (see Section XIII: The Social Security Tribunal (SST) Overview)

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Chapter Nine - Employment Law

I. Introduction

This chapter is intended as a basic guide to outline some of the most common issues faced by employees. Each jurisdiction has its own legislation governing employment standards and human rights, and this chapter focuses on the laws of British Columbia. Nothing in this chapter is legal advice; only a lawyer can advise an employee on their specific situation.

The majority of employment related legal claims fall into one of the three categories discussed in this chapter:

- Human Rights claims;
- Violations of the Employment Standards Act; and
- Common law breaches of employment contracts.

In many cases, there are potential claims in two or even three categories. Consider and explore the potential for claims under each category.

Begin by going through Section III: Checklist.

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II. Governing Legislation and Resources

Employment and Wrongful Dismissal Legislation

1. Federal Legislation

- *Canada Labour Code*, RSC 1985, c L-2, sets out minimum employment standards for federal employees including standards governing collective bargaining and occupational health and safety. There are three general parts to the Act: Part I: Industrial Relations, Part II: Occupational Health and Safety, and Part III: Standard Hours, Wages, Vacations and Holidays. Website: http://www.laws.justice.gc.ca/eng/acts/L-2/index.html
- *Canadian Human Rights Act*, RSC 1985, c H-6, covers discrimination in the workplace and the procedure for adjudication before the Canadian Human Rights Commission. Website: http://www.laws.justice.gc.ca/eng/acts/h-6
- *Employment Equity Act*, RSC 1995, c 44, helps achieve equality in the workplace with particular attention to inequalities that exist for women, Aboriginal peoples, persons with disabilities, and visible minorities. Website: http://www.laws.justice.gc.ca/eng/acts/e-5.401/
- *Employment Insurance Act*, RSC 1996, c 23, outlines the requirements and qualifications for Employment Insurance. Website: http://www.laws.justice.gc.ca/eng/acts/E-5.6
- *Personal Information Protection and Electronic Documents Act*, RSC 2000, c 5, protects personal information collected and distributed electronically for employees in federal jurisdiction. Website: http://www.laws.justice.gc.ca/eng/p-8.6

2. Provincial Legislation – Employees

- *Employment Standards Act*, RSBC l996, c 113, (*ESA*) sets out minimum employment standards for provincial employees. On May 30, 2019, the Employment Standards Amendment Act received Royal Assent, and amendments set out therein are now in force. Website: http://www.bclaws.ca/civix/document/id/consol22/00_96113_01
- *Employment Standards Regulation*, BC Reg 396/95, includes provisions on scope of coverage and the penalty regime. Website: http://www.bclaws.ca/civix/document/id/loo97/loo97/396_9511_396_95
- *Wills, Estates, and Succession Act*, ss 175-180 deals with deceased workers' wages. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/09013_01#division_d2e13620
- *Human Rights Code*, RSBC l996, c 210, deals with discrimination in employment, among other things. Website: http://www.bclaws.ca/Recon/document/ID/freeside/00_96210_01
- *Labour Relations Code*, RSBC 1996, c 244, deals with union membership, collective bargaining, and the role of the Labour Relations Board. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/96244_01
- *Workers' Compensation Act*, RSBC l996, c 492, governing Act of the Workers' Compensation Board. Website: http://www.bclaws.ca/civix/document/id/lc/statreg/96492_00
- *Personal Information Protection Act*, SBC 2003, c 63, sets out ground rules for how private sector and not-for-profit organizations may collect, use, or disclose information about an individual. Website: http://www.bclaws.ca/Recon/document/ID/freeside/00_03063_01
- *Apology Act* [SBC 2006] CHAPTER 19 addresses some circumstances where a claimant is seeking an apology from his former employer. Employers can be cautious about making an apology in case the apology attracts liability. This

concern can be addressed by providing an apology in accordance with the Apology Act, which specifically separates an apology from an acknowledgement of liability. Website: http://www.bclaws.ca/civix/document/id/consol18/consol18/00_06019_01

3. Provincial Legislation – Contractors

- *Builder's Lien Act*, SBC l997, c 45, provides that a builder may file a lien against property for work and materials put into that property and sets out the procedure for filing a lien. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/97045_01
- *Repairers Lien Act*, RSBC l996, c 404, states that a repairer may put a lien on chattel for work and materials put into that chattel. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/96404_01
- *Woodworker Lien Act*, RSBC l996, c 491, states that a woodworker may put a lien on logs or timber for work done or services performed. Website: http://www.bclaws.ca/civix/document/id/consol26/consol26/00_96491_01

Resources

4. Books

- Howard A Levitt. *The Law of Dismissal in Canada*, (Aurora, Ont: Canada Law Book, 2003). This textbook is used by Employment Standards Branch staff.
- Malcolm Mackillop. *Damage Control: An Employer's Guide to Just Cause Termination*, (Aurora, Ont: Canada Law Book, 1997).
- Ellen E Mole. *The Wrongful Dismissal Handbook*, Second Edition (Scarborough: Butterworths, 2005).

5. Other Resources

- The Continuing Legal Education Society of BC holds an Employment Law conference each year. Papers are published on topics of current interest, and can be found at most law libraries, or online for those with a subscription at: http://online.cle.bc.ca/
- The Employment Standards Branch publishes the Employment Standards Act Interpretation Guidelines Manual. The Manual sets out the ESB`s interpretation of the Act and Regulations. The manual is published online at: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/toc
- LexisNexis Quicklaw publishes Canada Wrongful Dismissal Quantums. Canada Wrongful Dismissal Quantums summarizes wrongful dismissal awards organized according to occupation and duration of employment. The Quantums are available online to those with a subscription at http://www.lexisnexis.com/ca/legal
- Carswell hosts an online Wrongful Dismissal Database. The database calculates average notice period awards from precedential cases. Reports can be purchased individually or by subscription. The database is accessible online at: http://www.wrongfuldismissaldatabase.com
- Lawyer Greg Gowe publishes the Canadian Workplace Law WebSource which tracks developments and cases in Canadian labour and employment law. Mr. Gowe updates the blog regularly. The WebSource is published online at: http://www.greggowe.com
- vLex Canada provides a free Bardal factor calculator. By inputting your employment information, the service will provide you with some caselaw similar to your circumstances and estimate a range of reasonable notice periods. The

tool can be found here: Website: http://www.bardalfactors.ca/whats-reasonable

Referrals

Employment Standards Branch (Employees in Provincial Jurisdiction)

Online	Website [1]
Address	Lower Mainland Regional Office 250 – 4600 Jacombs Road Richmond, B.C. V6V 3B1
Phone	(604) 660-4946 Fax: (604) 713-0450

The other Branch in the Lower Mainland is located in Langley

Employment Standards General Inquiry Line

Online	Website [2]
Phone	**(Prince George):** (250) 612-4100 (Rest of B.C.): 1-800-663-3316 Fax: (250) 612-4121

Labour Relations Board

Online	Website [3]
Address	(Union Enquiries: Provincial Jurisdiction) Suite 600 Oceanic Plaza 1066 West Hastings Street Vancouver, B.C. V6E 3X1
Phone	(604) 660-1300 Fax: (604) 660-1892

Employment and Social Development Canada, Labour Program

Address	Labour Standards 125 East 10th Avenue Vancouver, B.C. V5T 1Z3
Phone	(604) 872-4384 Toll Free: 1-800-641-4049 Emergency: 1-800-641-4049 Fax: (604) 666-3166

Canada Industrial Relations Board

Online	Website [4]
Address	(Union Enquiries: Federal Jurisdiction) Western Region Office Suite 501, 300 West Georgia Street Vancouver, B.C. V6B 6B4
Phone	(604) 666-6002 Toll-free: 1-800-575-9696 Fax: (604) 666-6071

Employment Standards Tribunal of British Columbia

Online	Website [5] E-mail: registrar.est@bcest.bc.ca
Address	Suite 650 Oceanic Plaza 1066 West Hastings Street Vancouver, B.C. V6E 3X1
Phone	(604) 775-3512 Fax: (604) 775-3372

B.C. Human Rights Tribunal

Online	Website [6] E-mail: BCHumanRightsTribunal@gov.bc.ca
Address	1170 – 605 Robson Street Vancouver, B.C. V6B 5J3
Phone	(604) 775-2000 TTY: (604) 775-2021 Toll-free (in B.C.): 1-888-440-8844 Fax: (604) 775-2020

Workers’ Compensation Board of B.C. (WorkSafeBC - Head Office)

Online	Website [7]
Address	Main Building 6951 Westminster Highway Richmond, B.C. V7C 1C6
Phone	604-276-3143

Canadian Human Rights Commission – British Columbia and Yukon

Online	Website [8]
Phone	Toll-free: 1-888-214-1090

West Coast Domestic Workers' Association

Online	Website [9] E-mail: info@wcdwa.ca
Address	302 – 119 West Pender Street Vancouver, B.C. V6B 1S5
Phone	604-669-4482 Toll-free: 1-888-669-4482 Fax: (604) 669-6456

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[1] http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards
[2] http://www.labour.gov.bc.ca/esb
[3] http://www.lrb.bc.ca
[4] http://www.cirb-ccri.gc.ca
[5] http://www.bcest.bc.ca
[6] http://www.bchrt.bc.ca
[7] http://www.worksafebc.com
[8] http://www.chrc-ccdp.ca
[9] http://www.wcdwa.ca

III. Checklist

A. Preliminary Matters

☐ **Jurisdiction:** Determine whether the employee falls within provincial or federal jurisdiction, and make a list of which statutes apply to the employee.

- See Section IV.A: Jurisdiction

☐ **Unionized or Non-Unionized**: Determine whether the employee is working in a union environment, and if so, whether the employment relationship is governed by a collective agreement, and whether the employee is in the bargaining unit covered by the collective agreement.

- See Section IV.C: Unionized vs. Non-Unionized Employees

☐ **Employee or Contractor**: Determine whether the worker is an actual "employee" or an "independent contractor".

- See Section IV.D: Employees vs. Independent Contractors

B. Determine the Issue

☐ Read through the common employment law issues and determine which issue(s) the employee is experiencing.

- See Section V: Employment Issues.
- If the issue respects termination of employment, complete the checklist located at Section V.C.1: Termination of Employment Checklist before returning to this list.

C. Determine the Remedy

☐ ☑ Determine the employee's legal remedy based on the legal basis for the employee's complaint: A breach of the Employment Standards Act will lead to a claim at the Employment Standards Branch; a breach of the Human Rights Code will lead to a complaint at the Human Rights Tribunal; and a breach of the employment contract, or one of its implied terms, will lead to a claim in Small Claims Court (for claims under $35,000 as of June 1, 2017) BC Supreme Court (for claims over $35,000 as of June 1, 2017), or the Civil Resolution Tribunal (for claims $5,000 or under). As of June 1, 2017, with a number of exceptions, civil claims of up to $5000 will no longer be dealt with in Small Claims Court – instead, they will be resolved in B.C.'s online Civil Resolution Tribunal.

- See Section VI: Remedies.
- See Chapter 20: Small Claims.

☐ Ensure that you have not missed the limitation date to file a claim.

- See Section VI.D: Limitation Periods.

☐ Determine whether there are any written contracts, employment policies, or other written terms of employment that apply to the worker.

☐ Consider the strategies and tips offered.

- See Section VII: Strategies and Tips.

Forums for Employment Law Disputes					
	Employment Standards Branch	**Human Rights Tribunal**	**Civil Resolution Tribunal**	**Small Claims Court**	**Supreme Court**
Costs	None	None	$100 for claims up to $3,000; $150 for claims over $3,000 (waivers may be available)	$100 for claims up to $3,000; $156 for claims over $3,000	$200 to file, plus additional costs for applications and trials exceeding 3 days
Maximum Awards	No maximum dollar amount, but generally award limited to amounts owed for past 6 months only	No maximum	$5,000	$35,000 (as of June 1, 2017)	No maximum
Type of Claim	Statutory entitlements in the ESA (i.e. minimum wage, overtime, vacation pay, etc.)	Discrimination in employment or hiring	Any term express or implied in the contract; wrongful dismissal	Any term express or implied in the contract; wrongful dismissal	Any term express or implied in the contract; wrongful dismissal

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IV. Preliminary Matters

Determine Federal or Provincial Jurisdiction

Employees are subject to either federal or provincial employment legislation. This section will help you determine whether the employee is covered by federal or provincial jurisdiction, and which statutes apply.

Federal Jurisdiction

Employees will fall under federal jurisdiction if they are employed in connection with any federal work, undertaking, or business that is within the legislative authority of Parliament, or if they work for certain federal crown corporations. This can be a complicated constitutional question, but generally, areas of business that are federally regulated include:

- Shipping and navigation, including the operation of ships and transportation by ship anywhere in Canada
- Interprovincial or international transportation (for example, truck, rail, ferry, or shipping routes that cross a provincial or international border)
- Telecommunications companies, such as cell phone, cable, or internet providers
- Airports and air transportation, including any airline companies
- Radio broadcasting stations
- Banks (but not credit unions)
- Businesses located on First Nations reserves
- Other areas listed in section 91 of the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

In order to determine jurisdiction, look to the type of work done, as well as the employer's area of business. It is important to note that a single employer could have both federally and provincially regulated employees. Although an

employer may be subject to federal jurisdiction, it does not mean all of that employer's employees will be governed by federal law. In some cases, additional research must be done to determine the employee's jurisdiction. For additional details to assist in determining jurisdiction if a difficult case arises, see *Actton Transport Ltd v British Columbia (Director of Employment Standards)*, 2008 BCSC 1495.

Performing a BC Online company search may help determine jurisdiction. While not always determinative, a company search will provide information regarding whether the company is provincially registered, which may help determine jurisdiction. In addition, a company search will usually provide the company's director and registered office information: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ organizational-structure/ ministries-organizations/ ministries/ technology-innovation-and-citizens-services/bc-registries-online-services

Provincial Jurisdiction

Employees who are not within the scope of federal legislation generally fall under provincial jurisdiction and accordingly their employment is governed by provincial legislation.

Determine Applicable Legislation

Once you have determined the jurisdiction, make note of which statutes apply to the employee, and then continue on to the next step in the checklist: Section IV.C: Unionized vs. Non-Unionized Employees.

Note that this chapter focuses on provincial legislation. In cases where the employee is federally-regulated, this chapter can still be of assistance as the provincial and federal statutes have many similarities, but it will be necessary to read the federal statutes to determine whether a particular provision is similar.

The Employment Standards Act

Provincially regulated employees are generally covered by the *Employment Standards Act* [ESA] as updated by the Employment Standards Amendment Act.

Be aware that certain professions and employees are exempt from the *ESA*, or parts of the *ESA*. Review the *Employment Standards Regulations* to determine if the employee is covered by the *ESA*.

See V.A.10: Exceptions to the General Rule (Specialty Professions) to determine whether the *ESA* applies to the employee in question. See V.A.6: Hours of Work and Overtime Pay to determine if the employee is exempt from overtime.

Labour Relations Code and Canada Labour Code

Provincially regulated employees who belong to a union are covered by the *Labour Relations Code* in addition to the *ESA*. However, some parts of the ESA do not apply to unionized employees.

Federally regulated employees are covered by the *Canada Labour Code* [CLC]. A significant difference between the CLC and the ESA is that the CLC confers a special right: If the employee is non-managerial, worked for at least one year, and was unjustly dismissed, his or her job can be reinstated (CLC, ss 240-246). This right exists alongside a number of other discretionary remedies for unjust dismissal under the CLC. A complaint must be filed within 90 days (CLC, s 240(2)).

For a discussion on the significance of the discretionary remedies for unjust dismissal available under the CLC, see the Supreme Court of Canada's recent decision in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.

Human Rights

Provincially regulated employees are covered by the British Columbia *Human Rights Code*. Federally regulated employees are covered by the Canada *Human Rights Act*. For more information on Human Rights claims: See Chapter 6: Human Rights.

Common Law and Contract Law

In addition to statutory entitlements, provincially and federally regulated employees have common law employment entitlements. Causes of action, such as breach of contract due to wrongful dismissal, remain the same whether the employee is provincially or federally regulated.

Employees will also often have written contractual entitlements. Any applicable written employment contract or applicable workplace policy should be reviewed carefully to both clarify the terms of employment and whether the contract is enforceable. See Section V.C(d) and (c): Invalid Contracts.

Unionized employees may have common law or contractual entitlements, but generally these entitlements have to be acted upon by the union that is party to the collective agreement. See Section IV.C: Unionized vs. Non-Unionized Employees.

Determine if the Employee is Unionized or Non-Unionized

Determine whether the employee belongs to a union. If the employee does not belong to a union, continue on to the next step in the checklist: Section IV.D: Determine if the Worker is an Employee or Independent Contractor.

Issues regarding unionized employees can be complex, and unionized employees should therefore generally be referred to their union representative or a lawyer. However, the following paragraph provides basic information for unionized employees.

If an employee is a union member and has a complaint regarding the employer, he or she must first advise the union's representative. The employee can contact either the shop steward at the workplace, or an external union representative, to see what the union can and will do. The *ESA* provides minimum standards that generally must be met, but collective agreements will contain other critical guidelines that the employer must follow. Usually, union contracts contain different or more onerous terms than the *ESA* provisions, and union members in their collective agreements can contract out of *ESA* limitations (*ESA*, s 3) regarding such matters as hours of work, overtime, statutory holidays, vacations, vacation pay, seniority retention, recall, and termination of employment or layoff. Whole sections of the *ESA* might not apply under a collective bargaining agreement as long as they have been addressed by the agreement. The collective agreement does not necessarily have to meet minimum guidelines for certain sections of the *ESA*. For more information consult the Employment Standards Branch fact sheet on collective bargaining agreements at: http://www.labour.gov.bc.ca/esb/facshts/collagr.htm

Unions have a duty to represent their workers fairly. An employee who feels his union has not fairly represented his interests or advanced a grievance can bring a complaint under section 12 of the *Labour Relations Code*. These complaints are seldom successful, and so it is very important to have the employee document all requests for help to the union and document the union's response.

Determine if the Worker is an Employee or Independent Contractor

Most workers are considered “employees”, but some are considered “independent contractors”, and some fall under an intermediate category sometimes referred to as “dependent contractors”.

The distinction is important because independent contractors are generally not protected by the *Employment Standards Act* or the *Human Rights Code* for provincially regulated employees, or the *Canada Labour Code* or the *Canada Human Rights Act* for federally regulated employees.

Additionally, independent contractors may not be entitled to reasonable notice if they are dismissed, as many employees are, although the law on this can be complex (see below).

Note that different statutes have different objectives and definitions, and as a result, “employee” and “independent contractor” may be interpreted differently under each statute. These interpretations are generally similar and sometimes follow the same tests; however, the *ESA* and particularly the *HRC* may define “employee” more broadly than the common law tests would – see Sections IV.D.2 and IV.D.3, below. As a result, those who would be categorized as dependent or independent contractors under the common law may sometimes be categorized as employees under the *HRC*.

Employees v. Contractors - Common Law

When considering an employment related claim, it will be important to determine if the claimant was an employee, dependent contractor, or an independent contractor.

This classification will determine which statute laws apply. It will also change what entitlements are available for breach of contract (including wrongful dismissal) at common law. For example, employees can make claims for severance pay in lieu of notice, a common law entitlement that is not available to contractors.

In *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, the Supreme Court of Canada affirmed that the key to a determination of employment with regards to whether an individual is an employee or an independent contractor” is the degree of control and dependency. The Court in *TCF Ventures Corp v The Cambie Malone’s Corporation*, 2016 BCSC 1521, noted that the ‘dichotomy’ between independent contractors and true employees is best practically assessed on a spectrum that exists between the two extremes; persons (both natural and unnatural) can find themselves on that spectrum and can bring an action for breach of an entitlement to notice of termination of their contracts, and the true nature of the relationship should be assessed on a case-by-case basis.

An employee is typically highly controlled by the employer: the employer might set the employee’s hours, provide training, decide how work should be performed, require adherence to policies such as dress codes, and discipline the employee for misconduct. The employer would also typically make Canada Pension Plan (CPP) and Employment Insurance (EI) deductions, provide Worker’s Compensation coverage, and pay for any business expenses and equipment. Employees tend to rely on their employment with a single employer or business as their primary or sole source of income.

An independent contractor is generally not significantly controlled by the employer: the independent contractor might set their own hours, determine how to perform the work, make their own payments for CPP, EI, and Worker’s Compensation coverage, pay for their own business expenses and equipment, and determine whether to hire their own employees or subcontractors to assist in performing the work. Independent contractors often contract with more than one business, and as a result are less dependent on a single business to earn their living.

A dependent contractor is an intermediate category, falling somewhere in the middle of the scale. A dependent contractor might set their own hours and hire their own employees, but derive most of their income from a contract with one business, and thus be fairly dependent on that business to earn their living.

None of the factors listed above can alone determine the categorization of the worker. One of the leading tests to apply to determine how to categorize the worker is set out in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983:

"[…]The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks."

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. . Although this is one of the leading tests, it should be noted that there are other tests that courts would consider as well.

Some additional examples of conditions that are not, by themselves, enough to ensure someone is considered a contractor are:

- The worker signs an agreement that identifies him as a contractor. (Section 4 of the *ESA* states that you cannot contract out of the Act. If you sign an independent contractor agreement, you still must meet that definition);
- The worker charges sales tax (the worker may or may not be in a lawful position to charge sales tax);
- The worker is incorporated (per *Marbry Distributors Limited v Avrecan International Inc*, 1999 BCCA 172). However, the worker may wish to see an accountant or tax lawyer if they are an incorporated employee as they may not be entitled to all of the same tax benefits of other corporations;
- No deductions are taken from the worker's paycheque (this may simply mean that the employer is in violation of both the *ESA* and the *Income Tax Act*);
- The worker submits a "bill" for labour (it may be nothing more than a time card); and
- The worker uses their own vehicle or provides their own tools (it may simply be considered a condition of employment. Note that employment related expenses are recoverable and cannot be charged to the employee).

All of these factors will be considered, but do not determine the issue.

In some cases, a worker may fall into the category of dependent contractor. Those who fall under the intermediate category are entitled to reasonable notice. Some of the factors that are considered in determining whether a worker falls under this category are (*Marbry Distributors Limited v Avrecan International Inc*, 1999 BCCA 172):

- Duration or permanency of the relationship
- Degree of reliance and closeness of the relationship
- Degree of exclusivity

In the case of *Marbry*, the incorporated company, Marbry Ltd., distributed Avrecan's products almost exclusively for 11 years. Marbry Ltd. employed Mr. Marbry as well as one salesperson. Considering the above factors, the court found that the contractual relationship between Marbry Ltd. and Avrecan required reasonable notice to terminate. See also *Zupan v Vancouver (City)*, 2005 BCCA 9; *1193430 Ontario Inc v Boa-Franc Inc*, 78 OR (3d) 81, 260 DLR (4th) 659; *Hillis Oil & Sales v Wynn's Canada*, [1986] 1 SCR 57.

The BCSC has recently adopted Alberta's ruling that dependent contractors are also entitled to notice, albeit possibly to a lesser degree than that of a regular employee (*Pasche v. MDE Enterprises Ltd.*, 2018 BCSC 801).

For additional discussion of intermediate contracts, see "Intermediate Contracts of Employment", Stephen Schwartz, Employment Law Conference 2010, Paper 4.1, CLE BC. For additional discussion of the tests used to determine whether a worker is an employee or an independent contractor, see the Canada Revenue Agency publication: *Employee or*

Self-Employed (RC4110). This useful publication lists a number of indicators to help determine whether a worker is an employee or an independent contractor, but note that it does not consider the category of dependent contractor. It can be found at: http://www.cra-arc.gc.ca/E/pub/tg/rc4110/rc4110-16e.pdf

Cases where the worker may be considered a dependent or independent contractor, rather than an employee, can be quite complex. Although this chapter includes some information regarding dependent and independent contractors, its focus is towards the rights and responsibilities of employees. Ensure that you thoroughly research case law if you have a case involving dependent or independent contractors.

If the worker appears to be a dependent or independent contractor, and the worker has a legal issue that is covered by the *ESA* or the *HRC*, see Sections IV.D.2 and IV.D.3 below to determine whether these statutes' broader definitions of "employee" include the worker in question. Otherwise, continue to the next step of the checklist.

Employees v. Contractors - Employment Standards Act

The distinction between employees and independent contractors under the *Employment Standards Act* is quite similar to that under the common law. It should be used when pursuing a claim at the Employment Standards Branch.

"Employee" is defined in the *ESA*, s 1. The Employment Standards Branch has published an Interpretation Guidelines Manual to assist in determining the difference between employees and independent contractors. It can be found at: https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/ employment-standards/ forms-resources/igm/esa-definitions/esa-def-employee

Additionally, Employment Standards Branch staff sometimes use Levitt's discussion of the control test, four-fold test, and integration or organization test in his book *The Law of Dismissal in Canada* (Aurora, Ont: Canada Law Book, 2003).

As previously mentioned, an independent contractor is not protected by the *ESA*. However, just because an employer calls someone an independent contractor does not make him or her one. Generally, at the Employment Standards Branch, the onus is on the company to show that someone is an independent contractor. If there is a disagreement, the Employment Standards Branch will use the common law tests. Generally, the longer and more continuous the relationship, and the less control the contractor has over his or her employment, the more likely it is to be considered an employment relationship.

Generally speaking, the ESA is to be given a wide and liberal interpretation (per *Interpretation Act*, RSBC 1996, c 238, s 8; see also *Machtinger v HOJ Industries Ltd*, [1992] 1 SCR 986 and *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27). The legislation is always construed broadly when determining whether someone is or is not an employee.

Employees v. Contractors - Human Rights Code

The distinction between employees and independent contractors under the *Human Rights Code* should be used when pursuing a claim at the Human Rights Tribunal.

Employment is more broadly defined under the *HRC* compared to the common law and the *ESA*. It includes the relationships of master and servant, master and apprentice, and some principals and agents. In some cases it may extend to include workers who would, under the common law, be defined as dependent or independent contractors. Additionally, some volunteering relationships could potentially be considered employment relationships, or alternately could be covered under s 8 of the *HRC* (provision of services).

The four factors that most strongly determine whether a worker is an "employee" for the purpose of the *HRC* are (*Ismail v British Columbia (Human Rights Tribunal)*, 2013 BCSC 1079, at para 265):

- Whether the employer utilized, or gained some benefit, from the worker
- The amount of control exerted by the employer over the worker

- Whether the employer bore the burden of financial remuneration of the worker
- Whether the employer has the ability to remedy any discrimination

The Canadian Human Rights Tribunal also uses a broader definition of employment compared to the common law; see *Canadian Pacific Ltd v Canada (Human Rights Commission)*, [1991] 1 FC 571 (CA), at paras 9-15.

Employees v. Contractors – Workers Compensation

The Supreme Court of Canada recently upheld a British Columbia decision extending employer occupational health and safety obligations to contractors. See West Fraser Mills Ltd. v. British Columbia (Workers Compensation Appeal Tribunal) 2018 SCC 22. If a contractor has been injured in the workplace, explore whether employee occupational health and safety regulations may apply to the contractor.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 28, 2019.

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V. Employment Issues

Use this section to identify any potential issues the employee might have. Note that this section is geared towards identifying the most common employment law issues for provincially regulated non-unionized employees (see Section IV: Preliminary Matters to determine whether the worker in question is a provincially regulated non-unionized employee). However, many issues will apply in a similar fashion to federally regulated employees, and some issues will also apply to unionized employees.

Generally, employment issues arise as a breach of the *Human Rights Code*, the *Employment Standards Act*, or an employment contract. Take note of which of these legal protections applies for the issue that you identify, and then see Section VI: Remedies to find out how to proceed.

Employment Standards Act Claims

The ESA sets the minimum standards for various conditions of employment. The ESA applies to provincially regulated employees. The ESA addresses some of the most basic employee entitlements, such as wages, vacation pay, holiday pay, overtime, pregnancy and other leaves, and termination standards.

The *Canada Labour Code* sets these minimum standards for federally regulated employees, . This section primarily discusses the *ESA*, but the *Canada Labour Code* has many similar provisions.

Make sure the individual considering starting a claim is not exempt from the ESA. Make sure the individual considering starting a claim is not exempt from the ESA. Be aware that certain professions and employees are exempt from the ESA, or parts of the ESA. Review the *Employment Standards Regulations* to determine if the employee is covered by the ESA. See *ES Regulation*, Part 7.

See IV.C.5: Exceptions to the General Rule (Specialty Professions) to determine whether the *ESA* applies to the employee in question. See V.A.6: Hours of Work and Overtime Pay to determine if the employee is exempt from overtime.

1. Hiring Practices

An employer may not induce a person to become an employee or to make him or herself available for work by deceptive or false representations or advertising respecting the availability of a position, the nature of the work to be done, the wages to be paid for the work, or the conditions of employment. If this occurs, the employee could file a complaint at the Employment Standards Branch per section 8 of the ESA.

Apart from ESA entitlements, an employee who was hired as a result of false representations could potentially sue for the tort of misrepresentation. For more information about this tort, see *Queen v Cognos Inc*, [1993] 1 SCR 87.

2. Employment Agencies

An employment agency is any person or company that recruits employees for employers for a fee. All employment agencies must be licensed and they must keep records. An employment agency may not receive any payment from a person seeking employment either for obtaining employment or for providing information respecting prospective employers. Any payment wrongfully received can be recovered under the ESA, s 11.

3. Talent Agencies

A number of the more recent amendments to the ESA deal with talent agencies and impose minimum standards on what was previously an unregulated industry. A talent agency must be licensed annually under the Act. Once an agency is licensed, it may receive wages on behalf of clients who have done work in the film or television industry. Section 38.1 of the ES Regulation provides that wages received by a talent agency from an employer must be paid to the employee within a prescribed period: five business days from receipt of payment if payment is made within B.C. and twelve business days from receipt of payment if payment is made from outside B.C.

Talent agencies can charge a maximum 15 percent commission, and must ensure that the employee receives at least minimum wage after this deduction. The only other fee a talent agency may charge is for photography, and this charge must not exceed $25.00 per year. This fee may only be deducted from wages owed to the employee. When a talent agency is named in a determination or order, unpaid wages constitute a lien against the real and personal property of the agency. A 1999 amendment to section 127 of the Act gives the Lieutenant Governor in Council the power to regulate these agencies and, accordingly, the ES Regulation should be consulted for further information. A list of talent agencies currently licensed in B.C. is available at http:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/employment-standards/specific-industries/talent-agencies.

4. Child Employment

Employing a child is an offence for which both the employee and the employer are liable. The ESA does not apply to certain types of employment such as babysitters and some students (*ES Regulation*, s 32).

Section 9 of the ESA states that children under the age of 15 cannot be employed unless the employer has obtained written permission from a parent or guardian. The employer must have this written consent on file indicating that the parent or guardian knows where the child is working, the hours of the work, and the type of work. No person shall employ a child under the age of 12 years unless the employer has obtained permission from the Director of Employment Standards. In cases where permission from the Director is required, the Director also has the ability to set conditions of employment for the child. See *ES Regulation*, Part 7.1. For complete details of conditions, see www.labour.gov.bc.ca/esb or call 1-800-663-7867.

Common forms of allowable employment for those under 12 are found in the film and television industries. For more information on the employment of young people in the B.C. entertainment industry, consult the Employment Standards

Branch fact sheet on this matter at: http:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards--advice/ employment-standards/ specific-industries/ employment-of-young-people-in-entertainment

If an employer is accused of illegally using child employment they will carry the onus in proving that it was either justified, or that the child was of legal age.

5. Wages

Minimum Wage and the Entry Level Wage

As of June 1, 2019, minimum wage in British Columbia is $13.85/hour. Minimum wage is scheduled to increase in June each year until June 2021. Minimum wage information from the Employment Standards Branch can be found at: https:// www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/ employment-standards/ wages/ minimum-wage

Liquor servers are entitled to a lower minimum wage of $12.70/hour. This wage is also scheduled to increase each June until 2021. Since tips and gratuities are not wages, employees must be paid at least minimum wage in addition to any tips or gratuities they receive. Please note that there are other exceptions under Part 4 of the *ES Regulation*, which include live-in home support workers, resident caretakers, and farm workers. See ss 16–18 of the *ES Regulation*. The BC government has announced its commitment to yearly minimum wage increases linked to the BC Consumer Price Index. For more information regarding up to date information on minimum wage in BC, see the Minimum Wage Factsheet at: www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/factsheets/minimum-wage

Federally regulated employees are entitled to the minimum wage of the province that they work in (*Canada Labour Code*, s 178). Thus, federal employees working in B.C. are entitled to $10.85 per hour.

Wage Clawbacks

Section 16 of the ESA deals with the issue of "claw-backs". This term refers to an employer who gives an employee an advance on future wages or commissions. Section 16 states that when the employer re-claims such advances, they must not take back an amount that would leave the employee under the minimum wage rate for the hours worked. Employers who claw-back wages from commission workers must ensure that the amount of wages clawed back does not cause the worker to ultimately receive less than minimum wage.

Payment of Wages

Timing

Employers have to pay wages- at least semi-monthly and no later than eight days after the end of the pay period (ESA, s 17). This section does not apply to public school teachers and professors (*ES Regulation*, s 40). Wages, as defined in Part 1, include salaries, commissions, work incentives, compensation for length of service (ESA, s 63), money by order of the tribunal, and money payable for employees' benefit to a fund or insurer (in Parts 10 and 11 only). The definition does not include, for instance, expenses, penalties, gratuities, or travel allowance (however, travel time is considered time worked for which wages are payable, whereas commuting time is generally not).

No Deductions for Business Costs

An employer cannot require an employee to pay any of the employer's business costs.

Wage Statements

Every payday, employees must be given a statement showing hours worked, wage rate/overtime wage rate, deductions, method of wage calculation, gross/net wages, and time bank amounts (ESA, s 27). Electronic statements can be provided instead under certain conditions (s 27(2)).

Wage Payments on End of Employment

If an employee quits, all wages and vacation pay owed must be paid within six days of the last day worked. When the employer terminates the employment, all wages (and vacation pay) must be paid within 48 hours of termination (ESA, s 18). Certain notice requirements dictated by the ESA are set out later in this chapter.

Enforcement

To enforce the payment of wages, the ESA provides that the Director can arrange payment of wages to the employee, or to the Director, if he or she is satisfied that wages are owed to the employee. Under the ESA, only the Canada Customs and Revenue Agency has priority over the Employment Standards Branch. Finally, the Section 87 of the ESA provides that unpaid wages in a determination, settlement agreement or an order constitute a lien on real property owned by the employer. The enforcement mechanisms available to the Employment Standards Branch are such that the lien often gets priority over other claims against the property (see also *Helping Hands Agency Ltd v British Columbia (Director of Employment Standards)*, [1995] BCJ No 2524 (BCCA)).

If an employee has not been paid wages, and the limitation date under the ESA has passed, the employee may still be able to file a claim in Small Claims Court or the Civil Resolution Tribunal, as it is a term of any employment contract that the employee be paid for their labour. Chapter 20: Small Claims and Section VI.D Limitation Periods.

Allowable Deductions

Only certain deductions can be made from an employee's wages (*ESA*, ss 21 and 22). There must be a written assignment of wages.

Allowable deductions include EI, CPP, income tax, charitable donations, maintenance order payments (such as spousal or child support), union dues, pensions, insurance (medical and dental), and payments to meet credit obligations. Benefit packages often allow a whole range of deductions from employee wages. In the case of an employer who fails to remit these deductions, the Employment Standards Branch will collect from the employer the premiums the employee paid. However, the Branch is not able to collect costs incurred by an employee who believed he or she was insured, i.e. actual cost of dental work done. If an employee has suffered a loss such as this, they should consider whether they have a contractual agreement with the employer, and whether it has been breached; if so, they may be able to recover the loss in Small Claims Court or the Civil Resolution Tribunal.

Section 22(4) of the *ESA* allows the employer to deduct money from the employee's paycheque to satisfy the employee's credit obligation (for example, if the employer has loaned the employee money, or if the employee has agreed to pay the employer a monthly sum for personal use of the employer's car). To do this, the employee must make a written assignment of wages to the employer.

Business expenses charged to an employee

An employer cannot require employees to pay any business costs – as either a deduction from their paycheque or out of their pockets or gratuities. Examples of business costs include loss due to theft, damage, breakage, or poor quality of work, damage to employer's property, or failure to pay by a customer (e.g. dine-and-dash). If an employer deducts business costs from an employee's wages they can be required to reimburse the employee for the amount, and can be fined by the Employment Standards Branch for failing to follow the *ESA*.

6. Hours of Work and Overtime Pay

Under the *ESA*, employees are generally entitled to be paid at overtime rates if they work over 8 hours in a day, or over 40 hours in one week. See the *ESA*, Part 4 which sets out overtime rates and entitlements.

Regular Hours and Rest Periods

An employer must not require or permit an employee to work more than eight hours per day or 40 hours per week as a rule, unless the employer pays overtime wages (*ESA*, s 35). An exception to this overtime rule is made for workers who have written averaging agreements under s 37 (see the next section for more information on averaging agreements). An employer must ensure that no employee works more than five consecutive hours without a half-hour meal break (s 32). Such eating periods are not included in hours of work. There is no entitlement to coffee breaks.

Employees are also entitled to at least 32 consecutive hours free from work each week or 1.5 pay for the time worked during that period, and eight hours free from work between shifts, except in the case of an emergency (s 36).

Federally regulated employees cannot work more than eight hours per day or 40 hours per week as a rule, but unlike provincially regulated employees there is a 48 hours a week maximum, even with overtime rates being paid (*Canada Labour Code*, s 171). Averaging agreements are allowed under the federal legislation. There are no specifications for meal breaks. Employees are entitled to one day off from work each week (Sunday if possible). There is no requirement for time off between shifts.

Overtime

Daily Overtime: Unless he or she has an averaging agreement, an employee must be paid overtime wages if he or she works more than eight hours in any one day. Employees are to be paid one and a half times their regular wage rate for time worked beyond eight but less than 12 hours in one day, and two times their regular wage rate for any time worked beyond those 12 hours in one day (*ESA*, s 40(1)).

Weekly Overtime: Unless part of an averaging agreement, overtime must also be calculated on a weekly basis. For any time over 40 hours per week, an employee will receive one and a half times his or her regular wage (s 40(2)). When determining the weekly overtime, employers must use only the first eight hours of each day worked (s 40(3)). Essentially, this means that if an employee works six days out of the week, eight hours each day, eight of those hours have to be paid at one and one half times the regular rate. However, if an employee works 10 hours a day for four days a week, it would be calculated under daily overtime as the weekly hours still add up to 40.

Overtime Banks

Section 42 of the *ESA* allows for the "banking" of overtime hours on a written request from the employee, if the employer agrees to such a system. Hours are banked at overtime rates. The employee may ask at any time to be paid the overtime hours as wages, or to take these hours as paid time off of work at on dates agreed to by the employer and employee (s 42(3)). The employer may close the employee's time bank with one month's notice to the employee at any time (s 42(3.1)), and within six months of doing so, must either pay the employee for the hours in the time bank, allow the employee to take time off with pay equivalent to the amount in the time bank, or some combination of the two (s 42(3.2)). If the employee requests the time bank be closed, or if the employment relationship is terminated, the employer must pay the employee for the hours in the time bank on the next payday.

Many of the problems encountered by the Employment Standards Branch involve conflicts between the records of employers and the claims of employees regarding regular and overtime hours worked. **Employees should always keep consistent records of the hours they work.**

Federally regulated employees cannot opt for time off in lieu of overtime pay. All overtime hours must be paid at one and a half times the regular rate of pay (*Canada Labour Code*, s 174).

Employees and Occupations Exempt from Overtime

Part 7 of the *ES Regulation* excludes certain groups of employees from the following rules under Part 4 of the ESA. They may be excluded from Part 4 of the Act as a whole, or excluded from certain sections only. Please check the Regulation for more details.

A common situation is where the employer attempts to exclude the employee from overtime eligibility by calling the employee a manager. The Employment Standards Branch uses the definition of manager as set forth in section (1) of the Regulation. It is the nature of the job, and not an employee's title, that makes that person a manager.

Be aware that even though an employee is considered a manager (or falls within another overtime exemption), the employee is still entitled to be paid for all hours worked.

Entitlement to overtime pay may be affected by an employment contract. Review the manager's contract, and see if there is a clause that deals with hours of work. If a manager or other exempt employee works more hours than set out in their employment contract, they may be entitled to additional pay for those hours at a standard wage rate. If the employment contract specifies that an annual salary is in exchange for a set amount of hours over 40, this may impact the employee's entitlement to be paid at an overtime rate.

If the manager does not have a contract, collect any evidence you can regarding an agreement on the manager's hours of work, and evidence on historical hours worked.

The *ESA* Interpretation Guidelines provides some helpful discussion on overtime, and can be found at http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm/esa-part-4-section-35.

Minimum Daily Hours

When workers report for work as required by an employer, whether or not they start work, they are entitled to two hours of pay unless they are unfit for work or do not meet Occupational Health and Safety Regulations. Whether or not an employee starts work, if an employer had previously scheduled an employee to work for more than eight hours that day, he or she is entitled to a minimum of four hours pay, unless inclement weather or other factors beyond the employer's control caused the employee to be unable to work, in which case the worker is entitled to just two hours' pay (*ESA*, s 34).

Shift Work

An employee is entitled to at least eight hours free between shifts, unless there is an emergency. Split shifts must be completed within a 12-hour period (*ESA*, s 33).

Variance

It is possible for an employer to apply for a variance to exclude employees from certain provisions of the *ESA*. To apply for a variance, the employer must write a letter to the Director of Employment Standards, and must have the signatures of at least 50 percent of the employees who are to be affected. When reviewing the application, the Director must consider whether the variance is inconsistent with the purpose of the *ESA* and the Regulation, and whether any losses incurred by the employees are balanced by any gains.

For more information see: https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-9-section-72.

Averaging Agreements

Under s 37 of the ESA, an employee and employer can agree to average an employee's hours of work over a period of up to four weeks for the purposes of determining overtime. These agreements must be in writing and be signed by both parties before the start date of the agreement and must specify the number of weeks over which the agreement applies. It must also specify the work schedule of each day covered by the agreement and specify the number of times if any that the agreement can be repeated. The employee must receive a copy of this agreement before the agreement begins. The work schedule in such an agreement must still follow conditions outlined from ss 37(3) – (9). The employer and employee may agree at the employee's written request to adjust the work schedule (s 37(10)). The Employment Standards Branch will not get involved unless a complaint is made.

7. Vacation and Vacation Pay

Employees are entitled to both a minimum amount of annual vacation and to vacation pay under Part 7 of the *ESA*. Note that vacation time and vacation pay are separate entitlements under the *ESA*. Employees are entitled to both vacation pay and actual time away from work.

Employment contracts must provide at least the minimums vacation and vacation pay entitlements as set out in the *ESA* (ss 57-60).

Employees can be entitled to vacation and vacation pay entitlements above the *ESA* minimums if agreed to in an employment contract.

Annual Vacation

After each year worked, employees are entitled to an annual vacation of at least two weeks. After five years employment, this entitlement increases to three weeks. Employees must take vacation each year.

Annual vacation is without pay, but the employee should receive vacation pay either in advance of his vacation, or on each paycheck. See Vacation Pay explanation below.

Vacation Pay

After 5 days of work, the employer is required to pay the employee 4% of his wages as vacation pay. After 5 years of employment, this increases to 6%.

Employers are required to bank vacation pay for an employee, and then pay the employee their banked vacation pay 7 days before the employee's annual vacation. Alternatively, with written consent the employer can pay the employee his or her vacation pay on each paycheck.

If the employee is terminated, the employer is required to pay out any vacation pay owing to the employee. Based on the timing of when vacation pay is earned and payable, this can result in some circumstances where employees will have claims for years of vacation pay owing.

For a detailed explanation of vacation and vacation pay entitlement and calculation examples, see Part 7 of the ESA, and the ESA Interpretation Guidelines found at: https:/ / www2. gov. bc. ca/ gov/ content/ employment-business/ employment-standards-advice/employment-standards/forms-resources/igm/esa-part-7-section-58

8. Statutory Holidays and Statutory Holiday Pay

Employees are entitled to ten paid holidays a year: New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, B.C. Day, Labour Day, Thanksgiving Day, Remembrance Day, and Christmas Day (*ESA*, Part 5). "Family Day" is a new holiday as of 2013, and is scheduled to occur on the third Monday of every February. Boxing Day, Easter Sunday, and Easter Monday are not statutory holidays in B.C. Federal employees are entitled to Boxing Day but not to B.C. Day.

To be entitled to a statutory holiday, an employee must have been employed by the employer for at least 30 calendar days before the statutory holiday and either have worked under an averaging agreement within this period or have worked or earned wages for 15 of these 30 calendar days.

Employees who work on a statutory holiday receive one and one-half times their regular rate of pay for the first 12 hours worked. Any further time worked should be paid at twice the regular amount of pay. Where a statutory holiday falls on a non-working day, the employer must give the employee a regular working day off with pay. An employee who is given a day off on a statutory holiday or a day off instead of one must be paid statutory holiday pay equal to at least an average day's pay.

An average day's pay is the employee's gross earnings in the past 30 days, divided by days worked, where:

- **Amount paid** is the total amount paid or payable to the employee for the work done and wages earned during the 30 calendar day period preceding the statutory holiday including vacation pay for any days of vacation within that period, less any amounts paid or payable for overtime; and
- **Days worked** are the number of days the employee worked or earned wages within the 30 calendar day period.

9. Leaves of Absence

Part 6 of the *ESA* regulates leaves of absence. Again, Part 7 of the *ES Regulation* should be consulted to determine if a client is covered by this part of the Act. Those employees who are not protected by the *ESA* may have protection under the governing statutes of their specific profession.

An employee who is on leave under any of the following categories maintains several of the same protections he or she received while working. The employment is deemed to be continuous for the purposes of calculating annual vacation entitlement and any pension, medical, or other plan beneficial to the employee (*ESA*, s 56). At the time of reinstatement, employees on leave are entitled to return to their previous position or to a comparable one, and are also entitled to any wage and benefit increases that they would have received had they remained at work (s 54).

An employer may not terminate an employee for taking a leave he or she is entitled to take under the *ESA*. In the case of an alleged contravention of Part 6 by the employer, the burden is on the employer to prove that the reason for a termination was not a pregnancy, jury duty or other leave allowed by the Act (s 126(4)(c)). When there is an infraction of this section of the Act, the Director of Employment Standards can order that the employee be reinstated (s 79). However, this almost never occurs (see Section VI: Remedies for more details). Section 79(2) is a very powerful "make whole remedy" which allows the Director to reinstate the employee and pay them any wages lost due to the contravention of the Act. Termination during a leave may also give rise to a cause of action before the Human Rights Tribunal.

If an employee was dismissed due to a leave of absence but the limitation date to file a claim with the Employment Standards Branch has passed, consider whether the employee may have a wrongful dismissal claim; see section V.C: Termination of Employment.

NOTE: The protections offered under ss 54 and 56 of the *ESA* do not apply if the leave taken by the employee is greater than that allowed by the Act (s 54).

Pregnancy and Parental Leave

Pregnancy leave is protected under the ESA and the HRC. An employee dismissed while on pregnancy leave may also be entitled to a larger common law severance.

Under ss 50 and 51 of the ESA, a birth mother is entitled to take up to 17 consecutive weeks of unpaid pregnancy leave if the leave starts before birth or termination of the pregnancy. In addition, the birth mother can take a further 61 weeks of parental leave where pregnancy leave was taken, or 62 consecutive weeks of parental leave where pregnancy leave was not taken. Although the employer does not have to pay wages during a pregnancy or parental leave, Employment Insurance may cover a portion of the wages during this period if the person qualifies. Please refer to Chapter 8: Employment Insurance for more information. Birth fathers and adoptive parents are entitled to up to 62 weeks of parental leave. Employees must give their employer four weeks written notice of pregnancy or parental leave, but even if they do not, they are still protected by the ESA.

The employer may request a medical certificate to verify an anticipated birth date or the date of pregnancy termination. Pregnancy leave may commence up to 13 weeks prior to the estimated date of birth, and no later than the actual birth date of the child; it ends no later than 17 weeks after the leave begins. To request pregnancy leave for a period shorter than six weeks following the birth of the child or termination of the pregnancy, an employee must provide one week written notice to the employer and may have to supply a medical certificate confirming the employee's ability to return to work. Parental leave can begin at any time within 78 weeks after the birth or adoption of the child and need not conclude within that period; however, it must all be taken in one block.

Pregnancy leave can be extended by six weeks with a doctor's certificate outlining reasons related to the birth or termination. Parental leave can be extended by five weeks where the child has a psychological, physical, or emotional condition that requires such an extension.

An employer has a duty to allow the employee the leave he or she requests under the provisions of the ESA. Furthermore, upon the employee's return from leave, the employer has a duty to place the employee in the same or comparable position to the position he or she held before the leave. The employer must not terminate employment because of leave taken, or change a condition of employment without the employee's written consent.

Maternity rights are being quickly developed by the courts. Supreme Court decisions such as *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219, should be reviewed before giving advice to individuals with this type of grievance. This case says that pregnancy, while not considered a sickness or accident, is a valid health-related reason for absence from work.

If an employee has a dispute with their employer regarding pregnancy or parental leave, they may also be able to file a complaint for discrimination based on sex or family status with the Human Rights Tribunal. Additionally, where an employer offers compensation benefits for health conditions and then excludes pregnancy as a ground for claiming compensation, the employer may have acted in a discriminatory fashion.

If an employee has been terminated while on leave, in some cases they may be able to make a claim for wrongful dismissal in Small Claims Court or the Civil Resolution Tribunal. The employee should at minimum be entitled to a regular severance. Consider whether the circumstances of dismissal in breach of protected leave provisions might be grounds for aggravated or punitive damages in civil court. See Section VI: Remedies for further details. If there are anti-discrimination provisions in an employment contract, employees may have the possibility of a claim for failure to enforce such clauses (see *Lewis v. WestJet Airlines Ltd.*, 2019 BCCA 63)

An employer can terminate the employment of a pregnant person if the termination is part of legitimate downsizing (s 54).

Family Responsibility Leave

An employee is entitled to up to five days of unpaid leave each year to meet responsibilities related to the health of an immediate family member or the educational needs of a child in the employee's care (*ESA*, s 52). These days need not be consecutive, and their use is not restricted to emergencies. They may be used for meetings about a child's schooling, meetings with a social worker, or other similar commitments.

Bereavement Leave

An employee is entitled to up to three days of unpaid leave on the death of a member of the employee's immediate family (*ESA*, s 53). "Immediate family" is defined in the *ESA* as "the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee, and any person who lives with an employee as a member of the employee's family."

Compassionate Leave

The ESA was amended to allow an employee to take up to 27 weeks of unpaid leave to care for a family member who is gravely ill and faces a significant risk of death within 26 weeks (s 52.1). The employee must provide a certificate from a medical practitioner stating that the family member faces significant risk of death. The eight weeks do not have to be taken consecutively, but they must be used within the 26-week period. If the family member is still alive after 26 weeks but still gravely ill, a further eight weeks can be taken; however, a new medical certificate must be provided by a medical practitioner. While on compassionate leave the employment is considered to be continuous. An employer must not terminate the employee, or change the conditions of employment while an employee is on compassionate leave, unless they obtain their written consent to do so. An employee may also qualify for a maximum of six weeks of pay through Employment Insurance for compassionate leave. For more information please refer to Chapter 8: Employment Insurance.

Jury Duty

An employee is entitled to unpaid leave to meet the requirements of being selected for jury duty (*ESA*, s 55).

Reservists' Leave

Under certain circumstances the *ESA* now allows unpaid leave for reservists in the Canadian Armed Forces (*ESA*, s 52.2).

Leave Respecting Disappearance or Death of a Child

An employee is entitled to up to 52 weeks of unpaid leave relating to the disappearance or a child, and up to 104 weeks relating to the death of a child (see ESA s. 52.3 and 52.4)

Leave Respecting Domestic or Sexual Violence

An employee is entitled to unpaid leave of up to 10 days, plus an additional 15 weeks, if required as a result of domestic or sexual violence to either the employee or an eligible person (i.e. child under the employee's care) (see ESA s. 52.5)

Critical Illness or Injury Leave

An employee is entitled to up to 36 weeks of unpaid leave to provide care to a critically ill family member under 19 years of age, or up to 16 weeks of unpaid leave to provide care for a critically ill family member who is over 19. (see ESA s. 52.11)

10. Professions with Special Provisions and Limited Exemptions under the Employment Standards Act

Some professions remain excluded from the requirements of the *ESA*. However, this does not always mean an employer is fully excluded; they may only be exempted from parts of the legislation. Also, employers not commonly covered can apply to the Employment Standards Branch for a variance, making them fully exempt from the requested parts of the *ESA*. Check the legislation directly, and any appropriate case law on the matter.

Independent Contractors

See Section IV.D: Determine if the Worker is an Employee or Independent Contractor to determine whether the worker in question is an employee or an independent contractor. The *ESA* applies only to employees.

Commissioned Salespeople

Commissioned salespeople are entitled to most of the protection the *ESA* has to offer. Look carefully at *ES Regulation* s 37.14. They are entitled to receive at least minimum wage, unless they sell heavy industrial/agricultural equipment, or sailing/motor vessels. If a salesperson is entitled to minimum wage and the total commission falls short of that, the employer must make up the difference.

The first issue to examine in the case of a commissioned salesperson is the terms of the employment contract. These will tell you when the commissions are to be paid. Employers are not bound to bi-weekly payment of commissions. However, even if the employee must wait for sales to be reconciled before being paid their commission, they must still be paid wages bi-weekly.

Farm Labourers and Domestic Workers

The *ESA* has special provisions for farm and domestic labourers. See the Act and Regulation for more details. A domestic worker must have a written employment contract and be registered with the Employment Standards Branch (*ESA*, ss 14 and 15). The Employment Standards Branch is working in cooperation with federal immigration officials to curb abuses of the program. The federal agency will ensure that the employer is registered with the Branch before entry of a new immigrant is authorized. In 2002, under the banner of creating a more flexible workforce, the *ESA* was changed to exclude domestic and farm workers from certain overtime laws. Essentially domestic and farm workers can have their hours averaged without the need for consent (see above at Section V.A.6(h): Averaging Agreements).

Most migrant farm labourers will be paid in accordance with the amount of work produced, e.g. payment per weight of crop picked. While this is legal, it should be noted that hours must still be recorded, and payments made for the purpose of Employment Insurance. Abuses by employers in this area have been significant, and workers should be aware that the government may try to collect EI from their paycheques if it is not reported.

NOTE: The federal government via Citizenship and Immigration Canada administers the Live-in Caregiver Program. The Program came into effect on April 27, 1992. The purpose of the program is to prevent abuse and exploitation of domestic workers. The program was to clarify the employer-employee relationship by providing information on the terms and conditions of employment and on the rights of workers under Canadian law. The program also sets out educational requirements for live-in caregivers which are designed to aid a worker’s ability to get a job after gaining

permanent residency status and leaving domestic employment. While the first-year assessment interview and in-Canada skills upgrading have been eliminated, the remaining requirements are very high, thereby forming a serious barrier for these women to enter Canada. The program requires the equivalent of a Grade 12 education (equivalent to second-year university in many countries) and six months of formal training in the caregiving field or one year of full-time paid work experience, and good knowledge of English or French. Further information is available from the West Coast Domestic Workers' Association (see Section II.C: Referrals).

High Technology Professionals

The *ES Regulation* makes special provision for workers in the high technology sector. Most importantly, these professionals are exempt from the *ESA* provisions relating to hours of work, overtime, and Statutory Holidays (Parts 4 and 5). It is not easy, however, for an employee to qualify as a high technology professional – the criteria are very specific. See s 37.8 of the *ES Regulation* for a more detailed description, and especially if the employee deals with computers, information service, and scientific or technological endeavours.

Not all employees classified as high tech professionals by their employer fit the definition, and as a result may be entitled to overtime. The BC Employment Standards Branch awarded a group of digital animators who worked on the Sausage party movie overtime pay, as a result of a finding that they did not meet the overtime exempt definition of high tech professionals. See ER#426308

Silviculture (Reforestation) Workers

Special rules apply to workers in the reforestation and related industries (as defined in *ES Regulation* s 1(1)). A silviculture worker is paid on a piece rate basis. This is defined as a rate of pay based on a measurable amount of work completed (e.g., payment by the tree). Whatever the rate, it must exceed the minimum wage rate. The *ES Regulation* lays out specific requirements that employers in these industries must meet relating to shift scheduling, holiday pay, and overtime. The special regulations are intended to address the remote job sites and special piece rate payment schemes that are popular in this industry. See *ES Regulation* s 37.9.

Professionals

The *ESA* does not apply to architects, accountants, lawyers, chiropractors, dentists, engineers, insurance agents and adjusters, land surveyors, doctors, optometrists, real estate agents, securities advisers, veterinarians, or professional foresters (*ES Regulation*, s 31).

Other exceptions to the ESA

There are additional exceptions and variances to the *ESA* set out in the *ES Regulation*, Part 7. Some of the professions for which there are exceptions or variances to the ESA include:

- Election workers
- Fishers
- Taxi drivers
- Logging truck drivers
- Newspaper carriers
- Oil and gas field workers
- Loggers working in the Interior
- Municipal police recruits
- Aquaculture – fin fish workers
- Miners

- Foster care providers

B. Breach of contractual terms of employment

11. Severance Claims

The most common breach of an employee's contract (whether the terms of that contract are oral or in writing or a combination of the two) is a breach of a term that the employer will provide notice of dismissal.

When an employee is fired without being provided with reasonable notice of dismissal or being paid money in lieu of reasonable notice (i.e. severance), the employee may have a breach of contract claim. The failure to provide reasonable notice is also referred to as a wrongful dismissal. See Section V.C: Termination of Employment.

12. Constructive Dismissal Claims

If an employer has significantly changed the type of work done by an employee, the employee's rate of pay, or other working conditions, the employee may have been "constructively dismissed" and may be entitled to damages. See Section V.C: Termination of Employment for further information.

13. Other Contractual Claims

There are also situations during the employment relationship where an employer can breach other terms of an employment contract (other than the notice requirement). For example, an employer might fail to pay a previously agreed upon bonus to an employee. See *Gadbois v Newcom Business Media Inc.*, 2016 ONCA 898; *Paquette v TeraGo Networks Inc.*, 2016 ONCA 618.

14. Remedy: Court Claim

Claims for breach of contract are addressed through civil court claims, either at Provincial Court or Supreme Court depending on the potential value of the case.

Suing an employer while still on working notice is a risky move, as a court can find that the act of suing an employer can amount to just cause. See Section V.C.5: Just Cause Dismissal for more information.

There is conflicting case law on whether an employer would have just cause to dismiss an employee who sues the employer while still employed. As a result, prior to suing an employer while the claimant employee is still working or on a period of notice, claimants should carefully research the law and compare the current law to the employee's particular circumstances.

Sometimes, a written contract, or certain provisions within it, will be invalid. See Section V.2: Employment Contract Considerations to determine whether the contract or any of its provisions are invalid.

C. Termination of Employment

At common law, employers can dismiss an employee at any time without cause, on provision of reasonable advance notice or pay in lieu thereof. In rare circumstances, employers can dismiss an employee for just cause, if the employee is guilty of serious misconduct.

In practice, dismissals are normally without cause. In without cause dismissal scenarios, employees are entitled to notice of dismissal, or pay in lieu of such notice, under both the ESA and common law (unless the employee's contract validly restricts the employee to only the ESA minimum severance).

Non-unionized, federally regulated employees, as covered by the CLC, are subject to different laws concerning dismissal without cause. See sections 240-246 of the CLC. Also see *Wilson v Atomic Energy of Canada*, 2016 SCC 29.

The ESA (or the CLC for federally regulated employees) provides statutory minimums for notice, or pay in lieu, if an employee is dismissed from their employment. The maximum an employee can receive under the ESA is 8 weeks of notice or pay.

In addition, employees are entitled to a reasonable notice of dismissal at common law, or pay in lieu of such reasonable notice. The amount of reasonable notice, or pay in lieu, should be sufficient to allow the employee to find comparable employment, based on the employee's age, length of service, and the nature of the employee's position.

The entitlement to notice at common law is a contractual entitlement. All employees have an employment contract, even if there is no written contract. Employment contracts can be written, oral, or a combination of both written and oral terms.

By default, there is an implied term in indefinite hire employment contracts (either oral or written contracts) that employers will provide employees with a reasonable notice of termination if they dismiss the employee without cause.

Written employment contracts may contain a termination provision that sets out how much notice the employee will receive if the employer terminates the employee without cause. In order to rebut the presumption of reasonable notice and limit an employee's common law severance entitlement, termination clauses in employment contracts have to be clear, unambiguous, and have to meet at least the minimum ESA entitlements.

If the employer fails to give the employee reasonable notice or pay in lieu, this would constitute a breach of the employment contract by the employer, and the employee could sue the employer for a severance in Small Claims Court, the Civil Resolution Tribunal, or BC Supreme Court. This is commonly called a wrongful dismissal claim.

Generally, the notice periods recognized at common law tend to be larger awards than the statutory minimum.

There are many potential issues involved if an employee is terminated. The below checklist and the information in this section of the chapter merely provide a starting point for further legal research.

15. Termination of Employment Checklist

☑ This section applies to both provincially and federally regulated non-unionized employees, dependent contractors, and independent contractors. It is necessary to determine which category the worker falls under. See Section IV: Preliminary Matters to determine this.

☑ Determine whether the worker has an indefinite or fixed term contract of employment. See Section V.C.2(a) Successive or Expired Fixed Term Contracts for details, as some contracts that appear to be for a fixed term may be deemed to be of indefinite duration by the courts, particularly when the fixed term contract is renewed year after year.

- If the contract is for an indefinite term, or if the worker was dismissed part way through a fixed-term contract, go to the next step of the checklist.

- If the worker was dismissed at the end of a fixed-term contract of employment, then their contract has simply been completed and there is generally no further entitlement to severance pay (unless their contract specifies otherwise).

☑ Determine whether the worker was dismissed or if they resigned. Sometimes a worker may have been forced to resign or may have had their pay or working conditions changed significantly; see Section V.C: Termination of Employment to determine whether your situation would be considered a constructive dismissal or a resignation.

- If the worker was dismissed, continue to the next step of the checklist.
- If the worker voluntarily resigned, they are generally not entitled to severance pay (unless their contract specifies otherwise).

☑ If it appears that the contract may have become impossible to perform, determine whether there has been “frustration” of the contract; see section Section V.C.16: Frustration of Contract. Note that this is rare, and layoffs usually do not fall into this category.

- If the contract has been frustrated then generally there is no entitlement to severance pay. Otherwise, continue to the next step of the checklist.

☑ Determine whether the terms of the contract specify the amount or length of notice or severance pay the worker will receive if dismissed.

- If this amount is specified, determine whether that provision of the contract is valid; see Section V.C(d) and (c): Invalid Contracts If it is valid, it will determine the amount of severance they are entitled to.
- If this amount is not specified, or if the contract or that provision of the contract is invalid, then:
  - Employees, dependent contractors, and independent contractors who are dismissed part way through a fixed term contract may be entitled to damages for breach of the contract; see Section V.C.4: Damages at Common Law-Fixed Term Contracts. Use for breach of a fixed-term contract. Use these damages in place of those damages regarding “reasonable notice” for the rest of the checklist.
  - Employees and dependent contractors who are employed for an indefinite term will generally be entitled to “reasonable notice”; go to the next step of the checklist.
  - For independent contractors with an indefinite contract, the rules are more complex; see the cases listed in Section III.C.1 as a starting point for research as to whether the contractor may be entitled to reasonable notice. If the contractor is entitled to reasonable notice, continue to the next step of the checklist.

☑ Determine whether there may be just cause for dismissal; see Section V.C.5: Just Cause. Note that it is often very difficult for an employer to prove that there is just cause. If there may be just cause, consider whether the employee has a potential defence; see Section V.C.6: Defences to Just Cause Arguments.

- If you think that the employer can prove in court that they truly had just cause for dismissing the worker, and the worker does not have a defence, the worker will generally not be entitled to severance pay.
- If there is a reasonable chance that the employer did not have just cause for dismissal, or if the employer may not be able to prove that there was just cause, continue to the next step of the checklist.

☑ For those workers entitled to reasonable notice, determine an approximate length for the worker’s reasonable notice period; see V.C.4(d) Calculating Reasonable Notice. Note that it is difficult to predict how much a particular worker will receive if the case goes to trial, but case law can give an approximate range. Once this is done, calculate the damages the employee would be entitled to for the reasonable notice period. This generally includes the salary and benefits that the employee would have received if they had continued to be employed during the reasonable notice period.

- If the worker was given severance pay to cover their lost wages and benefits for the length of the reasonable notice period, or was allowed to continue working for the employer for that period, they will generally not be entitled to anything further.

- If the worker was given less working notice or severance pay than they are entitled to through their reasonable notice period, they may be able to claim the remainder in court; continue to the next step of the checklist.

☑ Determine whether the worker has mitigated their damages. Note that if the worker has mitigated their damages during the notice period, for example by finding a new job, they will have their severance award reduced by the amount of money they earn during the notice period. If the worker does not make reasonable attempts to find a new job, they may have their severance award reduced. See Section V.C.14: Duty to Mitigate.

☑ Determine whether the worker may be entitled to aggravated and/or punitive damages. If so, estimate how much they may be entitled to, and determine whether the worker has a strong case for these types of damages. See Section V.C.13: Aggravated and Punitive Damages.

☑ If the worker was an employee, determine what length of notice the employee is entitled to under the *Employment Standards Act* (or the *Canada Labour Code* for federally regulated employees). Note that if at least 50 employees were terminated at once, the employee is entitled to additional notice under the *ESA*; see Section V.C.4(b): Group Terminations. In the rare case that the employee is entitled to more money under the ESA than through reasonable notice, and the employee was dismissed in the past 6 months, consider filing a claim with the Employment Standards Branch. Otherwise, continue to the next step of the checklist.

☑ If the worker was an employee, and was dismissed for a discriminatory reason, determine whether they have a claim with the Human Rights Tribunal (or the Canada Human Rights Tribunal for federally regulated employees); see Chapter 6: Human Rights. If they do have a potential claim, estimate how much the employee would be able to claim for (i) lost wages (minus any amount from the duty to mitigate), and (ii) injury to dignity, feelings, and self-respect. Compare this to the amount the employee could claim for (i) reasonable notice (minus any amount from the duty to mitigate), and (ii) aggravated and punitive damages. If the employee is likely to obtain more money at the Human Rights Tribunal, and has been dismissed within the past 6 months, consider filing a human rights claim; see Chapter 6: Human Rights. Otherwise, continue to the next step of the checklist.

☑ If the potential award for (i) reasonable notice and (ii) aggravated and punitive damages is under $35,000, as of June 1, 2017, consider filing a claim in Small Claims Court; see Chapter 20: Small Claims. If the worker has a strong case for an award significantly greater than $35,000, the worker should strongly consider contacting an employment lawyer to discuss proceeding with a claim in BC Supreme Court. If the potential award is only slightly over $35,000, the employee may wish to file in Small Claims Court, and waive their entitlement to any amount over $35,000, as proceeding in Small Claims Court can be less costly than proceeding in BC Supreme Court.

16. Employment Contract Considerations

As discussed earlier, the employer-employee relationship is contractual. Every employee has an employment contract, even if a written document does not exist.

Most employment contracts are contracts of indefinite hiring. This means that no definite term of employment was set out at the time of the contract, and there is an implied term that either party may terminate the contract upon giving "reasonable notice". The implied term to give reasonable notice can be overridden by an express notice provision limiting the amount of notice the employer is obligated to give the employee. Accordingly the courts will assume that an employee should receive "reasonable notice" prior to termination unless the contract explicitly says something different. If there is an express notice provision in the employment contract, then that clause is binding, unless there is a reason for it to be invalid (see **Section V.C.2(c) and (d) Invalid Contracts**, below).

If reasonable notice is not given, then the contract is breached, and courts can award damages in the form of compensation that would have been paid during that reasonable notice period. However, if there is just cause for

dismissing an employee, no damages need be paid, and no notice need be given.

Note that any wage claims that crystallized before the termination of the contract are not eliminated by just cause for dismissal. Just cause only relieves the employer from notice and severance pay requirements, but not liability for past wages, etc.

Successive or Expired Fixed Term Contracts

If an employee had successive fixed term contracts, the courts may find there is in fact an indefinite term of employment; see *Ceccol v Ontario Gymnastic Federation* (2001), 55 OR (3d) 614.

If there was a fixed term contract and the employee continued to work after the term's expiration, the contract then becomes an indefinite contract. If the employee had an indefinite contract, but then signed a fixed-term contract, determine whether the new contract is valid; see **Section V.C.2(c) and (d) Invalid Contracts**, below.

Consideration

Once a job offer is made and accepted, a contract is in place (though as discussed above, it may be unwritten). In order to change the terms of the contract after it is in place, there must normally be fresh consideration flowing from each party to the other. Consideration in contract law is the benefit one party receives from another as a result of entering into a contract with another party. This means that to change an existing contract, the new contract must contain a new benefit for both the employer and the employee. Because of this, an entire written contract might be invalid if the contract was imposed on the employee after they had already accepted the job offer: the employee would already have a contract, and the written contract would need to have some new benefit, or "fresh consideration", for the employee. Compare the signature dates on the written contract to the actual start dates, to determine if there is an argument that the contract is unenforceable for lack of consideration.

Be aware that the BCCA case of *Rosas v. Toca*, 2018 BCCA 191, while not an employment law case, may present some arguments for employers that new employee contracts entered into during the course of employment should be enforceable, even if there is no valid consideration. At paragraph 183 of Toca: "When parties to a contract agree to vary its terms, the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns, which would render an otherwise valid term unenforceable.". As this Toca case is new a note up of employment law cases referencing or applying Toca will be important to an analysis under this topic.

Invalid Contracts – Vagueness or Ambiguity

Vague or ambiguous contract terms may be unenforceable. Courts will examine the wording of the contract terms to determine whether a clause is enforceable for vagueness or ambiguity. If a clause is not enforceable, courts may rule on the term of agreement based on the conduct of the employer and employee and pre-contractual communication between the parties. See *Alsip v Top Rollshutters Inc. dba Talius*, 2016 BCCA 252.

Employment Standards Cap Severance Clauses and Enforceability

Many employers enter into written employment contracts that purport to allow the employer to dismiss the employee without cause by providing only the Employment Standards Act minimum severance. These clauses will often be enforceable. However, some arguments are available to attempt to have these ESA severance termination clauses unenforceable.

Termination Clause Does Not Meet ESA Minimums Any term of the written contract that does not meet the minimum standards set out by the Employment Standards Act (for provincially regulated employees) or the Canada Labour Code (for federally regulated employees) is invalid.

A contractual termination clause is not enforceable if, at any time, the clause would provide the employee with less than his entitlement under the ESA. See *Shore v Ladner Downs*, [1998] 160 DLR (4th) 76.

If a term of the contract is invalid, then the employee will likely receive whatever the common law provides instead of what the contract said.

For example, a termination clause might say the employee will receive 30 days notice if they are being terminated without cause. Under the ESA, the employee could receive up to 8 weeks notice. The contractual termination clause would be invalid because it purports to provide the employee with less than the minimum statutory entitlement.

In this example, the employee would be entitled to reasonable notice under common law. This can be very beneficial for the employee in cases where the common law provisions, such as the reasonable notice period, are better than the contractual provisions.

Note that in assessing whether a term of a contract breaches the ESA, one must consider the maximum entitlement that an employee could ever receive under the ESA at any point in time, rather than their current entitlement.

In the previous example, it is irrelevant whether the employee has worked for the employer long enough to be entitled to more than 30 days of notice under the ESA.

However, this principle may have been qualified with respect to severance clauses and fixed term contracts (see *Miller v Convergys CMG Canada Limited Partnership*, 2013 BCSC 1589 (upheld on appeal); *Rogers v Tourism British Columbia*, 2010 BCSC 1562). No Severance Ceiling Set out in Termination Clause If a contractual ESA severance termination clauses does not set out that this severance is the maximum an employee will receive, the employee may not be limited to such a severance.

In *Holm v AGAT Laboratories Ltd*, 2018 ABCA 23, the Alberta Court of Appeal looked at whether a termination clause was sufficient to limit a constructively dismissed employee's entitlement to severance. The termination clause provided for dismissal in accordance with the Alberta Employment Standards Code, but did not clearly state that this entitlement was a ceiling. As a result, the clause was ambiguous, and did not act to limit the employee's severance entitlement.

In *Movati Athletic (Group) Inc v Bergeron* (2018 ONSC 7258), the Ontario Divisional Court also found a termination clause that allowed the employer to terminate employment without cause at any time upon providing notice or pay in lieu of notice pursuant to Ontario Employment Standards was also not sufficient to limit the employee's severance, as it did not clearly state that the minimum statutory severance was a cap.

General Contract Construction Rules Apply

Other general rules regarding contracts may also invalidate the contract, such as duress, undue influence, and unconscionability, but these occur less frequently.

Under certain circumstances, employers and employees cannot use the above rules to invalidate a contract for their own benefit. If a new contract is imposed in which all the benefit is to the employee, the employee cannot have the contract invalidated for lack of fresh consideration to the employer in order to avoid a severance provision or other provision of the contract. Additionally, the employer cannot back out of a contract that only gave benefits to the employee, due to lack of fresh consideration to the employer.

17. Without Cause vs. Just Cause Dismissal

Employers can dismiss an employee in one of two ways:

- A. Without cause, and on provision of reasonable notice or pay in lieu of notice; or
- B. For Just Cause.

Without cause dismissals and just cause dismissal are both express dismissal. An employer tells the employee they are being dismissed, generally by having a meeting and providing the employee with a letter of dismissal.

18. Without Cause Dismissal and Reasonable Notice

If an employee is dismissed without cause, he is entitled to a reasonable notice of dismissal, or pay in lieu, under both statute law and common law.

If a non-unionized, federally regulated employee has been dismissed without cause, refer to sections 240-246 of the CLC; see *Wilson v Atomic Energy of Canada*, 2016 SCC 29.

Notice under the ESA

Employees are entitled to notice, or pay in lieu, under the ESA. These are the minimum statutory requirements for compensation for individual terminations. For periods of employment greater than three months, the employer must pay severance to the employee, or satisfy that obligation by giving a written notice of termination.

For service between three months and one year, one week of wages (or notice) is required. For one to three years, two weeks' wages or notice are required. For three years, three weeks' wages or notice are required. After three consecutive years of employment, one additional week of wages or notice is required for each additional year of employment, to a maximum of eight weeks (s 63(3)(iii)). Additional compensation is required for group terminations (see below).

Group Terminations under the ESA

Group terminations (those of 50 or more at a single location) have additional requirements under the ESA. First, the employer must give written notice to the Minister, to each employee being terminated, and to the union. This notice must specify the number of employees being terminated, the date(s) of termination, and the reason for termination. According to s 64, the number of weeks notice for group terminations varies with the number of employees being terminated:

- At least eight weeks if between 50 and 100 employees;
- 12 weeks if between 101 and 300; and
- 16 weeks if 301 or more.

If an employee is not covered by a collective agreement, these notice requirements apply in addition to the statutory minimum for individuals.

Exceptions to these guidelines (ss 63 and 64), to which minimum notice requirements do not apply, are laid out in section 65 of the Act. No minimum notice or compensation is required of the employer by the *ESA* when the employee:

- has not worked for a consecutive period of three months;
- quits or retires;
- is fired for just cause (see discussion of just cause below);
- worked on an on-call basis doing temporary assignments he or she was free to accept or reject;
- was employed for a definite term and the employment ends in accordance with the end of the term of employment;
- was hired for specific work to be completed in 12 months or less;
- cannot perform the work because its performance has become impossible due to an unforeseeable event or circumstance (i.e. frustration of contract);

- was employed at one or more construction sites by an employer whose principal business is construction;
- refused reasonable alternative employment from the employer; or
- was a teacher employed by a board of school trustees.

Reasonable Notice at Common Law – Indefinite Term Contracts

In addition to *ESA* notice, employees are entitled to a reasonable notice of dismissal at common law, or pay in lieu of such reasonable notice.

The entitlement to notice at common law is a contractual entitlement. As such, there may be a valid termination clause in an employment contract which sets out the employee's entitlement to common law notice.

In the absence of a valid termination clause in an employment contract, the employee is entitled to reasonable notice of dismissal at common law. The amount of reasonable notice, or pay in lieu, should be sufficient to allow the employee to find comparable employment, based on the employee's age, length of service, and the nature of the employee's position.

The case of *Bardal v Globe and Mail Ltd* (1960), 24 DLR (2d) 140 (Ont HCJ) includes a list of the four primary factors to be considered in determining the appropriate length of a notice period:

i) character of the employment; ii) the length of service; iii) the age of the employee; and iv) the availability of similar employment, having regard to the experience, training and qualifications of the employee.

These are known as the Bardal factors. The current upper limit of "reasonable notice" is 24 months, generally for the most long tenured, older, and senior level employees. While there are some cases beyond this upper limit, they are the exception. The Supreme Court has endorsed this list in a number of cases; see e.g. *Honda Canada Inc v Keays*, 2008 SCC 39, 2 SCR 362. However, these factors are not exhaustive, and additional factors may be considered on a case-by-case basis.

Reasonable notice is an entitlement to assist the employee. In *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801, the Ontario Court of Appeal held that the financial health of a company does not reduce its notice obligations to employees.

Termination clauses in contracts are not always valid and enforceable.

In addition, be aware that employers may try to rely on termination provisions in an employee handbook or other such workplace policy documents. For example, in *Cheong v Grand Pacific Travel & Trade (Canada) Corp.*, 2016 BCSC 1321, the court found that an employee handbook termination clause did not act to limit the employee's reasonable common law severance. It is important to review and question all documentation relied on to limit an employee's severance.

Calculating Reasonable Notice

To determine how much notice an employee might get, compare their case to previously decided cases. Carswell hosts an online Wrongful Dismissal Database. The database calculates average notice period awards from precedential cases. Reports can be purchased individually or by subscription. This is a helpful tool for searching for cases where an employee had a similar range of age, length of service, and job type as compared to the employee in question. The database is accessible online at: http://www.wrongfuldismissaldatabase.com

Additionally, the UBC Law Library and many other law libraries hold publications with tables of cases sorted by job type, such as the Wrongful Dismissal Practice Manual by Ellen E. Mole (which is also found on Quicklaw). WestlawNext Canada also offers Quantum Services Database for wrongful dismissal. Comparing the Bardal factors of the employee in question with those of previous cases using either of these methods can assist in finding an appropriate range for the reasonable notice period. As a starting point, you can ask the particular employee how much time it would

take or has taken to find similar work for similar pay.

Note that Reasonable Notice is concerned with a period of time, not an amount of money. A permanent part-time employee is entitled to the same notice as a full-time employee. The fact that the employment is part-time will be reflected in the amount of compensation, based on the amount of time the employee was actually working (Stuart v. Navigata Communications Ltd., 2007 BCSC 463 at para. 15)

Severance is generally awarded in a manner correlated to length of service. However, is some circumstances short service employees can be entitled to proportionally more severance. Senior level short term employees, particularly upper management employees, may be entitled to proportionally more severance than their more junior counterparts. An example of an extended severance period for short service employees is found in *Chapple v. Big Bay Landing Ltd. (Inc. No. 0764163)*, 2018 BCSC 1666, where the employee was 61 years old, and had worked as a resort manager for less than two years. The Court awarded a nine month notice period.

Extensions to Notice Period

There is case law that supports the principle that more vulnerable employees, for example due to injury or illness, are entitled to more notice.

For example, the employee's notice period was increased from 5 to 8 months in *Pakozdi v. B & B Heavy Civil Construction Ltd.*, 2016 BCSC 992 (this case is currently being appealed), as a result of the "vulnerability" of an employee at the time of dismissal due to a medical condition..

There is also case law to support the principle that an employee's unique background and the nature of their responsibilities can outweigh an employee's short length of employment in assessing a reasonable notice period upon termination. For example, the employee's notice period was increase from 5 to 10 months in *Waterman v Mining Association of British Columbia*, 2016 BCSC 921, based on the employee's position in the company, her unique background and the nature of her responsibilities. Also see *Munoz v Sierra Systems Group Inc.*, 2016 BCCA 140.

Generally, the maximum reasonable notice period is 24 months. In exceptional circumstances, such as very long services cases, courts can award notice periods beyond 24 months; see *Markoulakis v Snc-lavalin Inc.*, 2015 ONSC 1081.

Damages at Common Law- Fixed Term Contracts

Fixed term contracts have a defined end date. In the normal course, fixed term contracts simply end when the term expires, or they are terminated in accordance with termination provisions in the fixed term contract itself. Reasonable notice is not normally required to end a fixed term contract.

If an employee, dependent contractor, or independent contractor has a fixed-term contract, and is dismissed before the end date of the contract, they may be able to claim damages for a breach of the contract.

Determine whether the contract itself specifies the conditions under which the employer can dismiss the worker, and what amount of notice or severance is required. If this is specified, and the contract and termination clause are valid (see Section V.C.2(c) and (d) Invalid Contracts), this will generally be determinative.

If the contract does not specify the conditions of dismissal, or if the contract or is the termination clause is invalid, the worker may be able to claim all the wages that they would have earned for the remainder of the contract. (*Canadian Ice Machine v. Sinclair*, [1955] SCR 777). After determining the damages the worker may be entitled to, return to Section IV.D.1: Termination of Employment Checklist.

Calculating Damages for Wages, Benefits, Pension Plans, and Bonuses

Employers are required to provide employees with a reasonable notice of dismissal. This could be provided by advance notice, in which case the employee would work for the prescribed amount of time, and continue to receive all elements of his compensation, such as wages, benefits, pension, car allowance, etc.

If an employer provides an employee with pay in lieu of notice, that pay in lieu of notice should account for all the elements of compensation the employee would have earned had he worked for the reasonable notice period.

For example, if an employee receives a company car for personal use, and that personal use is recognized by both the employer and employee as a benefit of employment, the employee is entitled to compensation for the loss of that car during the notice period.

Other lost benefits, such as extended health and dental coverage are also recoverable during the notice period. Usually a judge will calculate this loss by adding up all of the medical expenses incurred by the dismissed employee during the notice period that would have been recoverable under the employer's benefits plan had the employee been working.

If the employee had a pension plan, the loss is generally calculated as:

[the projected commuted value that the pension would have had if the employee remained employed during the notice period] minus [the commuted value the pension actually had at the time the employee was dismissed].

The commuted value is the net present value of the invested money, and its calculation is complicated; the pension plan administrator can provide the employee with the current and projected commuted values.

An employee may be entitled to compensation for loss of bonus during the notice period. This assessment will require a consideration of whether the bonus was discretionary or based on quantifiable metrics, and whether the employee would have likely received a bonus had he worked during the notice period. Research should be done on this topic to determine potential entitlement.

At common law, the employee is only entitled to be compensated for wages and benefits to which he or she would have been contractually entitled during the notice period, and not for any ex gratia expectancies (see *Swann v MacDonald Dettwiler and Associates Ltd*, [1995] BCJ No 1596 (QL) (SC)).

Courts have a wide discretion to determine the appropriate damages based on the evidence of the plaintiff's pre-dismissal earnings (*Davidson v Tahtsa Timber Ltd*, 2010 BCCA 528). If an employee's earnings have varied in the years prior to dismissal, some courts in BC have calculated damages by averaging the employee's annual wages (see *Krewenchuk v Lewis Construction Ltd*, [1985] BCJ No 1553 (SC). Where remuneration is based on an annual salary and not an hourly rate, a court may still assess damages on the basis of the average salary paid in the years prior to dismissal (see *Goodkey v Dynamic Concrete Pumping Inc*, 2004 BCSC 894)

Where an employee earns a variable income, courts may average the rate of pay within the relevant notice period for calculating damages; see *O'Dea v Ricoh Canada Inc.*, 2016 BCSC 235.)

19. Just Cause Dismissal- General

If an employee is guilty of serious misconduct which goes to the heart of the employment relationship, the employer may dismiss the employee for just case.

If an employer has just cause to dismiss an employee, it is not require to provide any notice or pay in lieu of notice.

Just cause it is a question of fact, and must be determined by a judge on a case by case basis.

Note that in the case of independent contractors, courts may instead consider whether there was a fundamental breach of the contract, or one that goes to the root of the contract, depriving one party of the whole or substantially the whole benefit of the contract (see *Hunter Engineering Co v Syncrude Canada Ltd*,[1989] 1 SCR 426; *1193430 Ontario Inc v Boa-Franc Inc*, 78 OR (3d) 81); *Fernandes v Peel Educational & Tutorial Services Limited (Mississauga Private School)*, 2016 ONCA 468. The law on this topic can be complex and may require additional research.

Common law has defined just cause as conduct that is inconsistent with the fulfilment of the express or implied condition of service (*Denham v Patrick* (1910), 20 OLR 347 (Div Ct)). It is conduct inconsistent with the continuation of the employment relationship, which constitutes a fundamental breach going to the root of the contract (*Stein v BC Housing Management Commission* (1989), 65 BCLR (2d) 168 (SC), (1992), 65 BCLR (2d) 181 (CA)). This includes serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with the employee's duties or prejudicial to the employer's business, or wilful disobedience to the employer's orders in a matter of substance; see *Port Arthur Shipbuilding Co v Arthurs et al*, [1968] S.C.J. No. 82, [1969] S.C.R. 85.

An objective test is used to determine whether there has been a serious misconduct or a fundamental breach. For a long term or senior employee, the employer may need more than mere misconduct; see *Mallais v Lounsbury Co* (l984) 58 NBR (2d) 345 (QB).

What constitutes just cause will vary from case to case and must be something that a reasonable person would be unable to overlook (*McIntyre v Hockin*, [1889] OJ No 36, l6 OAR 498 (Ont CA)).

A single incident is usually insufficient to justify dismissal (*Buchanan v Continental Bank of Canada* (1984), 58 NBR (2d) 333 (QB)), unless that act is extremely prejudicial to the employer such as dishonesty or immoral character that causes a failure of trust (*Stilwell v Audio Pictures Ltd*, [1955] OWN 793(CA)).

The cumulative effect of minor instances may justify dismissal if they make the employee unable to perform his or her duties or result in a serious deterioration of the employment relationship (*Ross v Willards Chocolates Ltd*, [1927] 2 DLR 461 (Man KB)).

Where an employer accepts a certain standard of performance over a period of time, the employer cannot without warning treat such conduct as cause for dismissal (*Dewitt v A&B Sound Ltd* (1978), 85 DLR (3d) 604 (BCSC)).

Courts are required to take a contextual approach to determining whether just cause for dismissal existed, taking into account numerous factors. See *McKinley v BC Tel*, [2001] 2 SCR 161.

Although there is no comprehensive list of what constitutes just cause, the list below discusses some of the more common grounds for a dismissal.

Insubordination/Disobedience

Insubordination or insolence that is incompatible with the continuation of the employment relationship is just cause for dismissal (*Latta v Acme Cheese Co* (1923), 25 OWN l95 (Ont Div CT)). A single incident that is very severe and interferes with and prejudices the safe and proper conduct of the business will be just cause for dismissal (*Stilwell v Audio Pictures Ltd*, [1955] OWN 793(CA)). Poor judgment, insensitivity, or resentment, is generally not sufficient (*Leblanc v United Maritime Fisherman Co-op* (1984), 60 NBR (2d) 341 (QB)).

An intentional and deliberate refusal of an employee to carry out lawful and reasonable orders will generally suffice as cause for dismissal. However, should an order be outside the employee's job description, then such an order will not be considered "lawful and reasonable". Frequent less serious instances of disobedience can justify dismissal where they are combined with other misconduct (*Markey v Port Weller Dry Docks Ltd* (1974), 4 OR (2d) 12 (Co Ct); *Stein v BC Housing* (1989), 65 BCLR (2d) 168 (SC), (1992), 65 BCLR (2d) 181 (CA); *Cotter v Point Grey Golf and Country Club*, 2016 BCSC 10). Generally, one isolated act of disobedience will not, in itself, be cause for dismissal.

For a breach of company policy or company rules to constitute just cause for dismissal, the rule or policy must have been made clear to the employees and must have been regularly enforced by the employer.

NOTE: A refusal to co-operate, a neglect of duties, or a refusal to perform the job may be just cause for dismissal (*Lucas v Premier Motors Ltd*, [l928] 4 DLR 526 (Alta CA)). However, if an employer proposes a unilateral change in position, job function, pay, hours, etc., it is not just cause if the employee refuses the change. Rather, it may be considered a constructive dismissal. Failure to accept a reasonable transfer not involving demotion or undue burden or hardship may be cause for dismissal, if such a transfer is determined to be an express or implied term of the contract.

Poor Employee Performance

Where there is actual incompetence, not just dissatisfaction with an employee's work, the employee may be dismissed with cause if such incompetence is the fault of the employee (*Waite v La Ronge Childcare Co-operative* (l985), 40 Sask R 260 (QB)). If an employee presents an exaggerated assessment of his or her own skills, a company is justified in dismissing that employee after finding out his or her true abilities (*Manners v Fraser Surrey Docks Ltd* (1981), 9 ACWS (2d) 155). Incompetence is assessed using an objective standard of performance, and it is for the employer to prove that the employee fell below the standard. Usually, one isolated example of failure to meet such a test does not warrant discharge (*Clark v Capp (1905)*, 9 OLR 192). The employer must prove that:

- a) reasonable standards of behaviour and performance were set and clearly communicated to the employee;
- b) the employee was notified when he or she did not meet those standards;
- c) the employee received training and was allowed adequate time to meet those standards; and
- d) the possible repercussions of failing to meet those standards were clearly communicated.

Just cause for termination exists when an employee fails to respond to these measures. However, the ESB and courts require that the employer prove that all these steps were taken.

There is also a requirement that the employee appreciates the significance of the warning (*Korber v Can West Imports Limited and Satten*, [1984] BCWLD 737).

See *Hennessy v Excell Railing Systems Ltd.* (2005 BCSC 734), for a comprehensive list of what an employer must show to establish poor performance.

Incompetence as grounds for dismissal needs to be considered in light of the *Human Rights Code* and the *bona fide* occupational requirement ("BFOR") test (see *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union* (BCGSEU), [1999] 3 SCR 3). In a case of poor employee performance, the ESB will not find just cause for dismissal unless the employer can demonstrate a "neglect of duties".

Dishonesty

Dishonesty must be proven on a balance of probabilities and the burden rests with the employer (*Hanes v Wawanesa Insurance Company*, [1963] SCR 154). The employer must show that the employee intentionally and deceitfully engaged in the misconduct. Failure by the employer to prove dishonesty may lead to punitive damages. Dishonesty may be a cause for dismissal, especially if it indicates an untrustworthy character or is seriously prejudicial to the employer's interests or reputation (*Jewitt v Prism Resources* (1981), 127 DLR (3d) 190 (BCCA)). In *McKinley v BC Tel*, [2001] 2

SCR 161, the Supreme Court of Canada used a contextual approach to make this assessment. The test is whether the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship or is fundamentally or directly inconsistent with the employee's obligations to his or her employer. An effective balance must be struck between the severity of the misconduct and the sanction imposed.

Intoxication

Depending on the extent of intoxication and degree of prejudice to the employer, intoxication may be a cause for dismissal; see *Armstrong v Tyndall Quarry Co* (1910), 16 WLR 111 (Man KB). But, intoxication in itself is not grounds for dismissal. The courts should undertake a contextual approach, per McKinley, look at all relevant factors (i.e., work history, discipline history, and whether the position is safety sensitive. Courts may be sympathetic to alcohol abusers especially if they are long-term employees; see *Robinson v Canadian Acceptance Corp Ltd* (l974), 47 DLR (3d) 417 (NSCA).

Consider whether the intoxication is part of a larger substance abuse issue. If so, the employee may have a Human Rights claim (see Chapter 6: Human Rights and the duty to accommodate).

Absences and Lateness

When an employee is frequently absent from work, the absence occurs at a critical time, or the employee lies about the absence, it may be a cause for dismissal. Chronic lateness may also be cause for dismissal.

Consider whether the lateness or absenteeism are caused by a physical or mental disability. If so, the employee may have a claim at the B.C. Human Rights Tribunal (see Chapter 6: Human Rights).

Illness

Temporary illness does not constitute just cause (*McDougal v Van Allen Co Ltd.* (1909), 19 OLR 351 (HC)). For a lengthy illness, one must consider the nature of the services to be performed, the intended length of service of the employee, and other factors (*Yeager v RJ Hastings Agencies Ltd* (l985), 5 CCEL 266 (BCSC)). In some cases, a period of one year may not be too long for an employer to await the return of a valuable employee (*Wilmot v Ulnooweg Development Group Inc*, 2007 NSCA 49). If the employee is permanently incapable of performing work duties, he or she may properly be dismissed (*Ontario Nurse's Federation v Mount Sinai Hospital*, [2005] OJ No 1739). Illness is usually considered frustration of contract, and is not grounds for dismissal for just cause; however, if the contract is frustrated, the employee is not entitled to severance pay.

Consider whether the illness is actually a physical or mental disability. If so, the employee may have a claim at the B.C. Human Rights Tribunal (see Chapter 6: Human Rights).

Conflict of Interest

An employee has a duty to be faithful and honest. Information obtained in the course of employment may not be used for their own purposes or purposes that are contrary to the interests of the employer (*Bee Chemical Co v Plastic Paint and Finish Specialists Ltd et al* (l979), 47 CPR (2d) 133 (Ont CA)). An employee may be liable for damages for breach of contract where he or she is running a business contemporaneous with being an employee (*Edwards v Lawson Paper* (1984), 5 CCEL 99). An employee's conduct that is seriously incompatible with their duties and creates a conflict of interest can be grounds for summary dismissal (see *Durand v Quaker Oats Co of Canada* (1990), 45 BCLR (2d) 354 (CA). Following the end of employment, an employee is not permitted to compete unfairly against the employer, for example by using confidential information.

Off-Duty Conduct

Private conduct will be considered just cause for dismissal if it is incompatible with the proper discharge of the employee's duties, or is prejudicial to the employer. This depends on the conduct and the nature of the job. Alleged criminal conduct or conduct that interferes with the internal harmony of the workplace, if it is prejudicial to the employer, may also be just cause.

Personality Conflict

A personality conflict, i.e. inability of an employee to function smoothly in the work environment on a personal level, is not grounds for dismissal unless it is inconsistent with the proper discharge of the employee's duties or is prejudicial to the employer's interests (*Abbott v GM Gest Ltd*, [l944] OWN 729). If the inability to get along with others results in business interference, the employee may be dismissed (*Fonceca v McDonnell Douglas Ltd* (l983), l CCEL 51 (Ont HC)).

Breach of Confidence/Privacy Obligations

An employee's unauthorized disclose of employer confidential information may amount to a cause dismissal. An employee's secret recording of meetings with management might be found to be a breach of confidentiality and privacy obligations amounting to cause. See *Hart v. Parrish & Heimbecker*, Limited 2017 MBQB 68

Just Cause - Deleting Company Information

Deleting or altering company information in the course of departure from employment may in some circumstances be grounds for a just cause dismissal. However, as with all just cause cases a McKinley contextual analysis should be applied. In the case of *Kerr v. Arpac Storage Systems Corporation*, 2018 BCSC 704, the court found the employee's deletion of company information around the end of employment was not enough to constitute a just cause dismissal, partially due to the employee's mental state and because the employee apologized.

20. Defences to Just Cause Arguments

If an employer alleges just cause for dismissal, the employee might have one of the following defenses to the just cause allegations.

No Warning

It can be argued that an employer must warn an employee before firing that employee for a series of trivial incidents that are not serious enough alone to justify dismissal (*Fonceca v McDonnell Douglas* (l983), l CCEL 51 (Ont HC)).

Condonation

If an employer's behaviour indicates that they are overlooking conduct which gives cause, that employer cannot later dismiss the employee without new cause arising; see (*McIntyre v Hockin (1889)*, 1l6 OAR 498 (CA)). This applies only where the employer knows of the conduct. The employer is entitled to reasonable time to decide whether to take action, and this reasonable time period commences at the time that the employer learns of the employee's conduct.

Behaviour by the employer constituting condonation may include actions or omissions such as failing to dismiss the employee within a reasonable time (*Benson v. Lynes United Services Ltd*, [1979] 18 A.R. 328), tolerating an employee's behaviour without reprimand (*Johnston v General Tire Canada Ltd*, [1985] OJ No 98), giving the employee a raise (*SjervenS v. Port Alberni Friendship Center*, [2000] BCJ No 608), or giving the employee a promotion (*Miller v Wackenhut of Canada Ltd*, [1989] OJ No 1993).

If an employer learns of an employee's misconduct after dismissing the employee, the employer may use that misconduct to justify the dismissal for cause. This can be referred to as after-acquired cause.

However, if the employer already knew of the employee's misconduct, but terminated the employee without alleging cause or gave the employee a letter of reference, in some cases the employer has been held to be estopped from alleging cause or has been taken to have condoned the employee's misconduct. However, there is conflicting case law on this subject and many cases have held that the employer may still allege cause. See *Smith v Pacific Coast Terminals*, 2016 BCSC 1876; *Technicon Industries Ltd v Woon*, 2016 BCSC 1543.

Improper Just Cause Allegations as a Litigation Tactic

Some employers assert just cause (or file counterclaims) as a litigation tactic to deter an employee from advancing a valid wrongful dismissal claim. In these scenarios employees may use that employer tactic as both a defence, and as grounds for additional damages claims against the employer. See R*uston v. Keddco Mfg. (2011) Ltd.*, 2018 ONSC 2919 , where the court awarded moral damages, extensive costs, and $100,000 in punitive damages for improper cause allegations.

21. Redundancy and Layoff

Where the company no longer requires the employee, or the employer encounters economic difficulties or undergoes reorganization, the employee is still entitled to reasonable notice (*Paterson v Robin Hood Flour Mills Ltd (l969)*, 68 WWR 446 (BCSC)). In times of economic uncertainty, redundancy is not cause for dismissal. The economic motive for terminating a position does not relate to an individual's conduct and hence is not adequate cause (*Young v Okanagan College Board* (1984), 5 CCEL 60 (BCSC)).

"Temporary layoff" is defined in section 1 of the *ESA*. A recent B.C. Supreme Court decision, *Besse v Dr AS Machner Inc*, 2009 BCSC 1316, established that the temporary layoff provisions of the *ESA* alone do not give employers the right to temporarily lay off employees: a layoff constitutes termination unless it has been provided for in the contract of employment either expressly or as an implied term based on well-known industry-wide practice, or the employee consented to the layoff. If the right to temporary layoff exists for one of these reasons, then the limits set out in section 1 apply: where an employee has been laid off for more than 13 consecutive weeks, and this has not been extended either by agreement or by the Director, the employee is considered to have been terminated permanently, and is entitled to severance pay. He or she also may be able to sue for wrongful dismissal before the 13-week period has expired. This would be the case where, although the employer has used the term "layoff", it is nonetheless clear that the employee has been terminated.

22. Probationary Employees

The Employment Standards Act does not require any payment for length of service during the first three months of employment (s 63).

However, if no probationary period is expressly specified in the employment contract, then the employee may still be entitled to reasonable notice at common law. The dismissed probationary employee could file a claim in Small Claims Court for wrongful dismissal.

In British Columbia, there is a developing judicial trend towards extending the right to be treated fairly to probationary employees. The test in British Columbia for terminating probationary employees is that of suitability, not just cause, as set forth in *Jadot v Concert Industries*, [1997] BCJ No 2403 (BCCA). In determining suitability, the case of *Geller v Sable Resources Ltd*, 2012 BCSC 1861, explained that the probationary employee must be given a chance to meet the

standards that the employer set out when the employee was hired; the employer cannot begin imposing new standards afterwards.

In *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42, the Court held that if a company wants to fire an employee on probation, it should give the employee a fair chance to prove he or she can do the job. Otherwise, it may owe severance.

In order to give an employee a fair chance to prove he or she can do the job, companies should do the four following things.

- 1. Make the employee aware of how he or she will be assessed during the probation period.
- 2. Give the employee a reasonable chance to demonstrate his suitability.
- 3. Think about the employees suitability based not only on work performance but also on personal characteristics such as compatibility and reliability.
- 4. Act fairly and with reasonable diligence in assessing suitability.

23. Near Cause

In the past, judges have reduced the notice period where there has been near cause (i.e. where even if there were no grounds for dismissal, there was substantial misconduct).

The Supreme Court of Canada in *Dowling v Halifax (City)*, [1998] 1 SCR 22 expressly rejected near cause as grounds for reducing the notice period. This decision has been consistently followed.

24. Constructive Dismissal

In some circumstances, an employer can make fundamental changes to the terms of an employee's employment in such a way that the employee may be forced to leave their job. This is called "constructive dismissal", and an employee who is constructively dismissed is entitled to the same benefits as if he were fired without cause.

If the employer makes a fundamental, unilateral change in the employment contract, it may amount to constructive dismissal. Changes to a "fundamental term of the contract" includes changes such as: significant reduction in salary, a significant change in benefits, a significant change in job content or status, or a job transfer to a different geographic location if such a transfer is not a normal occurrence or contemplated in the employment contract. Generally, a reduction in pay of more than 10% may result in a constructive dismissal. See *Price v 481530 BC Ltd et al*, 2016 BCSC 1940.

The imposition of a temporary layoff, where not provided for in the contract, has also been deemed to constitute constructive dismissal (see Section V.C.7: Redundancy and Layoff for details).

Suspensions from work may result in a constructive dismissal, particularly if the suspension is without pay. The case of *Cabiakman v Industrial Alliance Life Insurance Co*, [2004] 3 SCR. 195 and *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 S.C.R. 500, reinforced an employer's right to impose a suspension for administrative reasons, with pay, provided the employer is acting to protect legitimate business interests, the employer is acting in good faith and fairly, and the suspension is for a relatively short period.

A constructive dismissal claim is a drastic step for an employee, as it involves the employee leaving work (as though they were fired) and then bringing an action for constructive dismissal. The employee will no longer be receiving compensation from employment, and will instead be seeking to recoup that compensation through a court action.

An employee bringing a claim for constructive dismissal is making a claim for the severance they would have received had they been dismissed without cause.

Mitigation Required

An employee is still required to mitigate his damages if he is constructively dismissed. Sometimes, the employee will be required to mitigate by continuing to work for his current employer. See *Evans v Teamsters Local Union No. 31* (2008 SCC 20) for a discussion of the relationship between constructive dismissal and the employee`s duty to mitigate.

Condonation

If an employee accepts the imposed changes without complaint, he or she is considered to have accepted the change, and will therefore be barred from action; however, employees are generally permitted a reasonable time to determine whether they will accept the changes.

Repudiation

Employees alleging constructive dismissal bear the risk that the court finds they have repudiated their contract of employment by either leaving the workforce or commencing legal proceedings against their employer (or both). If a court finds the employee repudiated the contract (i.e. quit instead of being constructively dismissed) then the employee does not get severance.

25. Resignation v. Dismissal

Not all resignations are resignations, and not all dismissals are dismissals. The legal test is what a reasonable person would have understood by the relevant statements and actions, taking into consideration the context of the particular industry, and all surrounding circumstances.

To be effective, resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear. See *Koos v A & A Customs Brokers Ltd.* (2009 BCSC 563).

For example, harassment at work could cause the employee to be unable to continue working and this might cause them to resign; in cases such as these, additional research should be done to determine whether the situation should be considered a resignation or a dismissal.

26. Sale of a Business

If a business is sold, unless the seller specifically dismisses the employees there may be an implied assignment to the new owner if the employee continues to provide services as before and the new owners accept those services (*ESA*, s 97). See also *Helping Hands Agency Ltd v British Columbia (Director of Employment Standards)*, [1995] BCJ No 2524.

27. Aggravated and Punitive Damages

Aggravated Damages

Courts can award aggravated damages if the employer acted unfairly or in bad faith when dismissing the employee, and the employee can prove that they suffered harm as a result of the manner of dismissal.

The loss must arise as a result of the manner of dismissal, and not due to the dismissal itself.

An employee should be encouraged to obtain medical evidence such as a doctor’s report connecting this manner of dismissal to a personal injury. For example, the doctor’s report might document the employee’s depression, anxiety, or other mental harm. It may be helpful to have a doctor testify in court in order to present a solid case for aggravated damages. However, an employee can provide his or her own testimony regarding an injury, without medical corroboration, and a court can still consider whether to award aggravated damages. See *Lau v. Royal Bank of Canada*, 2017 BCCA 253. If the employee did not suffer documented harm, see section V.C.13.b: Punitive Damages below.

The basis for these additional damages is a breach of the implied term of an employment contract that employers will act in good faith in the manner of dismissal. In *Honda Canada Inc v Keays*, 2008 SCC 39, the Supreme Court of Canada held that any such additional award must be compensatory and must be based on the actual loss or damage suffered by the employee, which can include mental distress stemming from the manner of dismissal. However, normal distress and hurt feelings arising from the dismissal itself are not grounds for additional damages.

Prior to the Honda v Keays decision, damages awarded where the employer had acted in bad faith were assessed by simply extending the notice period to which the employee would otherwise be entitled. This practice was based on the Supreme Court of Canada's decision in *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701, and the awards were informally known as "Wallace Damages". Following the Honda v Keays decision, the practice of assessing damages by extending the notice period is no longer to be used. Now, a claimant must prove what actual losses or mental harm the employee incurred, and the employee is then compensated for those actual losses or mental distress. See *Strudwick v Applied Consumer & Clinical Evaluations Inc*., 2016 ONCA 520.

What constitutes "bad faith" is for the courts to decide, and has in the past centred on deception and dishonesty. Mere "peremptory" treatment is not sufficient: see, for example, *Bureau v KPMG Quality Registrar Inc*, [1999] NSJ No. 261 (NSCA). Sexual harassment has been held not to give rise to additional damages (*Chiang v Kejo Holdings Ltd*, 2005 BCSC 414). See, however, *Sulz v Minister of Public Safety and Solicitor General*, 2006 BCCA 582, where punitive damages were awarded for sexually harassing conduct in the employment context.

Bad Faith Performance of Contracts

What constitutes "bad faith" is for the courts to decide, and has in the past centred on deception and dishonesty. Mere "peremptory" treatment is not sufficient: see, for example, *Bureau v KPMG Quality Registrar Inc*, [1999] NSJ No. 261 (NSCA). Sexual harassment has been held not to give rise to additional damages (*Chiang v Kejo Holdings Ltd*, 2005 BCSC 414). See, however, *Sulz v Minister of Public Safety and Solicitor General*, 2006 BCCA 582 where punitive damages were awarded for sexually harassing conduct in the employment context. "Bad faith" has been found in cases the following cases:

- i) where the employer lied to the employee about the reason for dismissal (see *Duprey v Seanix Technology (Canada) Inc*, 2002 BCSC 1335, where an employer told a commissioned employee he was being released due to financial hardship, when it was found he was being released so the employer would not have to pay owed commission);
- ii) where an employer has deceived the employee about representations of job security (*Gillies v Goldman Sachs Canada*, 2001 BCCA 683);
- iii) where a senior employee was induced to leave his position under the promise of job leading to retirement; and
- iv) where an employer promised an employee he would keep his job after a merger, although he knew differently (*Bryde v Liberty Mutual*, 2002 BCSC 606). In one case, a response by employer's counsel to an employee's counsel containing an allegation of just cause where none existed was held not to constitute bad faith (*Nahnychuk v Elite Retail Solutions Inc*, 2004 BCSC 746). However, in another province, a letter threatening to allege just cause where none existed, for the purpose of forcing a settlement, even though just cause was not plead in court, was held to give rise to additional damages (*Squires v Corner Brook Pulp and Paper Ltd*, [1999] NJ No 146 (Nfld CA)); and,
- v) where an employer has made false accusations about the employee at the time of dismissal. See Price v 481530 BC Ltd et al, 2016 BCSC 1940, where an employer dismissed an employee on the basis of false allegations of dishonesty contributing to the creation of a hostile work environment and ultimately his constructive dismissal.
- vi) Where an employer produced false evidence of the employee's absence without leave in order to argue just cause for dismissal and only offered ESA minimum severance (*Bailey v. Service Corporation International (Canada) ULC*, 2018 BCSC 235)).

Good Faith Performance of Contracts

The Supreme Court of Canada affirmed the principle of good faith performance of contracts and its creation of the new common law duty of honesty in contractual performance in *Bhasin v Hrynew*, 2014 SCC 71.

This case was referenced in *Styles v Alberta Investment Management Corporation*, 2015 ABQB 621, where the court awarded $440,000 for the employer's refusal to pay awards under a long term incentive plan, in breach of duty of honest performance and good faith.

If one suspects the employer acted in bad faith in the manner of dismissal, one should do further research to determine whether the employee has a strong case. For a table of cases in which aggravated or punitive damages were sought, and a list of the damages awarded, see “Aggravated and Punitive Damages and Related Legal Issues”, Employment Law Conference 2013, Paper 8.1, CLE BC.

Punitive Damages

If the conduct of the employer was especially outrageous, harsh, vindictive, reprehensible, or malicious, then the court may award punitive damages (see *Honda Canada Inc v Keays*). The focus will be on the employer’s misconduct, and not on the employee’s loss; the damages are not designed to compensate, but rather to punish and deter. Generally, the discretion to award punitive damages has been cautiously exercised and used only in extreme cases. Courts are wary of the risk of double-compensation where punitive damages and aggravated damages are considered in the same case.

Punitive damages are, however, currently on an upward trend in B.C. Since the *Honda* decision, courts have generally required medical evidence showing that an employee suffered mental harm in order to award aggravated damages, and this has left certain employees, who are less susceptible to suffering mental harm, without that recourse. The courts are tending to award punitive damages more often now than in the past in order to make up for this discrepancy. If an employee was treated particularly harshly, but did not suffer documented medical harm, consider claiming punitive damages. See the paper entitled “Aggravated and Punitive Damages and Related Legal Issues” for a table of cases in which aggravated or punitive damages were sought in order to compare your situation to others and determine an appropriate amount of damages (link in section V.C.13: Aggravated and Punitive Damages, above).

If the employee has suffered any of the following situations through the employer’s conduct, consider claiming for punitive damages:

- Defamation
- Malicious prosecution, if the employer maliciously instigates criminal proceedings against an employee (*Teskey v Toronto Transit Commision*, 2003 OJ No 4547)
- Duress
- Interference with the employee’s compensation
- Flawed investigation of alleged employee misconduct
- Unproven alleged cause
- Constructive dismissal
- Demotion
- Sexual harassment
- Unsafe or unhealthy work environment
- Oppression (if the employee is also a shareholder of the corporation)
- Inducement to resign, for example by offering a letter of reference only if the employee resigns (*Vernon v British Columbia (Liquor Distribution Branch)*, 2012 BCSC 133)
- Misrepresentations by the employer
- Employer’s behaviour before, during, or after the dismissal
- Breach of the employee’s privacy

- Insensitivity to an employee's pregnancy
- Physical or verbal assault or abuse
- Interference with trade unions
- Any independent causes of action
- Being "mean and cheap in trying to get rid of an employee" (*Gordon v. Altus*, 2015 ONSC 5663)
- Unduly insensitive treatment during attempts to exercise rights to contract renegotiation (*Pepin v. Telecommunications Workers Union*, 2016 BCSC 790; overturned on appeal, 2017 BCCA 194, and remitted back to the BCSC for a new trial)
- The tort of intentional infliction of mental distress (*Strudwick v Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520).

Workplace Investigations

Workplace investigations into misconduct must be carried out in a good faith manner without bias. Unfair process may entitle an employee to aggravated or punitive damages.

A flawed workplace investigation followed by a dismissal can attract aggravated damages; see *Lau v. Royal Bank of Canada*, 2015 BCSC 1639; *Kong v. Vancouver Chinese Baptist Church*, 2015 BCSC 1328; and *George v. Cowichan Tribes*, 2015 BCSC 513.

28. Duty to Mitigate

Common Law

Claimants in civil court should be aware that an employee has a common law duty to mitigate his or her losses. An employee does not have to take every action possible to mitigate; instead, reasonable effort is required; see *Gust v Right-of-Way Operations Group Inc.*, 2016 BCSC 1527. Searching for similar work is sufficient. For a discussion of the relevant legal test for mitigation, see *James v The Hollypark Organization Inc.*, 2016 BCSC 495.

Because of the requirement to mitigate, the employee may have to take another job the employer offers, as long as the new job is not at a lower level than the previous one, and the change does not amount to constructive dismissal. Similarly, a dismissed employee may have to accept an employer's offer to work through the notice period (*Evans v Teamsters Local Union No 31*, 2008 SCC 20). Retraining may be considered part of mitigation if it is to enter a job field with better prospects. This applies where an employee tries and fails to obtain alternate suitable employment (*Cimpan v Kolumbia Inn Daycare Society*, [2006] BCJ No 3191).

In many cases, the duty to mitigate may require a constructively dismissed employee to stay on the job while seeking other employment (*Cayen v Woodwards Stores Ltd* (1993), 75 BCLR (2d) 110 (CA)).

Employees are not required to return to a position where the fundamental terms of their job have changed or where they have been maligned such that the relationship cannot be restored. Accusations of dishonesty in negotiations or radically limited and uncertain terms in offers may result in reemployment being found to be unreasonable. The employee is not expected to act in the employer's best interest to the detriment of their own interests. For example, if an employee was ill at the time of dismissal they are not required to make strenuous efforts to find new employment. Similarly, an employee in the late stages of pregnancy may not be required to seek new employment until several months after the birth of their child. The employee's perception of what is reasonable is usually given more weight than that of the employer.

An employee's failure to take accept a job in the course of looking for employment may not mean they failed meet the requirements of mitigation if they were overqualified for the job; see *Luchuk v Starbucks Coffee Canada Inc.*, 2016 BCSC 830.

In a legal dispute, the onus of proof as to whether the claimant former employee has properly taken efforts to mitigate their damages generally falls on the defendant former employer.

Employment Standards

There is no duty to mitigate in order to receive statutory compensation for length of service under the ESA. An employee is entitled to statutory termination pay regardless of whether the employee finds new work.

Mitigation and Constructive Dismissal

An employee is still required to mitigate his damages if he is constructively dismissed. Sometimes, the employee will be required to mitigate by continuing to work for his current employer. See *Evans v Teamsters Local Union No. 31* (2008 SCC 20) for a discussion of the relationship between constructive dismissal and the employee`s duty to mitigate.

There are some circumstances where an employee's refusal to accept re-employment with the employer who fired him is found to be a failure to mitigate. However, this might not be the case if the trust relationship is eroded as result of the employer's actions. See *Fredrickson v. Newtech Dental Laboratory Inc.*, 2015 BCCA 357.

Mitigated damages

As severance pay is designed to compensate for lost income, a dismissed employee who found alternate employment after dismissal will have their severance pay reduced by the amount they are able to earn in their new job.

If the employee was working a second job before being dismissed but earned more in the second job (e.g. by putting in more hours) after dismissal, their severance pay will be reduced by the extra amount they have earned. (*Pakozdi v. B&B Heavy Civil Constructions Ltd.*, 2018 BCCA 23 at paras 36-51)

29. Employment Insurance Payback

If an employee receives damages for wrongful dismissal, this money is treated as earnings, and the employee will be required to pay back the appropriate amount of EI benefits received while waiting for the court case to be heard (EI benefits are not deducted from the amount of the damage award). Note that the employee may be able to receive the EI benefits back again if they are still unemployed and searching for work after the period covered by the severance award; call Service Canada at 1-800-206-7218 for further details if this situation may apply to the employee.

30. Frustration of Contract

If the contract becomes impossible to perform through no fault of the employee or the employer, then the contract is frustrated, and may be terminated without liability. The contract must be impossible to perform, not merely less profitable. The impossibility of performance must be unforeseen, there must be no alternative to termination, and termination must not be self-induced. Frustration of contract is a separate ground for termination of contract, separate from just cause, which is a breach of the employment contract by the employee.

Frustration normally arises in cases of long term disability where the employee has been off work for 1 or 2 years. Courts will consider whether the worker is likely to be able to return to work in the reasonably foreseeable future, see *Hydro-Quebec v Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec* (2008 SCC 43) and *Naccarato v Costco* (2010 ONSC 2651).

If the employee suffers a serious, permanent, debilitating illness or injury, this could frustrate the contract; see *Wightman Estate v 2774046 Canada Inc*, 2006 BCCA 424. However, note that in any case where an employee is dismissed due to a disability, there may be a case at the Human Rights Tribunal; the employer must have a bona fide occupational

requirement that cannot be met by the employee due to their disability, and the employer must follow a proper process to attempt to accommodate the employee, in order to avoid liability. See Chapter 6: Human Rights for additional details.

If an employer validly terminates a contract on the basis of frustration, they are not required to provide severance.

Prior to terminating an employment contract on the basis of frustration, employers should provide the employee with an opportunity to provide any additional medical information which might change their decision. Failure to do so might result in a finding of without cause dismissal, as opposed to frustration of contract.

D. Post-Employment Issues

31. Restrictive Covenants

It is becoming increasingly common for employment contracts to include restrictive covenants that prevent former employees from doing certain things, including but not limited to: divulging company secrets, working for competitors, or setting up their own competing business. While restrictive covenants have historically applied to upper level employees, they are more and more common for all types of employees as specialization increases and more companies sell information as opposed to goods.

Whether a particular provision is a restraint of trade is determined not only by the form of the clause, but by the effect of the clause in practice (*Levinsky v The Toronto-Dominion Bank*, 2013 ONSC 5657). Restrictive covenants may also influence the assessment of reasonable notice (see “Two Topics Relating to Restraint of Trade in Employment: Practical Alternatives to Restrictive Covenants and the Impact of Restrictive Covenants on Reasonable Notice”, Richard Truman and Valerie S. Dixon, Employment Law Conference 2014, Paper 3.2, CLE BC). As a general common law rule, restrictive covenants are presumed to be invalid. It is up to the party trying to enforce the covenant (usually the employer) to prove that it should be enforced, and it can be quite difficult to write a covenant narrow enough to be upheld in court. In deciding whether or not to enforce a restrictive covenant, the court must balance the interests of society in maintaining free and open competition with the interests of individuals to contract freely. The “public policy test” that emerges from the common law consists of the following considerations (per *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6):

- i) the employer must show a legitimate business interest for imposing the covenant on the employee - there must be a connection between the covenant and the business interest that is sought to be protected;
- ii) the covenant must minimally impair the employee’s ability to freely contract in the future;
- iii) the restraint must be fair and reasonable between the parties, and must be in the public interest, having regard to the nature of the prohibited activities and the length of time and geographic area in which it will operate; and
- iv) the terms of the covenant must be clear and unambiguous – it will not be possible to demonstrate the reasonableness of an ambiguous covenant.

The courts are unwilling to re-write restrictive covenants if they contain uncertain and ambiguous terms; these covenants are deemed prima facie unreasonable and unenforceable (*Shafron v KRG Insurance Brokers (Western) Inc*). It can often be a simple matter to find an ambiguity: the length of time or geographic area might not be specified, or there may be a prohibition against soliciting clients that the employee did not work with, or the employer may have used a non-compete clause when a non-solicitation clause would have adequately protected their legitimate business interests. See *Powell River Industrial Sheet Metal Contracting Inc. (P.R.I.S.M.) v Kramchynski*, 2016 BCSC 883.

32. Record of Employment and Reference Letters

There is no statutory requirement under the *ESA* for an employer to provide a reference. Employers are required to provide former employees with a record of employment, which includes information such as the length of service, wage rate, but does not include anything about the employee's performance.

Since the decision of *Wallace v United Grain Growers*, the view has been that an employer should provide a reference unless they have good reason not to. Failing to provide a reference could be construed by the courts as evidence of bad faith. In practical terms however, there is no way for a former employee to force their employer to provide a suitable reference letter without making some other sort of claim covered by the *ESA* or the common law.

If an employer tells an employee that they will only receive a reference letter if they resign, in order for the employer to avoid liability for severance payments, the employee may be able to make a claim for both wrongful dismissal and punitive damages (*Vernon v British Columbia (Liquor Distribution Branch)*), 2012 BCSC 133).

When an employer can sue an employee

Generally, it is rare for an employer to sue an employee. This might occur if an employee breaches a term of a contract (including an implied term), or if an employee breaches a fiduciary duty. Sometimes, after an employee brings an action against an employer, the employer will make a counterclaim against the employee as a strategic move to encourage the employee to settle for a lower amount; the strength of the employer's case should be carefully considered if this occurs.

The duties listed below are generally implied in employment contracts. This list of duties is not exhaustive.

33. Duty to perform employment functions in good faith

Employees owe a duty of good faith to the employer; this is an implied term of employment contracts. An employee might breach this by actively working against one of their employment duties; for example, a supervisor who is supposed to retain employees could breach this duty by inducing the employees they supervise to resign in order to complete against the employer. See *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54, and *Consbec Inc. v Walker*, 2016 BCCA 114, for further details.

34. Duty to give reasonable notice of resignation (wrongful resignation)

An employee must give their employer reasonable notice if they are resigning. "Reasonable notice", in the case of resignations, is much shorter than the notice that employers must give to employees who are being dismissed. Although giving two weeks' notice is the usual practice, the courts may require more or less than that amount, depending on the employee's responsibilities. If an employee breaches this duty, they may be held liable for the profits that their continued employment would have generated for the employer; this is generally only of concern if the employee generates significant profits for the employer. For further details, see *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54.

35. Competition against the employer

If an employment contract contains a restrictive covenant (such as a non-competition clause or a non-solicitation clause), see section IV.F.1: Restrictive Covenants, above. Employees without a valid non-competition clause (and who are not in a fiduciary position – see section V.E.3: Fiduciary duties, below) may compete against an employer as soon as they are no longer employed by the employer (*Valley First Financial Services Ltd v Trach*, 2004 BCCA 312). However, employees should be careful not to compete unfairly, or compete using confidential information obtained from their former employer.

If an employment contract contains a restrictive covenant (such as a non-competition clause or a non-solicitation clause), see Section V.D.1: Restrictive Covenants, above.

36. Duty not to misuse confidential information

It is an implied term of an unwritten employment contract that the employee will not misuse the employer's confidential information. A common example of confidential information is the employer's list of customers. Employees who take a customer list by printing it out or putting it on a USB key and taking it with them, or by emailing it to themselves, would be in breach of this duty. One notable exception is that an employee may use any part of the customer list that they have simply memorized (per *Valley First Financial Services Ltd v Trach*, 2004 BCCA 312). Additionally, employees such as financial advisors, who have developed ongoing relationships with clients, may be entitled to take a list of their own clients to inform them that they are departing, and where they will be working in the future (*RBC Dominion Securities Inc v Merrill Lynch Canada Inc et al*, 2007 BCCA 22 at para 81, reversed in part at 2008 SCC 54; *Edwards Jones v Voldeng*, 2012 BCCA 295). Note however that this may be prevented if the employee is in a fiduciary position, and there may be limits on the permitted contact or other complications if the employee signed a non-solicitation agreement.

37. Fiduciary duties

Only a small fraction of employees are in a fiduciary position. They may have fiduciary duties if they are directors of the company, or if they are senior officers in a top management position (per *Canadian Aero Service Ltd v O'Malley*, [1974] SCR 592). A fiduciary position is generally one where the fiduciary (the employee) has some discretion or power that affects the beneficiary (the employer), and the beneficiary is peculiarly vulnerable to the use of that power (per *Frame v Smith*, [1987] 2 SCR 99).

Employees who are in a fiduciary relationship to their employer have duties of loyalty, good faith, and avoidance of a conflict of duty and self-interest. They cannot, for example, take advantage of business opportunities that they should have been pursuing for their employer, even if they resign from their position.

F. Other Employment Law Issues

38. Discrimination in Employment

For provincially regulated employees, the *Human Rights Code* prohibits discrimination in employment on the basis of the following prohibited grounds (ss 13, 43):

- Race
- Colour
- Ancestry
- Place of Origin
- Political Belief
- Marital Status
- Family Status
- Physical or Mental Disability
- Sex (this includes sexual harassment, and discrimination based on pregnancy or transgendered status)
- Sexual Orientation
- Age (only those over 19 years of age are protected by this provision)
- The person was convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person

- The person complains or is named in a complaint, gives evidence, or otherwise assists in a complaint or other proceeding under the *HRC*

This prohibition against discrimination in employment includes discrimination in the hiring process, in the terms and conditions of employment, and in decisions to terminate employment. Employment agencies also must not refuse to refer a person for employment based on one of the prohibited grounds for discrimination. Trade unions, employer's organizations, and occupational associations cannot discriminate against people by excluding, expelling or suspending them from membership (s 14).

There must be no discrimination in wages paid (s 12). Men and women must receive equal pay for similar or substantially similar work. Similarity is to be determined having regard to the skill, effort, and responsibility required by a job.

Family status protection includes childcare and family obligations. See *Johnstone v Canada Border Services* (2010 CHRT 20).

For more information about each of the prohibited grounds, see Chapter 6: Human Rights, Section III.B: Prohibited Grounds of Discrimination. See also "Recent Human Rights Cases of Interest for Employment Lawyers", Michael A. Watt, Employment Law Conference 2014, Paper 4.1, CLE BC.

Though generally employers are prohibited from discriminating against employees, it is permitted if the discrimination is required due to a bona fide occupational requirement (ss 11, 13).

IF it appears that the employee has been discriminated against based on a prohibited ground, see Section V.F.1: Discrimination in Employment of this chapter for basic information on remedies for discrimination, or see Chapter 6: Human Rights, Section III.C: The Complaint Process for more detailed information.

Federally regulated employees are covered by the *Canadian Human Rights Act*.

Similar protections are provided to that of the *Human Rights Code*, though they are not identical.

Federal legislation allows employers to impose manadatory retirement, however, the BC provincial statute was amended in 2008 to prohibit this practice

Federal equal pay provisions in the *Canadian Human Rights Act* are somewhat broader than those found in B.C.'s *Human Rights Code*. It is discriminatory under the *Canadian Human Rights Act* to pay male and female employees different wages where the work that they are doing is of comparatively equal value. This means that even if the work itself is not demonstrably similar, the pay equity provisions may still be enforced if the value of the work is similar. Factors that are considered in determining whether work is of equal value include: skill, efforts and responsibility required, and conditions under which the work is performed (*Canadian Human Rights Act*, s 11(2)).

39. Harassment in the workplace

Bullying and harassment in the workplace are developing areas of the law. There are several possible avenues for addressing a complaint in this area if the issue cannot be resolved within the workplace.

The Workers Compensation Act was amended to cover mental disorders caused by workplace bullying and harassment (*Workers Compensation Act*, RSBC 1996 c 492, s 5.1); Chapter 7: Workers' Compensation provides additional information on how to make a claim. Employees will have to demonstrate that the behaviour to which they were subject was bullying and harassment and that it caused a disorder requiring their medical absence from work. Working with a doctor at early stages of the process can help with the eventual success of such an application.

If the bullying or harassment is related to discrimination based on one of prohibited grounds listed in the *Human Rights Code*, the employee may be able to file a complaint with the Human Rights Tribunal; see Chapter 6: Human Rights for

additional information.

The BC Human Rights Tribunal has suggested that "the trend for injury to dignity awards is upward", in the case of *Araniva v RSY Contracting* 2019 BCHRT 97. In this case, the BC Human Rights Tribunal awarded $40,000 in damages for sexual harassment. The impugned conduct related to three verbal interactions and a touch on the arm asking for a hug followed by a reduction in hours when advances were rejected. The complainant had been previously sexually abused and the harassment triggered a significant emotional reaction.

The bullying or harassment could potentially constitute a constructive dismissal for which the employee could claim damages in court; see V.C.10: Constructive Dismissal. Finally, if the bullying or harassment is of an extremely serious nature, such as serious sexual harassment, consider whether the behaviour might be criminal and whether the police should be contacted.

40. Retaliation for Filing a Complaint

Generally, employers are not permitted to retaliate against an employee who files a statutory complaint.

A provincially regulated employee might file a complaint against an employer at the Employment Standards Branch, the Human Rights Tribunal, or with WorkSafe. The *Employment Standards Act*, the *Human Rights Code*, and the *Workers Compensation Act* each contain provisions which prohibit retaliation for filing complaints.

41. Employment Standards Act Claim Retaliation

An employer may not threaten, terminate, suspend, discipline, penalize, intimidate, or coerce an employee because the employee filed a complaint under the *ESA* (s 83). If this does happen, the Employment Standards Branch may order that the employer comply with the section, cease doing the act, pay reasonable expenses, hire or reinstate the employee and pay lost wages, or pay compensation (s 79). A complaint may be filed with the Employment Standards Branch.

42. Human Rights Code Claim Retaliation

A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, gives evidence or otherwise assists in a complaint or other proceeding under this Code (s 43). If a person is discriminated against in such a manner, they may file a complaint at the Human Rights Tribunal in the same way that they would complain about any other discriminatory practice; see Chapter 6: Human Rights, Section III.C: The Complaint Process.

Workers Compensation Act

Employers and unions must not take or threaten discriminatory action against a worker for taking various actions in regards to the Act, such as reporting unsafe working conditions to a WorkSafe officer (s 151). Remedies include the ability to reinstate the worker to their job (s 153). Additional details are set out in the *Workers Compensation Act*, Division 6 – Prohibition Against Discriminatory Action. For more information on the Workers Compensation Act and WorkSafeBC, see Chapter 7 of this manual.

Common Law Issues/Internal Complaints

An employee may face retaliation for bringing an internal complaint, possible through a formal complaint process outlined in an employment policy. If the employer retaliates against the employee in a significant manner, this could constitute a constructive dismissal. In addition, if the employer dismisses the employee following a legitimate complaint, this may form grounds for an aggravated damages claim as a result of a bad faith dismissal.

43. Employee's Privacy

Legislation

There are three statutes in BC that concern privacy.

The *Privacy Act*, RSBC 1996 c 373, creates a statutory tort for breach of privacy. Whether a person's actions or conduct constitutes tortious conduct depends on what is reasonable in the circumstances. An action for breach of privacy can only be brought in BC Supreme Court.

The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, [*FOIPPA*] applies to public bodies such as governmental ministries, universities, health authorities, etc. It gives individuals a right to access information held about themselves and access to many documents held by the public bodies. It also governs the collection, use, and disclosure of personal information, including public bodies' employees' personal information.

The *Personal Information Protection Act*, SBC 2003, c 63, [*PIPA*] applies to almost all organizations that are not public bodies covered by *FOIPPA*. It governs the collection, use, and disclosure of personal information, including employees' personal information.

Balancing Employer and Employee Interests

Generally, employers can collect information that is reasonably necessary in the circumstances. Some of the factors to be considered are whether the collection of the personal information is required to meet a specific need, whether the collection of information is likely to meet that need, whether the loss of privacy is proportional to the benefit gained, and whether there are less privacy-invasive methods of achieving the same end, per *Eastmond v Canadian Pacific Railway*, 2004 FC 852. In that case, surveillance of a rail yard was permitted after there were a number of incidents of theft, trespassing, and vandalism. GPS tracking of employees' work vehicles has also been permitted (*Schindler Elevator Corporation*, Order P12-01, 2012 BCIPC 25), though it generally necessary for the employer to inform the employee of the GPS tracking.

Random drug and alcohol testing can run afoul of privacy legislation. If the workplace is hazardous, this is not sufficient to justify random testing. There must be an additional factor, such as a general substance abuse problem at the workplace. If this additional factor is not present, then the employer cannot randomly test everyone in the workplace, but can test individual employees if there is reasonable cause to believe the employee was impaired while at work, was involved in a workplace accident, or was returning to work following treatment for substance abuse (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34). For more information about alcohol and drug testing, consult "Alcohol and Drug Tests in the Workplace", Kenneth R. Curry and Kim G. Thorne, Employment Law Conference 2014, Paper 1.1, CLE BC.

Other issues involving employee privacy may arise if an employer requests an employee's medical information, monitors computer usage, or wishes to conduct personal searches of employees. Privacy laws are constantly evolving, and research should be done to determine whether the employer may be breaching privacy legislation.

Complaints regarding a breach of *FOIPPA* or *PIPA* can be filed with the Office of the Information and Privacy Commissioner for British Columbia.

The Ontario Superior Court of Justice recognized the tort of public disclosure of private facts in *Doe v. D*, 2016 ONSC 541, so there may be a new common law remedy in the appropriate circumstances.

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VI. Remedies

A. The Employment Standards Branch

The Employment Standards Branch is the only forum an employee can go to if they have a complaint arising from a breach of the *ESA*. If the complaint is instead regarding a contractual issue, see section V.B: Small Claims Court.

The *ESA* established the Employment Standards Branch to deal with complaints and to disseminate information about the Act to both employees and employers. The Employment Standards Branch is responsible for informing employers and employees of their rights under the *ESA*, and for administrating all disputes arising under the Act. The Employment Standards Branch's Industrial Relations Officers and Employment Standards Officers are trained to interpret the *ESA* and to assist both employers and employees with problems arising under the Act. Employees should be referred to the Employment Standards Branch if they have a complaint arising under the *ESA*.

In *WG McMahon Canada Ltd v Mendonca* (16 September 1999), BCEST Decision No 386/99, the Employment Standards Tribunal set forth the "make whole remedy", which permits the employee to receive compensation instead of reinstatement. The employee is essentially "made whole" financially by way of a compensation order, such that the employee would be in the same economic position he or she would have been in had the infraction not occurred. This is an extraordinary remedy but one which allows for significant compensation. The above case can be located on the Employment Standards Tribunal website [1].

Although the *ESA* also allows for reinstatement as a possible remedy, there are no published decisions in which it has actually been ordered.

Provincially regulated employees may still be able to seek reinstatement under other statutes such as the *Worker's Compensation Act* or the *Human Rights Code* if their situation qualifies.

1. Application and Limitation Periods

The *ESA* gives the Director of Employment Standards power to investigate complaints made under the Act. The complaint must be made in writing and within certain time limits. The Branch will deal only with complaints that have arisen within six months from the date of the complaint, if the complainant is still employed by the company. If the complainant is no longer employed with the defendant company, the complaint must be filed within six months of the termination date (s 74). When an employee is terminated after a temporary layoff, the last day of the temporary layoff is deemed to be their last day of employment for the purpose of calculating the six-month limitation period. If this six-month time period has elapsed, there may still be an action in Small Claims Court.

NOTE: Time during which an employee was not working because he or she was on sick leave, pregnancy leave, Workers' Compensation benefits, etc. is nonetheless considered part of the term of employment.

2. Filing a Claim with the Employment Standards Branch

A complainant may file their complaint with the Employment Standards Branch in one of three ways:

- filling in a form and mailing or delivering it to the nearest Employment Standards Branch;
- filling in a form at the nearest Employment Standards Branch office; or
- submitting an online complaint form.

The Director may refuse to investigate a complaint if it is not made in good faith or if there is insufficient evidence to support it. The complainant may request, in writing, that any identifying information gathered for the purpose of the investigation remain confidential. However, the Director may disclose information if disclosure is deemed necessary to the proceeding or in the public interest (s 75).

Most employment standards complaints are resolved through a process of education of the parties, mediation, and/or adjudication, but some are referred to investigation. The officer reviewing the case has the discretion to determine the approach taken. Breach of any section of the *ESA* may be a basis for an investigation. At the conclusion of an investigation, the Director will give their determination (their decision) based on the evidence given. The Director has the power to settle the claim in a variety of ways, including:

- arranging payment to the complainant;
- forcing compliance with the Act; or
- requiring a remedy or cessation of the action (ss 78-79).

The Director also has the power to help parties settle a complaint and reach a binding settlement agreement that may be filed in Supreme Court for enforcement (s 78). Section 29 of the *ES Regulation* provides an augmented penalty provision that grants the Employment Standards Branch more power to enforce the Act. The penalty provision is also used to enforce the offences listed in section 125 of the *ESA*.

Penalties per offence are:

First Determination:	$500
Second Determination:	$2,500
Third Determination:	$10,000

Under Part 11 of the *ESA*, an officer or director of a corporation is personally liable for up to two months' unpaid wages per employee if the officer or director held office when the wages were earned or were payable – however, officers or directors of a corporation are not personally liable on bankruptcy of the corporation (s 96(2)). Also, directors and officers may be considered a common employer and be held jointly and severally liable (s 95). If the business is sold, transferred, or continued after bankruptcy, the subsequent business may be considered a successor business and "the employment of an employee is deemed ... to be continuous and uninterrupted" (s 97).

Under the ESA (s 80), employers' liability for wages (including payments for length of service upon termination) can now include those wages that became payable within the twelve months prior to the date of the complaint, or within the twelve months prior to the date of the employee's termination – whichever is earlier. However, because some benefits become payable long after they were earned, an employee may be able to recover those benefits that they earned more than twelve months prior to the date of the complaint or date on which they were terminated. For example, in some cases vacation pay is not payable until two years after it is earned; in these cases, an employee could potentially recover vacation pay that was earned over a longer period than the twelve month collection limitation period. Similarly, employees may be able to recover wages that were entered into a time bank more than twelve months prior to the date of the complaint.

NOTE: Employers cannot terminate, suspend, or discipline employees because they have filed, or may file, a complaint (s 83). The Branch can order an employee's reinstatement for contravention of this section and for violations of s 8 and Part 6.

3. Appeals

Anyone who wishes to appeal a determination of the Director must make an application to the Employment Standards Tribunal, a separate body established under Part 12 of the Act, at the conclusion of an investigation (s 115). The request must be made within certain time limits, which depend on the manner in which the decision is served. If the decision is hand-served, faxed, or delivered electronically, an appeal must be filed within 21 days. If the decision is sent by registered mail, an appeal must be filed within 30 days. After reviewing the decision, the Adjudicator of the Employment Standards Tribunal may confirm it, alter it, or refer it back to an officer. The appeal is decided based on the correctness of the Director's determination. (see *Alsip v Top Rollshutters Inc. dba Talius*, 2016 BCCA 252, and *Howard v Benson Group Inc. (The Benson Group Inc.)*, 2016 ONCA 256).

Sections 112 and 114 of the *ESA* confine the grounds of appeal to the tribunal to situations where:

- a) **The Director erred in law:** An error in law may encompass the interpretation of a particular statutory provision, or its application to the facts presented. It can also be used when the appellant feels the Director acted unreasonably, or without evidence.
- b) **The Director failed to observe the principles of natural justice in making the determination:** This ground of appeal encompasses a wide variety of circumstances such as bias on the part of the decision maker, procedural unfairness (refusing an adjournment without good reason), or when the appellant feels generally they have not been given the right to be heard (a right codified in s 77 of the Act).
- c) **Evidence has become available that was not available at the time the Determination was made:** The new evidence must be material, in the sense that if the Director had been given the chance to review it the determination in whole or in part would have been different.

Although the Act does not specifically allow a party to appeal the Director's findings of fact, in certain cases the Director's fact finding may be so flawed that it amounts to a legal error. *Gemex Developments Corp v British Columbia (Assessor of Area #12– Coquitlam)* (1998), 62 BCLR (3d) 354) defined an error of law as including instances where the Director was "acting on a view of the facts that could not reasonably have been entertained." This test has been adopted in a number of tribunal decisions. *Delsom Estate Ltd v British Columbia (Assessor of Area No 11 Richmond/Delta*, [2000] BCJ No 331 (BCSC) restated the test as being "...that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence" and is "perverse or inexplicable". For a summary of the law relating to judicial reviews under the Employment Standards Tribunal, see *Cariboo Gur Sikh Temple Society (1979) v British Columbia (Employment Standards Tribunal)*, 2016 BCSC 1622.

The tribunal may dismiss an appeal without a hearing if the requirements are not met, or if payment of a possible appeal fee, set up by regulation, has not been made. There are provisions for an appeal fee to be charged but there is currently no fee, nor are there plans to charge one.

If the employee is not satisfied with the decision of the Employment Standards Tribunal, they can seek judicial review of the decision; however, this must be done in BC Supreme Court. Employees should speak to a lawyer if they wish to pursue this possibility.

Provincial Small Claims Court

For information on how to proceed with a claim in Small Claims Court or the Civil Resolution Tribunal, see Chapter 20: Small Claims Court.

The Small Claims approach can often yield better results than claims filed with the Employment Standards Branch, particularly for cases involving termination of employment. For example, the ESA only requires an employer to pay one week's wages per year of service notice to a maximum of 8 weeks for dismissal without just cause, whereas a common law award could extend to as much as 24 months' wages. The Employment Standards Branch is also only able to award back-pay of up to twelve months, thus the claimant may wish to pursue a remedy in Small Claims Court if he or she is owed more than twelve months' back pay, and you determine there is a contractual claim to these funds. It might be in the employee's best interest to pursue certain claims through the Employment Standards Branch and others in Small Claims Court. However, keep in mind that civil court will not rule on a matter that is to be decided by the Branch.

Please note that employees may be preventing from directly enforcing rights under the ESA in civil court, and must instead use the Employment Standards Branch to enforce these rights (*Macaraeg v E Care Contact Centres Ltd*, 2008 BCCA 182). However, many of the interests protected by the ESA have parallel common law (contractual) remedies as well. A significant exception to this is overtime pay: employees have a contractual right to receive their normal hourly pay for all hours they work, but they can only make a claim at the Employment Standards Branch if they wish to receive 1.5 or 2 times their normal hourly rate for their overtime hours (an exception to this is if their employment contract specifically sets out that they will receive a higher rate for overtime pay, in which case this contractual right can be enforced in court). Each particular case should be reviewed fully before determining in which forum to proceed.

Also note that Small Claims Court only has jurisdiction for claims above $5,000 and up to $35,000. Employees with claims over $35,000 must either abandon the excess amount of the claim, or proceed to BC Supreme Court. Employees should consult a lawyer before proceeding in BC Supreme Court, as it can be quite complicated and costly. Employees with claims $5,000 or under may be required to pursue their claim through the Civil Resolution Tribunal.

When naming the defendant in Small Claims Court, the employee should sue the body with which the contract of employment was made, unless he or she is alleging fraud or induced breach of contract – in which case, consider joining the shareholders or directors of the company. The employee may have to sue the parent company and the subsidiary if the parent company does the hiring, paying, and terminating.

The BC Human Rights Tribunal

If an employee or potential employee has been discriminated against on the basis of one or more of the prohibited grounds, see Chapter 6: Human Rights, Section III.C: The Complaint Process for information on how to proceed with a complaint. If the employee was terminated from their position based on one of the prohibited grounds, they may be able to recover lost wages and compensation for injury to dignity, feeling, and self respect at the Human Rights Tribunal.

The employee also has the option to file a claim in Small Claims Court, the Civil Resolution Tribunal or BC Supreme Court for wrongful dismissal. See Section V.C: Termination of Employment for information on wrongful dismissal claims.

In most cases, the employee should choose one of these two options, based on which would provide the most compensation. For low-income employees who were employed for a short period of time, the Human Rights Tribunal can often provide greater compensation. However, in some cases where the employee has worked for the employer for a particularly long time before being terminated, or where the employer has demonstrated particularly egregious conduct, the employee may have better success in Small Claims Court or BC Supreme Court where they may be able to receive a larger severance award, and possibly punitive damages.

It is possible to have the employee's job reinstated by making a claim under the *Human Rights Code*. This is a significant remedy in itself, and it can also be used to incentivize a former employer to make a fair settlement offer, as they often do not wish for the employee to return.

Limitation Periods

If a client wishes to file a complaint with the Employment Standards Branch, there is a six month limitation period from the last day of employment to file a claim (ESA s 74). Applications to the B.C. Human Rights Tribunal must be made within one year of the alleged contravention or the last day of employment (HRC s 22). In the courts, there was formerly a six-year limitation period for pure economic loss arising from breach of contract (wrongful dismissal would qualify); this limitation period continues to apply for any wrongful dismissal claims that arose before June 1, 2013. For wrongful dismissals occurring on or after June 1, 2013, the new Limitation Act applies, and there is a two-year limitation period (See Limitation Act, SBC 2012, c 13). Section 124 of the ESA sets a limitation period of two years for any court action arising from an offence under the Act.

Note that in cases where an employer has provided working notice of dismissal, the limitation period for wrongful dismissal claims likely start when working notice is provided, not on the last day of employment. See *Bailey v. Milo-Food & Agricultural Infrastructure & Services Inc*. 2017 ONCA 1004

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References

[1] http://www.bcest.bc.ca

VII. Strategies and Tips

Gather Evidence

Employees who face employment issues should document everything so that they will be able to provide better evidence if the case goes to a hearing or trial. Employees who are dealing with work-related or dismissal-related stress should consider seeing a medical professional as soon as possible, as medical evidence can be extremely helpful at the Human Rights Tribunal and in Court. Medical evidence is often necessary if an employee wishes to make a claim for aggravated damages due to the manner of their dismissal, as only actual losses are compensable under this category of damages.

Make a claim for EI

An employee who is dismissed may receive severance pay eventually; however, sometimes this can involve a long process. If the employee is receiving EI, they may have sufficient financial resources to wait a longer time to receive severance pay, and so they will be less likely to be forced to take a low settlement offer to pay their monthly bills. File for Employment Insurance immediately after being dismissed as Service Canada imposes time limits for filing. Make sure the employee understands that if they receive a severance settlement or judgement later on, they may have to pay back some of the EI benefits received during the severance period.

Make Reasonable Efforts to Mitigate Damages and Track Mitigation Efforts

Employees must make reasonable efforts to mitigate their damages. This is most relevant if the employee has been dismissed; the employee will be making a claim for damages in lieu of reasonable notice in Small Claims Court or the Civil Resolution Tribunal, or a claim for lost wages at the Human Rights Tribunal, and they must make reasonable efforts to mitigate these losses by searching for similar work. The employee should document their search for work. Note, however, that if the employee is successful in finding work, they will have successfully mitigated their damages, and will therefore be entitled to less compensation for lost wages or reasonable notice.

Employees should also be encouraged to keep accurate records of their job search efforts, for potential use as evidence at court.

File a claim as soon as possible

Once an employee finds a new job, they begin to mitigate their damages and this will reduce their severance award. File a claim as soon as possible; if you can reach a settlement agreement or have the case tried before the employee finds a new job, you may avoid this problem.

Complex vs. Simple Claims

If a claim is filed that is relatively simple, the employee is more likely to get through the process more quickly; this is helpful if you wish to try to finish the process before the employee gets a new job and begins mitigating their damages. However, there can also be benefits to adding claims for aggravated or punitive damages or various torts, and benefits to splitting a claim into more than one forum; namely, there is the potential for a greater award and the potential for tax advantages on the damages received. Consider the strength of the claims, how important it will be for the employee to receive money quickly, and the likelihood of the employee finding a new job and mitigating their damages, before deciding whether to make a simple claim for severance pay, or to add additional claims.

Consider the Tax Consequences when Negotiating a Settlement

An employee must pay tax on the portion of an award that is given in place of the wages they would have received during their reasonable notice period. However, if part of the damages is instead awarded as aggravated or punitive damages (in Small Claims Court or BC Supreme Court), or as damages for injury to dignity, feelings, and self-respect (at the BC Human Rights Tribunal), this portion of the award may not be taxable. Consider structuring a written settlement agreement to allocate a reasonable portion of the award to these potentially non-taxable categories of damages. Note that this chapter, and LSLAP, cannot provide tax advice, and an employee may wish to consult an accountant or tax lawyer or the Canada Revenue Agency to determine exactly which amounts of a final settlement are taxable.

Consider splitting the claim into different forums

In some cases, it may be advantageous to split up the various employment issues an employee faces, and proceed in different forums based on which forum will award the greatest amount of money for each legal issue.

For example, one may wish to claim overtime pay and vacation pay at the Employment Standards Branch, and claim severance pay in Small Claims Court. This could be beneficial because overtime pay (at the 1.5 or 2 times hourly rate) is only legally required under the *ESA* (unless the employee's contract calls for overtime pay to be paid), so claims for it can only be brought at the Employment Standards Branch; however, severance pay tends to be significantly greater in Small Claims Court.

Often it will be best to keep the entire claim in one forum. Note that section 82 of the *ESA* states that once a determination has been made by the Employment Standards Branch, the employee may commence another action only if the Director gives written permission or the Director or tribunal cancels the determination. This prevents the possibility of "double recovery"; if an employee received damages for an action in one forum, they may not receive the same damages in another. However, even if an employee has already gone through the Employment Standards Branch to obtain the minimum statutory entitlement for length of service under the *ESA*, they are still able to make a claim in court for contractual breaches such as wrongful dismissal, and therefore they may potentially obtain additional severance pay (*Colak v UV Systems Technology Inc*, 2007 BCCA 220). Nonetheless, proceeding at the Employment Standards Branch to claim the statutory minimum entitlements for length of service can be problematic for several reasons. Firstly, if the employee is also going to be proceeding in Small Claims Court for wrongful dismissal, a claim at the Employment Standards Branch may simply cause an extra expenditure of effort with no additional benefit. Secondly, if the Employment Standards Branch makes a determination as to whether or not there was just cause for dismissal, this determination is likely to be adopted by Small Claims Court if a claim is later filed there. It should be considered that of these two forums, only the Small Claims Court decisions are made by judges, so if it is anticipated that there may be complex legal arguments on the issue of just cause, it may be beneficial to proceed in Small Claims Court.

Consider Defeating Signed Release Agreements

An employee may have already signed a release agreement that waives any liability against the employer. This is not the end of the claim.

In considering a signed release agreement, you should first ensure that it applies to the situation at hand. For example, a release of all liability pursuant to the Employment Standards Act may not prevent an employee from recovering in common law

If the release agreement is grossly unfair for the employee, it may also be set aside on grounds of unconscionability. The British Columbia Supreme Court has recently adopted Alberta's test for unconscionability in the context of a severance release as follows: (*Manak v. Workers' Compensation Board of British Columbia*, 2018 BCSC 182 at para 90)

A contract is unenforceable for unconscionability if:

• It is a grossly unfair and improvident transaction;

• The victim did not receive independent legal advice or other suitable advice;

• There exists an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and

• The other party knowingly took advantage of this vulnerability.

A contract is also unenforceable if it was entered into under duress.

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Appendix A: Glossary

Aggravated damages

- In the context of wrongful dismissal: damages awarded as compensation for an employee's reasonably foreseeable loss or harm that occurred due to the manner of their dismissal; generally awarded as compensation for psychological harm caused by the manner in which the employee was terminated from their employment.

Bad Faith

- If an employer dismisses a person in a harsh or vindictive manner, for example by purposely humiliating the employee or by taking some other action that might mentally harm the employee, they may have dismissed the employee in a bad faith manner, and the employee may be entitled to aggravated damages.

Constructive Dismissal

- A unilateral change by an employer to a fundamental term of an employee's contract (such as pay or job duties). The change must not be condoned, and must be significant. The employee might claim this change is a constructive dismissal (or equivalent to a dismissal because of the significance of the change), even though there has been no express act of dismissal on the part of the employer.

Contract

- An agreement between persons which obliges each party to do or not do certain things.

Dismissal

- An employer's decision to terminate a contract of employment.

Employment at Will

- An employment contract during which the employer may terminate the employment at any time. This is an American concept, as this type of employment does not legally exist in BC (or anywhere in Canada): if the employment contract purports to allow the employer to terminate the employee without notice, it is invalid and the employee may be able to obtain a severance award.

Just Cause

- Misconduct by an employee, or some other event relevant to the employee, which justifies the immediate termination of the employment contract. Note that this phrase has a different meaning in the context of Employment Insurance.

Mitigation of Damages

- The obligation upon a person who sues another for damages, to minimize - or mitigate - those damages, as far as reasonable.

Non-competition Agreement

- A contract or a clause in a contract in which an employee agrees not to compete against their employer. These are often found to be invalid in court, particularly if a non-solicitation agreement would have sufficed to protect the employer's interests.

Non-solicitation Agreement

- A contract or a clause in a contract in which an employee agrees not to solicit customers of the employer.

Reasonable Notice

- Employers must give an employee reasonable notice that their employment is to be terminated without cause, or payment of their usual salary and benefits in lieu of notice. The length of time that constitutes reasonable notice varies based on the employee's age, length of service to the employer, and employment responsibilities, and the availability of alternate employment. The reasonable notice period can be up to approximately two years.

Restrictive Covenant

- A contract in which a party agrees to be restricted in some regards as to future conduct. There are two common types: non-competition agreements and non-solicitation agreements.

Severance Pay

- An amount of money an employer owes to an employee in lieu of notice of the employee's termination.

Sick Leave

- Time off from work, paid or unpaid, on account of an employee's temporary inability to perform duties because of sickness or disability.

Union

- A defined group of employees formed for the purposes of representing those employees with the employer as to the terms of a collective contract of employment.

Workers' Compensation

- A public benefit scheme in which qualified workers who are injured in the workplace, receive compensation, commensurate with their degree of injury, regardless of who was at fault.

Wrongful Dismissal

- The failure to provide reasonable notice of the termination of an employment contract. Wrongful dismissal is a term that can apply to cases when an employer doesn't provide enough notice or severance in the case of a without cause dismissal, or when an employer fires an employee without any notice or severance in the case of a just cause termination.

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Chapter Ten - Creditors and Debtors

I. Introduction

There are legal remedies available to creditors to enforce a debt, but the related procedures are frequently time-consuming and potentially costly, and there is no guarantee that the creditor will actually receive all of the funds owed. The most important reason for starting civil proceedings to collect a debt is to permit the creditor to execute on their judgment. Such execution proceedings may include:

1. examinations in aid of execution (to determine the debtor's ability to pay the debt);
2. subpoena to debtor hearing (to obtain a court order compelling the debtor to make payments on the judgment);
3. garnishment (to compel third parties to pay funds into court to the credit of the judgment rather than pay those funds to the debtor. See "Garnishment"); and
4. collection by execution (to lodge a writ of execution with the bailiff who will then seize and sell the debtor's assets and pay proceeds to the credit of the judgment).

A judgment may also be filed on the title of real property owned by the debtor and will remain on the title of that property for two years unless it is renewed, discharged (by the debt being paid or bankruptcy), or the creditor commences proceedings to sell the property and apply the proceeds of the sale against the debt.

Depending on the amount claimed, the matter will fall under the jurisdiction of the Civil Resolution Tribunal (under $5,000), Small Claims Court ($5,001 to $35,000) or the Supreme Court of British Columbia (above $35,000). Most of this chapter relates to the Supreme Court of British Columbia process. However, similar principles apply to Small Claims Court.

The Small Claims Court provides a detailed guide for creditors on enforcement procedures available under the Small Claims Court processes. See https:/ / www2. gov. bc. ca/ gov/ content/ justice/ courthouse-services/ small-claims/ how-to-guides/ getting-results. Finally, the Civil Resolutions Tribunal is designed for self-represented litigants and has rules generally preventing legal professionals from representing litigants in tribunal claims. Therefore, LSLAP rarely represents clients with Civil Resolution Tribunal claims..

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II. Governing Legislation and Resources

Bankruptcy and Insolvency Act, RSC. 1985, c. B-3 as am. by SC 1992, c 27 and SC 1997, c 12.

Builders Lien Act, SBC 1997, c 45.

Business Practices and Consumer Protection Act, SBC 2004, c 2.

Business Practices and Consumer Protection Authority Act, SBC 2004, c 2.

Court Order Enforcement Act, RSBC 1996, c 78.

Creditor Assistance Act, RSBC 1996, c 83.

Family Maintenance Enforcement Act, RSBC 1996, c 127

Interest Act, RSC. 1985, c I-18.

Limitation Act, SBC 2012 c 13

Personal Property Security Act, RSBC 1996, c 359.

Pension Benefits Standards Act, RSBC 1996, c 352.

Repairers Lien Act, RSBC 1996, c 404.

Sale of Goods Act, RSBC 1996, c 410

Wage Earner Protection Program Act, SC 2005, c 47, s 1.

Warehouse Lien Act, RSBC 1996, c 480

Winding-up and Restructuring Act, RSC 1996, c 6.

Matters involving bankruptcy or insolvency should almost always be referred to an insolvency practitioner. Given the number of applicable statutes and regulations, the law in this area is frequently subject to change.

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III. Creditors' Remedies

Before taking action against a debtor, a creditor must provide a reasonable time for payment on a demand loan or term loan. That time begins to run from the date of the demand for payment and not the date of the loan. What constitutes a reasonable demand period depends upon the facts of each case. For a list of factors to be considered see Royal Bank of Canada v. W. Got Associates Electric Ltd., [1999] 3 SCR 408, 1999 CanLII 714 (SCC), para. 18). Under the current Limitation Act, in British Columbia the period for when a proceeding for the collection of a debt must be commencted is 2 years from the “date of discovery” of the claim. The date of discovery is defined as the day on which the claimant knew or ought reasonably to have known all of the following:

- a) that injury, loss or damage had occurred;
- b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- c) that the act or omission was that of the person against whom the claim is or may be made;
- d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

NOTE: The limitation period does not apply to claims exempted under sections 3 or 7.

A. Secured Creditors

1. Definition

A secured creditor holds a lien, mortgage, or charge against the debtor’s assets or collateral as security for the repayment of the debt.

2. General Introduction to the PPSA

The *Personal Property Security Act* [PPSA] establishes a system for the registration, priority, and enforcement of secured loan and credit transactions involving personal property in B.C. Secured creditors holding agreements that create or provide for security interests (i.e. chattel mortgages and conditional sales agreements) must register these security agreements in order to “perfect” its interest and establish its priority in regards to third parties. See “Perfection” at page 3.

For agreements that are subject to the PPSA, Part 5 of the PPSA outlines the creditor’s remedies (ss 56 - Rights and remedies, 57 - Collection of payments under intangibles or chattel paper, 58 – Right of seizure or repossession, and 67 - Rights and remedies: consumer goods). For agreements that involve fixtures, crops or accessions, ss 36 – 38 apply. In addition, Part 6 contains some sections (i.e. ss 68(2) - Good faith and commercially reasonable, and 72 - Notice) that are of procedural importance.

NOTE: *PPSA* issues, particularly those involving priority disputes or matters relating to the transitional provisions, are complex and may have to be referred to a lawyer.

3. What Does the PPSA Govern?

The scope of the *PPSA* is defined in s 2 as including every transaction that in substance creates a security interest without regard to its form. As well, under s 3, a transaction involving either a transfer of an account or chattel paper, a commercial consignment, or a lease for a term of more than one year that does not secure payment or performance of an obligation (i.e. does not create a security interest) is subject to the *PPSA*. Section 55 provides that Part 5 does not apply to transactions brought within the *PPSA* by s 3. It is necessary to look to the terms and the common law.

NOTE: Section 4 lists types of transactions that are exempt from the *PPSA*. The *PPSA* does not apply to a "lien, charge or other interest given by a rule of law or an enactment unless the enactment contains an express provision that the *PPSA* applies". Generally this excludes real property and natural resources.

a) Perfection

For a creditor's interest in a good to be practically effective, s 35(1)(b) of the *PPSA* states that the interest must be "perfected", whereby the creditor becomes a "secured" party. By virtue of s 19, a security interest must satisfy two conditions to be "perfected":

- i) the security interest must have "attached" (see below); and
- ii) the secured party must ensure that "all steps required for perfection under this Act have been completed" (see below).

In general, attachment will ensure that the security interest is enforceable against the debtor, while perfection will protect the security interest against competing third party claims.

"Attachment": Section 12 states that a security interest attaches to the good when:

- i) value is given;
- ii) the debtor has rights in the collateral; and
- iii) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under s 10 (unless the parties specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement).

4. Methods of Perfection

- i) **perfection by possession of collateral applies to all forms of security interests (s 24)**;
- ii) **perfection by registration**. Subject to s 19, registration of a financing statement in the Personal Property Registry perfects a security interest in collateral. (s 25); and
- iii) **temporary perfection** (See ss 5(3), 7(3), 26, 28(3), 29(4) and 51).

5. Remedies

Where a debtor defaults on a security agreement, s 56 provides that the only rights and remedies the secured party has against the debtor are those provided in the security agreement (as long as they do not derogate those rights given to the debtor by the *PPSA*), and those specifically provided by the *PPSA* (s 17 and ss 36 – 38).

Important sections of the *PPSA* for the creditor are ss 58 and 59, which contain rules for seizing and disposing of collateral. These sections provide that, unless the security agreement states otherwise, where the debtor defaults on their payment, the creditor may elect to take possession of the collateral pursuant to the contract, dispose of the collateral and then sue for any amount still owing. Section 67, provides for a more limited set of remedies where the collateral takes the form of consumer goods – known as the "seize or sue" rule. Formerly, under legislation repealed by the *PPSA*, all creditors could only seize or sue but not both. **The principle of "seize or sue" still applies to "consumer goods" (see Section II.A.6: Seizure, below); it no longer applies to commercial goods**.

6. Seizure

Where the security interest does not involve fixtures, accessions, crops, or consumer goods, s 58 provides the fundamental rule for realization upon non-possessory security interest in tangible personal property: **the secured party has a right to seize (in the case of a secured loan transaction) or to repossess (in the case of a secured credit sales transaction) the collateral**. Upon seizing the collateral, s 17 defines the rights and obligations of secured parties in possession of collateral. The section imposes a standard of reasonable care on the secured party in possession of the collateral and the secured party must follow the notice provisions outlined in ss 59(6) – (12) before they are entitled to carry through with disposal.

7. Disposal of Collateral

After seizing collateral, the secured party under s 59(2) may dispose of it either in its present condition or after repairing it (though s 68(2) protects the debtor from incurring unnecessary expenses because all rights, etc., under the *PPSA* must be discharged "in good faith"). Further, s 59(3) provides that the secured party may dispose of the collateral by a private or public sale (either as a whole or in commercial units or parts) and, if the security agreement so provides, by lease. See also Section II.A.10: Voluntary Foreclosure.

Section 59(2) provides a priority scheme regarding application of the proceeds of sale:

- first, toward the reasonable expenses of seizing, repairing, etc.;
- second, toward the satisfaction of the obligations owed to the secured party; and
- last, if any surplus exists, to the satisfaction of obligations owed to persons holding a subordinate security interest, and then toward the debtor (s 60).

A person who buys an item from a disposal sale takes the good free and clear of the debtor, the secured party, and any subordinate creditors whether or not the secured party complied with the requirements of the section. In the case of a prior secured creditor's interest, if the goods are "consumer goods" of a value less than $1,000 and the purchaser gave value for the goods, the purchaser takes them free of the prior secured creditor's interest (see s 59(14)).

8. Notice of Intention to Dispose of Collateral

> **NOTE:** The forms of notices under the *PPSA* depend on a number of factors, including the nature of the security and the terms of the security agreement. Advice concerning the validity of notices should be referred to a lawyer.

Subject to the circumstances where notice is not required as per s 59(17) (e.g. for perishable collateral, collateral requiring disproportionately high storage costs relative to its value, etc.), the requirements for notice are outlined in ss 59(6) and (10). These sections require that the secured party, or receiver, as the case may be, must provide at least **20 days'** notice of their intention to dispose of the collateral to parties including the debtor and any other creditor.

When a secured party is considering methods of disposal, they must give notice to the following parties (see s 59(6)):

- i) the debtor;
- ii) any other person who is known by the secured party as the owner of the collateral (where that is not the debtor);
- iii) any creditor or person with a security interest in the collateral whose interest is subordinate to the secured party, who registered a financing statement, or whose security interest is perfected by possession at the time of seizure or repossession of the collateral; and
- iv) any other person with an interest in the collateral who has given notice to the secured party of their interest in the collateral before the notice of disposition is given to the debtor.

The secured party is required to include specific information in the notice (see s 59(7)):

- i) a description of the collateral;
- ii) the amount required to satisfy the obligation secured by the security interest;
- iii) the arrears owing (exclusive of the operation of an acceleration clause);
- iv) the expenses associated with seizure and repossession; and
- v) the date, time and place of disposition.

In the case of a receiver attending to the disposition of the collateral, the receiver must give notice to (see s 59(10)):

- i) the debtor;
- ii) any other person known by the secured party to be an owner of the collateral;
- iii) any creditor with a security interest subordinate to that other secured party, who has either registered the financing statement, or who has perfected its security interest by possession at the time of the seizure or repossession of the collateral; and
- iv) any other person with an interest in the collateral who has notified the receiver of that interest in the collateral before the notice of disposition is given to the debtor.

The notice that the receiver must provide need contain only (see s 59(11)):

- i) a description of the collateral;
- ii) a statement that unless the collateral is redeemed it will be disposed of; and
- iii) the particulars relating to the place of disposition or where tenders may be delivered.

9. Surplus or Deficiency

When a secured party is left with a surplus after disposal of the collateral, it must be accounted for and paid to the parties in the order specified in s 60(2). If a dispute regarding entitlement arises, s 60(4) provides for the secured party to pay the secured funds into court, which gives those claiming entitlement the opportunity to make an application under s 70 for payment.

Under s 60(5), the debtor is responsible for any deficiency balance unless the secured party and the debtor have agreed otherwise and made provisionsas such in the security agreement.

NOTE: This section does not apply to consumer goods.

10. Voluntary Foreclosure

After default, a secured party may make a proposal to the debtor and other interested parties to take the collateral to satisfy obligations secured by it (s 61).

The debtor and other interested parties have 15 days to object to the secured party's proposal. Failure to object is deemed to be an irrevocable election to forfeit all rights and interests in the good and entitles the secured party to retain the good.

If the debtor or other secured party provides notice of objection to the secured party within 15 days after the notice is given, the secured party must dispose of the collateral in accordance with the provisions of s 59. In such circumstances, the secured party may make an application to the court for an order that an objection to the secured party's proposal is ineffective because:

- i) the objection was made for a purpose other than protecting an interest in the collateral or the proceeds of the disposition of the collateral; or
- ii) the market value of the collateral is less than the total amount owing to the secured party plus the costs of disposition.

11. Restrictions on Realization

a) Subordination of Unperfected Security Interests

Under s 20(a), an unperfected security interest is subordinate to the interest of:

- a person who causes the collateral to be seized under legal process to enforce a judgment (including execution, garnishment or attachment), or who has obtained a charging order or equitable execution affecting or relating to the collateral;
- a representative of a creditor enforcing the rights of a person referred to above; and
- a sheriff acting under the Creditor Assistance Act and any judgment creditor entitled to participate in the distribution of property under the *Creditor Assistance Act*.

Also, if an interest is unperfected at the date of the bankruptcy or winding-up, then that interest is not effective against a trustee in bankruptcy or a liquidator (*Winding-up and Restructuring Act*, RSC 1985, c 6).

In addition, ss 20(c), 30(3) and 31 confirm the subordination of the interest of a secured party to a bona fide purchaser for value under various circumstances.

b) Restriction on the Right to Accelerate a Term Debt

The security agreement may contain an "acceleration clause" that provides that the total amount owing becomes due upon default in payments or on other grounds, such as whenever the secured party has "commercially reasonable grounds" to believe that they may not be repaid or that the collateral is "in jeopardy". If there is an acceleration clause in the security agreement other than in the case of default payments, the acceleration clause may not be invoked unless this objective test of "commercially reasonable grounds" has been satisfied. A secured creditor has commercially reasonable grounds when they have a reasonable belief that there is a risk of non-payment. This could occur for a variety of reasons including the debtor fleeing the country, being hospitalized or illegal activity taking place on the premises. If the risk is not obvious the creditor must make commercially reasonable efforts to verify their suspicions. Commercially reasonable efforts do not mean best efforts.

c) Limitation of the Right of Seizure for Consumer Goods

For collateral that is a "consumer good", where the debtor has paid at least two-thirds of the total amount secured, the creditor may not seize the good without first obtaining a court order (see Section II.A.12.a: Secured Party's Remedies).

d) Obligation While in Possession of Collateral

Section 17 of the *PPSA* imposes a standard of reasonable care on any secured party in possession of the collateral.

e) Rights of a Debtor

The *PPSA* preserves the debtor's (but not the secured party's) rights and remedies under other statutes that are not inconsistent with the PPSA as well as the specific rights and remedies provided in the security agreement, ss 17 and 56(2)(b).

f) Rights of Redemption and Reinstatement

Under s 62, a debtor has redemption rights. Any person entitled to notice of a pending disposition of collateral may "redeem" the collateral by tendering to the secured party fulfilment of the obligations secured by the collateral plus the reasonable expenses incurred by the secured party associated in seizing the collateral or otherwise preparing it for disposition. The aforementioned obligations may simply be the amount in arrears; however, it is more often the case that

an acceleration clause applies, and that the obligations will be the total amount of the debt. Where the security agreement contains an acceleration clause, the debtor may apply to court for relief from the consequences of default or for an order staying enforcement of the security agreement's acceleration provision.

12. Consumer Goods

Where the collateral is a "consumer good", the calculation of the obligation secured and the obligation that must be tendered is varied. The debtor may "reinstate" the security agreement by paying only the monies actually in arrears – negating the operation of any acceleration clause. The debtor may waive this right but any such agreement must be in writing after default. Note that the number of times the debtor may reinstate the security agreement is limited depending on the period of time for repayment set out in the security agreement; however, the frequency of reinstatement may be varied by agreement between the parties.

a) Secured Party's Remedies

Section 67(1) lists the options available to a secured party. **The secured party may elect to pursue one of the following remedies:**

- seize or repossess the goods (s 58);
- enact the voluntary foreclosure remedy (s 61) (discussed above);
- accept the surrender of the goods by the debtor; or
- start an action to recover a judgment against the debtor for the amount of the unpaid debt or unperformed obligations under the security agreement.

This is sometimes called the "seize or sue" rule.

If the debtor has paid at least two-thirds of the total amount of the secured obligation, the secured party may not seize the consumer good used as collateral (s 58(3)). However, the secured party may apply to court for an order that the "two-thirds rule" should not apply and the court will make a decision based on (s 58(4), (5)):

- the value of the collateral;
- the amount of the obligation that has been discharged;
- the reasons for default; and
- the current and future financial circumstances of the parties.

b) Disqualification from "Seize or Sue" and Leases

A secured party with a security interest in "consumer goods" may escape the seize or sue provisions when:

- the debtor has engaged in wilful or reckless acts or neglect that has caused substantial damage or deterioration to the goods; the secured party may seek a court order pursuant to s 67(8) disqualifying the debtor from the rights and remedies ordinarily available under s 67(1)-(5) (s 67(8)); or
- the secured party discovers after seizure that an accession that was collateral has been removed and not replaced by other goods of equivalent value and free from prior security interests, a claim may be advanced against the debtor for the value of the accession (s 67(8)).

> **NOTE:** The "seize or sue" rule does not apply to "true leases" but will apply to "security leases" or "conditional sales agreements". BC courts have been developing tests to distinguish between true leases and security leases. Disputes often arise over car leases. Creditors and debtors should consult with a lawyer who is familiar with this area of law when trying to figure out whether their contract is a true lease or a security lease. If the lease is a true lease the creditor has the option to seize and sue; see *Daimler Chrysler Services Canada Inc v Cameron*, 2007

BCCA 144.

c) Consequences of Electing to Proceed Against Collateral

Under s 67(2), an election to proceed against the collateral results in the extinguishment of the debtor's obligations under the security agreement or any related agreement (with the exception of land mortgages executed before July 1, 1973), thereby automatically releasing any guarantor or indemnitor of the obligations contained in the security agreement. However, ss 67(3) and 67(4) contain exceptions.

Since proceeding against the collateral precludes the creditor from recovering the deficiency of the debt, the creditor is well advised to collect as much of the debt as possible, from other sources prior to seizing the goods. Remember, however, that if the creditor collects 2/3 or more of the debt they lose the right to seize the goods.

d) Consequences of Electing to Sue

An election to sue results in the following consequences for the creditor:

- Under s 67(6), if the creditor gets a judgment against the debtor and seizes the collateral pursuant to a writ of seizure and sale, the right of recovery is limited to the gross amount realized from the sale of the collateral;
- Under s 67(10), commencement of proceedings against the debtor extinguishes the security interest of the creditor in the goods.

Therefore, the sale proceeds become subject to a bankruptcy stay; and the creditor may have to share the proceeds of the seizure and sale with other creditors as they will no longer have priority based on secured creditor status.

Exceptions include cases of fraud or cases where the stay is unjust. Where there is alleged fraud or the stay is unjust for other reasons, the creditor can apply to the court to have the stay removed against them specifically. Generally the stay is removed so that litigants can continue their litigation.

B. Unsecured Creditors

A creditor initiates legal proceedings for one obvious and specific purpose: to permit that creditor to obtain a judgment and collect the debt owed. There may be cases where such action is not taken, for example, if the debtor has no assets and is not likely to ever have assets. There are also instances where a creditor may be legally prevented from initiating proceedings against a debtor, for example, if the debtor files an assignment in bankruptcy. These issues will be discovered when the debtor's assets, if any, are identified at a Payment Hearing in Small Claims Court, or in the Examination in Aid of Execution or Subpoena to Debtor Hearing in Supreme Court (see Appendix B: Checklist for Examination in Aid of Execution). However, when a debtor has or may have assets, the creditor may wish to obtain a judgment on the debt to execute against assets of the debtor.

1. The Creditor Assistance Act

Before this Act, the common law position was that priorities among execution creditors were determined in relation to the time the writs were filed. The creditor who filed the first writ would be paid in full, and then the next, and so on.

The principles of the *Creditor Assistance Act* allow creditors to give debtors time to pay, and not prejudice the patient creditor over another who files as soon as the debt is due. Section 3 provides that on execution, all creditors who have filed a writ will receive their share on a *pro rata* (or “rateable”) basis. *Pro rata* means that each creditor will receive a share of the funds available for distribution that is proportionate to their share of the debtor's total debt.

Exceptions to this principle of pro rata distribution allow preference to sheriff's costs, costs to the creditor at whose instance the seizure and levy was made, and wage claims that do not exceed three month's wages, or salary. Further, the

Family Maintenance Enforcement Act, RSBC 1996, c 127 provides that proceeds realized on execution under that Act are not subject to distribution under the *Creditor Assistance Act*. In addition, some statutory liens and charges may take priority over the rateable distribution under the Act.

> **NOTE:** Payments made pursuant to a foreclosure sale of land will be made in the order that judgments are registered at the Land Title Office, and not on a pro rata basis.

a) Money to be Levied by Execution

Under s 3, once the sheriff collects money, an event called a levy, the persons who qualify under the Act distribute it. These persons must have filed a writ of execution prior to the levy or must file a writ within one month of the date the levy was entered. Where the creditor does not have a judgment against the debtor at the time of levy, and the claim is for debt, the creditor may obtain a certificate of claim under the *Creditor Assistance Act*. If this certificate is delivered to the sheriff within one month of the levy, the creditor may participate in the rateable distribution. The procedure for the certificate of claim is in ss 6 – 21 of the Act.

b) Contest of the Creditor's Claim

Under s 14, on receiving an affidavit of claim the execution debtor may file and serve an affidavit of good defense to the claim within 10 days of the original service. The court may vary this length of time upon application. The distribution is halted pending verification of the validity of the claim.

Besides the debtor, another creditor may contest the claim (s 15). Grounds for filing include an allegation that there is no debt due in good faith from the debtor to the claimant, or an allegation that the claim is not one of debt as required by s 6 of the *Creditor Assistance Act*. A claimant whose claim is contested must make an application to the Supreme Court of British Columbia within eight days of being notified; otherwise, the claim will be deemed to have been abandoned.

Under s 12, if the amount levied does not satisfy all of the writs of execution and certificates of claim, the sheriff is authorized to make a further seizure of the execution debtor's personal property to satisfy all writs and certificates of claim. In addition, the certificate, if issued, remains in force for three years and may be renewed similarly to a writ of execution.

2. Execution

Under s 55 of the *Court Order Enforcement Act* [*COEA*], any judgment creditor may have property of the judgment debtor seized and sold by the sheriff to satisfy the amount owing under the judgment. Section 60 of the *COEA* directs that any surplus after payment of the judgment, interest, and reasonable costs of seizure and sale be paid to the debtor.

3. Exemptions from Seizure

Section 71(1) of the *COEA* creates categories of exemptions for the personal property of debtors with the specific amounts set by regulation. Debtors are allowed:

1. Necessary clothing, medical and dental aids that are required by the debtor and their dependants;
2. $4,000 for household furnishings and appliances;
3. $5,000 for one motor vehicle if the debtor is not a maintenance debtor;
4. $2,000 for one motor vehicle if the debtor is a maintenance debtor;
5. $10,000 for tools and other personal property that the debtor uses in their occupation.

In addition, s 71.1(1) of the *COEA* exempts the principal residence of the debtor; $12,000 is the prescribed amount of equity exemption if the debtor's principal residence is located within the boundaries of the Capital Regional District or

the Greater Vancouver Regional District. If the debtor's principle residence is located outside of these boundaries, $9,000 is the prescribed amount of equity exemption. These values are calculated using the net equity.

Section 71.3 of the COEA specifies that property in registered plans may be exempt from seizure as well (including Deferred Profit Sharing Plans, Registered Retirement Income Funds and/or Registered Retirement Savings Plans). In order to qualify for an exemption, the plan must be registered similar to the Registered Retirement Savings Plan However, there are some employee DPSPs that are not registered and exempt from seizure. Another exception to this rule is if property was contributed to the plan after or within 12 months before the date on which the debt became due.

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

> **NOTE:** Refer to BC Reg 28/98 (Court Order Enforcement Exemption Regulations) for further details regarding exemptions under the *COEA*. Where there are competing priority interests between judgment creditors and secured parties, each party should seek the assistance of counsel.
>
> **NOTE:** The execution remedy is available to an unsecured creditor only after they have obtained judgment against the debtor.
>
> **NOTE:** The B.C. Court of Appeal decision in *Atwal (Re)*, 2012 BCCA 46 confirmed that a debtor whose property is sold by a trustee under the *Bankruptcy and Insolvency Act* [*BIA*] is entitled to the above exemptions if the value of their property exceeds that which is prescribed in the legislation. Thus, if a debtor's vehicle, valued in excess of $5000 is sold by a trustee in bankruptcy, the debtor is entitled to $5000 of the sale price, as provided by the exemption. Seizure under Execution

Any goods, chattels and effects of the judgment debtor (*COEA*, s 55), money, bank notes, cheques, or other securities for money, such as shares of an incorporated company in British Columbia (s 64; *Peligren v Ajac's Equipment* (1982) Inc (1984), 56 BCLR 17, [1984] 5 WWR 563 (SC)), and any legal or equitable present, future, executory or contingent interest in land (s 81) may be seized after the exemptions from s 71(1) of the *COEA* are applied.

The secured creditor takes the secured goods subject to the security interest of the conditional seller or chattel mortgagee. Where the debtor is a conditional buyer or a chattel mortgagor, a sheriff or bailiff may seize secured goods. Sheriffs, however, are usually reluctant to seize collateral unless there is clearly equity in it. In such cases, the secured creditor cannot seize a greater interest than the debtor has.

Sections 71(2) and (3) set out three exceptions to the personal property exemptions provided in s 71(1) of the *COEA*:

- a) the debtor cannot exempt goods identical to the goods that were the subject of the contract in question;
- b) a trader cannot claim any goods that are part of their stock-in-trades; and
- c) Corporate debtors cannot avail themselves of the personal property exemption.

In addition, s 54 of the *Insurance Act*, RSBC 1996, c 226 allows for the exemption of certain insurance policies. Section 54(1) states that if insurance money has already been payable then it is exempt; essentially creditors cannot attach once money has been transferred. Section 54(2) states that insurance money and the rights and interests of the insured in a life insurance contract are exempt from execution or seizure, as long as there is a designation in favour of a preferred beneficiary (immediate family as defined by the act) of the person whose life is insured.

The *Bankruptcy and Insolvency Act*, 1985, s 67(1)(b.3) now shields all RRSP contributions from seizure in a bankruptcy, except those made in the 12 months prior to bankruptcy.

Certain interests have been held to fall outside s 71 and therefore are not exempt from seizure. Partial interest and equitable interests do not fall within s 71 and thus, for example, a purchaser under a conditional sales agreement cannot prevent seizure of the goods sold under the agreement. Similarly, the section does not apply to a charging order or a garnishing order since the section only refers to "forced seizure and sale". Thus, monies in court and debts or wages being

garnished cannot form part of the judgment debtor's exemption under the *COEA*.

a) Execution Procedure: Chattels, Money, Shares, Etc.

The judgment creditor obtains an order for seizure and sale (Small Claims Court) or a writ of seizure and sale (Supreme Court) directing the sheriff or bailiff to seize and sell sufficient goods or securities to satisfy the debt plus expenses (*COEA*, ss 58 and 60). The seizure of shares involves particular problems: see ss 64 and 65; see also *Peligren v Ajac's Equipment* (1982) Inc (1984), 56 BCLR 17, [1984] 5 WWR 563 (BCSC).

Where the sheriff seizes goods, the sheriff's officers are entitled to assume that all the goods and chattels on the premises are the property of the judgment debtor at the time of the seizure. The judgment debtor has a duty to claim that some of the property is personal property or the personal property of others: see *Supreme Auto Body v. British Columbia* (1987), 21 BCLR (2d) 101 (CA).

b) Execution Procedure: Land

> **NOTE:** Issues relating to land should be referred to a lawyer.

If the judgment creditor registers a judgment in any Land Title Office, a lien is created against the interest in the real property of the judgment debtor that is registered in the land registration district in which the judgment is registered (s 82 of *Court Order Enforcement Act*). Once a judgment is registered, the judgment creditor may seek a court order to have the sheriff sell the land (ss 92 and 96). If the land is held in joint ownership and the debt is in one owner's name only, the enforcement proceedings are similar, but a creditor can only apply to have the judgment debtor's portion of the land sold. In this case, the debtor's joint tenancy interest is considered severed. The buyer/new owner of the partial interest in the land can be the judgment creditor, a third party, or the non-debtor owner. After the sale of the land, the new owner or the remaining non-debtor owner can bring an application under the Partition of Property Act to 'buy out' the new owner. **The judgment creditor must renew the judgment after two years or it is extinguished**, unless it is a non-expiring judgment (i.e. a judgment registered under the *Family Maintenance Enforcement Act*).

> **NOTE: Where there is a conflict between the *PPSA* and the *Land Title Act*, the *Land Title Act* prevails (*PPSA*, s 74).**

c) Legal Advice on Execution Orders

Once the execution process has begun, the debtor usually has one final opportunity to pay. In the case of land, the sheriff may not sell until one month after receiving the order for sale (COEA s 100). The debtor should be advised to pay if possible because the amount recovered on a forced sale may not be as high as otherwise obtained on a normal sale of property.

4. Garnishment

Garnishment is a judicial proceeding in which a creditor asks the court to order a third party who is indebted to the debtor to turn over to the creditor any of the debtor's property. The creditor is the garnishor. The third party is the garnishee. The *COEA* provides that a garnishing order may be obtained before or after judgment.

5. Garnishment of Bank Accounts and other Account Receivable

a) Garnishment Before and After Judgement

A pre-judgment garnishing order is paid into court pending the outcome of the proceedings, and may be used in circumstances where the debtors ability to pay may be compromised before judgment. A pre-judgment garnishing order is not available against wages. The creditor's action against the debtor must be for a liquidated (i.e. explicitly specified) or ascertained sum. - damages for a breach of contract must be quantified as a term of that contract (see *Ocean Floors Ltd v Crocan Construction Ltd* (2010), 2010 BCSC 409). A definition of liquidated sum is found in *Steele v Riverside Forest Products Ltd* (2005), 2005 BCSC 920. The accompanying affidavit to a pre-judgment garnishing order must disclose the nature of the cause of action and the specified amount claimed. Note that recourse to a pre-judgment garnishing order is extraordinary and therefore the provisions of the COEA must be strictly complied with or it may be overturned. The creditor will generally swear an affidavit in support of a pre-judgment garnishing order by himself or herself.

A creditor who begins an action for a liquidated sum may seek to garnish a debt owed to the debtor to have the money paid into court to "ensure" payment if the creditor is successful in court. However, remember other judgment creditors may also be trying to ensure payment.

If the order has not yet been made and the debt is valid, it may be in the debtor's best interest to pay the creditor if possible, since the debtor is liable for payment of the costs of the garnishing proceedings.

If the order has already been made, the creditor should examine the possibility of having the garnishment released and an order for payment by instalments substituted under s 5, or in the case of garnishment of wages, having the exemption increased under s 4. **The creditor should be advised that hardship may be used as a defence.**

If you are a garnishee who wishes to dispute indebtedness to the defendant or judgment debtor, they should file a dispute notice as soon as possible with the court. If they do not dispute it, a second order, called an order absolute may be issued (see Appendix A: List of Relevant Documents: Affidavit in Support of Garnishing Order After Judgment). This order operates as a judgment and execution may be taken against him or her. **Inactivity could render a garnishee liable even if they never owed the money to the defendant/judgment debtor.**

b) Which Debts Can be Garnished?

Any debt that is "due or accruing due" to a judgment debtor may be garnished by a judgment creditor. This requires that the debt be an existing or perfected debt even though payment is not yet due. Bank accounts can be garnished as long as it is not a joint bank account, except where the debt is owed jointly by the same parties or the creditor is exercising its right of offset. For example, a creditor bank may garnish a debtor's personal account, including a joint account, to offset the debtor's debts to that bank. Term deposits may be garnished as long as any conditions on withdrawal are mere matters of procedure and administration, though there may be complications where the account is transferable.

Registered plans such as RRSPs and RRIFs are exempt from enforcement processes under s 71.3 of the *COEA*. However, contributions made in the 12 months preceding the date of judgment may be enforced on. Also, many pension plan payments are exempt pursuant to s 63 of the *Pension Benefits Standards Act*. Section 15 of the *COEA* provides that a creditor may seek a garnishing order that will attach a debt maturing in the future. This form of garnishing order may be useful in attaching monthly payments, since all future monthly payments can be attached by one order rather than issuing a garnishing order for each payment.

c) Procedure for Pre-Judgment Garnishing Order

In order to obtain a pre-judgment garnishing order, a civil action must first be commenced by a creditor for the amount of the debt.

The creditor must swear in an affidavit that an action on the debt is pending, provide the date of its commencement, the nature of the cause of action, and the actual amount (i.e. liquidated or ascertained sum) of the debt, claim or demand, and that the same is justly due and owing. The affidavit may be sworn before or after the action is commenced (although the form of the affidavit will differ). The affidavit must also state that another person, the garnishee, is indebted to the debtor, and provide the garnishee's address (*COEA*, ss 3(2)(e) and (f)).

The garnishing order may be set aside if the procedural requirements are not strictly complied with because it is considered an extraordinary remedy. For example, a pre-judgment garnishing order will be set aside where the affidavit in support sets out an amount including interest and the affidavit does not allege the existence of an agreement on the part of the debtor to pay interest: see *Nevin Sadler-Brown Goodbrand Ltd. v Adola Mining Corp. and Prophecy Developments Ltd.* (1988), 24 BCLR (2d) 341. **Never** claim court ordered interest in the affidavit.

The court has discretion to set aside a pre-judgment garnishing order, but the applicant must submit a meritorious set-off claim or show extraordinary hardship arising out of the garnishment. While the plaintiff's solicitor may swear in an affidavit as to what is the amount owing (see *Caribou Construction v Cementation Co (Canada)* (1987), 11 BCLR (2d) 122 (SC); *Trade Fortune Inc v Amalgamated Mill Supplies* (1994), 89 BCLR (2d) 132 (SC)), most practitioners prefer never to swear an affidavit to support a pre-judgment garnishing order. Whenever possible, the plaintiff should swear the affidavit: see *Samuel and Sons Travel v Right on Travel* (1987), 19 BCLR (2d) 199. The remaining procedure is the same as for post-judgment garnishing orders (below) except that the court retains the money pending the action's outcome.

d) Procedure for Post-Judgment Garnishing Order

Post-judgment garnishing orders are not held to the same level of scrutiny as pre-judgment garnishing orders.

In order to obtain a post-judgement garnishing order, a judgment creditor or their solicitor must swear an affidavit stating:

- a) that a judgment has been recovered;
- b) the amount that is unsatisfied;
- c) that another person, the garnishee, is indebted to the judgment debtor; and
- d) the address of the garnishee's residence in the jurisdiction (s 3(2)).

The affidavit is filed in the court registry along with the form of order requested. The garnishee is then to be served with a copy of the order, which commands them to pay the money into court. A copy of the order must be served on the debtor at once, or within a time allowed by the judge or registrar by memorandum endorsed on the order . Failure to serve a garnishing order on a debtor "at once" may result in the garnishing order being set aside. Whether delayed service is fatal to a garnishing order depends on the circumstances of each case. See *Skybound Developments Ltd. v. Hughes Properties Ltd.* (1985), 1985 CarswellBC 219, 65 BCLR 79 (CA) for a discussion on this topic. The garnishee may dispute indebtedness to the judgment debtor (see **Section II.B: Legal Advice for Debtors Who are Garnished**, below). Where the garnishee pays money, the court keeps the money until it is paid out to the judgment creditor under ss 11, 12, and 13.

Funds held jointly to the credit of the defendant and another person, who is not a party to the action, cannot be garnished, except where a creditor bank exercises its right of offset: see *238344 BC Ltd. v Patriquin et al* (1984), 57 BCLR 224.

e) Payment by Instalments

A debtor against whom a garnishing order has been made may apply for a release of the garnishing order, and for an order for the payment of the debt by instalments on the basis of hardship (see *Bank of Montreal v Monsell* (1994), 58 BCLR 11 (SC)). This order, if granted (it is rare), will bind the debtor's creditors, but will only continue for as long as the debtor is not in default on any payment for more than five days, and so long as no other garnishing order is issued against him or her for any other debt (s 5). The creditor may apply to have the order varied if new evidence of the debtor's finances comes to light.

6. Garnishment of Wages

a) Judgment Required

Garnishment of wages can only occur after a judgment (s 3(4)).

b) Deductions and Exempt Wages

70 percent of any wages due by an employer to an employee is exempt from seizure or attachment under a garnishing order. Therefore, only 30 percent of wages after statutory deductions (i.e. Employment Insurance premiums, Canada Pension Plan, Income Tax, etc.) can be garnished (s 3(5)). However, a single person cannot be left with less than $100 per month (or calculated pro rata for a shorter period), and a person with dependents cannot be left with less than $200 per month (or calculated pro rata for a shorter period) (s 3(5)). However, where wages are garnished to pay maintenance or support for the debtor's family, the exemptions allowed to that person are 50 percent of wages not exceeding $600 per month or 33 and 1/3 percent of wages exceeding $600 per month (*COEA* s.3(7)). These exemptions must not be less than $100 per month (s 4(6)).

Garnishment by the Family Maintenance Enforcement Program is called a Notice of Attachment. The *Family Maintenance Enforcement Act Regulation*, BC Reg 346/88 contains rules about exemptions from attachment. These rules are different than those found in the *COEA*.

c) Variation of Exemption

A debtor whose wages are garnished may apply under s 4 to have the exemption varied. The registrar or judge shall, within three days after receiving the application, notify persons affected by it and a hearing will be held within seven days.

With respect to maintenance orders, under s 18(2) of the *Family Maintenance Enforcement Act*, upon application by a creditor, the court can issue a garnishing order against the debtor without giving notice.

A separate garnishing order must be sworn and issued for each payment of wages to the debtor, since one garnishing order is good for only one debt that is owed to the debtor.

d) Employer's Liability for Firing Employee

No employer may fire or demote an employee because that employee has their wages garnished. An employer who does so is liable on summary conviction to a fine of up to $500 or up to three months in jail or both, and an employee can be reinstated with back pay if they are fired for garnishment of wages (s 27). One should consider the fact that the garnishment may have been the final reason among others for termination, and may be difficult to prove.

7. Garnishment of Statutory Benefits

Benefits including Employment Insurance, Canada Pension Plan, Old Age Security, workers compensation, social assistance and provincial disability benefits are usually exempt from garnishment, seizure or attachment. The exemptions are found in the statutes that govern these respective benefit programs.

However, this exemption from garnishment does not apply to offsets or to debts to the government. For example debts to the federal crown may be collected from Canada Pension Plan benefits. Canada Revenue Agency is now routinely offsetting CPP and other benefits. Social assistance (welfare) is the only statutory benefit that is truly exempt from garnishment. **The creditor or debtor should also be advised that this protection against garnishment may not extend to a bank account into which the exempt income is deposited if it is commingled with other funds.**

8. Enforcing a Judgment Outside of BC

It is possible to register a B.C. judgment in many foreign jurisdictions, including other Canadian provinces. The requirements for registration may differ from jurisdiction to jurisdiction, so the judgment creditor should consult with counsel in the destination jurisdiction to determine the specific requirements.

It is also possible, and sometimes more efficient, to sue on the judgment in the province or country where the judgment debtor's assets are located. Normally the foreign court requires a certificate. To obtain a certificate in BC, creditors must file an application to the court that asks for a certificate to be issued (*COEA* s 30).

C. Unsecured Creditors: Remedies and Options Before Judgment (Liens)

A lien is a claim, encumbrance, or charge on property (real or personal) for payment of a debt, obligation, or duty. In many cases, a creditor is entitled to place a hold or lien over specific property that has benefitted from the individual's material or labour. It acts as security from the individual's material or labour and as security for the payment to the creditor. **Property liens are complicated and potentially serious. Please refer to a lawyer.** The most common liens are listed below.

1. Liens on Land (Builder's Liens)

> **NOTE:** Builder's lien issues involve limitation periods and real property registrations and filings. The **time limitations are extremely strict**; solicitors have been known to lose suits because they filed a day late. **All cases should be referred to a lawyer.** Refer to: *Builder's Lien Act*, SBC 1997, c 45.

Under the current *Builder's Lien Act*, a worker, material supplier, contractor, or sub-contractor who does or causes to be done any work upon, or supplies material, or both, for an improvement, has a lien for the price of the work and material, upon the interest of the owner in the improvement, upon the improvement itself, upon the material delivered to the land, and upon the land itself (s 2). "Price" does not include interest on outstanding accounts: see *Horseman Bros. Holdings Ltd v Lee* (1985), 12 CLR 145 (BCCA).

After a claim of lien is filed against land, the lien-holder may enforce their claim by obtaining a court order for the land to be sold (s 31). When a writ is issued, the lien holder must register a certificate of pending litigation against the land (s

33(1)), which prevents any dealings with the title to the land until after the court determines the validity of the claim. No claim of lien can be filed if the claim is for less than $200 (s 17).

a) Procedure

A claim of lien on land is filed in the Land Title Office (s 33(1)). A claim of lien must be in the prescribed form or it is extinguished (s 22). It takes effect from the time when work began, or when the first material was supplied for which the lien is claimed. A claim of lien has priority over all judgments, executions, attachments, and receiving orders recovered, issued, or made after that date (s 22).

b) Limitation Period

The time for filing a claim of lien is governed by s 20 and the time limitations are strict. **If a certificate of completion has been issued for a contract or subcontract, the claims of lien of the contractor, subcontractor, or any person engaged by or under the contractor or subcontractor must be filed no later than 45 days after the date on which the certificate of completion was issued.** If there is no certificate of completion, a claim of lien may be filed no later than 45 days after the head contract or improvement has been completed, abandoned, or terminated.

If a person agrees to have repairs done, they must withhold 10 percent of the value of the work or material as they are actually provided under the contract or subcontract, or the amount of any payment made on account of the contract or subcontract price, whichever is greater, from the contractor for a period of 55 days after the certificate of completion is issued. This covers the possibility of having to pay workers, subcontractors, and suppliers who were not paid for their services by the contractor. This holdback must not be retained from a worker, material supplier, architect, or engineer (s 4(6)). These funds are to be paid into a separate trust account at the time of payment.

In addition, all improvements done with the knowledge, but not at the request, of the owner will be held to be done at the request of the owner (s 3(1)). This rule does not apply to improvements made after the owner files a notice of interest in the Land Title Office. A notice of interest is a prescribed form warning other persons that the owner's interest in the land is not bound by a lien claimed under the Act for an improvement on the land unless that improvement is undertaken at the express request of the owner (s 1).

Unless an action to enforce a claim of lien is started and a certificate of pending litigation is registered in a Land Title Office within one year, the lien is extinguished (s 33(5)). Note that the owner may require the lien-holder to commence an action within 21 days, by sending the holder of a claim of lien notice in writing (s 33(2)).

2. Liens on Chattels (Repairer's Liens)

a) Possessory Lien and Right to Sell

Under the *Repairer's Lien Act* [*RLA*] every mechanic or other person who has bestowed money, skill or materials upon any chattel for its improvement, has a common law possessory lien on the chattel while it remains in their possession. These people are called garage keepers in the *RLA*. The lien holder may keep the chattel until paid. Where the person holds the chattel for 90 days, they may sell it upon compliance with statutory provisions (s 2). If the lien holder gives up possession prior to filing a lien, they lose the lien (except with liens on automobiles and aircraft, etc.) and are restricted to ordinary remedies in court.

b) Liens on Automobiles, Aircrafts, Boats and Outboard Motors

If a mechanic relinquishes possession of an automobile, aircraft, boat or outboard motor, they do not lose the lien, provided that the debtor, before giving up possession, signed an acknowledgement of indebtedness (e.g. invoice, statement of account, etc.).

c) Procedure

Where a garage keeper gives up possession of an automobile, etc., and afterwards files an affidavit with the registrar, the garage keeper may enforce the lien by issuing a warrant for seizure to a licensed bailiff or the sheriff (s 11). The automobile or aircraft may then be sold by following the procedures for the sale of chattels set out in s 2 (s 12). A warrant may only be issued within 180 days of filing the lien (s 11).

d) Limitation Period

The garage keeper has, pursuant to s 3 of the *RLA*, 21 days to register a lien once they have given up possession.

When an affidavit of lien is filed, the lien will expire after 180 days, unless the automobile, etc., has been seized within that period (s 4).

A copy of the acknowledgement of indebtedness must be included in the affidavit. If the acknowledgement has not been obtained or is not included, the affidavit is invalid.

If a debtor's car has been seized, check with the Registrar-General to determine whether the acknowledgement of indebtedness was properly included, and whether the automobile, etc. was seized before the end of the limitation period: see *Rudd's Heavy Equipment Repairs Ltd v Blackstone Paving Ltd* (1985), 34 ACWS (2d) 244.

3. Buyer's Lien

When a buyer has made a partial or full payment to a seller - and the goods are unascertained or future consumer goods, the buyer can place a lien against all goods that are in, or will come into, the possession of the seller that correspond with the description or sample of goods agreed upon (See Part 9 of the *Sale of Goods Act*). This holds as long as the goods were not sold to someone else. The buyer also has a lien against any bank account where the seller normally deposits the proceeds of sales. This lien has priority over all other security interests, but generally is not valid in bankruptcy. However, if the seller has maintained records or documents that clearly identify the goods for which a deposit was paid, the buyer may be entitled to the lien. Where the seller maintains a separate trust account, the buyer can file a property claim for the trust funds which is in priority to other security interests. See *In the Bankruptcy of Ian Gregory Thow*, 2006 BCSC, 1414 and *In the Matter of the Bankruptcy of Anderson's Engineering Ltd.* 2001 BCSC 1476.

The seller can discharge the lien by handing over the good or returning the buyer's deposit, but the latter will not relieve the seller from the possibility of suit for breach of contract. The buyer's lien permits the buyer, upon application to court, to have goods seized and sold and have the proceeds delivered, or just have the goods delivered.

4. Liens for Storage

The *Warehouse Lien Act* provides that every warehouse owner or operator has a lien on goods deposited with him or her for storage, whether deposited by the owner of goods or by their authority, or by any person entrusted with possession of the goods by the owner, or by their authority (s 2(1)). This right does not apply to unpaid charges for goods previously stored: see *Re Dutton Pacific Forest Products Ltd.* (1980), 117 DLR (3d) 507 (SC), sub nom *Squamish Terminals Ltd. v Price-Waterhouse Limited*. After the warehouser gives the appropriate notices, the goods may be sold to collect the charges (ss 3 and 4).

5. Legal Advice on Liens

If the lien is valid and the debtor wishes to discharge the lien, but disputes the amount of the claim, the debtor may wish to make the payment to the court by application under s 23(1) of the *Builder's Lien Act*. This discharges the liability in respect to the Lien under s 23(2) The court will then assess the proper amount to be paid by receiving evidence, or directing a trial.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 15, 2019.

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IV. Debtors' Options

Being in debt is obviously stressful for debtors. Debtors should be made aware that measures can be taken against overeager creditors. Although creditors may choose to not initiate legal action, a **debtor should not assume that they can ignore their responsibilities.** The debtor may try to communicate with the creditor(s) in hopes of reaching an agreement about repayment, and to avoid potentially costly legal battles. However, this is only to be done when the debtor wishes to acknowledge the debt.

Under the *Limitation Act*, SBC 2012 c. 13. a creditor generally cannot succeed in pursuing a debtor after two years from the last payment or acknowledgement of the debt. Communications with creditors that acknowledge the debt will initiate a new two year time horizon in which a creditor is able to pursue the debtor. To avoid acknowledging a debt, it is important that the following phrase be included in the letter: "This communication is provided solely for the purpose of [state purpose of letter] and does not constitute an acknowledgement of the alleged debt described (above)." This should be carefully considered when a debtor is approaching the end of a two year timeline in which they will be relinquished of legal responsibility for the debt at issue. Since this change to the limitation period, several major creditors have been pursuing debtors through in house collections more aggressively, rather than sending the accounts to third party agencies. The limitation change may also be leading creditors to pursue debtors in court with greater frequency.

If an acknowledgement of the debt occurs, both the debtor and the creditor must be realistic about the situation. Both parties must assess the costs and delay involved in any litigation. In such negotiations, the latter factors may work in favour of the debtor.

A debtor may wish to seek legal advice before discussing or disputing a debt with a creditor, but this is not always necessary. If the debtor believes they do not owe the debt they should consider legal advice. If the debtor believes they owe the money but disputes the amount claimed, they may also want to consider legal advice. However, if the debtor simply cannot meet the payment terms, it is recommended that they seek credit counselling. See Section IV. Dealing With Debt.

Where a creditor is pressuring a debtor for payment, a debtor may send a "without prejudice" letter to the creditor explaining their position and/or offering a settlement. See Section III.F: Settlements, below for further information. When writing a Without Prejudice letter it is critical to include the following phrase: "This communication is provided solely for the purpose of [state purpose of letter] and does not constitute an acknowledgement of the alleged debt described above."

A debtor cannot seek to avoid defending an action in court where that action takes place in another province on the grounds that the court lacks jurisdiction. An action under s 29 of the *COEA* to enforce an extra-provincial default

judgment may proceed where the debtor was served but chose not to offer any defence to the original statement of claim. The creditor simply registers a judgment from another province in B.C., and it becomes a B.C. judgment. Furthermore, as a result of the decisions in *Morguard Investments v De Savoye*, [1990] 3 SCR 1077 and *Beals v Saldanha*, [2003] 3 SCR 416, 2003 SCC 72, American and other international default judgments can be easily enforced in B.C.

The process for enforcing a foreign judgment is simplified where the judgment originates from one of the reciprocating states listed in the COEA: http://www.bclaws.ca/civix/document/id/loo95/loo95/courtorderenflist.Judgments from one of the foregoing reciprocating states can simply be registered in the B.C.S.C.

If the judgement does not originate from a reciprocating state, a creditor must bring an action on the judgment or on the original cause of action instead. This process requires a trial on the judgment or original action, where the court will determine whether to enforce the foreign judgment.

> **NOTE:** There have been judgments for the creditor where the creditor pursues the debtor after the two-year timeline. This may happen where the creditor is inexperienced or neglectful, the debtor does not defend themselves, or the period between payments is not reviewed. If the judgment has been issued by the court, it may be more cost-effective to try and settle the matter with the creditor instead of challenge it in court.

A. Legal Advice for Debtors Under Secured Transactions

The information in this section is specific to the defendant's point of view, but is most usefully read in conjunction with Section II: Creditors' Remedies. If a student needs more information, that section may help to complete the picture.

Where the debtor is in default under a security agreement, s 56 of the PPSA provides that the secured party has against the debtor the rights and remedies provided in the security agreement (provided such do not derogate those rights given to the debtor by the PPSA) as well as those specifically provided by the Act.

Sections 58 and 59, contain rules for seizing and disposing of collateral. These sections provide that, unless the security agreement states otherwise, where the debtor defaults on their payment, the creditor may elect to take possession of the collateral pursuant to the contract, dispose of the collateral and then sue for any amount still owing. Section 67, provides for a more limited set of remedies where the collateral takes the form of consumer goods – known as the "seize or sue" rule. Formerly, under legislation repealed by the PPSA, all creditors could only seize or sue but not both. The principle of "seize or sue" still applies to "consumer goods" (see Section II.A.6.: Seizure and Section II.A.7: Disposal of Collateral); it no longer applies to commercial goods. The PPSA defines "consumer goods" as those goods that are used or acquired for use primarily for personal, family or household purposes. "Commercial goods" are those goods used for commercial purposes.

1. Notice

> **NOTE:** The forms of notices under the PPSA depend on a number of variables, including the nature of the security and the terms of the security agreement. Creditors or debtors seeking advice concerning the validity of notices should be referred to a lawyer.

Subject to the circumstances where notice is not required as per s 59 (17) (i.e. for perishable collateral, collateral requiring disproportionately high storage costs relative to its value, etc.), the requirements for notice are outlined in ss 59(6) and (10): the secured party or receiver, as the case may be, must provide at least 20 days' notice of an intention to dispose of the collateral to parties including the debtor and any other creditor. The clinician should check to make sure that the debtor received notice in time and in the correct form. See Section II.A.8: Notice to Dispose of Collateral for a complete account of the notice requirements that must be met under the PPSA.

2. Limitation of the Right of Seizure

With respect to collateral which is a "consumer good," where the debtor has paid at least two-thirds of the total amount secured, the creditor may not seize the good without first obtaining a court order.

3. Rights of a Debtor on Realization

The PPSA preserves the debtor's (but not the secured party's) rights and remedies under other statutes that are not inconsistent with the *PPSA*, as well as the specific rights and remedies provided in the security agreement, ss 17 and 56(2)(b).

4. Rights of Redemption and Reinstatement

Under s 62, a debtor has redemption rights. Any person entitled to notice of a pending disposition of collateral may "redeem" the collateral by tendering to the secured party fulfilment of the obligations secured by the collateral plus the reasonable expenses incurred by the secured party associated in seizing the collateral or otherwise preparing it for disposition. The aforementioned obligations may simply be the amount in arrears; however, it is more often the case that an acceleration clause applies, and that the obligations will be the total amount of the debt. Where the security agreement contains an acceleration clause, the debtor may apply to court for relief from the consequences of default or for an order staying enforcement of the security agreement's acceleration provision.

Where the collateral is a "consumer good", the calculation of the obligation secured and the obligation that must be tendered is varied. The debtor may "reinstate" the security agreement by paying only the monies actually in arrears – negating the operation of any acceleration clause. The debtor may waive this right but any such agreement must be in writing after default. Note that the number of times the debtor may reinstate the security agreement is limited depending on the period of time for repayment set out in the security agreement; however, the frequency of reinstatement may be varied by agreement between the parties.

5. Execution

See Section II.B.2: Execution.

B. Legal Advice for Debtors Who are Garnished

The details of how an order for garnishment is obtained are found in the creditor's remedy portion of the chapter, but debtors should be reminded that hardship may be a defence to garnishment. Therefore, a pre or post-judgment garnishment order may be varied where it would be unfair to the judgment debtor; it is generally easier to have a pre-judgment order varied.

Under ss 3 or 4 of the *COEA*, a judge has the discretion to set aside a garnishing order once the debtor has made an application. A judge will consider:

For pre-judgment orders only:

1. the strengths and weaknesses of the defendant's defence to the claim.

For both pre and post-judgment orders:

1. whether the judgment leaves the debtor with an inordinately low cash flow;
2. whether there is a risk that the grant or continuance of the order will cause an injustice to the debtor;
3. whether there is a possibility of abuse of process by the creditor; and
4. whether the garnishment of certain payments, such as social assistance benefits, run counter to public policy

Furthermore, s 4(4) of the *COEA* describes the limits to which a debtor's wages may be garnished. Thus, if a debtor has a low income or has savings they depend on for the necessities of life, they can have the amount that is being garnished (or proposed to be garnished) reduced, the terms of the order varied, or the garnishment ended. A person who is subject to a Notice of Attachment under the Family Maintenance Enforcement Program can also try to have the amount that is being 'garnished' reduced. Additionally, a garnishing order from a civil action has to be renewed monthly, while a garnishing orderfor maintenance does not.

If the debtor receives income from a statutory benefit that is exempt from garnishment (e.g social assistance), they should be advised as to how to protect their money after it is paid to them. **The right of offset allows banks to seize deposited funds from an account at that institution to cover a loan or account in default. If funds which are exempt from garnishment are deposited into a regular account that is commingled with other funds, they will not be protected from seizure by the financial institution. Their income should be safe if it is paid by direct deposit into an account at an institution to which they do not owe any money.** No other deposits should ever be made into this account. It is also helpful to speak to a branch manager so that they understand the purpose of the account. **A debtor should be advised that they have a right to open a personal bank account at a chartered bank, even if they do not have a job or do not have money to put in the account right away.** However, the applicant can be refused if the bank employee suspects fraud or experiences harassment from the applicant. For further information, see: http://www.fcac-acfc.gc.ca and navigate through the website by clicking on Consumers > Resources > Publications > Banking > Opening a personal banking account: understanding your rights.

> **NOTE:** This right to open a personal account does not extend to credit unions. Credit unions are regulated under provincial legislation rather than the federal act and they have wider powers to deny applicants. For further information, visit http://www.fic.gov.bc.ca.

C. Harassment by Debt Collectors

The *Business Practices and Consumer Protection Act*, [*BPCPA*] provides for the licensing and regulation of debt collectors, which is carried out by Consumer Protection BC. The statute provides that jurisdiction is determined by the location of the debtor. Under the statute, Consumer Protection BC has wide powers of investigation.

1. Unreasonable Collection Practices

A collector must not communicate with a debtor, a member of the debtor's family, a relative, a neighbour or the debtor's employer in a manner or with a frequency as to constitute harassment. The following constitutes harassment:

- a) using threatening, profane, intimidating or coercive language;
- b) exerting undue, excessive or unreasonable pressure; and/or
- c) publishing or threatening to publish a debtor's failure to pay (*BPCPA*, s.114).

A collector cannot communicate with a debtor at the debtor's place of employment unless one of the following conditions is met:

- a) the collector does not have the home address or telephone number for the debtor and the collector contacts the debtor solely for the purpose of requesting the debtor's home address or telephone number or both;
- b) the collector has attempted to contact the debtor at the debtor's home address or telephone number, but the collector has not contacted the debtor in any of these attempts (the collector is limited to one verbal attempt at the debtor's place of employment (s 116(2)), meaning one call even if the debtor doesn't answer or hangs up); or
- c) the collector has been authorized by the debtor to communicate with the debtor at the debtor's place of employment (s 116 (1)).

When the collector is contacting the debtor, they must indicate the name of the creditor with whom the debt was incurred, the amount of the debt, and the identity and authority of the collector to collect the debt from the debtor (s 116 (3)).

The collector must only contact a debtor through writing if the debtor provides a mailing address and notifies the collector in writing that they wish to be contacted only by writing. (s 116 (4)). If the debtor does not respond or make an effort to respond to the collector's written correspondence, the collector can contact the debtor in other ways.

In collecting or attempting to collect payment of debt, a collector must not supply any false or misleading information; misrepresent the purpose of communication; misrepresent the identity of the collector or, if different, the creditor; or use, without lawful authority, a summons, notice, demand, or other document that suggest or implies a connection with any court inside Canada (s.123).

If a creditor does not obey the *BPCPA*, the debtor may report the creditor to Consumer Protection BC [1].

2. Limits on Right of Seizure

Under s 122, no collector, whether on their own behalf or on behalf of another, directly, indirectly, or through others, shall:

- a) unless there is a court order to the contrary, remove from the debtor's private dwelling any personal property claimed under seizure, distress, or repossession, in the absence of the debtor, the debtor's spouse, the debtor's agent, or an adult resident in the debtor's dwelling;
- b) seize, repossess or levy distress against any chattel not specifically charged or mortgaged, or to which legal claim may not be made under a statute, court judgment, or court order; or
- c) remove, seize, repossess, or levy distress against any chattel during a day or during the hours of a day when such removal, seizure, repossession or distress is prohibited by regulations under this Act.

3. Consequences of Contravention of the Business Practices and Consumer Protection Act

Where there is evidence of misconduct by the debt collector, the Director may suspend, cancel, or refuse to issue their licence (s 146(1)). Such conduct includes (s 146(2)):

- a) contravening this Act or regulations;
- b) failing to meet the minimum requirements for a licence;
- c) conduct by the debt collector that shows that they are unfit to have a licence; or
- d) being convicted of an offence under Canadian law.

4. Legal Advice for a Harassed Debtor

If there may be a violation of the *Business Practices and Consumer Protection Act*, the debtor should do the following:

- a) find out the name of the collector and/or agency;
- b) record the exact words or practice followed by the debt collector or the agency; and
- c) detail the time and dates of the calls or visits.

With the above information the debtor should contact Consumer Protection BC for the name of the complaints manager for the collection agency the debtor is dealing with. This complaints manager will work with the debtor to resolve the complaint, including disciplinary action, if appropriate. Their website is http://www.consumerprotectionbc.ca and includes resources regarding consumer and debtor rights, as well as dispute resolution. It also includes a form for registering a complaint with Consumer Protection BC.

Finally, if the debtor suffered damages or inconvenience as a result of the agency's collection practices, a Small Claims action may be commenced (s 171, 172).

D. Credit Reporting Agencies

Businesses offering goods or services on credit often rely on credit bureau reports for financial and prior debt information on their customers. See *Business Practices and Consumer Protection Act, ss* 106-112.

The *Business Practices and Consumer Protection Act* regulates the activities of the credit bureaus in order to minimize unfair treatment of the party seeking credit. Federal legislation, such as the *Personal Information Protection and Electronic Documents Act* [*PIPEDA*] and the *Privacy Act*, also outline the requirements for organizations in their use, collection, and disclosure of personal information in their business practices. Credit information that these bureaus can disclose is the most common type of personal information, and includes one's:

- a) name, date of birth and address;
- b) current and former marital status;
- c) current and former place of work;
- d) payment habits; and
- e) debts owing.

A credit reporting agency cannot give out an individual's personal credit report without that individual's consent. When one seeks credit, they will be asked to consent to the lender obtaining a credit report or a credit check. (After consent is given, the lender can obtain a "soft check" periodically meaning they can view the report relating to their loans).

Certain information cannot be included in a credit report, e.g., criminal charges (unless the individual was convicted), convictions more than six years old, and information about race, religion or political affiliation.

Credit reporting agencies' records are not always accurate and up to date. The quality and accuracy of the credit information depends on the credit information provided by the credit granting companies who sign up with the credit reporting agencies. If an individual finds incorrect information on their file, they can report the error to the agency that provided the information to have it corrected. If an individual has proof that their credit report contains an error and they are unable to resolve it with the creditor directly, the individual should contact the credit reporting agencies who are reporting the incorrect information.

The agencies will assist them with finding a resolution. **Any individual who is a victim of identity theft should immediately file a police report**. The *BPCPA* allows individuals to provide a 100 word explanation to the reporting agency, which is to be kept and reported with their file (s.111); this may be a useful provision if a business has reported a disputed claim regarding yourself, or if you are a victim of identity theft. Any victim of identity theft is recommended to post a comment on their credit report. This notifies creditors of the fact that the identity theft has taken place, and prevents additional credit being granted without a thorough review by the creditor. It is an offence (punishable by a fine of up to $10,000 or imprisonment for up to 12 months) to knowingly supply false or misleading information to a reporting agency (s 112).

Consumers may obtain their own credit report for free at least once a year by telephoning the credit bureaus directly or completing the form available on their websites Alternatively, a consumer can obtain an instant credit report by using a credit card to pay a one time fee.

There are currently two main credit reporting agencies in Canada, listed below.

Equifax

Toll-free: 1-800-465-7166

Website: http://www.equifax.ca

TransUnion

Toll-free: 1-800-663-9980 (English); 1-877-713-3393 (French)

Website: http://www.transunion.ca

> **NOTE:** Individuals should check their credit history regularly. Industry specialists suggest once per year. Credit reporting agencies will send a person a copy of their credit history by regular mail for free. **As each agency operates in a different matter, individuals are encouraged to request their credit history from both agencies, as they will likely be different.**

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References

[1] http://www.consumerprotectionbc.ca

V. Dealing with Debt

A. Introduction

> **NOTE:** The following applies to individuals only.

Before giving or receiving advice dealing with debt, ensure that the debtor, in fact, is liable for the alleged debts. Be sure to determine who the actual creditor is. When a creditor assigns an account to a third party agency the third party does not become the creditor. There are situations, however, where third parties purchase accounts from creditors and thereby become the creditors themselves. Creditor remedies can differ depending on the type of creditor, in particular if a debt is owed to the government.

Most people do not seek advice until long after they have become overburdened with debts, however, getting help sooner rather than later will leave people with more options available to them. Financial counselling may be of assistance to explore which options will work best.

> **NOTE: Many counsellors and trustees provide an initial consultation at no cost. Consumers should be aware that unless they are going to meet with a lawyer they need not pay for an initial consultation.**

B. Debtors' Assistance Referrals and Resources

The Credit Counselling Society is a non-profit organization that assists people who are experiencing difficulties with debts. They provide free and confidential counselling with highly trained counsellors. They can answer questions over the phone or by online chat, Monday – Saturday, with extended hours.

> **NOTE: Exercise caution when hiring unregulated companies that promise to "reduce" a consumer's debt. Effective April 1, 2016, any debt repayment agent and any corporation that collects and/or settles debt in BC should be registered with the Consumer Protection Agency (the Credit Counselling Society is a licensed organization). For information on your rights relating to debt collection, refer to the Debt Collection tab on the Consumer Protection Agency website [1].** Please see the *Business Practices and Consumer Protection Act,* s 127 for more information on debt repayment agents.

Credit Counselling Society

Online	Website [2]
Address	330 - 435 Columbia Street New Westminster, B.C. V3L 5N8
Phone	1-888-527-8999

The Financial Consumer Agency of Canada ("FCAC") publishes a great deal of useful information on consumer's rights as they relate to financial institutions, including information on opening personal banking accounts and guidelines for garnishing joint accounts: see http://www.fcac-acfc.gc.ca. You should be advised that credit unions in B.C. are governed by the provincial Financial Institutions Commission ("FICOM"). See http://www.fic.gov.bc.ca for further details.

The Public Legal Education and Information Network's "Clicklaw" web site has a helpful section titled "Debt". Articles and information on various topics relating to consumer protection, debt and Small Claims Court in British Columbia can be found online at: http://www.clicklaw.bc.ca.

Information on how to deal with debt collectors and collection agencies and harassment can be found on the Clicklaw website or through Consumer Protection BC online at: http://www.consumerprotectionbc.ca.

The Office of the Superintendent of Bankruptcy in Canada, an agency of Industry Canada, assists debtors by providing them with many useful online resources such as "Dealing with Debt: A Consumer's Guide" and "Debtor's Frequently Asked Questions". A full directory of licensed trustees in bankruptcy is available on their website: http://www.ic.gc.ca/app/osb/tds/search.html?lang=eng. A licensed trustee in bankruptcy will provide a free confidential assessment of your financial affairs and advise you of the merits and consequences of filing a consumer proposal or bankruptcy.

For further information the Office of the Superintendent of Bankruptcy can be contacted at:

Office of the Superintendent of Bankruptcy

Online	Website [3]
Address	2000 - 300 West Georgia Street Vancouver, B.C. V6B 6E1
Phone	(877) 376-9902 Fax: (604) 666-4610

Also refer to section F below, *Settlements*.

C. Communicating with Creditors when Unable to Make Contractual Payments

NOTE: Before communicating with creditors, debtors should be aware of the consequences of acknowledging a debt as a result of the *Limitation Act* SBC 2012 c 13. Under the recently revised Act, for debts last acknowledged from June 1, 2013 onwards, after two years since the last acknowledgement of a debt by the debtor, a creditor has no legal recourse for pursuing the unpaid debt. Therefore, by instructing a debtor to acknowledge a debt, even implicitly, a clinician will create a renewed two year time frame for the creditor to initiate legal action against the debtor. See note above, at the start of Section III, for further information.

NOTE: Debtors should also be aware that if a judgement has been rendered against them it can be enforced for 10 years after the date of judgement (s 7). Refer to the *Limitation Act* for exceptions to this rule (s 23).

Depending on a consumer's circumstances, they may need to contact their creditors to ask for assistance in getting through financially difficult times. Most people truly want to honour their commitments; however, they may not be able to do so at this time. If someone needs help with determining what their budget is and if they have surplus income to offer their creditors a reduced payment, the Credit Counselling Society is able to help consumers at no cost: 1-888-527-8999.

If the debtor has enough surplus income in their budget to repay their debt, they may wish to contact their creditors in writing and offer reduced payments until they are in a position to make contractual payments again. **This is not a legal arrangement.** A sample letter requesting reduced payments can be found on CCS's website at http:/ / www. nomoredebts.org/debt-help/dealing-with-creditors/debt-letters.html.

The steps involved in this reduced payment are:

1. determine the amount(s) owed and to whom (verify with the creditors rather than relying on the debtor);
2. determine how much money is available to pay to creditors, keeping the basic standard of living in mind;
3. consider if the debtor has assets, bank accounts or investments at risk;
4. consider the nature of the debt and if someone else would be impacted if the debtor is unable to make full payment, e.g. a joint credit card;
5. work out a payment plan for the creditors on a pro rata basis;
6. write the creditor a short letter outlining your situation and providing proof of reduced financial capacity, e.g. EI stub;
7. send or fax the above letter with supporting documentation and retain proof of the creditor receiving said letter (e.g. fax transmission report), retain a copy for your file;
8. update creditor periodically, e.g. if debtor's situation stays the same or improves and if they're able to resume contractual payments.

NOTE: Contact the Credit Counselling Society for free help with this process if needed. The creditors may feel the reduced payments are not acceptable, but would likely not pursue alternative legal action if this is all the debtor can afford at this time. Communication with the creditors is vital, especially if a consumer has no ability make

payments at this time.

D. Debt Consolidation and Refinancing

Creditors will often offer refinancing or debt consolidation as the solution to the debtor's financial problem. The interest rate may be higher for the consolidation. Terms and conditions will determine total interest paid and the payment period. If making payments in the first place is the problem, consolidation loans may not be the solution. All creditors should be treated on a pro rata basis; if the consolidation only satisfies a particular creditor, the debtor should ensure they are at least able to meet the minimum payments owing to all other creditors.

E. Voluntary Debt Repayment Programs

When someone has some ability to repay their debts, but is unable to meet the minimum payment requirements of their creditors, contact the Credit Counselling Society for help determining if the Debt Management Program (DMP) at the Society might be an option. This is an agreement between a debtor, to make set, reduced monthly payments, and their creditors, who in return agree to accept reduced payments and who often suspend or reduce ongoing interest charges. A client agrees not to incur further debt while on the program. If a debtor defaults from the program, creditors may proceed with any and all remedies available to them. The debtor should contact the Credit Counselling Society for more information at 1-888-527-8999.

> **NOTE:** Though non-profit, the Credit Counselling Society does charge a small fee to administer the Debt Management Program (DMP). While counselling is free, CCS charges a one time setup fee of no more than the average monthly payment to creditors to a maximum of $75 upon entering the DMP. Once a debtor has entered intot he program and begins making payments, and only upon written acceptance by creditors, CCS charges 10% of a debtor's deposit to a maximum of $75 per month. CCS will consider reducing or waiving fees where they would become a barrier to debtors needing the help of a DMP.

F. Settlements

Depending on the consumer's circumstances, their creditors may be willing to accept a settlement on a portion of what is owed. If a consumer has funds available, they can approach their creditors in writing to accept a onetime lump sum payment. In exchange, the creditors agree to report the debt as "settled' to all credit reporting agencies. It is essential that the consumer get this agreement in writing from the creditors before sending any money for the settlement.

Debtors should be advised that some agencies that advertise "debt settlement" services may take advantage of debtors. Debtors should be aware of agencies that demand upfront fees before a settlement is negotiated. During the pay period of a settlement there is no protection from legal action or garnishes. Contact the Credit Counselling Society for help with the settlement process if needed. **Please consult the Financial Consumer Agency of Canada's warning regarding debt reduction companies at:**

http://www.fcac-acfc.gc.ca/eng/about/news/pages/ConsAlert-ConsAvis-0.aspx?itemid=170

G. Government Debt

The government is the most powerful creditor in Canada and has unique remedies available to it. For example see Section II.B.6: Garnishment of Statutory Benefits. There is also a category of government entities called “tax payer support entities.” For debts owed to these agencies the six year limitation period still applies. Commercial crown corporations of self-sufficient entities do not belong to this category. Unpaid ambulance fees and Medical Services Plan premiums are example of tax payer support entities.

H. Services a Trustee Provides Under the Bankruptcy and Insolvency Act

The first appointment with a licensed insolvency trustee in BC is always free. During this appointment, the Trustee should outline the implications and information a consumer needs to consider before taking any action. This is the time to ask questions to understand the process and long term effect on your credit. A Trustee should be willing to take the time to explain everything thoroughly as there is no backing out once someone has signed the documents to assign themselves into bankruptcy. The same limitation does not exist with consumer proposals. **For more information on how a licensed insolvency trustee helps with debt, refer to the Office of the Superintendent of Bankruptcy video series at**

http://www.ic.gc.ca/iec/site/bsf-osb.nsf/eng/br03567.html

1. Consumer Proposal

Depending on the nature and amount of the debt(s) and the consumer’s ability to pay, a consumer proposal should be considered. Creditors may recover more money in consumer proposals than in bankruptcy. However, there are windfalls that arise in bankruptcies that can result in unexpected recoveries. A consumer proposal is a legal arrangement with creditors to repay a portion of the amounts owing. Assets are not usually jeopardized (as they may be in bankruptcy) and the interest stops accruing as long as payments are being made. Legal action is not effective while the consumer proposal arrangement is in place.

Filing a consumer proposal is not free. If the CP is accepted by the creditors, the first $1,500 is paid to the trustee. The first $1,500 is deducted before calculating the distribution to creditors. Consumers are also expected to pay the administrator 20% of the moneys distributed to creditors under the consumer proposal There may also be more fees [*Bankruptcy and Insolvency General Rules,* CRC, c 368, s 129(1)]. Please consult a Trustee for more detailed information. **For more information on consumer proposals, refer to the Office of the Superintendent of Bankruptcy in Canada's description of consumer proposals at**

https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01976.html

2. Personal Bankruptcy

Personal Bankruptcy is governed by the BIA, and is based on the premise that the debtor is completely unable to pay their debts, even at a reduced rate, and does not have assets to liquidate (debtor is insolvent). Bankruptcy is one option to deal with a heavy debt burden. The record of a bankruptcy stays on a person’s credit record for a **minimum** of six years from the day the debts are discharged for a first-time bankrupt. This increases to 14 years for a second-time bankrupt. This does not necessarily mean that credit will be denied, only that the bankruptcy will be a factor that a potential creditor will consider when deciding whether or not to extend credit to that person. Certain professionals (such as lawyers, accountants, and mortgage brokers) may be required to report their bankruptcy to their professional organization. The BIA does provide that no person may be terminated just for filing bankruptcy.

The debtor is required by law to engage a trustee to administer their bankruptcy. Personal bankruptcy using a trustee may cost the debtor approximately $1 685 (including $85 per counselling session, of which two are mandatory for a first time bankruptcy and GST). Usually the trustee will require a minimum payment to initiate the proceedings; however, the first appointment with a Trustee is free. The timelines for automatic discharge, in addition to being subject to fulfilment of the terms and conditions of the bankruptcy are dependent on both bankruptcy history and the individual's surplus income (as prescribed by the Superintendent of Bankruptcy standards – Directive 11R2).

If all the conditions of bankruptcy have been met, there are no facts for which a discharge may be refused pursuant to s 173 of the BIA, and no objections have been filed by creditors or the Superintendent of Bankruptcy Canada;

- A first-time bankrupt with surplus income payable less than $100 is automatically discharged after nine months;
- A first-time bankruptcy with surplus income greater than or equal to $100 is automatically discharged after 21 months;
- A second-time bankruptcy with surplus income less than $100 is automatically discharged after 24 months;
- A second-time bankruptcy with surplus income greater or equal to than $100 is automatically discharged after 36 months.

The period of the discharge may also be extended for certain prescribed reasons under BIA. Consult the Office of the Superintendent of Bankruptcy or trustee.

a) Debts That Bankruptcy Will Not Discharge

A debtor should know that filing for bankruptcy will not discharge their obligations, such as:

- an amount owing on a fine, penalty or restitution order imposed by a court in respect of an offence or debt arising out of a recognizance or bail;
- an award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted or sexual assault (including wrongful death resulting therefrom);
- a court order or a separation agreement regarding alimony or maintenance;
- an amount obtained under false pretences while acting in a fiduciary capacity;
- a debt resulting from obtaining property or services by false pretences or by fraudulent misrepresentation (other than a debt arising from an equity claim);
- any debt or obligation for federal and provincial student loans where the date of bankruptcy occurs before the date on which the bankrupt ceased to be a full or part-time student or, as of June 18, 1998 through an amendment to the Act, within 7 years after the date on which the bankrupt ceased to be a full or part-time student (BIA, s 178(1)(g)).

The full list of exceptions may be found in s 178(1) of the BIA. Questions about bankruptcy, including specific questions regarding Canada Student Loans, may be directed to a licensed insolvency trustee or the Superintendent of Bankruptcy, at 1-877-376-9902.

b) Assets That May be Retained by the Bankrupt in B.C.

The bankrupt may retain household furnishings and appliances valued at up to $4,000 and any other goods or property exempt from execution under provincial and federal statutes (COEA, s 71(1); Court Order Enforcement Exemption Regulation, B.C. Reg. 28/98, BIA, s 67(1) and relevant amendments).

See Section II.B.3: Exemptions from Seizure for a list of what the *COEA* allows a debtor to retain.

All RRSPs and RRIFs are exempt from seizure in a bankruptcy (except for contributions made in the year preceding bankruptcy).

Any material transaction made within the past 5 years is reviewable. If a preference was given to a creditor, the trustee may act on the transaction. Lastly, any tax refund for the year of bankruptcy or any prior year becomes part of the bankruptcy, and will go to a trustee for the benefit of the creditors., or it may be seized by the government to fulfil a government debt.

> **NOTE:** If the debtor (except anyone in commercial activities (self-employed or business) or in jail) chooses a trustee and is rejected (due to a fee charge) because they are unable to pay, they should contact the Office of the Superintendent of Bankruptcy ("OSB"), and ask to participate in the Bankruptcy Assistance Program. The debtor must obtain a written refusal from 2 trustees and, if they qualify for the program, will then be assigned a trustee in the referral program for a reduced fee (not for free). This program is not available to everyone that cannot afford to pay. Further, it does not exclude non-exempt assets such as GST and income tax refunds from seizure. Information can be found at the Bankruptcy Assistance Program website [4] or by calling the OSB's national number at 1-877-376-9902.

> **NOTE:** A debtor who is on a low end fixed income, such as a fixed income pension, with circumstances unlikely to change may have no need to declare bankruptcy as they would be, in essence, judgment-proof. Refer to section C above, Communicating with Creditors when Unable to Make Contractual Payments.

I. Student Loan Debt

The law surrounding student loans and grants is constantly changing, and varies greatly between provincial jurisdictions. Students should visit the federal and provincial student loan websites to get up to date information about repayment assistance. The information found below is up to date as of August of 2019.

1. Federal Student Loan Debt

The National Student Loan Service Centre (NSLSC) is responsible for consolidating all federal student debt in Canada. In certain circumstances, students can apply for the Repayment Assistance Plan (RAP) and receive payment relief. Successful applicants may receive temporary interest relief, permanent interest relief, and in the case of a student with a disability a portion of the principal amount of their loan may be forgiven. The level of assistance a student will receive is dependent on their income level, the size of their family, and whether they have a disability.

For further information on getting repayment assistance for Federal student loans, see http://www.canlearn.ca/eng/loans_grants/repayment/help/index.shtml.

2. Provincial Student Loan Debt

BC has a student loans service program called Student Aid BC. For further information on how to get repayment assistance for BC Provincial Student Loans, see https://studentaidbc.ca/repay/repayment-help.

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References

[1] http://www.consumerprotectionbc.ca/
[2] http://www.nomoredebts.org
[3] http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/home
[4] http://www.servicecanada.gc.ca/eng/goc/bankruptcy_assistance.shtml

Appendix A: Relevant Forms

The following are debt-related forms and documents. These, and other Small Claims forms may be found online [1].

Pre-judgment Garnishment

A. COEA Form F: Garnishing Order Before Judgment

B. COEA Form B: Affidavit in Support of Garnishing Order Before Judgment

C. COEA Form A: Affidavit in Support of Garnishing Order Before Action

D. Affidavit in Support of Motion to Set Aside Garnishing Order (Enter into search box to locate)

E. Order To Set Aside Garnishing Order (Enter into search box to locate)

Post-judgment Garnishment

F. COEA Form D: Garnishing Order After Judgment

G. COEA Form B: Affidavit In Support Of Garnishing Order After Judgment

H. COEA Form E: Garnishing Order (Absolute)

I. Form 29; Enforcing a British Columbia Judgment in a Reciprocating Foreign Jurisdiction (Certificate: Pursuant to Schedule 2, COEA)

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References

[1] http://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/small-claims-forms

Appendix B: Examination Checklist

Students should consult the B.C. Law Society web site [1] for an extensive checklist for examination in aid of execution. Although this checklist is for the Supreme Court process, it is useful for Small Claims payment hearings as well.

1. Preliminary Matters
2. Employment
3. Real Property
4. Other Property (Legal or Equitable)
5. Dispositions of Property
6. Spouse
7. Family
8. Debts
9. Personal Budget
10. Litigation and Judgments
11. Satisfaction of the Judgment
12. Supplementary Questions for a Corporate Debtor

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References

[1] http://www.lawsociety.bc.ca

Chapter Eleven - Consumer Protection

I. Introduction

A. Introduction

This chapter provides a general discussion of consumer protections laws in British Columbia.

While parts of this chapter are concerned with the rights of sellers, the main objective is to aid consumers who want to enforce contractual obligations, cancel contractual obligations, obtain damages for a breach of contract, or file a complaint with the appropriate regulator. This chapter should also help in determining contractual and other obligations of the parties, and whether or not those obligations are enforceable.

B. Common Law vs. Statute

An aggrieved party may have remedies under statutory law, the common law, or both. B.C. statutes provide better protection to consumers than is afforded by the common law. Since legislation takes precedence over the common law, it is crucial to check all relevant statutes when faced with the legal matters of consumers. For example, some contracts that are enforceable at common law are rendered unenforceable by relevant statutes.

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II. Governing Legislation and Resources

A. Legislation

The statutes to consult include the following:

Sale of Goods Act [1], RSBC 1996, c 410 [*SGA*].

- This legislation regulates contracts for the sale (or lease) of goods, but not services. The *SGA* is not concerned with the ethics of the transaction unless there is also a defect in the manner in which the contract is carried out (e.g. if the goods are not delivered, are damaged, or are unfit for the purpose for which they were sold). The protections are stronger for new goods than for goods that the purchaser knows are used.

Business Practices and Consumer Protection Act [2], SBC 2004, c 2 [*BPCPA*].

- The *BPCPA* is concerned with the ethics of a transaction, such as deceptive and unconscionable practices as well as information requirements for many types of consumer contracts. The BPCPA also gives consumers the right under some circumstances to get out of contracts in which the consumer has ongoing obligations under the contract, such as time share, gym memberships, and book of the month contracts. If the client wishes to get out of future obligations under a contract, see Section V.A: Direct Sales, below. In addition, the Act regulates businesses that offer such contracts and other transactions that are open to abuse, such as direct sales and payday lenders. One of the key features of the Act is that it provides for statutory causes of action for certain kinds of consumer transactions.

Motor Dealer Act [3], RSBC 1996, c 316 [*MDA*].

- The *MDA* sets out the requirements for motor dealers selling vehicles to retail consumers. It requires disclosure of the prior history of a car (for example, its use as a taxi) and any damage suffered over $2,000, and other important information. Clients with consumer complaints regarding car dealers should be directed to the Vehicle Sales Authority of British Columbia, which has the authority to investigate consumer complaints and provide dispute resolution. Note that some amendments to the MDA regarding the Customer Compensation Fund recently came into force on 2016-05-19.

Personal Property Security Act [4], RSBC 1996, c 359 [*PPSA*].

- The PPSA governs all security agreements as well as chattel mortgages, conditional sales, floating charges, pledges, trust indentures, trust receipts, assignments, consignments, leases, trusts, and transfers of chattel paper that secure payment or performance of an obligation. A security interest is an interest in goods or other property that secures payment or performance of an obligation for a lender. It used to matter who retained title; however, recent cases abolished title as the most important factor. See also Section VI: Conditional Sales Contracts and Security Agreements.

Bills of Exchange Act [5], RSC 1985, c. B-4, ss. 188-192.

- This Act states that a promissory note is a written promise to pay a specified sum of money, at a fixed time or on demand. These are commonly used in conjunction with executory contracts, where one party has fulfilled his or her material obligations and the other party still has some or all outstanding.

B. Resources

A list of resources which clients might find useful:

Consumer Protection BC (previously the Business Practices and Consumer Protection Authority)

Toll-free: 1-888-564-9963

Website: http://www.consumerprotectionbc.ca

- Consumer Protection BC operates at arm’s length from government and has responsibility for a range of licensing, inspection, investigation, and enforcement activities. If consumer protection legislation appears to have been violated, the aggrieved party can phone Consumer Protection BC to report the infraction. This office has a mandate to receive and act on consumer complaints generally.

NOTE: This is the office to contact to seek action by the Director under the statutory causes of action found in consumer protection legislation.

Vehicle Sales Authority of British Columbia

Telephone: (604) 574-5050

Website: http://www.mvsabc.com

- The VSA is a regulatory agency that oversees the retail sales of motor vehicles in British Columbia. This is the office to contact if a consumer believes that the MDA has been violated or one has questions regarding the provisions in the MDA.

Better Business Bureau

Telephone: (604) 682-2711 or 1-888-803-1222

Website: http://www.bbb.org/mbc

- Businesses voluntarily join this association, which provides self-policing of the business community. Complaints against a member company can be made at this office, which offers an extra-judicial resolution process for conflicts between consumers and member companies. Information about a specific member company can also be obtained.

Dial-a-Law

Telephone: (604) 687-4680 or 1-800-565-5297

Website: http://www.cbabc.org/For-the-Public/Dial-A-Law

- This service provides pre-recorded summaries on the law pertaining to a wide variety of issues in consumer law. Some useful tapes include:
  - Door-to-Door Sales, Time-Shares and Contracts You Can Cancel: 255
  - Shopping by Phone, Mail or the Internet: 256
  - Buying Defective Goods: 257
  - Dishonest Business Practices and Schemes: 260

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References

[1] http://www.bclaws.ca/civix/document/id/complete/statreg/96410_01
[2] http://www.bclaws.ca/civix/document/id/complete/statreg/04002_00
[3] http://www.bclaws.ca/civix/document/id/complete/statreg/96316_01
[4] http://www.bclaws.ca/civix/document/id/complete/statreg/96359_01
[5] https://laws-lois.justice.gc.ca/eng/acts/b-4/page-14.html#h-30390

III. Contracts for Sale of Goods

Generally, consumers have no right to return goods or cancel a contract simply because they decide the goods are no longer wanted or needed. However, it is often only after the goods are purchased that damages or defects are discovered. In such cases, a purchaser may have a remedy if it can be shown that a term of the contract has been breached. It may also be the case that the business has a refund policy of which the consumer can take advantage.

This section outlines the protection that consumers have against the problems that may occur after a purchase has been made. To understand one's legal rights, it is necessary to know the differences between terms, representations, and mere puffs.

A. Identifying and Classifying the Terms of a Contract

A term of the contract is a promise made by the manufacturer or seller regarding the character or quality of an article. It can be either written or oral. Written terms will generally be straightforward to identify. Whether an oral statement can be properly considered a term may be less obvious. Not everything said by the seller will be a term of the contract. To be a term, the statement must be a specific promise that makes up part of the contract.

If a statement is not a term, it will be either a representation or a puff. A representation is a material statement of fact made to induce the other party to enter the contract. A puff is vague sales talk not meant to have any legal effect. For example, a statement that, "This is a wonderful car," would be a puff.

If a statement is a term of the contract, it can be a condition, warranty, or innominate term. A well-drafted contract will characterize particular terms as conditions or warranties, though the wording used in the contract will not always be determinative. The difference between the three types of terms is as follows (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, [1962] 2 QB 26, [1962] 1 All ER 474 at para 49):

1. Condition

A condition is a term that is so essential to the agreement that its breach is considered to be a substantial failure to perform the contract. A breach of a condition is said to go to the root of the contract. In other words, the breach is such that it deprives the innocent party of "substantially the whole benefit" of the contract. Breach of condition entitles the buyer to terminate any further obligations under the contract and sue for damages. The aggrieved party, if aware of the impending breach, could accept the repudiation of the other party and terminate the contract, ending all future obligations except for the damages that stem from non-performance. Or, the aggrieved party could not accept the repudiation, and may wait for the future breach to occur before pursuing damages (e.g., if he or she thinks that there is still a chance that the contract will be performed).

2. Warranty

A warranty is a term of the contract that is not so essential. A warranty must be performed, but its breach is not considered to go to the root of the contract. This meaning of warranty should not be confused with other uses of the word such as in "one-year maintenance warranty". When a warranty is breached, the innocent party must continue to perform its own obligations under the contract but can sue for damages.

3. Innominate Terms

Innominate terms arise out of the common law, but unlike conditions and warranties, they are not mentioned in the *SGA*. An innominate term is one that may be treated as either a condition or a warranty, depending on how severe the consequences of a breach turn out to be. Whether an innominate term is a condition or a warranty is for a judge to decide.

> **NOTE:** for certain terms the *SGA* specifies whether they are conditions or warranties. The SGA also implies some terms as conditions or warranties even if they are not expressly included in the contract (see Section C. Provisions of the Sale of Goods Act below).

B. Determining if the Sale of Goods Act Governs the Contract

The *SGA* applies to transactions that can be characterized as contracts for the sale of goods. Any transaction that is not for the sale of goods does not receive the benefit of the *SGA*. Hence, the subject matter of the transaction must be goods and the essential elements of a contract must also be present.

1. Goods

Goods include all personal chattels, other than "things in action" (e.g. cheques, insurance policies, money). Things attached to real property, which the parties agree to sever before sale, or under the contract of sale, are included (s 1). Note that registration in the Land Title Office may be advisable to avoid possible characterization of the goods as real property or fixtures, so that the *SGA* may apply to the transaction.

According to ss 1 and 9, the *SGA* covers **existing** and **future goods**. Future goods are goods to be manufactured or acquired by the seller after the making of the contract of sale.

According to ss 1 and 6(1), general property or title in the goods must pass – not merely a special property or interest. Thus, for example, a contract of bailment is not covered.

Contracts for skill and labour alone are not contracts for the sale of goods, so the *SGA* does not apply to them. However, if a contract is for labour and materials, then the *SGA* could apply to the materials (e.g. a contract to paint a house with paint supplied by the contractor).

2. Contract of Sale

According to s 6(1), the SGA applies only where the purchaser agrees to buy goods with money as consideration. Hence gifts, barters, or exchanges are not subject to the SGA's implied conditions and warranties. However, a court may avoid this result by finding two separate contracts rather than a barter, as long as the consideration, whether money or goods, has its value measured in monetary terms: see "Messenger v Green", [1937] 2 DLR 26 (NSSC). Thus, if a total price is attached, there will be a sale, even if payment is in goods.

According to s 6(3) of the SGA, a contract of sale may be absolute or conditional. If the contract is subject to some condition to be fulfilled later, it is called an agreement to sell.

Section 8 of the SGA provides that the contract may be either written or oral.

3. Lease Contracts

The *SGA* applies to lease contracts if the goods are leased for personal, family or household purposes.

C. Provisions of the Sale of Goods Act

Sections 16 – 19 of the *SGA* imply many terms into contracts for the sale of new items. Section 20 governs when these implied terms can and cannot be expressly waived by the seller. The *SGA* also defines these terms as conditions or warranties, thus defining the remedies available if breached.

1. Implied Conditions and Warranties

The vital part of the *SGA* for the consumer is ss. 16 – 19, which **may** add statutory conditions and warranties to a contract for the sale of goods, subject to the possibility of exclusion (see Section III.C.2: Exemption from Implied Contractual Terms).

a) Implied Condition of Title: s 16(a)

Section 16(a) provides that, subject to contrary intentions, there is an implied condition that the seller has the right to sell the goods. In an agreement to sell goods at a later date, there is an implied condition that the seller will have the right to sell the goods at the date the buyer takes possession.

b) Implied Warranty of Quiet Possession: ss 16(b) and (c)

Sections 16(b) and (c) provide implied warranties that in the future the buyer will enjoy undisturbed possession of the goods, free from any liens or other encumbrances in favour of third parties that are unknown to the buyer at the time the contract is made. If a secured creditor subsequently makes claims against the buyer, the buyer can sue the seller for damages resulting from breach of this implied warranty. The quantum of damages would likely be the amount of the liens outstanding so that the buyer could pay them off.

c) Implied Condition of Compliance with the Description: s 17

Under s 17, when goods are sold by description, there is an implied condition that they correspond to the description.

Most sales will be sales by description. The notable exception is where a buyer makes it clear that he or she is buying a particular item on the basis of its qualities known, independent of any representations by the seller. Generally, where a buyer purchases a product because of a vendor's representations about its features (which may have been offered either gratuitously or in response to the buyer's questions), this will be a sale by description, with the vendor's representations forming part of the description. Catalogue purchases and purchases of products sealed in containers by the manufacturer are also sales by description.

NOTE: Specific (as opposed to unascertained) goods are goods that, at the time the contract is made, are agreed to be the only goods whose transfer will satisfy the contract. For example, in a sale of a new chair, if the parties agree that a specific chair is to be the subject matter of the contract, the sale has been of specific goods. So, if the seller attempts to deliver a different chair, which is identical in every way, except that it is not the actual chair agreed upon, the seller has breached the contract. Unascertained goods are goods that are agreed to be the subject matter of the contract at a point in time after the contract is made. For example, in the sale of a new chair, if the parties agree only on a specific type of chair, but do not specifically single out any individual chair, the sale has been of unascertained goods.

Although s 17 cannot be excluded in retail sales of new goods, it may be excluded in private or commercial sales, subject to the *contra proferentum* rule. The *contra proferentum* rule states that a contract, if ambiguous, is construed as against

the party who wrote it. Where a standard form contract is used, it is construed as against the party who offered it.

A sale by description may also raise s 18(b) issues (see Section III.C.1.e: Implied Condition of Merchantable Quality).

d) Implied Condition of Fitness for Buyer's Purpose: s 18(a)

Under s 18(a), if:

- i) the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that he or she relies on the seller's skill and judgment; and
- ii) the goods are of a description which it is in the course of the seller's business to supply;

then there is an implied condition that the goods are necessarily fit for such purpose. An **exception** occurs where the contract is for the sale of a specified article under its patent or trade name, in which case there is no implied condition as to its fitness for any particular purpose.

To establish a claim under s 18(a) of the SGA, three factors must be satisfied on a balance of probabilities (*Nikka Traders v Gizella Pastry* 2012 BCSC 1412, para 65):

1. that the buyer has made known to the seller the purpose for which it requires the goods;
2. the dissemination of that purpose shows that the buyer relies on the seller's skill or judgment; and
3. the goods are of a description that is in the course of the seller's business to supply.

Furthermore, the courts have held that the seller need not know the specific purpose for which the buyer wishes to use the goods. Knowledge of a broad purpose is sufficient. For example, in *Sugiyama v Pilsen* [1], 2006 BCPC 265, para 71, the court held that section 18(a) provides a warranty that a car is "a reliable vehicle for use in driving in safety on the roads." However, if the buyer wishes to use the goods for an unusual or peculiar purpose, this must be indicated to the seller.

The "Patent and Trade Name Exception" is of little effect since the courts have interpreted it narrowly. The issue remains one of reliance, and the trade names exception will apply only where the buyer's use of the patent or trade name indicates a lack of reliance upon the seller. In other words, the exception only applies where a consumer decides to purchase goods solely because of the trade name of a product without any reliance on representations by the seller. See *Wharton v Tom Harris Chevrolet Oldsmobile Cadillac* [2], 2002 BCCA 78, paras 38-39.

e) Implied Condition of Merchantable Quality: s 18(b)

Under s 18(b), if: (1) goods are bought by description, and (2) from a seller who deals in goods of that description, the seller is bound by an implied condition that the goods are of merchantable quality, except to the extent that the buyer has examined them.

(1) The Concept of Merchantable Quality

The concept of merchantable quality is difficult to define. A commonly used test, the **price abatement** test, asks whether a reasonable buyer, informed of the actual quality of the goods, would buy the goods without a substantial abatement of price (*BS Brown & Son v Craiks Ltd*, [1970] 1 All ER 823 (HL)). If the informed reasonable buyer would not buy without a substantial abatement of price, unmerchantable quality is inferred, and repudiation may be available.

Any damage to goods beyond the de minimus range, may be said to render the goods of unmerchantable quality (*International Business Machines Co Ltd v Shcherban* [3], [1925] 1 DLR 864 (Sask CA), [1925] 1 WWR 405).

Section 18(b) applies to the sale of used goods as well. However, there is a lower standard here: the goods must be usable but not perfect. A minor defect does not necessarily render the goods unmerchantable. See *Bartlett v Sidney Marcus Ltd*,[1965] 2 All ER 753 (Eng CA).

In any case, where the buyer seeks recovery of the full purchase price based on the implied condition of merchantable quality, he or she should be cautioned that continued use of the goods in question seriously weakens the argument that the goods are not fit for a particular purpose, or are not of merchantable quality.

(2) Sale by Description

Section 18(b) only applies to a sale by description. This is usually not a problem since most sales are by description, except where the buyer is clearly buying a particular item on the basis of qualities known to him apart from any representations.

(3) Seller who Deals in Goods of that Description

In addition to requiring that the sale be by description, section 18(b) also requires that the seller must "deal in goods of that description." In *Hartmann v McKerness*, 2011 BCSC 927, a seller sold a watch by description over eBay and was sued for violating the implied condition of merchantability in section 18(b). In paragraphs 43-47, the BC Supreme Court held that the eBay seller was not a seller "who dealt in goods of that description" for the purpose of 18(b), as he did not specialize in watches, but rather sold a large variety of goods.

(4) Effect of Examination by the Buyer

If the buyer examines the goods, there is no condition of merchantable quality for defects that the examination ought to have revealed. However, if the average person would not have been able to spot the defect during the exam, the condition of merchantability remains. Hence, it must be determined: 1) whether the buyer examined the goods, and 2) whether the defects ought to have been revealed by the exam. There is no obligation on the buyer to make a reasonable examination, or even any examination.

(5) Implied Condition of Reasonable Durability

The goods must be durable for a reasonable period of time with regard to their normal use (s 18(c)).

f) Implied Conditions in Sales by Sample: s 19

For a contract to be a sale by sample, there must be "an express or implied term in the contract to that effect" (s 19(1)).

Three implied conditions of a sale or lease by sample are set out in s 19(2):

- i) the bulk must correspond with the sample in quality;
- ii) the buyer or lessee must have a reasonable opportunity of comparing the bulk with the sample; and
- iii) the goods must be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

The last condition can only be relied upon where the defect would not have been apparent on a hypothetical reasonable examination. Contrast this with the s 18(b) condition of merchantability for sales by description, where the buyer's **actual** examination is considered.

2. Exemption from Implied Contractual Terms

a) Private Seller

Based on section 20, Private sellers or lessors, as opposed to retail sellers or lessors, can explicitly exempt themselves from ss 17, 18, and 19. A retail sale is defined as one in the "ordinary course of the seller or lessor's business." This is subject to the *contra proferentum* rule that such a clause, if ambiguous, is read strictly against the person relying on it.

b) Commercial Seller

Under s 20 of the *SGA*, retailers of **new goods** cannot exempt themselves from the implied terms in ss 16 – 19, and any clause that attempts to do so is void, subject to the exceptions listed below.

A seller who is making a retail sale in the ordinary course of business can only expressly waive ss 16 – 19 if:

- i) the goods are used (except s 16, which also applies to used goods);
- ii) the purchaser, even a private individual, intends to resell the goods;
- iii) the lease is to a lessee for the purpose of subletting the goods;
- iv) the purchaser intends to use the goods primarily for business;
- v) the purchaser is a corporation or commercial enterprise; or
- vi) the seller is a trustee in bankruptcy, a liquidator, or a sheriff.

Where a commercial dealer includes a disclaimer clause exempting the transaction from the provisions in ss 16 – 19, the clause is void, unless one of the exceptions applies.

3. Buyer's Lien

Amendments to the *SGA* in 1994 created the buyer's lien, which gives priority to a consumer who has paid some or all of the purchase price of the goods, but has not taken possession, before the seller goes into receivership or bankruptcy.

4. Buyer's Obligations and Seller's Rights

A seller's rights arise from a breach of the buyer's obligations. The buyer has two main obligations: (1) to pay the price, and (2) to take delivery. A breach of either of these obligations does not necessarily give rise to all of the seller's possible remedies as outlined below. One must consider the severity and consequences of a breach to determine the seller's remedy. The seller has two classes of rights under the *SGA*: (1) personal rights against the buyer for price or for damages, and (2) *in rem* rights to the goods.

a) Seller's Personal Rights

(1) Action for the Price: s 52

This action arises when the property in the goods has passed to the buyer, and the buyer neglects or refuses to pay; or where the price is payable on a certain day and the buyer neglects or refuses to pay. This remedy involves the seller seeking the price of the goods.

(2) Damages for Non-Acceptance: s 53

This is an alternate remedy to action for the price. The prima facie rule for damages is set out in s 53(3). The seller is entitled to be paid an amount equal to the difference between the negotiated price and the market price for the goods. However, this rule may be displaced where there is either no available market, or the goods are unique, in which case the damages will be assessed based on the estimated loss incurred by the seller stemming from the breach (s 53(2)).

b) Seller's In Rem Rights

(1) Unpaid Seller's Lien: ss 43 - 45

To get an unpaid seller's possessory lien (the right to retain the goods until the whole of the price has been paid), the seller must be an "unpaid seller" as set out in s 42. An unpaid seller may retain the goods beyond the specified delivery date. Where goods are to be delivered in installments under a single contract, the seller may exercise a lien over any part of the goods if any part of the price is outstanding (s 45). If the goods are sold on credit, the seller is not entitled to a lien, except under ss 44(1)(b) and (c) where the term of credit has expired, or where the buyer is insolvent.

The right of lien may be lost if:

- a) the price is paid or tendered (s 44(1));
- b) delivery is made to a carrier or bailee (not the seller's agent) without reserving a right of disposal (s 46(1)(a));
- c) the buyer or his or her agent lawfully obtains possession (s 46(1)(b)); or
- d) there is a waiver (s 46(1)(c)).

(2) The Right of Stoppage in Transit: ss 47 - 49

This right can be exercised in accordance with s 47 when the seller is unpaid, the buyer is insolvent, and the goods are in the hands of a carrier.

(3) The Right of Resale: ss 43(1) and 51

The seller has the right to resell:

- a) if the goods are perishable, or if notice of an intention to resell is given to the buyer by the unpaid seller, and the buyer does not pay within a reasonable time. In this case, the seller may resell the goods and recover damages from the original buyer for any loss from the breach of contract (s 51(3));
- b) if the seller has expressly reserved the right to resell in the contract (s 51(4));

Note that if the buyer defaults, and the contract provides that the seller may resell the goods in that situation, the seller may still claim damages, (s 51(4)).

5. Other Sale of Goods Act Provisions

a) Stipulations as to Time

Section 14 states that, unless there is a different intention, stipulations as to time of payment do not go to the essence of a contract of sale (i.e. they are not conditions).

b) Stipulations as to Quantity

Under s 34, if the seller delivers a quantity of goods either greater or lesser than that contracted for, the buyer may either reject the entire shipment, or accept the quantity delivered and pay accordingly, or, if the quantity is greater than ordered, reject the balance over that ordered. There is likely an exception when the difference in quantity is so slight as to be *de minimis*.

c) Stipulations as to Price

Under s 12, where a contract is silent as to price, the court will infer a reasonable price, but where the price would be too vague for the court to infer, there may be no consensus upon an essential term, and therefore no contract.

d) Installments

Under s 35(1), a buyer need not accept delivery by installments unless that is agreed to. Where a contract is for separately paid installments, circumstances and construction of the contract determine whether a breach allows for repudiation of the entire contract, or only a right to sue for damages regarding the defective installment.

D. Remedies for Breach of Contract

Sections 52 – 57 of the *SGA* cover actions for breach of contract. Common law and equitable remedies may exist as well.

1. Damages Generally

Generally, the object of damages is to put the injured party in the same position he or she would have been in had the other party performed their contract obligations ("expectation damages").

At common law, to be awarded damages for breach of contract, those damages must be in the reasonable contemplation of both parties at the time the contract was formed. If the damages are too remote, they may not be recoverable under contract law. Both sides must be aware of the circumstances at the time of formation that would lead to damages if an obligation went un- or underperformed. This may encompass either implied circumstances, if reasonable, or special circumstances that were communicated at the time the contract was formed (*Hadley v Baxendale* (1854), 156 ER 145 (Eng Ex Div)). Damages that were substantially likely and easily foreseeable at the time the contract was formed will be deemed to have been in the reasonable contemplation of the parties. Once the **type** of loss is found to have been foreseeable, the extent of damages can be recoverable even if the **degree** of damages is so extensive as to be unforeseeable.

Parties have a common law **duty to mitigate** their damages from the date of the contractual breach. In a contract for the sale of goods, this means buying the goods elsewhere and suing the party who breached the contract for the additional amount paid for the goods over the contract price. In a contract for services, such as roof repair, this means hiring another party to do the repairs and suing the original party for the difference in price paid, if any. There is some jurisprudence that suggests when it is not feasible for a party to mitigate, they are excused from doing so. See *Southcott Estates Inc v Toronto Catholic District School Board* [4], 2012 SCC 51.

2. Breach of Warranty

For a breach of a term of the contract that is a warranty, the only available remedy will be damages. The innocent party must continue with the contract while seeking damages.

In a contract for the sale of goods governed by the *SGA*, the standard measure of damages is "the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach" (s 56(2)). Where the warranty pertained to quality of the goods, the loss will be calculated as the difference between the cost of obtaining the goods in the market and the contract price of the goods (s 56(3)). Thus a buyer who has negotiated a good deal can recover the difference between his or her expected savings and the market price. Section 57 states that s 56 does not affect recovery of special damages or interest, if otherwise available by law. The common law governs the recovery of special damages. For special damages to be recoverable, both parties must have been made aware of their possible incursion at the time of formation of the contract.

3. Breach of Condition

For a breach of condition, the aggrieved party can affirm the contract and, in the future, seek damages, or terminate the contract, discharging future obligations but still allowing recovery for damages. The offending party has "repudiated" the contract by acting in a way that expresses the intention to no longer be bound by the contract, and the party aggrieved can accept or reject that repudiation.

a) Repudiation

The buyer's primary right for a breach of a condition is to repudiate the contract and reject the goods. This can normally be exercised regardless of the actual quantum of loss or benefit to the parties. However, the right to repudiate may be lost under the *SGA*.

In the case of a rightful repudiation, the buyer may refuse further payment, and in addition, seek either damages or restitution from the seller. The consequence of wrongful repudiation termination (the buyer repudiates when he or she did not have the right to do so; e.g. because the seller breached a warranty rather than a condition) is that the buyer is liable to the seller for his or her own breach of condition. So, it is important to determine whether or not repudiation is justified **before** taking any action, by determining the nature of the term the seller breached.

(1) When a Breach of Condition is Treated as a Breach of Warranty

Section 15(4) specifies two circumstances where, unless the parties contract otherwise, any breach of condition (including the implied statutory conditions in ss 16 – 19) must be treated as a breach of warranty: (1) in a contract for sale of specific goods when property has passed to the buyer; or (2) where the buyer has accepted the goods, or part of them.

(2) Specific Goods: Upon Passage of Property

When s 15(4) is combined with ss 23(1) and (2), the result is that, for a sale of specific goods in a deliverable state, the buyer loses the right to repudiate as soon as the contract is made.

However, courts may avoid this harsh result by: (1) implying a term allowing the buyer to accept the goods and later reject them: see *Polar Refrigeration Service Ltd v Moldenhauer* [5] (1967), 61 DLR (2d) 462 (Sask QB) at para 22; (2) finding a total failure of consideration: see *Rowland v Divall*, [1923] 2 KB 500; (3) finding the intent for property to not pass immediately (ss 22 and 23(1)); (4) finding that the goods are not specific; or (5) finding ss 23(3), (4) or (5) to be applicable.

(3) Unascertained Goods: Upon Acceptance

For a sale of unascertained goods, the buyer loses the right to repudiate upon acceptance of the goods (s 15(4)).

Under s 38, if the buyer has not previously examined the goods, there is no acceptance unless and until the buyer has had a reasonable opportunity to examine them. However, under s 39 a purchaser has accepted the goods once (1) the seller is notified by the buyer of acceptance, (2) the goods are used in a manner inconsistent with the seller's ownership (e.g. reselling the goods to a third party), or (3) the goods are retained without being rejected within a "reasonable time".

The court determines a reasonable time for inspection and possible rejection by looking at all the circumstances surrounding the transaction.

b) Damages for Breach of Condition

As mentioned above, the innocent party has a choice in the face of a breach of condition. He or she may (1) accept the repudiation, terminate the contract, and sue for damages right away, or (2), if he or she has a legitimate interest in doing so, may affirm the contract, wait for the date of performance, and sue for damages for any defect in performance at that date. (In many cases involving one-time sales, the performance date will be contemporaneous with the date of the payment/delivery/breach, rendering this a moot point.)

In deciding whether or not to affirm a contract in order to assess damages at a later date, the client should consider the implications of his or her duty to mitigate the loss. In a sale of goods, purchasing the goods from someone else can often mitigate damages; generally no special interest exists in purchasing the particular goods from a particular vendor.

c) Specific Performance

If an aggrieved party does decide to affirm the contract, specific performance may be available for a contract of sale for specific goods. Specific performance is a court order compelling performance of a contract in the specific form in which it was made (*SGA*, s 55). In certain circumstances, it may be available at common law for unascertained goods (*Sky Petroleum Ltd v VIP Petroleum Ltd*, [1974] 1 WLR 576, [1974] 1 All ER 954). Specific performance is a discretionary equitable remedy and will only be granted if damages are inadequate; for example where the goods are unique or otherwise unavailable. Section 3(1)(c) of the *Small Claims Act*, RSBC 1996, c 430, provides that the Small Claims Division of the Provincial Court of British Columbia can grant specific performance in an agreement relating to personal property.

4. Rescission

The remedy of rescission seeks to undo a contract. It is available for, among other things, misrepresentation. See section IV.G for a fuller discussion of what constitutes misrepresentation. Rescission is an equitable remedy that sets the contract aside and seeks to restore the parties to their original, pre-contractual positions. This usually means return of the goods and return of any payment made. Because it undoes the contract, no damages can be claimed beyond the restitution necessary to return the parties to their pre-contractual positions. Delay in bringing the action or acceptance of the goods may bar rescission.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 15, 2019.

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IV. Consumer Protection

A. Does the Act Govern the Contract?

For a contract to fall under the *Business Practices and Consumer Protection Act* [*BPCPA*], the contract must be 1) a consumer transaction, between 2) a consumer and 3) a supplier, as defined by section 1. Each of the three criteria must be fulfilled before relying on the *BPCPA*. The only exceptions to the applicability of the *BPCPA* are those listed under s 2 of the *BPCA* and include credit reporting and debt collections practices. These sections of where the *BPCPA* apply regardless of whether the transaction or matter involves a consumer or not. Additionally, section 2 (2) outlines the limited application of the *BPCPA* to contracts involving the sale, lease, mortgage of or charge on land or chattel real.

1. Consumer Transaction

A consumer transaction is a dealing that:

- a) involves a supply of goods, services, or real property by a supplier to a consumer for primarily personal, family or household purposes, **or**
- b) is a solicitation, offer, advertisement or promotion by a supplier with respect to the above-mentioned types of transactions.

Except in Parts 4 and 5 of the *BPCPA*, a consumer transaction includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer.

The Act **does not** apply to securities as defined by the *Securities Act*, RSBC 1996, c 418 or contracts of insurance under the *Insurance Act*, RSBC 1996, c 226.

2. Consumer

The consumer may reside inside or outside BC. A consumer is an individual, other than a supplier, who participates in a consumer transaction for **primarily personal, family, or household** purposes. The definition of consumer in section 1 does not include a guarantor of the consumer who actually participated in the transaction.

3. Supplier

A supplier means a person, whether in BC or not, who in the course of business participates in a consumer transaction by:

- a) supplying goods, services, or real property to a consumer; or
- b) soliciting, offering, advertising, or promoting with respect to a transaction referred to in paragraph (a) of the definition of “consumer transaction”.

A supplier also includes the successor to, or assignee of, any rights or obligations of the supplier and, except in Parts 3 to 5, includes a person who solicits a consumer for a contribution of money or other property.

The definition of supplier in section 1 requires that the transaction occur “in the course of business”. Thus, private sales and transactions made by people who are not in the business of dealing with such goods are generally exempt from the *BPCPA*. If a consumer buys a used car advertised in a newspaper ad placed by a private person, the consumer will likely be restricted to the remedies found in the SGA or at common law. Some remedies in the *SGA* are also available only when goods are sold in the ordinary course of business.

Several suppliers can be involved in one transaction. Therefore, in order for the consumer to sue, he or she need not have a contract with the supplier who made a deceptive representation or committed an unconscionable act. For example, a consumer buys a car from a dealer and the contract is assigned to a financial institution. The vendor would be a supplier, as would the finance company attempting to collect on the contract (see section 15). Since privity of contract is not necessary, each of the suppliers would be liable under the *BPCPA* if they engaged in deceptive or unconscionable practices.

According to section 6(2), advertisers who, on behalf of another supplier, publish a deceptive or misleading advertisement are not liable for damages, court actions, or offences, if they are acting in good faith when they accept advertisements for publication. If, however, they knew or ought to have known that the advertisement had the capability, tendency, or effect of deceiving or misleading, then they too may be liable as a supplier under the *BPCPA*.

B. Defining a "Deceptive or Unconscionable Act or Practice"

For the consumer to have a remedy, the supplier's conduct must involve deceptive or unconscionable acts or practices.

Section 4 of the *BPCPA* describes "deceptive" acts or practices. Section 8 of the *BPCPA* describes "unconscionable" acts or practices.

1. Deceptive Acts

A deceptive act or practice is a representation (whether oral, written, visual, descriptive, or other) or any conduct by the supplier that has the capacity, tendency, or effect of deceiving or misleading a consumer or guarantor.

Section 4(3) sets out an extensive but non-exhaustive list of deceptive practices.

If a certain practice is not listed in 4(3), it may still be considered deceptive. The term "deceptive act or practice" was also found in BC's old *Trade Practices Act*, which was repealed by the *BPCPA* in 2004. Thus, looking back at the old Trade Practice Act jurisprudence can shed light on the meaning of "deceptive act or practice."

The term was interpreted by the court in *British Columbia (Director of Trade Practices) v Household Finance Corp*, [1976] 3 WWR 731, [1976] BCJ No 1316 (SC) at paras 19-23 [*Household Finance*] and later affirmed by the BC Court of Appeal. Household Finance suggests that a practice is deceptive for purposes of the BPCPA if it causes the consumer to commit an error of judgment.

A plaintiff consumer relying on the supplier's deceptive practice for an action should show:

- a) that he or she was actually deceived by the deceptive practice;
- b) that he or she relied on the deception to the extent that an error in judgment resulted from the deception; and
- c) that the error in judgment caused loss.

The Director need only show that a deceptive practice would tend to cause consumers to make an error in judgment, but does not need to show that any consumer made an error in judgment, to enforce the Act against a supplier.

The *BPCPA*, similarly to the *Trade Practices Act*, should be interpreted as imposing "a high standard of candour, especially on suppliers who choose to commend their wares" (*Rushak v Henneken*, [1991] 6 WWR 596, [1991] BCJ No 2692 (CA) at para 17 [*Rushak*]).

Where there is an embellishing endorsement of the goods, and the supplier knows the goods may be defective in an important respect, these facts must be disclosed. For the consumer to set aside the consumer transaction on the basis that the supplier engaged in a deceptive act or practice, the representation must be material – what is material depends on the individual circumstances of the transaction (*Rushak*).

The court may draw the conclusion that a practice is deceptive on the basis of vague contractual language in circumstances where that language allowed the supplier to claim that additional work was not part of the original contract: see *British Columbia (Director of Trade Practices) v Van City Construction Ltd*, [1999] BCJ No 2033 (SC) (QL).

2. Unconscionable Acts

Sections 7 to 9 of the *BPCPA* now set out clear prohibitions. Unconscionable acts involve high pressure tactics or demanding consideration far in excess of the market, and may occur before, during or after the consumer transaction. Under s 10(1), if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer or guarantor. The court will look at the particular vulnerabilities of the consumer, such as mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, which will trigger the reviewability of that transaction in the consumer's mind. Both the common law and statutes hold the supplier to a stringent standard, demanding that he or she not act unreasonably in order to protect his or her own interests.

Under s 9(2), if it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof is on the supplier to show that the unconscionable act or practice was not committed.

> **NOTE:** As above, s 8(3) sets out a list of circumstances that the court must consider when determining whether a practice is unconscionable. Again, this list is not comprehensive, as the court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

C. Remedies and Sanctions

1. Damages Recoverable by Consumers

Under s 171 of the *BPCPA*, a consumer may commence a civil action seeking damages for loss due to a deceptive or unconscionable act or practice. As with other civil actions, punitive damages or restitution may also be available. Small Claims Court may be used if the claim does not exceed $35,000.

2. Transaction Unenforceable by Supplier

Under s 10(1), where there is an unconscionable act or practice in a consumer transaction, that transaction is unenforceable by the supplier.

3. Injunction, Declaration and Class Action

Under s 172, any person, whether or not that person has a special interest in or is affected by a consumer transaction, may bring an action seeking declaratory or injunctive relief. This involves seeking to have the court declare an act to be deceptive or unconscionable and to have the court grant an injunction restraining the supplier from engaging further in such acts. Under s 172(2) the Director may bring an action on behalf of consumers generally or a designated class of consumers.

The *BPCPA* stipulates that while the Provincial Court has jurisdiction for civil actions under s 171, actions under s 172 must be brought in Supreme Court.

For an example of a class action suit dealing with the *BPCPA*, see *Dahl v Royal Bank of Canada*, 2006 BCCA 369. Credit card debtors brought a class action suit against the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, and the Bank of Montreal. In the plaintiffs' Statement of Claim, they asserted that the defendants failed to

disclose the true cost of borrowing by providing the transaction dates for cash advances on their monthly statements rather than the posting dates (the dates the money was actually advanced), allowing more interest to be charged; the court, however, ultimately rejected this argument.

In any action for permanent injunction under s 172(1)(b), the court may restore to any interested person any property or money acquired by deception or unconscionable acts or practices by the supplier (s 172(3)(a)), and may require the supplier to advertise to the public in a way that will assure prompt and reasonable communication to consumers (s 172(3)(c)).

4. Supplier Found Guilty of an Offence

Under the *BPCPA* Section 189 creates a list of offences punishable by both fines and imprisonment, which may be sought by the Crown against a party found in breach of the BPCPA. Under s 190, an individual who commits an offence is liable to a fine of not more than $10,000, or to imprisonment for not more than 12 months, or to both.

D. Limitation Period

Under s 193, no prosecution under the *BPCPA* may be started more than two years after the date on which the subject matter of the proceeding arose.

Note that s 193 does not apply to civil proceedings. The limitations period in civil proceedings will depend on the nature of the claim and the time period allowed by the *Limitation Act*; see Section II.E: Determine the Limitation Period for Making a Claim.

E. Powers of the Director

Consumer Protection BC is responsible for the administration and enforcement of the *BPCPA*. Part 10 of the BPCPA contains all inspecting and enforcement powers of Consumer Protection BC, its inspectors, and the Director. The Director has the power to:

- a) use the same powers that the Supreme Court has during trials of civil action for the purposes of an inspection, to summon and enforce the attendance of witnesses, compel witnesses to give evidence under oath or in any other manner, and to produce records;
- b) institute proceedings or assume the conduct of proceedings on behalf of a consumer;
- c) make an order (called a “freeze” order) against assets of a person who is being investigated (s 159). This order can also be attached to property being held in trust for a person under investigation;
- d) refrain from bringing an action against a supplier and accept instead a written undertaking under s 154 of the *BPCPA*. This undertaking usually takes the form of a formal agreement between the Director and supplier and may involve consumer redress. It is probably one of the most effective remedies under the *BPCPA* because it avoids both the time and expense of court proceedings;
- e) issue a compliance order under s 155 of the *BPCPA* where compliance is mandatory. The Director can order restitution and compensation to the consumer with this function (s 155(4)) without having to go through court proceedings. If a person fails to comply with a compliance order, he or she is committing an offence under s 189(5) and could face a fine of not more than $10,000, imprisonment for not more than 12 months, or both;
- f) seek declaration and/or injunctive relief on behalf of a consumer, or a class of consumers, and make their applications *ex parte* (s 172); and
- g) impose an administrative penalty under s 164.

F. Deceptive Practices Under the Competition Act

In addition to the protections under the *BPCPA*, the *Canadian Competition Act*, RSC 1985, c C-34, proscribes various types of deceptive practices. Some common ones are discussed below:

1. More than One Price Tag ("Double Ticketing")

Shopkeepers often mark goods for sale with more than one price tag. Under the *Competition Act*, RSC 1985, c C-34, it is an offence for the store to charge anything but the lowest price unless the lower price has been crossed out or the new tag covers the older tag (s 54). The older tag does not have to be unreadable; a line over it or a new tag slightly covering it is fine. However, a cashier may not cross out the older price at the cashier stand. Note that the consumer has no independent right of action. The Competition Bureau, on its website, indicates that "prosecutions under this section have rarely occurred".

2. Advertising a Sale Price

If a business advertises a sale price, it must charge that price throughout the sale period (*Competition Act* s 74.05). However, the advertiser may be relieved of this obligation if (1) the price was advertised in error and if the advertisement indicated prices were subject to error, or (2) the advertisement is immediately followed by a correction. Advertisers who violate this section may be subject to an administrative penalty (s 74.1).

3. Bait and Switch

If a business advertises a sale, it must stock a reasonable quantity of the item (*Competition Act* s 74.04(2)). The bait and switch tactic occurs when a business advertises an item at a bargain price to attract customers but, having no intention of selling the item, does not adequately stock it. Rather, the business intends to use sale pressure to get customers to buy other, higher-priced items.

If the business does not have adequate stock of a sale item, it must issue rain cheques. Rain cheques are not required, however, if the advertisement states "while quantities last".

Advertisers who violate this section may be subject to an administrative penalty (s 74.1). A business may avoid penalties stemming from bait and switch tactics if it attempted to supply more of an item than it was able to, if demand for the item was greater than expected, or if the advertisement stated that the sale price was good "while supplies last".

G. False or Misleading Advertising

All advertising, whether on radio or television, in a newspaper or flyer or posted in a store, is subject to federal and provincial laws that prevent businesses from making false claims that may mislead consumers. The *BPCPA*'s prohibition against deceptive acts and practices extends to advertising, as a representation made before a sale. (s 4(2)).

Purchasers have a right to know what they are buying. If a person asks for information and the sales agent volunteers it, the information **must** be correct and not deceptive. However, not everything a salesperson says is a term of the contract; some comments are mere puffery. Puffery is the sort of comment that is made to promote a product. Such comments are statements of opinion rather than misrepresentations of fact and are not treated as part of the contract.

An example of puffery is "It's a great little car."

An example of a statement of fact is "It's a 1994 Dodge."

What would otherwise be puffery may constitute a deceptive act or practice under the *BPCPA*. In circumstances where a supplier provides a laudatory description of a defective item of which he or she has specific factual knowledge and of

which the potential buyer is wholly unaware, the description is not mere puffery, but rather a deceptive act. See *Rushak*, above.

For credit advertising, pay particular attention to ss 59 to 64 of the BPCPA. When there is misrepresentation, a consumer may also have a cause of action at common law.

1. The Common Law

Despite the breadth of the *BPCPA*, it does not provide remedies for all contractual situations. Before commercial legislation (*SGA*) or consumer protection acts (*BPCPA*), the common law provided remedies for misrepresentation.

a) Fraudulent Misrepresentation

Fraudulent misrepresentation occurs when the vendor knowingly makes a false statement of fact that is material to the contract and the statement serves as an inducement to enter the contract. The buyer may be awarded the common law remedy of rescission and can also sue for damages in the tort of deceit. Breaches of contract damages, such as the expectation of profit, are not available, because a party cannot claim for the contract to be rescinded and, at the same time claim that the contract exists for the purposes of claiming damages.

b) Innocent Misrepresentation

An innocent misrepresentation arises when a representation of fact is false, material to the contract, and the buyer is induced to enter the contract by the representation. Unlike fraudulent misrepresentation, though the representation is not known to be false. The remedy, which is an equitable remedy, is rescission, which attempts to put the parties back in the position they were in before the contract.

A misrepresentation might also be considered to be a term of the contract or as a term in a collateral contract. In this situation, the client can sue for damages if the misrepresentation ends up being untrue.

For the remedy of rescission, there could be several possible bars:

- i) third party rights have arisen;
- ii) an undue delay occurred since the misrepresentation;
- iii) the contract has been executed (not an absolute bar);
- iv) the contract has been affirmed by the aggrieved party; or
- v) it is impossible for the courts to undo the contract.

c) Negligent Misrepresentation

Negligent misrepresentation operates in the same way as innocent misrepresentation, but it arises when the representation is made negligently as opposed to in a completely innocent manner. As with innocent misrepresentation, the remedy is rescission. *Hedley Bryne & Co Ltd v Heller and Partners Ltd*, [1961] 3 All ER 891 (HL) is one example of a case involving negligent misrepresentation.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on August 15, 2019.

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V. Direct Sales

Since the *BPCPA* has replaced the *Consumer Protection Act*, the *BPCPA* covers door-to-door sales, payday loans, credit cards, income tax refund services (although the federal Tax Rebating Discounting Act, RSC 1985, c T-3 regulates the actual amount which can be refunded), food plan contracts, unsolicited goods, and similar activities. The primary remedy for consumers in the *BPCPA* regarding these types of activities is the right to avoid or cease contracts for direct sale or for future services, after giving notice in the manner required by the statute. A single contract may fall under more than one category, and in that case, will attract the requirements and cancellation provisions of each applicable section.

> **NOTE:** When exercising cancellation rights under the *BPCPA* consumers should be apprised of ss 27 and 28. In most cases, the contract is effectively rescinded by the cancellation; goods must be returned undamaged and payment must be refunded in full.

A. Direct Sales

When consumer is approached by a salesperson, instead of making a conscious decision to seek out a product or service, they may be taken unawares and can be vulnerable to being taken advantage of. The *BPCPA* recognizes this risk by imposing disclosure requirements and allowing a consumer to cancel the contract in ways the common law of contract does not permit.

A direct sales contract is defined in s 17 as:

...a contract between a supplier and a consumer for the supply of goods or services that is entered into in person at a place other than the supplier's permanent place of business, but does **not** include any of the following:

- (a) a funeral contract, interment right contract or preneed cemetery or funeral services contract;
- (b) a contract for which the total price payable by the consumer, not including the total cost of credit, is less than an amount of $50 (*Consumer Contracts Regulation* BC Reg 272/2004 s 4 [*CCR*]);
- (c) a prepaid purchase card;

The *BPCPA* sets out a lengthy list of requirements under ss 19 and 20 for the content of direct sales contracts, such as the name, address, and telephone number of the seller, the name (in a readable form) of the individual who signs the contract on behalf of the supplier, a detailed description of the goods or services to identify them with certainty, the price, and a detailed statement of the terms of payment. When credit is extended, there also needs to be a description of the subject matter of any security interest. This is **not** an exhaustive list; please consult the *BPCPA* and regulations.

Under s 5 of the *CCR*, there are several exemptions to the applicability of the *BPCPA* to direct sales contract. Such exemptions include certain classes of direct sellers who are selling goods or services for which they are licensed, registered, or incorporated (s 5(4)), and direct sales contracts that are entered into in certain places, such as agricultural shows or fairs, trade shows, and craft fairs. Direct sellers are also exempt if the seller attends the place following a request that was made at least 24 hours in advance by the consumer or a friend or relative of the consumer who is not an associate of the direct seller. For a full list of exemptions, please consult the *CCR*.

1. Right of Cancellation - Direct Sales

Under s 21 of the *BPCPA*,

- (a) the purchaser may cancel the contract within 10 days after receiving a copy of the contract. The purchaser need not offer explanations for his or her decision. The vendor then has 15 days after the date of cancellation to refund all money without deduction.
- (b) if a delivery date is specified in the contract and not all of the goods/services are delivered/performed within 30 days of this date, the purchaser may cancel the contract within one year after the date a copy of the contract was received, provided that the purchaser has not accepted or used the goods/services;
- (c) if the contract does not contain information required under s 19 and 20(1) of the Act, the buyer may cancel within one year of the date of the contract.

A direct sale is unenforceable by the seller if the buyer is required to make a down payment in excess of a prescribed amount (*BPCPA*, s 20(3)(b)). Section 4(2) of the *CCR* sets the amount of down payment prescribed under s20(3)(b) as either $100 or 10% of the total price.

NOTE: Whether the purchaser has **accepted** goods is determined by the definition in the *Sale of Goods Act* (s 39).

The BPCPA does not make oral executory contracts unenforceable. However, s 20(3) requires that the seller give a written copy of the contract to the buyer at the time of signing. Otherwise the contract is not binding on the buyer.

Section 54 requires that the buyer provide notice of cancellation to the seller, and declares that it may be delivered by any method that permits the cancelling party to produce evidence that the contract was cancelled. Notice by registered mail, electronic mail, personal delivery, and fax is explicitly permitted. Nowhere does the BPCPA explicitly state that a notice of cancellation shall be in writing, but a buyer should be cautious and deliver written notice. The section explicitly permits that the notice can be given to the seller directly, or to the postal, fax, or electronic mail address of the seller shown in the contract. When a buyer rescinds a contract under s 21, that section also provides that the goods may be retained until all of the money paid is refunded.

In *Woodward v International Exteriors (British Columbia) Ltd* (1991), 53 BCLR (2d) 397, 1 BLR 254 (CA) at para 10, verbal notice of termination of an agreement was sufficient for the consumer to terminate this form of contract. Note that verbal notice may not be sufficient in all instances and written notice remains advisable.

B. Future Performance Contracts

A future performance contract is defined in s 17 as:

...a contract between a supplier and a consumer for the supply of goods or services for which the supply or payment in full of the total price payable is not made at the time the contract is made or partly executed, but does **not** include:

- (a) a contract for which the total price payable by the consumer, not including the total cost of credit, is less than a prescribed amount of $50 (*CCR' s 6);*
- (b) a contract for the supply of goods or services under a credit agreement, as defined in s 57 (definitions), if the goods or services have been supplied;
- (c) a time share contract; or
- (d) a prepaid purchase card.

Future services contracts are subject to some important statutory requirements under Part 4, Division 2 of the *BPCPA*.

The *BPCPA* sets out a long list of requirements under ss 19 and 23 for the content of future services contracts, such as the name, address, and telephone number of the seller, a detailed description of the goods or services to identify them with certainty, the price, supply date, and a detailed statement of the terms of payment. When credit is extended, there

also needs to be a description of the subject matter of any security interest. This is **not** an exhaustive list; please consult the Act.

Under s 23(4), a future performance contract is not enforceable by the seller if a rebate or discount is given on the condition of some event occurring after the time the buyer agrees to buy (usually a referral selling scheme whereby the purchaser aids the seller in making a further sale).

If the future performance contract does not contain the required information (ss 19 and 23), then a consumer may cancel the contract by giving notice of cancellation to the supplier within one year of the date that the consumer receives a copy of the contract (s 23(5)). Section 54 sets out the required form and procedure for giving notice. (See Section V.A.1).

C. Continuing Services Contracts: Gym Memberships, Travel or Vacation Clubs

These contracts are called continuing services contracts because, while you may pay now, the contract extends into the future. This type of contract is often used when one joins a karate club or a dance studio, or buys a membership in a vacation club.

Continuing services contracts must not exceed 24 months in duration. However, a contract can allow the consumer to renew in writing within one month of its expiry, and if the consumer exercises this option, the contract can continue past 24 months (s 24(3)). If a contract does exceed 24 months in duration, there are remedies available under s 24(6).

1. Right of Cancellation

Because they are often sold at high-pressure presentations, under s 24 these contracts are subject to a 10 day right of cancellation from the date the consumer receives a copy of the contract (s 25(6)). Section 26(3), which also gives a 10 day right of cancellation, applies to time-share interests not covered by the *Real Estate Development Marketing Act*, SBC 2004, c 41, such as resorts or condominiums.

Contracts for continuing services can also be cancelled if there is a material change in circumstances of the buyer or the seller, and where the buyer or seller gives notice of cancellation (s 25). When alleging a material change in circumstances as the basis for cancelling, the reason must be specified in the notice (s 25(2)).

Material changes in circumstances include, but are not limited to:

- the buyer's death; and
- permanent disability or permanent relocation further than 30 km further from when the consumer entered into the contract.

Material changes in circumstances of the seller include:

- through the partial or entire fault of the seller, the services are not completed, or at any time the seller appears to be unable to reasonably complete the services in the time frame set out in the contract for the completion of services;
- the services are no longer available because of the seller's discontinued operation or substantial change in operation; and
- the relocation of the business of the seller 30 km from the buyer without provision of equivalent service within 30 km.

Section 54 sets out the required form and procedure for giving notice. (See Section V.A.1)

D. Unsolicited Goods or Services

Under s 11, unsolicited goods or services means goods or services that are supplied to a consumer who did not request them, other than:

- (a) goods or services supplied to a consumer who knew or ought to have known they were intended for delivery to another person;
- (b) goods or services for which the supplier does not require payment; or
- (c) a prescribed supply of goods or services.

Under s 12, a recipient of unsolicited goods has no legal obligation to the sender unless the recipient gives notice of an intention to accept them, or unless the recipient knew or ought to have known that the goods were intended for delivery to another person.

If however, a consumer does pay for unsolicited goods or services, under s 14 the consumer may give to the supplier a demand, in writing, for a refund from the supplier within 2 years after the consumer first received the goods or services if the consumer did not expressly acknowledge to the supplier in writing his or her intention to accept the goods or services.

> **NOTE:** If a consumer is being supplied with goods or services on a continuing basis and there is a material change in the goods or services or in the supply of them, the goods or services are deemed to be unsolicited goods or services from the time of the material change **unless** the supplier is able to establish that the consumer consented to the material change.

E. Distance Sales

Under s 17, a “distance sale” means “a contract for the supply of goods or services between a supplier and a consumer that is not entered into in person and, with respect to goods, for which the consumer does not have the opportunity to inspect the goods that are the subject of the contract before the contract is entered into”. This definition encompasses all forms of commerce where the parties are not face-to-face, such as catalogue sales, sales over the internet, or sales over the telephone. Section 48 stipulates that a supplier must give a consumer a copy of the contract within 15 days after the contract is entered into, and also sets out a list of requirements for distance sales contracts. Section 46 sets out what information must be disclosed to the consumer prior to the consumer entering into the distance sales contract. For example, the supplier must disclose a detailed description of the goods, the currency, delivery arrangements and the cancellation policy, if any. This is not an exhaustive list; please see the Act.

Section 47 includes additional requirements for contracts that are in electronic form. Specifically, the supplier must make the information from s 46 available in a manner that the consumer can access, retain and print. The supplier must also give the consumer the opportunity to correct errors and accept or decline the contract.

Section 49 provides consumer rights concerning cancellation of distance sales contracts. These provisions are an attempt to deal with sales done over the internet. Note that there are different time restrictions on cancellation rights on distance sales depending on which provisions the supplier does not comply with. Once a consumer gives notice to the supplier of the cancellation, the supplier has 15 days to refund to the customer all monies paid in respect of the contract and any related consumer transactions. If the supplier fails to do this, the consumer may have recourse under s 52 if the consumer charged to a credit card all or any part of the total price under the contract.

F. Credit Transactions

Part 5 of the *BPCPA* deals with the disclosure of the cost of consumer credit.

The Acts set out disclosure requirements, as well as advertising requirements for both fixed and open credit. The basic distinction between fixed and open credit is that open credit involves multiple advances and does not establish the total amount advanced under the agreement. However, open credit can be subject to an overall credit limit. Fixed credit is a credit arrangement that is normally based on a fixed initial advance and a predetermined payment schedule. Under s 105 of the *BPCPA*, the creditor is obliged to compensate borrowers for contraventions of the Act.

The rules for credit transactions under the *BPCPA* are:

- Under s 66, lenders are required to furnish debtors with a written statement of disclosure. Consult ss 66-93 for the specific requirements pertaining to your client's situation.
- Under ss 59 to 64, certain requirements flow from the advertising of certain aspects of credit, such as interest-free periods, interest rates, and cost of credit.
- Under Division 4 of Part 5, a borrower has certain rights, such as being able to choose an insurer and to cancel optional services.
- Under s 99, where a credit card is lost or stolen, the holder is not liable for any charges incurred after notice in person or by registered mail has been given to the issuer of the card. In the case of purchases made before notice is given, an individual is only liable for $50 or up to the credit limit remaining on the card, whichever is less. This protection does not extend to unauthorized use of a card to get cash from an ATM where the cardholder left his or her PIN number in the wallet with the card, and it is stolen (see *Plater v Bank of Montreal* (1988), 22 BCLR (2d) 308 (Co Ct)).

1. Notice Required for Increased Interest Rates

Under s 98, there is a notice requirement for increasing credit card interest rates.

2. Unsolicited Credit Cards

Section 96 provides that a credit card issuer must not issue a credit card to an individual that has not applied for one. This does not affect the ability of a credit card issuer to provide a renewal or replacement card that has been applied for.

Sections 56.1-56.5 regulate the terms of prepaid purchase cards. A prepaid purchase card is a card, written certificate or other voucher with a monetary value that is issued or sold to a person in exchange for the future supply of goods or services. These include gift cards or gift certificates. Section 56.2 prevents any cards from being issued with an expiry date. *Prepaid Purchase Cards Regulation*, BC Reg 292/2008 contains exemptions from the expiry date prohibition. These include cards issued for a specific good or service, cards issued for a charitable purpose, and cards issued to a person who provides nothing of value in exchange.

G. High-Cost Loans (Payday Loans)

1. Criminal Code

Section 347 of the *Criminal Code* prohibits loans that charge a criminal rate of interest, which is defined as an annual rate that **exceeds 60 percent**.

Loans offered by payday lenders, if calculated according to the *Criminal Code*, may charge rates that exceed the amount permitted under the definition. In 2006, the federal government amended the *Criminal Code* to exempt payday loan agreements from the criminal interest rate provision.

Under s 347.1, payday loan agreements are defined and are exempted from s 347 provided that the following three conditions are met:

- i) the loan must be for $1500 or less and for 62 days or less;
- ii) the person must be licensed or specifically authorized under provincial/territorial law to enter into that payday loan agreement; and
- iii) the province must be designated by the Governor in Council (which will happen in the province has adequate measures to protect recipients of payday loans)

2. Payday Loans

Section 2 of *Payday Loans Regulation*, BC Reg 57/2009 designates payday lenders as a “designated activity” under s 142 of the *BPCPA*. A payday lender "means a person who offers, arranges, provides or otherwise facilitates payday loans to or for consumers" and includes "a person who, for compensation, arranges, negotiates or facilitates an extension of credit". Section 143 requires anyone who participates in a designated activity to carry a license. A payday lender must carry a separate license for each operating location. They must have a sign at each location displaying this license number, the maximum charges permitted in BC (15% of principal), the amount they charge, the total cost of borrowing $300 for 14 days, and the annual percentage rate they charge.

The regulations also set limits on the amount of interest that can be applied, mirroring s 347 of the *Criminal Code*.

- i) The maximum amount that can be charged on a payday loan is $15 for every $100 borrowed including all charges and fees.
- ii) In addition, a payday loan cannot exceed 50% of the borrower's net pay to be received during a single pay period within the payday loan term.
- iii) If the repayment amount is not paid, default fees cannot exceed 30% per annum on the outstanding principal.

Thus, payday loans in BC are permitted under *Criminal Code* section 347.1, as long as they follow the provincial requirements.

These requirements do set out a number of additional restrictions on payday lenders (s 112.08). Notably, a payday lender may **not**:

- (a) sell insurance to or for the borrower, or require or request that the borrower insure a payday loan;
- (b) issue a new payday loan to a borrower who already has a payday loan issued by the lender;
- (c) require, request or accept consent from a borrower to use or disclose the borrower's personal information for a purpose other than offering, arranging, providing or otherwise facilitating a payday loan;
- (d) require, request or accept any undated cheque;
- (e) require, request or accept any post-dated cheque, pre-authorized debit or future payment of a similar nature, for any amount exceeding the amount to repay the payday loan by the due date, including interest and permissible charges (although, a one-time fee of $20 is allowed for a dishonoured cheque or pre-authorized debit);
- (f) require or request any payment from the borrower before it is due under the loan agreement;
- (g) grant rollovers (i.e. charge a fee to extend a loan’s due date);
- (h) require, request or accept an assignment of wages from the borrower (and if they do the assignment of wages is not valid);
- (i) require, request or accept from the borrower or any other person, as security for a payday loan, any personal property, real property, or documentation that could be used to transfer title in personal property or real property;

- (j) discount the principal amount of a payday loan by deducting or withholding from the initial advance an amount representing any portion of the total cost of credit;

Additionally, there is a mandatory period set out in the regulations where a consumer is allowed to return the money and cancel the payday loan. This period begins on the date that the borrower receives the first advance and expires at the end of the second day that the payday lender is open for business after that first advance.

3. High-Cost Credit Products

Legislation designed to protect consumers from lenders who offer loans with high interest rates, but are not payday lenders, received royal assent in May 2019, but requires regulations to be passed before coming into force.

High cost credit products are loans or lines of credit that charge high interest rates and/or various fees. The formal definition of a High-Cost Credit Products is:

- (a) a fixed credit product that has an APR (annual percentage rate) that exceeds the prescribed APR and meets other prescribed criteria,
- (b) an open credit product that has an annual interest rate that, calculated in accordance with the regulations, exceeds the prescribed annual interest rate and meets other prescribed criteria,
- (c) a lease that has an APR that exceeds the prescribed APR and meets other prescribed criteria, or
- (d) a prescribed product through which credit is extended by a high-cost credit grantor to a borrower primarily for a personal, family or household purpose,

but does not include a payday loan, mortgage on real property or prescribed credit product;

Once the regulations are passed, a new part (Part 6.3) will be added to the *Business Practices and Consumer Protection Act* that creates restrictions on high-cost credit products. The new regime limits a credit grantor to a prescribed rate (or the criminal rate if none is prescribed), requires certain terms to be in high-cost credit agreements, and requires that the credit grantor not charge, require, or accept any amount not allowed (such as a fee for making a payment before it is due), not disclosed, or that exceeds the high-cost credit agreement.

H. Remedies and Sanctions

In addition to the remedies already mentioned that are available to consumers, the *BPCPA* provides for further sanctions:

1. Fines or Imprisonment

Section 190 establishes a summary conviction offence with penalties of imprisonment up to one year and fines of up to $10,000 for individuals and $100,000 for corporations, for any contravention of the *BPCPA*.

2. Investigation and Search Powers

Part 10 gives the Director the power to investigate and request information where there are reasonable and probable grounds to believe that a person has contravened, is contravening, or is about to contravene the *BPCPA* or an order made under it.

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VI. Conditional Sales Contracts

The *Personal Property Security Act*, RSBC 1996, c 359 [*PPSA*] governs conditional sales agreements and security contracts. It established a new unified system for the registration, priority, and enforcement of transactions where collateral is given to secure payment or the performance of an obligation. The main purpose of the *PPSA* is to offer lenders or creditors a system of priority vis-à-vis other creditors where it is necessary for the lender or seller to take an interest in personal property to ensure the obligations of the borrower or purchaser are met. The legislation effectively creates a system for the registration and enforcement of a security interest against personal property.

Under s 2, the *PPSA* governs every transaction that creates a security interest. A "security interest" is defined in s 1 as an interest in goods that secures payment or the performance of an obligation.

Note: For the purposes of this section, goods is used to define security interests. However, the actual definition is broader than that. For more information, see ss 1(a) and ss 1(b) "security interest".

Chapter 10: Creditors' Remedies and Debtors' Assistance has a discussion on the protection offered to a consumer by the *PPSA*, including the requirements of enforceable security. The *PPSA* has some special considerations applicable if the goods in which the collateral was taken were consumer goods. Consumer goods are defined in s 1 as goods that are acquired primarily for personal, family, or household purposes.

A. Creditor's Remedies Against the Debtor

1. Control by the Creditor

Section 58 provides that where the debtor defaults on a security agreement, the creditor can take control of the collateral item through any method authorised by law with a few select exceptions (s 56). Where, however, the collateral is a consumer good and the debtor has paid two-thirds of the total amount secured, the creditor may not seize the goods without an application to the court (s 58(3)).

2. Action by the Creditor

A creditor can sue the debtor for breach of contract and seek repayment of the monies owed. Unless the security interest has been taken in consumer goods, the secured party can seize **and** sue for any deficiency. When consumer goods form all or merely a portion of the collateral, the secured party must elect to **seize or sue**, subject to s 58(3).

3. Acceleration Clauses

A security agreement provides that a creditor may accelerate payment (or performance) by the debtor if the creditor, in good faith, believes and has commercially reasonable grounds to believe that the prospect of payment or performance is about to be impaired or that the collateral is or is about to be placed in jeopardy (s 16).

B. Restrictions on the Creditor's Right to Dispose

Section 59 provides that a creditor cannot sell the seized goods before the expiration of the 20-day notice period as every party entitled to notice under ss 59(6) or ss 59(10) via approved method outlined in s 72 may redeem the collateral by fulfilling the obligations secured in the security agreement (s 62). Where the collateral is a consumer good, the redeeming party need only pay the amount in arrears (s 62(1)(b)), plus reasonable seizure fees. This is known as the right of re-instatement. It cannot be used more than twice in a 12-month period (s 62(2)).

C. Disqualification from "Seize or Sue" Provisions

A party with a security interest in consumer goods may avoid the "seize or sue" restriction where:

- a) the debtor has engaged in wilful or reckless acts or neglect which have caused substantial damage or deterioration to the goods, and the secured party may seek a court order pursuant to s 67(9) disqualifying the debtor from the rights and remedies ordinarily available under ss 67(1) - (7); or
- b) the secured party discovers after seizure that an accession that was collateral has been removed and not replaced by other goods of equivalent value and free from prior security interests; a claim may be advanced against the debtor for the value of the accession (s 67(8)).

Note: Accession means goods that are installed in or affixed to other goods. For example, a shovel attached to a truck. See s 38 and ss 1(1) for more information about accessions.

The seizure of consumer goods generally extinguishes the debt in relation to the security agreement. However, there are exceptions under s 67:

- If the creditor returns the consumer goods within 20 days after the seizure, that will revive the debt;
- If the security agreement is a mortgage or an agreement for sale and the consumer goods are part of this security, in the case that the lender exercises his or her rights under the mortgage or agreement of sale but does not seize the goods, the debt is not extinguished;
- If the creditor has a purchase money security interest in the seized consumer goods and other consumer goods, the debt is extinguished to the extent identified in the security instrument as relating to the seized consumer goods.

These qualifications also apply in the event of a voluntary foreclosure and a voluntary surrender of consumer goods rather than a seizure.

D. Third Party Purchaser's Rights

Under ss 30(3) and 30(4), where a third party purchases collateral in the form of consumer goods worth less than $1,000, and the third party does not have knowledge of the security agreement between the vendor and the creditor, the third party takes the item free of the creditor's interest, even if registered. This is known as the "garage sale" defence. The purchaser is known more commonly as a *bona fide* purchaser for value without notice.

The third party's priority over the creditor ends if there is knowledge of the pre-existing security interest. Under s 1(2), "knowledge" is judged objectively rather than subjectively (i.e. would a reasonable person know?).

> **NOTE:** If the creditor's interest in the collateral does not continue because the third-party purchaser takes title free of that interest, the creditor's interest will continue in the proceeds of the sale by the debtor to the purchaser if it is continuously perfected under ss 28(2) or perfected within 15 days under ss 28(3).

E. Application of PPSA to Leases

Many consumers lease cars instead of buying on credit under a financing agreement. A lease can qualify as a security agreement: see *DaimlerChrsyler Services Canada Inc. v Cameron*, 2007 BCCA 144 for factors and *Re Bronson* (1995), 34 CBR (3d) 255 (BCSC). Therefore, if they default and the car is repossessed, the "seize or sue" restriction may apply, but the situation is not always clear-cut. LSLAP clients should be referred to a lawyer.

F. Bills of Exchange Act

Under Part V of the *Bills of Exchange Act* [*BEA*], a bill of exchange or promissory note given for a consumer purchase must be clearly marked "Consumer Purchase" (s 190(1)), and where it is marked, the rights of an assignee of the bill or note are subject to any defence the purchaser would have against the vendor (s 191). Where it is not marked, it is void except in the hands of a holder in due course without notice (s 190(2)). The purpose of Part V is to codify the rule in *Federal Discount Corp v St Pierre* (1962), 32 DLR (2d) 86.

Part V does not cover private sales (where the seller is not engaged in the business of selling the goods in question), or sales to small businesses or corporations of items to be used in their business. Nor does it cover a purchaser's loan, i.e. a loan from a lender to a person to enable that person to buy goods and/or services from a seller (subject to s 189(3) below).

Section 189(1) defines a consumer bill and s 189(2) defines a consumer note. Under s 189(3), a consumer bill or note is conclusively presumed if:

1. the consideration for its issue was the lending of money, etc. by a person other than a seller, to enable the purchaser to make a consumer purchase; and
2. the seller and the person who lent the money, etc. were, at the time the bill or note was issued, not dealing with each other at arm's length within the meaning of the *Income Tax Act*.

If an instrument meets the definition of a consumer note, any defence that consumer would have for an action against him or her by the seller would also be available as against subsequent note holders.

Therefore, if the consumer does not get what he or she has paid for, that person may not be required to pay the loan back when pressed for payment by the assignee. Also, if the seller does not fulfil obligations under a warranty, the consumer will be able to resist payment. (See *Canadian Imperial Bank of Commerce v Geldart*, [1985] BCJ No 1973 and *Canadian Imperial Bank of Commerce v Kabatoff*, [1986] BCJ No 942)

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VII. Motor Dealer Act

A. Overview of the Motor Dealer Act

The *Motor Dealer Act*, RSBC 1996, c 316 [*MDA*] sets up a licensing regime that requires all motor dealers in the province be licensed. The Registrar of Motor Dealers carries out the licensing function. The Registrar has the authority to receive complaints concerning the conduct of a motor dealer and has the authority to refuse to provide a license, or suspend or terminate an existing motor dealer's license.

The definition of a motor dealer is a person who, in the course of business:

- (a) engages in the sale, exchange or other disposition of a motor vehicle, whether for that person's own account or for the account of another person, to another person for purposes that are primarily personal, family or household;
- (b) holds himself, herself or itself out as engaging in the disposition of motor vehicles under paragraph (a); or
- (c) solicits, offers, advertises or promotes with respect to the disposition of motor vehicles under paragraph (a),

but **does not** include a salesperson.

The MDA Regulations set out requirements concerning representations made by a motor dealer when offering motor vehicles for sale. A motor dealer is required to disclose to a prospective buyer whether the motor vehicle was previously used as a taxi, police or emergency vehicle, or for organized racing. In the case of a new motor vehicle, the motor dealer must disclose whether the vehicle has sustained damage that required repairs worth more than 20 percent of the asking price. In the case of a used vehicle, the dealer must disclose whether the vehicle has sustained damages requiring repairs of more than $2,000. The motor dealer is also required to disclose whether a vehicle has previously been used as a lease or rental vehicle and whether a used motor vehicle has been brought into the province specifically for the purposes of sale.

A motor dealer is required to disclose to a prospective consumer whether the odometer accurately reflects the true distance travelled by the motor vehicle. The *MDA* Regulations also set out the required contents of a sale or purchase agreement concerning new vehicles.

Section 34 of the *MDA* prohibits any person from disconnecting or tampering with an odometer. It is also an offence to drive or operate a motor vehicle with a disconnected odometer. Furthermore, it is an offence for any person to alter, disconnect, or replace a motor vehicle's odometer with the intent to mislead a prospective purchaser about the distance travelled by the motor vehicle. Odometer tampering can significantly increase the apparent sale value of a motor vehicle and, therefore, the consumer should be wary of representations of low mileage. The MDA sets out regulatory responses to odometer tampering. The consumer who suffers loss as a result of odometer tampering has a contractual remedy and may be able to present a claim to the Motor Dealer Customer Compensation Fund Board.

B. Motor Dealer Customer Compensation Fund

An individual who suffers a loss as a result of purchasing a motor vehicle from a registered motor dealer may be entitled to compensation from the Motor Dealer Customer Compensation Fund Board ("the Board"). A consignor of a motor vehicle is also entitled to make an application – on similar grounds as a purchaser – for compensation for the loss of the consigned vehicle or the value of the vehicle. Individuals who have purchased a vehicle, primarily for personal or family use, from a registered motor dealer are eligible to apply to the Board for compensation. Before applying for compensation, the consumer must first make a demand against the motor dealer responsible for the loss. What constitutes an eligible loss is set out in s 5 of the *Motor Dealer Customer Compensation Fund Regulation*, BC Reg 102/95. An eligible loss must be a liquidated amount arising from a trade-in, full payment, deposit or down payment or other

liquidated amount in respect of the purchase of a motor vehicle. The cause of the loss must be related to the bankruptcy, insolvency, receivership, dishonest conduct, or failure of the motor dealer to provide clear title.

Under the *Motor Dealer Customer Compensation Fund Regulation* an eligible loss may also arise from the unexpired portion of an extended warranty so long as it results from the bankruptcy, insolvency, receivership, or other failure of the motor dealer. Claims that will not be compensated include those based upon cost, value or quality, those based on an extended warranty or service if it is recoverable from an insurer, and those related to the portion of the operation of the motor vehicle claimed as a business expense. For further information about making an application for compensation from the Motor Dealer Customer Compensation Fund, call the Vehicle Sales Authority at (604) 574-5050 or visit http://mvsabc.com/compliance-and-claims/compensation-fund/. A claim against the Fund must be made within two years from the refusal or the motor dealer's failure to pay for the losses.

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VIII. Miscellaneous

A. Circumvention of Disclaimer Clauses

Vendors may try to protect themselves from liability arising from oral representations made to a buyer by inserting an exclusion clause into the written contract. Exclusion clauses attempt to invalidate any representations or warranties other than those explicitly mentioned in the written contract. Exclusion clauses can also seek to exclude statutory conditions and warranties, or they can attempt to limit the buyer's default rights. There can be a variety to ways to get around such clauses.

1. Statutory Relief

a) Retail Sales of Goods

SGA s 20(2) states that, in the case of a retail sale of new goods to a consumer, any term of a contract that purports to negate or in any way diminish the statutory conditions or warranties in ss 17 – 19 of the *SGA* is void.

b) Deceptive Act or Practice

Where a supplier makes oral representations to a consumer, but terms in the contract deny or negate such representations, the vendor may have engaged in a deceptive act or practice under the *BPCPA*.

c) Consumer Transactions Generally

In consumer transactions involving a commercial supplier, the purchaser may invoke s 187 of the *BPCPA*, which makes oral or extrinsic evidence admissible for determining the understanding of the parties.

2. Common Law Relief

Although the statutory provisions will usually help a consumer defeat disclaimer clauses, several common law doctrines and judicial techniques may also be of assistance.

a) Clause Deemed Not to Be Part of Contract

To rely on an exclusion clause, the seller must show that it is part of the contract. However, the court may find that the clause does not form part of the contract where, for example, it is insufficiently legible, or where it was inserted after the agreement was concluded.

b) Misrepresentation as to the Clause's Legal Effect

When the seller has misrepresented the legal effect of a disclaimer clause, a court may be willing to render the clause inoperative. Traditionally, however, courts would not invalidate a clause based on a misrepresentation of law, as opposed to fact.

c) Strict Interpretation of Clause

Disclaimer clauses are strictly construed against the party seeking to rely on them. Anything not explicitly found in the clause will not be read into it.

d) Collateral Contract

The court may find that where a clause excludes oral representations, an oral representation made by the seller actually constitutes a collateral (or parallel) contract.

e) Inadequate Notice

Some disclaimer clauses are hidden in the "boilerplate" fine print of the contract and have been held not binding for this reason, if they are particularly onerous and attention was not drawn to them (*Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601, 83 DLR (3d) 400 (Ont CA)).

B. Consumers' Rights against Creditors and Debt Collection Agencies

1. If the Client has Serious Debt, Inform the Client of:

- a) the limits of a creditor's remedies (*Court Order Enforcement Act*, RSBC 1996, c 78), including garnishment and seizure;
- b) the limits to debt recovery (exemptions) under the *Court Order Enforcement Act*; and
- c) options for getting out of debt (see Chapter 10: Creditors' and Debtors' Remedies for Orderly Payment of Debts information).

2. Legislation Regulating Debt Collection

Business Practices and Consumer Protection Act, SBC 2004

Court Order Enforcement Act, RSBC 1996, c 78

Repairer's Lien Act, RSBC 1996, c 404

Small Claims Act, RSBC 1996, c 430

Bankruptcy and Insolvency Act (Canada), RSC 1985, c B-3

Debtor Assistance Act, RSBC 1996, c 93

Creditor Assistance Act, RSBC 1996, c 83

Personal Property Security Act, RSBC 1996, c 359

For more information on debtor and creditor law, see Chapter 10: Debtors' and Creditors' Remedies.

C. Telemarketer Licensing Regulation

In the *Telemarketer Licensing Regulation*, BC Reg 83/2005 [TLR], "telemarketer" is defined as "a supplier who engages in the business or occupation of initiating contact with a consumer by telephone or facsimile for the purpose of conducting a consumer transaction."

Section 4(1) of the TLR requires that a telemarketer have a license for each location in which they conduct business.

Section 7 outlines the various records a telemarketer must keep for **each** sales contract entered into, and stipulates that the records be maintained for a period of two years after the contract is entered into by the consumer.

Section 8 of the *TLR* prohibits several acts and practices by telemarketers. Section 8(2) prohibits contacting a consumer by either phone or fax on (a) statutory holidays, (b) outside of the hours of 10 a.m. – 6 p.m. on Saturdays or Sundays, and (c) outside of the hours of 9 a.m. – 9:30 p.m. on any other day. Section 8(3) prohibits contacting a consumer more than once in 30 days for the same transaction. Section 8(4) prohibits telemarketers from blocking their number on the call display of the consumer. Section 8(5) requires that, before the consumer enters into a contract or commits to contributing money, a telemarketer acting on behalf of a supplier disclose (a) the name, business address and telephone number of the supplier, or (b) the purpose of the contribution if requesting a donation.

D. Repairer's Liens

The *Repairer's Lien Act* [*RLA*], which codifies the common law possessory lien, offers an extremely powerful collection tool for those who repair or do other work on chattels. With respect to any chattel, it allows the repairer to simply retain possession of the goods until paid and, if payment is not forthcoming, to sell the goods to recover the cost of the repair. In addition, for a limited category of chattels, the most important of which is motor vehicles, the *RLA*, if followed precisely, allows the repairer to maintain and enforce a lien on a vehicle, even after it has been returned to the owner. This is a common consumer problem encountered by individuals whose vehicles have been seized by a bailiff following a dispute over the amount of a repair bill. The most important requirement for a valid repairer's lien is that the repairer, after doing the work but before releasing possession of the vehicle, must get the owner to sign an acknowledgement of indebtedness (often included as part of the repair invoice). The repairer then has 21 days to file a lien in the Personal Property Registry and, if everything has been done properly, the lien remains valid for a period of six months and can be renewed for an additional six months. At any time while the lien is subsisting, the garage keeper or repairer can have the vehicle seized by a bailiff.

Another common consumer complaint with respect to repairer's lien seizures is the amount of the bailiff's fee. A schedule to the *RLA* limits certain bailiff fees. See BC Regulation 424/81. Bailiffs frequently try to demand excessive seizure fees. Complaints about excessive fees charged by bailiffs can be referred to the Director of Debt Collection, Ministry of Attorney General.

E. Liens for Storage

The *Warehouse Lien Act*, RSBC 1996, c 480 gives a statutory lien and power of sale to those who are in the business of storing goods.

F. Towed Vehicles

Under s 188 of the *Motor Vehicle Act*, where an illegally parked vehicle has been towed away, the owner of the vehicle must pay all costs and charges for the removal, care, and storage of the motor vehicle. These costs and charges represent a lien in favour of the keeper of the place where the vehicle is being kept.

G. Electronic Transactions Act

The *Electronic Transaction Act*, SBC 2001, c 10 [*ETA*] prevents parties from challenging contracts solely on the grounds that they are entered into electronically. The *ETA* removes legal uncertainty concerning the enforceability of contracts entered into electronically, and is primarily designed to facilitate commercial relations using the Internet. However, s 17 of the Act provides an element of consumer protection. It provides that an electronic record created by an individual is not enforceable where the individual made a material error in the record and: (i.) the electronic agent did not provide an opportunity to prevent or correct the error; (ii.) the individual notifies the other party that an error has been made as soon as practicable after learning of the error; (iii.) the person making the error takes reasonable steps to return the consideration in accordance with the instructions of the other party or destroy the consideration if requested to do so; and (iv.) the individual has not received any material benefit or value from the consideration.

H. Civil Resolution Tribunal

British Columbia's new Civil Resolution Tribunal Act, SBC 2012, c 25, establishes a new dispute resolution body, the Civil Resolution Tribunal. The Tribunal provides a new online venue for the resolution of small claims matters. It encourages people to use a broad range of collaborative dispute resolution tools to resolve their disputes as early as possible, while still preserving adjudication as a last resort.

The Civil Resolution Tribunal is able to resolve (and has initial exclusive jurisdiction of):

Small claims disputes up to a maximum value of $5,000 for

- debt or damages;
- recovery of personal property;
- specific performance of an agreement relating to personal property or services; or
- relief from opposing claims to personal property

Claims related to motor vehicle accidents up to $50,000 (*Civil Resolution Tribunal Act* s 133), such as:

- damages for injuries suffered due to a motor vehicle accident
- determination whether an injury is a minor injury for the purposes of the Insurance Act
- damage to property (such as a vehicle) incurred due to a motor vehicle accident

Strata disputes between owners of strata properties and strata corporations for a wide variety of matters such as

- non-payment of monthly strata fees or fines;
- unfair actions by the strata corporation or by people owning more than half of the strata lots in a complex;
- uneven, arbitrary or non-enforcement of strata bylaws (such as noise, pets, parking, rentals);
- issues of financial responsibility for repairs and the choice of bids for services;

- irregularities in the conduct of meetings, voting, minutes or other matters;
- interpretation of the legislation, regulations or bylaws; and
- issues regarding the common property.

For more information on the Civil Resolution Tribunal and the Small Claims Court, see Chapter 20: Small Claims.

I. Air Passenger Protection Regulations

Passengers on aircraft recently received an additional set of legal protections in the cases of delayed flights, denied boarding, children under 14 travelling with or without family, and musical instrument transportation. The *Air Passenger Protection Regulations* SOR/2019-150 [APPR] under the *Canada Transportation Act* went into effect with some protections entering into force on July 15th, 2019 and fully entering force on December 15th, 2019. There are also differences in the requirements for a large carrier (defined as carrying over 2 million people worldwide per year for the past 2 years) and a small carrier. The information below applies to large carriers, and small carriers have similar but slightly different obligations. Please see the regulation itself for more information.

1. Communication with Passengers

Air carriers must make its terms and conditions surrounding:

- Flight delay, flight cancellation and denial of boarding;
- Lost or damaged baggage; and
- The assignment of seats to children who are under the age of 14 years

Available in simple, clear and concise language (APPR s 5(1)). Additionally, they need to provide this information (or a hyperlink to this information) on all digital platforms that they use to sell tickets and on all documents on which the passenger's itinerary appears (APPR s 5(2)). In the airport, the carrier is required to display signage indicating that passengers have certain rights under the APPR in the case of lost/damaged baggage or denied boarding. There are additional requirements on the carriers and sellers of tickets for air travel in terms of advertisement (APPR s 25-31). Please see the regulation for more information.

2. Delays, Cancellations, and Denial of Boarding

a) General

Section 13 of the APPR sets out the information that must be provided to passengers in the event of a delay, cancellation, or denial of boarding:

1. the reason for the delay, cancellation or denial of boarding;
2. the compensation to which the passenger may be entitled for the inconvenience;
3. the standard of treatment for passengers, if any; and
4. the recourse available against the carrier, including their recourse to the Agency.

In the case of a delay, the carrier is also required to give status updates every 30 minutes until a new departure time is set or alternative travel arrangements have been made. There are three possible categorizations for a delay, cancellation, or denial of boarding: it is not within the control of a carrier, it is in control of the carrier, or it is in the control of the carrier but is required for safety purposes. Determining the category of the incident is the first step for determining the benefits that are required to be afforded to the passenger. The carrier is not at fault in situations such as weather conditions that render safe operation impossible, instructions from air traffic control, a medical emergency, a labour disruption within the carrier, illegal acts or sabotage, a collision with wildlife, or a security threat. It also includes a delay, cancellation or

denial of boarding that is directly attributable to an earlier delay or cancellation caused by something outside of the control of the carrier where the carrier took all reasonable measures to mitigate the impact of the earlier delay or cancellation. These are merely examples and other situations could potentially be classified as not within the control of the carrier (APPR s 10). This table below sets out the benefits that must be provided to passengers in the event of a delay, cancellation, or denial of boarding (APPR ss 10-21):

The Carrier Must:	Carrier not at fault	Carrier at fault, but needed for safety	Carrier at fault
Inform the passenger as set out in s 13 and detailed above	Yes	Yes	Yes
Provide food, drink, and access to communication free of charge in case of delay or cancellation	No	Starting 2 hours after original departure time, if passenger informed of delay/cancellation less than 12 hours before departure time	Starting 2 hours after original departure time, if passenger informed of delay/cancellation less than 12 hours before departure time
In the event of a cancellation, denial of boarding, or a delay of more than 3 hours where the passenger desires, provide alternate travel arrangements free of charge or a refund	A confirmed reservation for the next available flight with the carrier that is travelling to the destination within 48 hours; Or if that cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport; No refund need be offered	Provide a refund; or a confirmed reservation for the next available flight with the carrier that is travelling to the destination within 9 hours; If that cannot occur, a confirmed reservation for a flight to the destination by any other carrier from the original airport within the next 48 hours; Or, if that also cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport.	Provide a refund (minimum $400); or a confirmed reservation for the next available flight with the carrier that is travelling to the destination within 9 hours; If that cannot occur, a confirmed reservation for a flight to the destination by any other carrier from the original airport within the next 48 hours; Or, if that also cannot occur, a confirmed reservation for a flight to the destination by any other carrier and if that flight departs from another airport, transportation to that airport.
Provide compensation for a delay or cancellation with less than 14 days of notice	No	No	Compensation depends on how long it delays arrival to destination: • $400 if between 3 and 6 hours of delay • $700 if between 6 and 9 hours of delay • $1,000 if more than 9 hours of delay
Standard of Treatment for denial of boarding	No standard of treatment required by the regulations	before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the following treatment free of charge: 1. food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and 2. access to a means of communication. If a benefit is offered in exchange for a passenger giving up their seat, the carrier must provide the passenger a written confirmation before the flight departs	before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the following treatment free of charge: 1. food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and 2. access to a means of communication. If a benefit is offered in exchange for a passenger giving up their seat, the carrier must provide the passenger a written confirmation before the flight departs
Provide compensation for a denial of boarding	No	No	Compensation depends on how long it delays arrival to destination: • $900 if between 3 and 6 hours of delay • $1,800 if between 6 and 9 hours of delay • $2,400 if more than 9 hours of delay

In the case of compensation for delay, cancellation, or a refund, compensation needs to be applied for to the carrier before the first anniversary of the day on which the flight delay or flight cancellation occurred.

Compensation must be monetary unless (APPR s 21):

1. [the carrier] offers compensation in another form that has a greater monetary value than the minimum monetary value of the compensation that is required under these Regulations;
2. the passenger has been informed in writing of the monetary value of the other form of compensation;
3. the other form of compensation does not expire; and
4. the passenger confirms in writing that they have been informed of their right to receive monetary compensation and have chosen the other form of compensation.

In the case where a passenger's class of ticket changes on an alternate travel arrangement made by the carrier because of a delay, cancellation, or denial of boarding, the carrier may not charge an additional fee if alternate travel arrangements are of a higher class and, if the carrier was at fault for the delay cancellation or denial of boarding, must compensate the passenger the difference in the ticket cost if the alternate travel arrangement is of a lower class. To the extent possible, the carrier must provide services that are comparable to those of the original ticket.

b) Denial of Boarding, Priority Rules

When a passenger is denied boarding in a case where the carrier is at fault (even if it is done for safety reasons), there is a procedure in place for determining who is to be denied boarding (APPR s 15):

1. The air carrier must ask all passengers if they would be willing to give up their seat, and cannot deny boarding to a passenger until it has done so
2. The carrier must not deny boarding to a passenger that is already on the aircraft, unless it is required for safety reasons
3. If any passenger(s) must be denied boarding, the carrier must start by denying boarding to passengers that fall into the lowest category on this list that contains passengers who are still entitled to board the plane (in other words, this is the priority list for boarding):
    1. an unaccompanied minor;
    2. a person with a disability and their support person, service animal, or emotional support animal, if any;
    3. a passenger who is travelling with family members; and
    4. a passenger who was previously denied boarding on the same ticket.
    5. all other passengers

c) Delay on the Tarmac

There are additional protections in place if a delay occurs while waiting on the ground in the aircraft either before take-off or after landing. Once there is a delay, the air carrier is required to provide access to the following, free of charge [APPR s 8(1)]:

1. if the aircraft is equipped with lavatories, access to those lavatories in working order;
2. proper ventilation and cooling or heating of the aircraft;
3. if it is feasible to communicate with people outside of the aircraft, the means to do so; and
4. food and drink, in reasonable quantities, taking into account the length of the delay, the time of day and the location of the airport.
5. If urgent medical assistance is required, the carrier must facilitate access to that assistance

In addition, after 3 hours of delay on the ground the carrier must provide an opportunity for the passengers to disembark provided that it is not likely for take-off to occur in less than 45 minutes (APPR s 9).

3. Lost or Damaged Baggage

In the case where baggage is lost (even temporarily) or damaged, the carrier must provide compensation of up to $2,100 (see the regulation) and a refund of any baggage fees (APPR s 23).

4. Priority Seating for Children under 14

By December 15th, 2019, The carrier must facilitate the assignment of a seat to a child who is under the age of 14 years by offering, at no additional charge,

- in the case of a child who is four years of age or younger, a seat that is adjacent to their parent, guardian or tutor's seat;
- in the case of a child who is 5 to 11 years of age, a seat that is in the same row as their parent, guardian or tutor's seat, and that is separated from that parent, guardian or tutor's seat by no more than one seat; and
- in the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row (APPR s 22).

The carrier must compensate the passenger for the difference in ticket cost if the seat assigned to the child is of a lower class, and may ask for additional payment equal to the difference in ticket price if the passenger chooses a seat that is higher class than the ticket.

5. Musical Instruments

All carriers must have policies in place for the transportation of musical instruments, including restrictions with respect to size, weight, quantity, and use of stowage space in the cabin; fees for transporting instruments; and the options available for a passenger if the airplane that the flight actually takes place on is different than expected and has insufficient storage space in the cabin.

Carriers must accept musical instruments as checked or carry-on baggage unless the specific instrument is too heavy, too large, or too unsafe according to the general terms and conditions of the carrier.

J. Cheque Cashing Fees for Government Issued Cheques

The BCPCA sets out a restriction on the amount allowed to be charged to a person in fees for cashing a government issued cheque, such as a cheque issued under the *Employment and Assistance Act* for income assistance (BPCPA s 112.13). Specifically, under the *Government Cheque Cashing Fees Regulation* BC Reg 127/2018 [GCCFR], a person may not charge a cheque cashing fee of more than $2 plus 1% of the value of the cheque up to a maximum of $10 total (GCCFR s 3).

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IX. Consumer Transactions

A. Determine the Client's Position and Desired Outcome

- **Ask to see the contract.** Reading the terms as they are written is the first step in analysing the contract and determining its meaning.
- **What did the client and the other party agree to do, and how did that party agree?** Clients tend to focus on the personal consequences of a transaction. That a contract or its execution is inconvenient to the client is not helpful unless the client has a legal remedy. Determine the subject matter of the contract and the understandings surrounding it. It should be ascertained as early as possible what other terms or representations were made surrounding this contract as what is written on paper may not accurately communicate the parties' agreement.
- **What were the written and oral understandings?** Under traditional common law, a contract had to be either all written or all verbal. Section 8 of the *SGA* permits a contract to be partly in writing and partly by word of mouth, or implied by the conduct of the parties. Section 187 of the *BPCPA* states that parol (verbal) or extrinsic evidence can be admissible evidence toward understanding what agreements the parties made. Further, there is extensive case law supporting the position that one cannot induce another party to enter a contract with verbal representations and then refuse to act on those representations because they are not in the written contract.
- Did the client receive all of the statutorily required information when entering the contract? The BPCPA sets up significant notice and information requirements that, if unmet, may invalidate the contract.
- **What outcome is the client looking for?** Does the client want damages? Or to get out of a contract? Or some other remedy? The client may need assistance in resolving these questions. Frequently, a client will feel wronged, but have no clear idea what his or her rights are or what solutions he or she would find acceptable.
- **When the client arranged the transaction, did he or she do so primarily for personal, household, or family purposes, or for business purposes?** In many situations, the *BPCPA* will not apply to non-consumer transactions. The *SGA*, on the whole, protects all buyers – although some rights may be weaker if the buyer is a business rather than a consumer.
- **Was the client cheated, misled, or bullied in the transaction?** If the answer is yes, the *BPCPA* or common law rules against misrepresentation or unconscionable conduct may apply.
- **Has the client in any way acquiesced to the actions of the other party, or waived his or her rights?** According to section 3 of the *BPCPA*: "Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act". Section 69 of the *SGA* allows some of the rights or duties under a contract of sale to be set aside (see also *SGA*, s. 20). At common law, if a party waives rights he or she may be estopped from later insisting on them.
- **Has the other party already performed all or part of the obligations?** Section 15(4) of the *SGA* provides that if the buyer has accepted part of the goods, and the contract is not severable, the buyer can no longer treat the contract as terminated for breach without an express or implied term in the contract allowing so. However, he or she may be entitled to damages for breach of contract in that situation. This position is subject to qualification. For instance, under s. 23 of the *BPCPA*, concerning future performance contracts, the buyer is entitled to cancel the contract for up to a year when the supplier has not made the appropriate disclosures required by the Act.
- **Has the client expressed his or her concerns to the other party?** The other party may not know there is a problem. Where the other party has not been put on notice that there is a problem, issues of estoppel and acquiescence may enter into play. The *Law and Equity Act*, RSBC 1996, c 253, s 62 provides that a party to a contract may, instead of refusing to perform a disputed obligation, perform the obligation under protest if he or she gives reasonable notice to

the other party that the performance is under protest, and then perhaps receive compensation for that obligation if it is beyond what was required in the contract. Letting the other party know may be the most simple and cost effective way to resolve any problems arising from a consumer transaction.

- **Is either party unable to perform the obligations due to circumstances beyond that party's control?** If so, the common law around frustration of contracts and the *Frustrated Contract Act*, RSBC 1996, c 166 may apply to the transaction.
- **Was the client's attention drawn to any onerous provisions in the contract?** *Tilden Rent-A-Car Co v Clendenning* (1978), 18 OR (2d) 601, 83 DLR (3d) 400 (Ont CA) states that a party seeking to rely on onerous terms in a standard form contract should take reasonable measures to ensure that the other party is aware of those provisions. In *Karroll v Silver Star Mountain Resorts* (1988), 33 BCLR (2d) 160, 47 CCLT 269 (BC SC), however, the Court found that there is no general requirement to bring onerous terms to the attention of a signing party; only circumstances in which a reasonable person would have known that the party signing was not consenting to those onerous terms create an obligation on the party tendering a document for signature.

B. Check the Form and Terms of the Agreement

- The terms of a contract should refer to such things as quality, terms of payment, and the time at which title is transferred.
- The terms may be construed either as conditions, warranties, or innominate terms. The rights and remedies of the buyer will depend on how the terms of the contract are classified. This is discussed at length in Section III: Contracts for the Sale of Goods.
- The form of the agreement(s) can be legally important. If there is a contract in writing, what is said about the subject matter of the contract may be characterized as representations or as terms of the agreement. Section 8(1) of the *SGA* states (with qualifications) that a contract may be partly in writing and partly by word of mouth, or may be implied by the parties' conduct.
- Some contracts are statutorily required to be in writing, and moreover, some require that the writing conform to a strict format that is laid out either in an Act or by Regulation. The *BPCPA* is very strict on the form required for some contracts, as explained in detail in that section.

C. Determine Whether the Contract Complies with the Statutory Requirements

If the contract does not comply with the statutory requirements, inform the client of any available defences against legal actions by the other party, possible legal actions by the client, available statutory remedies, and the appropriate action for the client.

D. Determine Whether Any Common Law Remedies are Available

Where the statutes do not apply, there may still be a common law defence available.

1. No Obligation

In order to enforce the terms of a contract, there must be a contract and the particular terms must be enforceable under that contract.

2. Misrepresentation

Misrepresentation occurs when a party is induced to enter a contract based on a false statement. The remedies available depend on the nature of the misrepresentation. See section IV.I for more information on misrepresentation.

3. Frustration

If performance of the contract is impossible due to circumstances that arise after the contract was signed and that were outside of either party's control then the contract can be found to have been frustrated, and ongoing obligations under the contract will cease to apply. Once frustration is found to have occurred at common law, the *Frustrated Contract Act* will apply to adjust the rights and liabilities of each party and to appropriate restitution.

4. Mistake

Mistake is defined at common law as a fundamental misunderstanding between the parties to a contract. There are three categories of mistake: common, mutual, and unilateral.

- A **common mistake** exists when both parties make the same mistake. For example, the subject matter of the contract may not exist or was destroyed prior to the agreement.
- A **mutual mistake** exists when the parties make a different mistake, e.g. a purchaser wanted type A widgets and the vendor thought he or she ordered B widgets, so there is disagreement as to a term of the contract. This is usually an offer and acceptance issue, for both parties have to come to agreement for there to be a contract in the first place.
- A **unilateral mistake** exists when one party is mistaken about the obligations that he or she has assumed. This is a difficult defence because a court is unlikely to excuse the party from obligations on account of his or her unilateral mistake, unless the other party was aware of the mistake.

5. Laches or Acquiescence, Waiver, and Estoppel

If a party knowingly allows the other party in a contract to proceed according to a mistaken assumption that is to the other party's own detriment, then the initial party may have acquiesced to the mistaken assumption by inaction, and it may be enforceable against them.

The doctrine of laches becomes relevant if one party unreasonably delays pursuing a claim, and the other party is thereby prejudiced.

Promissory estoppel occurs when one party promises not to enforce his or her rights under the contract. In such a case, and where the other party has relied on the promise, it may be inequitable to allow the first party to later enforce the right. For an example of how promissory estoppel can be raised, see *Central London Property v High Tress House*, [1947] 1 KB 130, [1956] 1 All ER 256.

In some circumstances, a party to a contract can waive rights within the contract. It may be possible to retract the waiver with reasonable notice.

6. Unconscionability, Undue Influence, and Duress

Unconscionability, undue influence, and duress can all make a contract voidable. There are two requirements for unconscionability: an imbalance in the relationship of the parties, and an imbalance in the contract. Unconscionability is also dealt with in the *BPCPA*, ss 8-10. See *Morrison v Coast Finance Ltd* (1965), 54 WWR 257, 55 DLR (2d) 710 (BCCA) and *Harry v Kreutziger* (1978), 95 DLR (d) 231 for examples of unconscionability. Undue influence is the abuse of a relationship of trust and confidence to strongly influence another to make a contract. See *Geffen v Goodman Estate*, [1991] 2 SCR 353, [1991] 5 WWR 389 for an example of undue influence. Duress is the coercion of the will to

the point where it vitiates consent.

7. Illegality

In the past, Canadian courts would not enforce those contracts created for an illegal purpose.

A leading case in this area is *International Paper Industries Ltd v Top Line Industries Inc*, [1996] 7 WWR 179, 135 DLR (4th) 423 (BCCA), in which a lease for a portion of land was declared invalid, preventing the tenant from exercising the option to renew, because the land was subdivided contrary to the *Land Title Act*, RSBC 1996, c 250.

Today, courts may enforce contracts made for an illegal purpose if inequity would otherwise result, or if the purpose of the governing statute is not undermined. See Still v Canada (Minister of National Revenue), [1997] FCJ No 1622, [1998] 1 FC 549 (CA). The Court will consider the purpose and object of a statutory prohibition when deciding whether the contract is enforceable or not. Continental Bank Leasing Corp v Canada, [1998] 2 SCR 298 at para 67 in particular offers a good summary of the law of illegality.

8. Duty of Honest Performance

The Supreme Court of Canada has recently recognized that there is a general organizing principle of good faith and duty of honest performance in the context of Canadian contract law (*Bhasin v Hrynew*, 2014 SCC 71 at para 33). The duty of honest performance requires contracting parties to act honestly in the performance of contractual obligations. Note that this is not a fiduciary duty and parties remain free to act in their own self-interest, as long as they do not lie or mislead the other party.

Since the duty of honest performance applies generally, to all contracts, it would also apply to consumer transactions where one party has been dishonest or misled the other party.

E. Determine the Limitation Period for Making a Claim

The *Limitation Act*, RSBC 2012, c 13 sets out a general time limit of 2 years on starting any claim from the time that the claim is discovered (s 6(1)). Generally, a claim is discovered on the first day that a person knew or ought to have known that the injury, loss, or damaged had occurred and was caused (or contributed to) by an act or omission of the person against whom the claim is (or may be) made and that the court would be the appropriate means to seek a remedy (s 8). Usually this will be at the time of the act, but not always. If the person was (or is) a minor or was (or is) otherwise incapable of managing their affairs due to a disability special discovery rules apply (ss 18-19). There are also special discovery rules in the case of fraud, trust property, and securities amongst others (ss 12-17). In addition, certain acts provide exceptions to the general limitation period set out in the *Limitation Act*. For example, the *Local Government Act*, RSBC 2015, c 1 sets out that an action against a municipality must be commenced within 6 months after the cause of action first arises (s 735). Because of this, you must carefully check through the acts associated with your cause of action to ensure that you will not miss a limitation date.

If the claim was discovered before June 1, 2013, the former *Limitation Act* applies. At this point, the claim would be outside the limitation period unless there is an exception in the act for the type of claim brought. Under the former act, if the claim is for breach of contract, s 3(5) of the *Limitation Act*, RSBC 1996, c 266 states that the limitation period for breach of contract is six years. However, under s 3(2)(a), where damages claimed arise from physical damage to persons or property, the limitation period is two years, even where the claim is based on contract. In addition, if the claim is for negligence as well, the limitation period is two years.

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Chapter Twelve - Auto Insurance (ICBC)

I. Introduction

A. General

The automobile insurance system in BC is comprised of "no-fault" benefit claims and indemnification for claims in tort law.

No-fault benefits are included as part of the basic (compulsory) insurance coverage offered by the Insurance Corporation of British Columbia (ICBC or "the Corporation") exclusively. As the name implies, payment of the no-fault coverage is given regardless of whether any element of fault is attributed to the insured. Optional coverage above and beyond the basic coverage may be purchased from either ICBC or a private insurer under an optional insurance contract ("OIC").

Claims for damages brought under tort law, however, do require the presence of a fault element on the part of the defendant to be successful. The victim of the accident (e.g. a personal injury claimant) may sue the other driver(s), the owner(s) of the insured car, the manufacturer(s), automobile shop(s), municipality, the insurer(s), or any other parties liable for the injury. Legislatively, there is no limitation on the maximum amount of damages that a court could award to a victim. However, case law and statute may effectively cap certain heads of damage, such as non-pecuniary damages. Where the necessary conditions are met, ICBC may indemnify the insured for all or part of the assessed liability. This means that where damages are awarded to a victim in an accident, ICBC will pay those damages instead of the party (i.e. the insured) who is at fault.

It is important to determine whether the action is one that can be commenced in BC and whether the law of BC applies. For cases involving a BC resident who has been involved in an out-of-province accident, private international law rules will govern the action. Generally, for the substantive issues, the laws of the jurisdiction where the accident took place will apply. For procedural matters, the rules of the trial court will apply. A summary of out-of-province insurer qualifications, service procedures, and jurisdictional considerations is listed in **Section VI**, below.

The Insurance (Vehicle) Act [IVA] and the Insurance (Vehicle) Regulation [IVR] form a code governing most aspects of auto insurance in BC. This chapter is not meant to be a comprehensive summary of the IVA or IVR but rather is a guide to help people locate the relevant sections of the IVA and IVR that they are likely to encounter. A few preliminary concepts, which will be of use in understanding this chapter, are discussed immediately below.

1. Indemnification

Drivers purchase car insurance to protect themselves in the event that they are found liable for damages. If the necessary preconditions are met, ICBC assumes liability for payment of benefits or damages to the claimant or victim of a car accident. Instead of the insured paying the damages claimed, the insurance company, "indemnifies" the insured.

2. Subrogation

Subrogation is a common feature of insurance contracts. When ICBC assumes liability for payment of benefits or damages of any kind on behalf of the insured, ICBC is 'subrogated' to the right of recovery that the insured had against any other person (IVA, s 84), i.e., ICBC has all remedies available to it that the insured person might have exercised by him or herself (IVA, s 83).

3. Premiums and Point Penalties

Premiums are regular payments made by the insured to ICBC. Premiums are based on where the insured lives, how the vehicle is used, the type of vehicle, and the insured driver's claim record.

The point penalty system is authorized by sections 210 and 211 of the Motor Vehicle Act [MVA]. Section 28.01 of the Motor Vehicle Act Regulations, BC Reg 26/58, outlines the various breaches and/or offences of the MVA and the corresponding point penalties recorded.

Starting June 10, 2019, any traffic ticket a driver gets will have the potential to increase their ICBC insurance rates. Traffic tickets will be broken down into two categories: high-risk tickets and regular traffic tickets. High-risk tickets include but may not be limited to:

- Impaired driving incidents, including a 24-Hour Prohibition from driving, a 3-day prohibition from driving, a 7-day prohibition from driving, a 30-day prohibition from driving, or a 90-day Immediate Roadside Prohibition or Administrative Driving Prohibition. The increased insurance rates for impaired driving incidents will also include any individuals who have criminal convictions for impaired driving, refusing to provide a breath sample. The individual will be required to pay increased insurance rates once the individual‘s mandatory driving prohibition is over.
- Electronic Device tickets, which increases insurance rates on top of adding to the Driver Risk Premium
- Excessive Speeding tickets, which also increases insurance rates on top of adding to the Driver Risk Premium
- Driving While Prohibited charges
- Criminal Code driving convictions

These increased insurance rates would start on September 1, 2019.

4. Waiver

Section 85 of the IVA allows ICBC to waive a term or condition of an insurance contract (also known as "the plan"). However, in order for a term or condition to be waived, the waiver must be in writing and signed by an ICBC officer.

B. Application of the Current Legislation, and Transitional Provisions

On June 1, 2007, the IVA and accompanying IVR were amended. Transitional provisions in Parts 1, 4, and 5 of the IVA dictate which regime, old or new, will apply to a particular claim (ss 1.2, 58, and 74 respectively).

Generally, it is safe to say that the IVA and the IVR, taken as a whole, apply to:

- **Insurance policies** under the universal compulsory vehicle insurance plan set out by the Act (the "plan") that take effect on or after June 1, 2007;
- Optional **insurance contracts** that take effect on or after June 1, 2007;
- Any **claims** that arise under these insurance plans or contracts; and
- **Insured persons**, and **insurers**, and **ICBC** in relation to these insurance plans or contracts.

NOTE: TThe critical time to look at is the date on which the individual insurance policy or contract came into effect, or was renewed.

Claims and parties to the claims in relation to an insurance policy that came into effect before June 1, 2007 will continue to be governed by the old IMVA and IMVAR. It is entirely possible for a single accident to trigger the operation of both the old and new Acts simultaneously, (albeit in relation to different aspects of the resultant legal issues).

Although the IVA and IVR cover both ICBC and private insurer plans, some parts of the Act and Regulation apply only to one or the other. Specifically, the parts of the Act and Regulation that govern ICBC are Parts 1, 5, and 6 of the Act and Parts 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 of the Regulation. The parts of the Act and the Regulation that govern the

private insurers are Parts 4, 5, and 6 of the Act and Parts 13 and 14 of the Regulation.

Furthermore, the IVA and IVR apply to both universal mandatory coverage and optional coverage. Part 1 of the IVA applies to ICBC's mandatory coverage only. Part 4 of the IVA applies to optional coverage. Parts 5 and 6 of the IVA apply to both mandatory coverage and optional coverage.

C. Seeking Legal Counsel for Your Claim

Most personal injury lawyers will take motor vehicle accident claims on a contingency basis (a percentage of the total sum recovered) and offer a free consultation. Since this means that there is usually no cost barrier, it is often wise to at least consult a lawyer to ensure that you will receive the amount to which you are entitled. Here are a few things to be aware of when consulting a lawyer for your claim:

1. Contingency Fees

Contingency fees are variable; some lawyers use a sliding scale so that the fee increases as the trial date approaches. The Law Society of British Columbia imposes limits on contingency fees for motor vehicle injuries, and the claimant is unlikely to encounter lawyers who charge more than 33.33 per cent.

2. The Contingency Fee Contract

The contingency fee contract must be in writing and must contain a provision that it is the claimant's right to have the contract reviewed by the Supreme Court for reasonableness.

Contingency fee contracts often provide that if the claimant discharges the lawyer, the claimant will have to pay an hourly rate for services up to the date of discharge and that these fees must be paid before the lawyer will transfer the file to another lawyer. A claimant who discharges a lawyer can have the lawyer's bill reviewed by a Registrar of the Supreme Court in a hearing called an Assessment. The Registrar will make a ruling about the reasonableness of the bill and whether the claimant should be required to pay the bill right away.

3. Disbursement Costs

Disbursement costs are the expenses incurred for photocopying, medical reports, transcripts of evidence, police reports, motor vehicle searches, etc. Law firms will often pay these costs for the claimant and collect them at the end of the lawsuit. Some law firms take a retainer fee for disbursements.

4. Marshalling of Reports

Over the course of the claim, the claimant's lawyer will collect your medical records, typically for the period from 2 years before the motor vehicle accident to the period following the accident, and deliver them to the defence counsel. As a claimant in a personal injury action, it is important to be diligent in pursuing recommended medical treatment and visiting a family physician, as clinical medical records are typically only generated when a patient attends at an appointment. The lawyer for the claimant and for the defendant(s)/ICBC may also arrange for independent medical evaluations with specialized doctors over the course of the claim.

If there is a claim for loss of prospective earnings or cost of future care, the claimant's lawyer may also collect and deliver economic briefs and reports by vocational specialists, accountants, actuaries, and other non-medical professionals. This will require the claimant to draft a letter granting their lawyer signing authorization. – this letter should address who is receiving the authorization (in this case, the lawyer) and for what purpose, related issues, or kinds of documents (in this case, disclosures) the authorization is for,

The claimant's lawyer will also receive defence reports and expert summaries. All of this goes on behind the scenes. Claimants wishing to have a more active role in their file should not hesitate to contact their lawyers for periodic updates.

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II. Governing Legislation and Resources

A. Books

Gregory, E.A. and Gregory, G.F.T., The Annotated British Columbia Insurance (Motor Vehicle) Act (Toronto: Carswell, 1995). Continuing Legal Education Society of British Columbia, British Columbia Motor Vehicle Accident Claims Practice Manual (Vancouver: Continuing Legal Education Society of British Columbia, 2000). Continuing Legal Education Society of British Columbia, ICBC Motor Vehicle Accident Claims (November, 1988) (Vancouver: Continuing Legal Education Society of British Columbia, 1988).

Continuing Legal Education Society of British Columbia, Vehicle Insurance: British Columbia Legislation and Commentary (Vancouver: Continuing Legal Education Society of British Columbia, 2007).

B. Legislation

Insurance (Motor Vehicle) Act, RSBC 1996, c 231 [*IMVA*]. *Insurance (Motor Vehicle) Act* - Revised Regulations (1984), BC Reg 447/83 [*IMVAR*]. *Insurance (Vehicle) Act*, RSBC 1996, c 231 [*IVA* [1]].

Insurance (Vehicle) Regulation, BC Reg 447/83 [*IVR* [2]].

Notice to Mediate Regulations, BC Reg 127/98 [*NMR* [3]].

Motor Vehicle Act, RSBC 1996, c 318 [*MVA* [4]].

Motor Vehicle Act Regulations, BC Reg 26/58 [*MVA Regulations* [5]]. *Insurance Corporation Act*, RSBC 1996, c 228 [6]. *Limitation Act*, RSBC 1996, c 266 [7] [*LA*].

NOTE: The *Insurance (Motor Vehicle) Act* and the *Insurance (Motor Vehicle) Act* - Revised Regulations (1984) were amended and renamed the *Insurance (Vehicle) Act* and *Insurance (Vehicle) Regulation* respectively. The *IVA* and *IVR* came into force and effect on July 1, 2007. Note that there are transitional provisions governing whether the provisions of the old Act, new Act, or both Acts apply to an individual claim.

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[4] http://www.bclaws.ca/civix/document/id/complete/statreg/96318_00
[5] http://www.bclaws.ca/civix/document/id/complete/statreg/26_58_00
[6] http://www.bclaws.ca/civix/content/complete/statreg/111685340/96228/?xsl=/templates/browse.xsl
[7] http://www.bclaws.ca/civix/document/id/complete/statreg/12013_01

III. Compulsory Coverage

ICBC is the sole provider of basic insurance for non-exempt vehicles in BC. Exempt vehicles are described in sections 43–44 of the *IVA* and also in section 2 of the *IVR*. For most vehicles owned, leased or operated in BC, third-party liability coverage up to $200,000 is only available from ICBC. Full coverage for exempt vehicles, extended coverage in excess of the basic coverage (third party liability insurance over $200,000, *IVR*, s 67), and collision ("own damage") insurance may be purchased from either ICBC or from private insurers. See Section IV: Optional Insurance, below. Note that private insurers may have their own requirement for coverage that may be above and beyond the requirements of ICBC

Vehicles licensed in BC are required by law to carry basic compulsory coverage, which is evidenced by a certificate of automobile insurance issued under the *IVA* to someone licensed under the *MVA* (i.e. the "insured").

NOTE: The definition of "the insured" varies somewhat from section to section in the *IVA* and *IVR*.

Driving while uninsured is an offence (*MVA*, s 24(3)(a)) which carries a maximum penalty of a fine of up to $250 and/or imprisonment of up to three months (*MVA*, s 24(5)(a)). Driving an uninsured vehicle is also an offence (*MVA*, s 24(3)(b)) which carries a fine of at least $300 and no more than $2,000 and/or imprisonment for at least seven days and no more than six months (*MVA*, s 24(5)(b)).

A. Scope of Coverage

Subject to various limitations and exclusions, basic compulsory coverage is set out in the IVR and provides the insured with:

- indemnity for third party legal liability (Part 6);
- accident benefits; no-fault benefits payable for death or injury (Part 7);
- coverage for damages caused by uninsured or unidentified motorists (Part 8);
- first party coverage (Part 10);
- inverse liability (Division 1 of Part 10); and
- underinsured motorist protection (UMP) (Division 2 of Part 10).

B. Third Party Legal Liability: Part 6 of the IVR

1. Indemnity

This insurance indemnifies the insured against liability imposed on the insured by law for the injury or death of another, and/or loss or damage to another's property, to a total limit of $200,000 (IVR, s 67), to be shared among the victims of a motor vehicle accident (Schedule 3, s 1). The base limit of liability is $500,000 in claims made for a bus, and $300,000 in claims made for a taxi or limousine. Extended Third-Party Legal Liability coverage may be purchased at the insured's discretion. (See Section IV: Optional Insurance, below). **If the insured is found legally liable, and no extended coverage has been purchased, he or she is responsible for payment of any claims in excess of the above limits.**

2. Who is Covered

The definitions of "insured" for this part of the IVR may be found in IVR, s 63. For our purposes, the most relevant definitions of "insured" are:

- a) a person named in an owner's certificate; or
- b) b) an individual who operates the vehicle described in the owner's certificate with the consent of the owner; or
- c) c) an individual who operates the vehicle described in the owner's certificate while being a member of the owner's household.

3. Extension of Indemnity

According to IVR, s 65, indemnity is extended to an insured who operates a motor vehicle not described in an owner's certificate issued to the insured (i.e. someone else's car). For the purposes of s 65 only, "insured" includes the following:

- a) a person named as an owner in an owner's certificate;
- b) a member of the owner's household;
- c) an employee or partner of the owner, where their regular use of the vehicle described in the owner's certificate is provided for; and
- d) the spouse of an employee or partner described in paragraph (c) where the spouse resides with the employee or partner.

Note that, absent this expanded definition, "insured" would not otherwise cover a member of the insured's household operating a vehicle not described in an owner's certificate issued to the insured.

4. Restrictions on Indemnity

Section 65(2) of the IVR states that if an insured is operating a motor vehicle that is not described in an owner's certificate issued to him or her, indemnity is not extended to the insured if:

- the insured is operating the motor vehicle in connection with the business of a garage service operator;
- the motor vehicle is owned or regularly operated by the insured;
- the motor vehicle is used for carrying passengers for compensation or hire or for commercial use;
- the motor vehicle is in fact not licensed under the MVA (or similar legislation) and the insured does not have reasonable grounds to believe the motor vehicle is licensed; or
- the insured is operating the vehicle without the consent of the owner and does not have reasonable grounds to believe that he has the consent of the owner.

Section 77 provides, in part, that an owner seeking to rely on the coverage provided for a vehicle not named in the owner's certificate cannot do so if he or she also owns (or leases) the non-described vehicle that has been involved in the

accident (i.e. you cannot just insure one vehicle and expect this to cover all of the other vehicles in your fleet).

Neither garage service operators nor their employees are covered by the owner's certificate issued for customers' vehicles while the vehicle is in the care, custody, or control of the garage service operator or his or her employee for a purpose relating to the business. "Garage service operator" is defined in Part 1 of the IVR as "the operator of a motor vehicle service facility and includes a dealer, service station operator, motor vehicle repairman, auto body shop repairman, wrecker operator, and the operator of a vehicle parking or storage facility" (s 57). To offset the effect of s 57, the garage service operator must obtain special coverage pursuant to s 150.

5. What is Covered

In addition to the legal liability coverage (i.e. s 65 indemnification) outlined above, IVR ss 67 and 69 states that ICBC may also pay for:

- a) "reasonable" emergency medical aid, so long as reimbursement is not provided to the insured by another insurer or under another Part;
- b) emergency equipment or supplies provided to the insured (i.e. fire extinguishers, jacks or other necessary emergency equipment or supplies);
- c) all or some (depending upon the circumstances) of the costs taxed against the insured in an action, in accordance with the Supreme Court Civil Rules, BC Reg 56/2019 for aggregated general and specific damages; and
- d) the pre-judgment interest under the Court Order Interest Act, RSBC 1996, c 79 or analogous legislation of another jurisdiction on that part of the judgment, and pay post-judgment interest under the Interest Act, RSC 1985, c I-15 or analogous legislation of another jurisdiction on that part of the judgment, both within the limits set out in s 1 of Schedule 3 (IVR).

6. What is Not Covered

ICBC will not indemnify an insured for certain types of damage, including:

- loss or damage to property carried in or on a vehicle owned, rented or in the care, custody or control of an insured (s 72.1); or
- liability directly or indirectly arising out of the operation of attached equipment (i.e. machinery or equipment that is mounted on or attached to the vehicle, and which is not required for the safe operation of that vehicle) at a site where such equipment is operated, unless the attached equipment is used in accordance with the IVR (s 72(2)); or
- under Part 4, 6, 7, or 10 in respect of injury, death, loss or damage arising out of radioactive, toxic, explosive or other hazardous properties of prescribed substances under the Atomic Entergy Contract Act (IVR, s 56(1)(a)); or
- under IVA, ss 20 (uninsured vehicles) or 24 (hit and run accidents), under IVR, s 49.3 (default of premiums); or
- under Part 7 or Part 10 of the IVR in respect of any injury, death, loss or damage arising, directly or indirectly out of a declared or undeclared war or insurrection, rebellion or revolution (IVR, s 56(1)(b)); or
- under IVA, ss 20 or s 24, under IVR, ss 49 or 49.3(1)(b), Part 6 or Part 10 in respect of punitive or exemplary damages or other similar non-compensatory damages (IVR, s 56(1)(c)); or
- a general or special assessment, penalty or premium, payable under the Workers' Compensation Act (British Columbia) or similar Act (IVR, s 72.1(1)(a)).

7. Duties of the Insured

An insured has a duty to report to ICBC mid-term changes, as required by s 9 of the IVR. These changes may result in an increase or decrease in the premiums paid to ICBC. The insured named in the owner's certificate is obligated to report to an ICBC agent the following:

- a) any change in the insured's address within 10 days **after** the change;
- b) any acquisition of a substitute vehicle for the vehicle described in the certificate within 10 days **after** the acquisition;
- c) any anticipated change in the use of the vehicle described in the certificate to a use to which a different insurance rate applies **before** such a change;
- d) any anticipated change in the territory in which the vehicle described in the certificate is principally used **before** such a change; and/or
- e) any change in the location of where the insured vehicle is primarily located when not in use, within 30 days of the change, **if** the premium for the vehicle is established on the basis of this location, **unless** the vehicle is used for vacation purposes.

Furthermore, ICBC is not liable to indemnify an insured who, to the prejudice of ICBC, fails to comply with duties outlined in s 73 of the IVR. This section states that an insured:

- a) must promptly give ICBC written notice of any claim made for the accident, including any other insurance held by him or her providing coverage for the accident;
- b) must help secure evidence and information and the attendance of any witnesses;
- c) must cooperate with ICBC in the defence of any action or proceeding, or appeal, taken by ICBC on behalf of the insured;
- d) must allow ICBC to inspect an insured vehicle at any reasonable time;
- e) must, on receipt of a claim, legal document or correspondence relating to a claim, immediately send a copy to ICBC;
- f) must not voluntarily assume liability or settle any claim except at his or her own cost; and
- g) must not fail to cooperate with ICBC in the investigation, settlement or defence of a claim or action.

8. Duties of the Corporation

On receipt of a notice of a claim under Part 6 of the IVR, ICBC must, at its expense, assist the insured by investigating and negotiating a settlement where in its opinion such assistance is necessary, and defend the insured against any action for damages (s 74).

9. Rights of the Corporation

Upon assuming the defence of an action for damages brought against an insured, ICBC has the right, subject to section 79 of the Act, to the exclusive conduct and control of the defence. This right includes, but is not limited to, the right to appoint and instruct counsel, to admit liability, to negotiate, and/or settle out of court (IVR, s 74.1).

10. Forfeiture of Claims and Relief from Forfeiture

Certain conduct by the insured or applicant can result in "forfeiture", whereby the insured is deemed to have given up his or her right to be indemnified by ICBC. In this situation, the claim for indemnification becomes invalid. Apart from exclusions, a claim may be forfeited under s 75 of the IVA if:

- a) an applicant for coverage falsely describes the vehicle for which the application is made to the prejudice of the insurer (s 75(a)(i));
- b) an applicant for coverage knowingly misrepresents or fails to disclose a fact that was required to be stated in the application (s 75(a)(ii));
- c) an insured violates a term or condition of or commits a fraud in relation to the plan or the OIC (s 75(b); see Section III.B.11. Breaches of Conditions and Consequences;
- d) an insured makes a "wilfully false statement" with respect to a claim under a plan of insurance (s 75(c)).

NOTE: According to Brooks v Insurance Corporation of British Columbia [1], 1994 CanLII 3304 (BC SC), per Bouck J, the purpose of s 19(1)(e) (now IVA, s 75(c)) is to prevent intentionally deceitful misstatements for the purpose of defrauding the insurer; "exaggerated guesses" by an insured as to the value of a lost motor vehicle, or figures inserted for the purpose of goading an insurer into action, are insufficient to deny coverage unless a fraudulent purpose on the part of the insured is shown.

However, ICBC may relieve the insured from forfeiture under s 75 if said forfeiture would be "inequitable". Furthermore, ICBC must relieve an insured from forfeiture if: a) it is equitable to do so, and b) the insured dies or suffers a loss of mind or bodily function that renders the insured permanently incapable of engaging in any occupation for wages or profit (IVA, s 19(3)).

Because there are various definitions of "insured" in the IMVAR (and IVR), the only reasonable interpretation of s 19 (the relief of forfeiture provision discussed above) is that it is to be read broadly to include all of the definitions: see Khatkar v Insurance Corporation of British Columbia (1993), 25 CCLI (2d) 243 (BC Prov. Ct.), per Stansfield Prov. Ct. J.

11. Breach of Conditions and Consequences

Insured persons must be careful to abide by the terms and conditions of their plans and OICs. Coverage may be lost if an insured breaches certain conditions, including, but not limited to:

- a) failing to comply with s 73 of the IVR, to the prejudice of ICBC (See Section III.B.7. Duty of Insured);
- b) operating a vehicle when not authorized and/or not qualified to do so (IVR, s 55(3)(a));
- c) using the vehicle in illicit trades, racing, or avoiding arrest or other police action (IVR, s 55(3)(b), (c) and (d));
- d) towing an unregistered and/or unlicensed trailer (IVR, s 55(4));
- e) using the vehicle for a different purpose than the one declared by the insured in his or her application for insurance, except as "occasionally" permitted (IVR, s 55(2(a)); or
- f) naming in the owner's certificate someone as the principal operator of the insured vehicle who is not actually the principal operator (IVR, s 75).

NOTE: When the court determines who the principle driver is, it will consider the entire period covered by the insurance plan: see Dehm v Insurance Corporation of British Columbia [2], 1981 CanLII 608 (BC SC).

Despite any breach of condition by an insured, insurance money is still payable to third parties by ICBC in cases where the insured person was:

- a) incapable of properly controlling the vehicle because of the influence of alcohol or drugs;

- b) convicted under any one of the following sections of the Criminal Code, RSC 1985, c C-46 (see also MVA Regulations, s 28.01 Table 4):
- s 220 (criminal negligence causing death);
- s 221 (criminal negligence causing bodily harm);
- s 236 (manslaughter); s 249 (dangerous operation of a motor vehicle);
- s 252(1) (failure to stop at an accident),
- s 253 (driving while impaired or with a blood-alcohol level exceeding 80 milligrams per 100 millilitres);
- s 254(5) (refusal or failure to give a breath sample);
- s 255 (impaired driving causing bodily harm or death);
- s 259 (4): driving while disqualified;
- a conviction under the Youth Criminal Justice Act (Canada) for any of the above offences;
- “similar result” or conviction of these offences in a jurisdiction in the U.S.; or
- a conviction under ss 95 or 102 of the MVA or similar convictions under another Canadian or American jurisdiction (both concern driving while prohibited); or
- c) permitting another person to use the insured vehicle in a way that results in a conviction for any of the offences outlined above (IMVA Regulations, s 55).

12. Making a Claim Under Part 6: Procedural Steps and Considerations

a) Limitation Period

Section 76 of the IVR provides that any action started to enforce third-party liability for bodily injury and/or property damage (i.e. claims made under Part 6 of the IVR) must comply with the LA section 3(2)(a) of the LA provides a two-year limitation period for actions for damages related to injuries to a person and/or property, including negligence claims against the driver and/or the owner of the vehicle driven.

Minors are not subject to a limitation period (LA, s7). After the minor has reached age 19, s 3(2)(a) begins to apply and the two-year limitation period commences. However, if the minor’s guardian or litigation guardian receives a Notice to Proceed, the limitation period is initiated notwithstanding the minor status (LA, s 7(6)). The Notice to Proceed must meet the requirements of the LA, ss 7(7)(a-g).

It is important to be aware of the limitation periods associated with IVR Part 7 benefits, see Section III.C. Accident (“No-Fault”) Benefits: Part 7 of the *IVR* below.

b) Duties Outlined in Section 73 of the *IVR*

An insured must comply with s 73 of the IVR. Failure to do so may result in a claim being denied. **See** Section III.B.7. Duties of the Insured.

c) Service on ICBC

A claimant who starts an action for damages caused by a motor vehicle or trailer must also serve ICBC with a copy of the Notice of Civil Claim the same way the defendant is served and must also file proof of service in the court in which the action is started. No further step in the action can be taken until eight days after the filing of the service in court (IVA, s 22).

d) Information and Evidence

ICBC has a broad right to compel the insured and others to provide information set out in the IVA. Specific types of information that ICBC can demand are noted in s 11 (combined forms and information); s 27 (accident report); s 28 (medical reports for accidents before April 1, 2019); s 29 (employers' reports); and s 30 (superintendent's records).

According to McKnight v General Casualty Insurance Co. of Paris [3], 1931 CanLII 473 (BC CA), an insured need not provide information or evidence to an insurance company respecting a breach if the company is contemplating using such a breach to deny coverage to the insured. This is not considered to be refusing to cooperate with the insurer in the defence of the action. However, the insured may still have to provide information regarding the accident itself.

C. Accident ("No-Fault") Benefits: Part 7 of the *IVR*

1. What are "No-Fault" Benefits?

Regardless of who is at fault in an accident, ICBC pays benefits for injuries to the occupants of a licensed vehicle and pedestrians and cyclists injured by a vehicle described in any owner's certificate. The accident benefits, commonly called "no-fault" benefits, are payable to an insured for death or injury caused by an accident arising out of the owner's ownership, use, or operation of a vehicle in Canada or, with some restrictions, in the U.S. (*IVR*, s 79(1)).

In *Amos v ICBC* [4], [1995] 3 SCR 405, 1995 CanLII 66 (SCC), the Supreme Court of Canada laid out a two-part test for determining if death or injury falls within the scope of s 79(1). The following must be met:

- a) the accident must result from the ordinary and well-known activities to which automobiles are put; and
- b) there must be some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the plaintiff's injuries and the owner's ownership, use, or operation of his or her vehicle. That is, the connection between the injuries and the ownership, use, or operation of the vehicle must not be merely incidental or fortuitous.

Amos reversed the BC Court of Appeal judgment and held that the plaintiff's injuries were causally connected to the ownership and use of his vehicle. The plaintiff was shot while driving away from a gang who was trying to gain entry into his motor vehicle. However, Major J. noted that if the gunshots had been truly random and not causally connected to the plaintiff's ownership of the vehicle then his injuries would not have been covered under s 79(1).

2. Who is Covered?

Section 78 of the *IVR* contains a definition of "insured", which includes, in part:

- a person named as an owner in an owner's certificate;
- a household member of a person named in an owner's certificate;
- an occupant of a vehicle that is licensed in BC and is not exempted under section 43 of the *IVA* (vehicles from the federal or a provincial government other than BC);
- any occupant of a vehicle that is not required to be licensed in BC, but is operated by a person named in a driver's certificate;
- a cyclist or pedestrian who collides with a vehicle described in an owner's certificate;
- a BC resident who is entitled to bring an action for injury or death under section 20 (uninsured vehicles) or 24 (remedy for hit and run accidents) of the *IVA*; or
- the personal representative of a deceased insured.

3. Benefits Payable

a) Disability Benefits for Employed Persons

ICBC is obligated to pay "no fault" benefits to an insured person if:

- a) within 20 days of the accident, the injury completely disables the insured; **and**
- b) the insured is an "employed person" (*IVR*, s 80).

An "employed person" is defined in s 78 of the *IVR* as a person who, on the day of the accident or for any 6 months during the previous 12 months immediately preceding the accident, is employed or actively engaged in an occupation for wages or profit. Eligible insured persons who are completely unable to engage in employment can collect either 75 percent of their average gross weekly earnings or $300 per week, whichever is less, for the length of the disability or 104 weeks, whichever is shorter. See section 80 and Schedule 3 of the *IVR* for more details.

NOTE: There is a waiting period of seven days before disability benefits are paid out. Also, no benefits are paid for these initial seven days (*IVR*, s 85).

b) Disability Benefits for Homemakers

Insured persons who are homemakers may also be eligible for no-fault benefits. If a homemaker sustains an injury from an accident, and it substantially or continuously disables the insured from regularly performing most household tasks, ICBC will compensate the insured for the duration of the disability or 104 consecutive weeks, whichever is shorter (*IVR*, s 84(1)). The insured will be compensated for reasonable expenses incurred by the insured in hiring a person to perform household tasks on the insured's behalf, up to a maximum of $145 per week (*IVR*, Schedule 3, s 2(b)). However, there is no compensation for household tasks performed by an insured's family members (*IVR*, s 84(2)). Starting April 1, 2019, this amount will be increased to $280 per week.

c) Disability Beyond 104 Weeks

If at the end of the first two years, the total disability continues, an insured receiving benefits under s 80 or 84 of the *IVR* can continue to receive the payments for the duration of the disability or until the age of 65, whichever is shorter (*IVR*, s 86). The no-fault benefits will be reduced by the amount of the Canada Pension Plan benefits if and when such benefits become payable to the insured (*IVR*, s 86).

NOTE: Any benefits payable under s 80, 84, or 86 of the IVR may be reviewed every 12 months and terminated by ICBC on the advice of its medical adviser (*IVR*, s 87).

d) Medical or Rehabilitation Benefits

In addition to the disability benefits described above, ICBC is obligated to pay all reasonable expenses incurred by the insured as a result of the injury for necessary medical, surgical, dental, hospital, ambulance or professional nursing service, or for necessary physiotherapy, chiropractic treatment, occupational therapy or speech therapy or for prosthesis or orthosis (*IVR*, s 88(1)). In appropriate cases, ICBC may also provide attendant care to the insured to perform duties normally undertaken by the insured (*IVR*, s 88(2)(c)). Under Schedule 3, s 3, ICBC's liability for rehabilitation benefits is limited to $300,000. For qualification: the amount by which the liability of the corporation is limited in respect of each insured injured:

- in the same occurrence on or after January 1, 1990 and before January 1, 2018 must not exceed $150 000, and
- in the same occurrence on or after January 1, 2018 must not exceed $300 000.

Also, ICBC is not liable for expenses payable to the insured under a medical, surgical, dental, or hospital plan, or paid or payable by another insurer (s 88(6)).

e) Death Benefits

In the event of the applicant's death, ICBC will pay:

- a) up to $2,500 for funeral expenses (see s 91 and s 4 of Schedule 3 of the *IVR*), starting April 1, 2019, this amount will be increased to $7,500);
- b) $5,000 if the deceased was a "head of a household" (i.e. was providing the "major portion" of household income), plus a Supplemental Death benefit of $1,000 for each survivor other than the first, plus Additional Death Benefits of $145 per week for the first survivor and $35 per week for each additional survivor for a duration of 104 weeks (see s 92 of the *IVR*);
- c) $2,500 if the deceased was a "spouse in household" (i.e. was supporting the household or helping to raise dependent children), plus a Supplemental Death benefit of $1,000 for each survivor other than the first, plus Additional Death Benefits of $145 per week for the first survivor and $35 per week for each additional survivor for a duration of 104 weeks (see s 92–94 and Schedule 3 ss 5, 6, 8 of the *IVR*); and
- d) $500 to $1,500 for the death of each dependent child, depending on the child's age (see Schedule 3, s 5 of the *IVR*).

NOTE: Status with respect to "head of household", "spouse of household" or "dependent child" is determined at the date of death resulting from a motor vehicle accident.

In addition, the *Family Compensation Act*, RSBC 1996, c 126 [FCA], creates a statutory right for claims to be brought by the surviving spouse, parent, grandparent, or child of the deceased, in some cases appropriately as against ICBC.

The *FCA* provides a statutory scheme for fatal accident compensation that abrogated the common law rule that no one has a cause of action in tort against a person who has wrongfully caused the death of a third person (see *Gaida Estate v McLeod* [5], 2013 BCSC 1168 (CanLII)).

The *FCA* intends to place the claimant in the same economic position that he or she would have enjoyed but for the death of his or her spouse, parent or child. There are only a limited number of family members that would be eligible for compensation under the *FCA*, and the definition of who qualifies for compensation is important. The starting point to determine eligibility for bringing a claim begins with section 1 of the *FCA*. Compensation under the *FCA* is generally limited to the following:

1. damages for loss of love, guidance and affection (generally for infant children of the deceased only);
2. damages for the loss of services that would otherwise have been provided by the deceased to the remaining family members;
3. damages for the loss of financial support to the remaining family members;
4. limited out-of-pocket expenses incurred as a direct result of a death (funeral and related expenses); and,
5. damages for loss of inheritance.

f) Reinstatement and Revival of No-Fault Benefits

No-fault benefits can be reinstated if a person receiving benefits goes back to work only to find that the injury comes back and prevents them from working (*Brewer v Insurance Corporation of British Columbia* [6] 1999 CanLII 6570 (BC SC). This includes a situation where a plaintiff goes back to work prior to the end of the 104-week period and leaves work after the end of the 104-week period (*Symons v Insurance Corporation of British Columbia* [7], 2016 BCCA 207 (CanLII)).

4. Restrictions and Exclusion of Benefits

Claimants should check the *IVR* carefully to find what restrictions are applicable to a given claim for benefits. The following is merely a brief summary of some very complicated provisions. Generally, ICBC is not liable to pay any of the benefits discussed above, in any of the following situations:

- if the applicant resides outside BC **and** the vehicle in which he or she was riding or driving at the material time was not designated in an owner's certificate (s 96(a));
- if the applicant at the time of the accident was an occupant of, or was struck by, a vehicle that could not be licensed under the *MVA* or *Commercial Transport Act* (s 96(b)(i));
- if the death or injury resulted from the injured person's suicide or attempted suicide, whether "sane or insane" (s 96(c));
- if the applicant was an occupant of a vehicle being used in an illicit trade at the time of the accident (s 96(e)); or
- if the death or injury is a result of the applicant's medical condition, as distinct from an injury caused by the accident, unless the condition was itself a direct result of an accident for which benefits are provided under Part 7 of the *IVR* (s 96(f)).

Also, under s 90 of the *IVR*, ICBC may terminate an insured's benefits if an insured refuses to undergo any:

- medical, surgical, or other similar treatment, which, in the opinion of the ICBC medical adviser and the medical practitioner attending the insured, is likely to relieve, wholly or partly, the insured's disability; or
- retraining or educational program likely to assist in the insured's rehabilitation.

If ICBC intends to terminate an insured's benefit, ICBC must first give an insured at least 60 days notice in writing, by registered mail, of their intention to terminate benefits. Under section 90(3) of the *IVR*, the insured may, within that 60-day period, apply to the Supreme Court for an injunction against the termination of the benefits, on the ground that:

- the treatment required of the insured is unlikely to relieve the disability;
- the treatment may injuriously affect the balance of the insured's health; or
- the treatment program is not likely to assist in rehabilitation.

5. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under Third-Party Legal Liability. These are contained in s 19 of the *IVA* and s 55 of the *IVR*. See Section III.B.10: Forfeiture of Claims and Relief from Forfeiture and Section III.B.11: Breach of Conditions and Consequences, above.

6. Making a Claim Under Part 7: Procedural Steps and Considerations

a) Limitation Period

Section 103 of the IVR provides that any action started to enforce no-fault or accident benefits must do the following:

- the insured must have "substantially" complied with sections 97-100 (See Section III.C.6.b: Duties in Sections 97-100 of the *IVR* below); and
- the action must be started by the later of the following:
- a) with **three months** after the date of the response from ICBC;
- b) within **two years** after the date of the accident for which the benefits are claimed;
- c) where benefits have been paid, with two years after the date the insured last received a payment.
- These limitation periods also apply to minors. In other words, the limitation date for Part 7 actions for minors does not commence at age 19 but commences on the date of the accident.

b) Duties in Sections 97-100 of the *IVR*

An insured must meet the requirements set out in s 97-100 of the *IVR*. If an insured fails to do this to the prejudice of ICBC, ICBC may deny coverage of a claim. The following is a brief summary and claimants should refer to the *IVR* for more detail. The insured must comply with the following:

- give prompt notice to ICBC of the accident;
- provide a written report within 30 days of the accident;
- provide a proof of claim (a standard form authorized by ICBC and provided to applicants) within 90 days of the accident; and
- at ICBC's request, promptly provide a certificate of an attending medical professional as to the nature and extent of the insured's injury and the treatment, current condition, and prognosis of the injury;
- at ICBC's expense and request, be medically examined by someone selected by ICBC;
- where applicable, permit a post mortem examination and/or autopsy.

NOTE: For liability to cease (i.e. coverage to be denied), ICBC must have suffered prejudice as a result of the applicant's failure to comply.

D. Uninsured Motorists or Unidentified Motorist (Hit and Run) Cases

1. Claims Against Uninsured Vehicles: Section 20 of the *IVA*

While it is against the law, there are some drivers who operate motor vehicles without any insurance. If a claimant suffers damages from an uninsured motorist, he or she is not without a remedy. Instead, the claimant may make a claim to ICBC for compensation.

a) Definition of Uninsured Vehicle

Under the current *IVA*, an "uninsured motorist" continues to be defined as someone who operates a motor vehicle without third-party liability coverage of at least $100,000. When death, personal injury, or property damage results from the use of an uninsured vehicle, a claimant may apply to ICBC under s 20 for compensation.

b) Limitation Period

The claimant must meet the requirements set out in the *LA*. The claimant has two years from the date of the loss to start an action for personal injury, death, and/or property damage (*LA*, s 3(2) and *Civil Resolution Tribunal Act*, s 13).

c) Rights and Obligations of ICBC

If ICBC receives such an application under s 20, it must forward a notice it to the owner or driver of the uninsured motor vehicle, by registered mail (*IVA*, s 20(3)). If ICBC pays out any amount under this section, it is subrogated to the rights of the person paid (i.e. the successful claimant). Also, ICBC may maintain an action in its name or in the name of the successful claimant against the person liable (*IVA*, s 20(11)).

After ICBC has given notice to the owner or driver of the uninsured vehicle ("the defendant"), it has control over the resolution of the case. ICBC is deemed to be the agent of the defendant for service of notice. Thus, the Claimant may start an action against the defendant by serving ICBC with a Notice of Claim in Small Claims or a Notice of Civil Claim in Supreme Court.

ICBC has the authority to settle or consent to judgement, at any time, in the name of the uninsured defendant. But, if the defendant responds within the time limit indicated in the notice, then ICBC is not entitled to recover from the defendant without a judgment (s 20(5)). If the claimant serves the uninsured defendant directly and he or she does not enter an appearance or does not file a Response to Civil Claim, or does not appear at trial, or does anything that permits default judgment to be taken against him or her, then ICBC may intervene. ICBC can defend the action in the name of the defendant. ICBC's acts are deemed to be the defendant's acts (*IVA*, s 20(7)).

d) ICBC Liability Limited

There is a limit to how much ICBC will pay out for any individual claim made under section 20 of the *IVA*. Regardless of the number of claims or the number of people making claims, the limit of ICBC's liability arising out of the same accident is $200,000, including claims for costs, pre-judgment, and post-judgment interest (see *IVR*, s 105 and Schedule 3, s 9(1)).

The insured and the claimant both have an obligation to seek other sources of coverage. Applicants may have other sources of insurance, including claims or benefits under the *Workers' Compensation Act*, RSBC 1996, c 492, the *Employment Insurance Act (Canada)*, RSC 1996, c 23, and/or the government of Canada or provinces or territories. It is important that applicants apply for all benefits they are entitled to under the above sources of coverage or other similar sources coverage since ICBC is relieved from paying the of judgment equal to what is provided by these sources.

Furthermore, applicants should also apply for all benefits and/or coverage from any private insurance that they may have as soon as possible. An applicant may have private insurance through their employer. ICBC may not be obligated to pay benefits that could have been received (note: need not actually receive) from another source. If a decision is made concluding that ICBC is not liable for these amounts, the limitation period for making a claim through the other source will most likely have ended. See section 81, 83 and 106 of the *IVR* for more details.

Also, see Section III.D.3. Exclusion of ICBC Liability, below.

NOTE: Any dispute as to entitlement or amount of damages an insured is entitled to recover must be submitted for arbitration under the *Commercial Arbitration Act*, RSBC 1996, c 55 (*IVR*, s 148.2).

NOTE: Excess underinsured motorist protection may still be purchased through insurers and presumably is intended to be covered under *IVA* Part 4 (Optional Insurance Contracts).

2. Claims Against Unidentified or Hit and Run Motorists: Section 24 of the *IVA*

Where personal injury, death, or property damage over $150 arises out of the use of a vehicle on a road **in British Columbia** and the identity of the driver and owner cannot be ascertained (or the ascertained owner is not liable, as would be the case if the vehicle had been stolen), the injured party may sue ICBC as nominal defendant. For accidents occurring outside BC, see Section III.E.1: Inverse Liability and Uninsured or Hit and Run Accidents Outside BC.

a) Reasonable Efforts to Ascertain Identity

In order for a claimant to make a claim or get a judgment against ICBC under s 24 of the IVA, the court must first be satisfied that all reasonable efforts have been made to ascertain the identity of the owner and/or driver (IVA*, s 24(5)). Leggett v Insurance Corporation British Columbia* [8]*, 1992 CanLII 1263 (BCCA), states that the critical time of taking steps to ascertain the identity of the driver is immediately at the scene of the accident, and that reasonable efforts must be interpreted in the context of the claimant's position and ability to discover the driver or owner's identity. This could include taking down the description of the vehicle, including the license plate number, if the claimant is able to at the scene. If the identity of those persons cannot be ascertained, ICBC is authorized to settle any such claims, or to conduct the defence of the case as it sees fit.*

b) Written Notice to ICBC

To proceed with the claim, the claimant must give written notice to ICBC "as soon as reasonably practicable" and within six months of the accident (*IVA*, s 24(2).

c) Police Report Requirements

A claimant must make an accident report to the police (*IVA*, s 107(1)). More specifically, the claimant must:

- make a report to the police within 48 hours of discovering the loss or damage;
- get the police case file number for the police report; and
- on ICBC's request, advise ICBC of the police case file number.

If a claimant fails to comply with the above without reasonable cause, then ICBC will not be liable to pay the claim made under s 24 of the *IVA*.

d) Limitation Period

Once notice has been properly provided, the claimant must also meet the requirements set out in the *Limitation Act*. The claimant has two years from the date of the loss to start an action for personal injury, death, and/or property damage (*LA*, s 3(2)).

3. Exclusion of ICBC Liability

There are certain situations where ICBC will not be liable to pay a claim made under section 20 and/or section 24 of the *IVA*. ICBC will **not** be liable:

- to a claimant, under s 24 of the *IVA*, who fails to comply with section 107(1) of the *IVA* without reasonable cause (see Section III.D.2.c): Police Report Requirements);
- to a claimant, under s 20 or 24 of the *IVA*, for loss or damage arising while the vehicle was in the claimant's possession without the owner's consent (i.e. stolen) (*IVR*, s 107(2)(a)).

4. Forfeiture and Breach of Conditions

The same provisions apply as those outlined under Section III.B.10: Forfeiture of Claims and Relief from Forfeiture and Section III.B.11: Breach of Conditions and Consequences, above. These are contained in s 19 of the *IVA* and s 55 of the *IVR*.

E. First Party Coverage Under Part 10 of the IVR

1. Inverse Liability and Uninsured or Hit and Run Accidents Outside British Columbia: Part 10, Division 1 of the *IVR*

a) Section 147 Claims: Inverse Liability

(1) What is Inverse Liability?

Inverse liability coverage is part of the basic insurance plan, which covers costs to vehicle repairs when an insured is involved in an accident out of British Columbia. More specifically, the basic compulsory coverage will pay for loss or damage to a BC vehicle resulting from an accident occurring **outside BC**. but in Canada or the U.S. if the insured does not have a right of action under the law of:

- the place where the accident happened; or
- the place where the person responsible for the accident is a resident (e.g. unidentified defendant following a hit and run collision).

(2) Who is Covered?

Section 147 of the *IVR* has its own definition of "insured", which includes:

- (a) the person named as an owner in an owner's certificate or if deceased, his or her personal representative;
- (b) a person who can provide written proof that he or she is the beneficial owner of a commercial vehicle described in an owner's certificate; or
- (c) the renter of a vehicle described in an owner's certificate.

(3) What is Covered?

"Loss or damage" in this section means damage to the vehicle and does not include compensation for medical or rehabilitation costs. Compensation is to the extent to which the insured would have recovered if he or she had a right of action. In other words, ICBC will pay to the extent that the other driver is found liable (*IVR*, s 147). However, this amount is limited to the lesser of the cost of the vehicle repair, the declared value of the vehicle, or the actual cash value of the vehicle.

(4) Dispute Resolution

If the insured is found to be at fault or partially at fault, he or she will be responsible for paying for the remaining costs of repair to the vehicle, unless the insured person purchased collision coverage (see Section IV.B.2.1: Collision). If a dispute between the claimant and ICBC arises under this section, it must be arbitrated. Once the arbitrator adjudicates the dispute, the reasons for the decision must be published.

b) Section 148 Claims: Accidents in Nunavut, Yukon, Northwest Territories or the U.S.A.

This section deals with the scenario of a person having a motor vehicle accident in Nunavut, the Yukon, or Northwest Territories, or the U.S. that involves an uninsured or unidentified motorist.

(1) Who is Covered?

A person involved in a motor vehicle accident may be entitled to compensation under section 148(2) of the *IVR*, if that person:

- is a person named as an owner in the owner's certificate, or a household member of the person named as an owner in the owner's certificate;
- suffers death or injury in the Nunavut, Yukon, Northwest Territories or the U.S.; **and**
- the vehicle responsible is an unidentified or uninsured vehicle.

(2) How Much is the Coverage?

ICBC's liability (i.e. the payout) is limited to $200,000 (see Schedule 3, s 11 of the *IVR*). Payments are subject to adjustment if recovery or partial recovery is made from another party (*IVR*, s 148(2)).

(3) Exclusion or Limitation of Liability by ICBC

If a claim is made under this section, the claimant must be sure to comply with the requirements set out in s 148 of the *IVR*. ICBC will not be liable (i.e. ICBC will not compensate the claimant) in the following situations:

- if the insured has a right of recovery under an unsatisfied judgment;
- if the insured was operating a vehicle without the consent of the vehicle's owner;
- if the insured fails to comply with s 148(4)b) **to the prejudice of ICBC** (see immediately below); **or**
- if the insured fails to comply with s 148(5) (see immediately below).

(4) Insured's Obligations Under Section 148(4) and (5) of the *IVR*

Under section 148(4)(b) of the *IVR*, the insured:

- must file a copy of the originating process with ICBC within 60 days of the action commencing; **and**
- must not settle a claim without the written consent of ICBC

Under s 148(5) of the *IVR*, the insured (or his or her representative) must:

- for accidents involving an **unidentified** vehicle, report the accident, within 24 hours of the accident, to the police, or the administrator of any law respecting motor vehicles;
- file with ICBC, within 28 days of the accident, a statement under oath that: a) the insured has a cause of action arising out of the accident against the owner or driver of an **unidentified or uninsured** vehicle and b) setting out the facts in support of that statement; **and**
- at ICBC's request, allow ICBC to inspect the insured's motor vehicle that was in the accident.

> **NOTE:** Payments made under s 148 will be deducted from the amount aninsured is entitled to under Parts 6 or 7 of the *IVR* (s 148(6) and (7)). Also, ICBC will not be liable to pay any benefit, indemnity, or compensation payable from another source, including: Workers Compensation, Employment Insurance, and any government bodies (s 106(1)).

(5) Dispute Resolution

Any dispute between the claimant and ICBC under this section must be arbitrated. The arbitrator who adjudicates the dispute must publish the reasons for the decision (*IVR*, s 148(8)).

2. Underinsured Motorist Protection (UMP): Part 10, Division 2 of the *IVR*

a) What is UMP Coverage?

$1 million of UMP coverage is part of the basic compulsory coverage motorists have with ICBC. It provides compensation against bodily injury or death for the victim of an accident caused by a motorist who does not carry sufficient insurance to pay for the claims. The maximum coverage under UMP is $2,000,000 (which an insured must pay an extra premium to purchase) for each insured person (Schedule 3, s 13 of the *IVR*). This limit includes claims for prejudgment and post-judgment interest and costs. See section 148.1(5).

b) Prerequisites for UMP Coverage

Generally, UMP coverage is available where an insured's death or injury is caused by the operation of a vehicle operated by an underinsured motorist, and occurs in Canada or the U.S.

If an insured is making a claim for UMP coverage in the relation to a **hit and run** accident, there are additional requirements that need to be met. Under section 148.1(4), the following criteria must also be met:

- the accident must occur on a highway; and
- the accident must have **physical** contact between the insured vehicle and the unidentified vehicle, **if** it occurred in the Yukon, Northwest Territories, or U.S.

c) Who Is Covered?

Section 148.1 of the *IVR* has its own definition of “insured”. Note that the insured need not be in his or her car to be eligible for compensation. Under this section, “insured” includes, but is not limited to:

- a person named in the owner’s certificate and members of his or her household;
- any person who is an occupant of the insured vehicle;
- any person with a valid BC “driver’s certificate” (i.e. driver’s license) and members of his or her household; and
- any person entitled, in the jurisdiction in which the accident occurred, to maintain an action against the underinsured motorist for damages because of the death of one of the insured.

d) Who is Not Covered?

There are certain people who are not entitled to UMP coverage. Section 148.1(3) of the *IVR* describes when ICBC will not be liable. The following are most relevant, whereby coverage is denied if:

- the insured’s vehicle was in fact not licensed and the insured had no reasonable grounds to believe it was; or
- the vehicle’s operator or passenger did not have the owner’s consent to operate or be in the vehicle and ought to have known there was no consent (i.e. the operator or passenger is in a stolen vehicle).

e) UMP Coverage and Accidents Outside B.C.

For accidents occurring outside BC, the **law of the accident occurred determines the legal liability of an underinsured motorist**, whereas the **amount** of the UMP claim is determined by BC law. See section 148.2(6) of the *IVR*.

UMP protection does not apply in a jurisdiction where the right to sue for injuries caused by a vehicle accident is barred by law (*IVR*, s 148.2(4)). UMP coverage does not apply to vehicles used as buses, taxis, or limousines (s 148.4).

f) Forfeiture and Breach of Conditions

Under section 148.2(5) of the *IVR*, the same provisions that apply to those outlined under Third Party Legal Liability also apply here (see Section III.B.10: Forfeiture of Claims and Relief from Forfeiture and Section III.B.11: Breach of Conditions and Consequences, above.). An award otherwise available under UMP will be reduced by any amount forfeited by a breach outlined in s 55.

g) Dispute Resolution

Any dispute between the claimant and ICBC must be arbitrated. An arbitrator who adjudicates a dispute under this section must publish the reasons for the decision (*IVR*, s 148.2(1.1) and ((2.1)).

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2019.

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IV. Optional Insurance

A. Introduction to OICs

Optional Insurance Contracts ("OICs") are optional coverage that any person can purchase at his or her discretion. The following are **some** of the **types** of coverage, over and above the Basic Compulsory Coverage, that may be purchased at the owner's option from a private insurance company. The term OIC includes, but is not limited to policies providing coverage for excess third-party liability, excess own vehicle damage, excess UMP coverage, and excess no-fault income replacement.

NOTE: Formerly, Part 9 of the *IMVA Regulations* (Extension Insurance) covered material under this part. Under the current legislation, it has been replaced by Part 4 of the *IVA* (Optional Insurance Contracts) and Part 13 of the *IVR* (Optional Insurance Contracts).

1. Limiting and Excluding Coverage Under an OIC

Section 61(1.1) of the *IVA* provides that an OIC that extends coverage in an existing certificate or policy may nevertheless **limit** the extended coverage as follows:

- by prohibiting a specified person or class of persons from using or operating the vehicle;
- by excluding coverage for a specified risk; or
- by providing different limits of coverage for different persons or risks or classes of persons or risks.

NOTE: The above prohibition, exclusion, and limit are not binding on the insured unless the policy has printed on it in a prominent place and in conspicuous lettering the words "This policy contains prohibitions relating to persons or classes or persons, exclusions or risks or limits of coverage that are not in the insurance it extends" (*IVA*, s 61(2)).

In an OIC, an insurer may provide for further exclusions and limits to coverage for losses in respect of:

- the loss of the vehicle;
- damage to the vehicle; or
- the loss of use of the vehicle.

Section 61(1.2) of the *IVR* provides that an OIC may **not**, in respect of third party liability insurance coverage:

- prohibit a person who is living with and as a member of the family of the owner of the vehicle from using or operating the vehicle; or
- exclude or provide different limits of coverage for that person.

Despite any provision of the *IVA* or *IVR*, an insurer is not liable to an insured under an OIC for loss or damage in circumstances specified in the owner's policy if:

- the OIC relates to a vehicle that is not required under the *Motor Vehicle Act* to be licensed and insured (*IVA*, s 61(7)(a)); and
- the owner's policy is endorsed with a statement that the insurer is not liable to the insured for loss or damage in those circumstances (s 61(7)(b)).

B. Types of OICs

1. Extended Third Party Legal Liability

Third Party Legal Liability insurance may be increased from the basic compulsory $200,000 (taxis and limousines require $300,000; buses $500,000) to a greater amount. The exclusions and conditions that apply to the basic Third Party Legal Liability coverage (Part 6) also apply to this extended coverage. See Section III.B.10: Forfeiture of Claims and Relief from Forfeiture and Section III.B.11: Breach of Conditions and Consequences.

2. Own Damage Coverage

Own Damage protection is provided by Collision, Comprehensive, or Specified Perils coverage. It covers loss or damage sustained to the vehicle named in the owner's certificate.

a) Types of Own Damage Coverage

(1) Collision

This insurance covers loss or damage to the insured vehicle resulting from upset or collision with another object, including the ground or highway, or impact with an object on or in the ground. This type of insurance is available with a wide choice of deductibles (*IVR*, s 150).

(2) Comprehensive

This insurance covers loss or damage from any cause other than collision or upset. In addition to the Specified Perils listed below, this includes vandalism, malicious mischief, falling or flying objects, missiles, and impact with an animal. Comprehensive coverage is subject to various deductibles (*IVR*, s 150).

(3) Specified Perils

This insurance is more limited than Comprehensive. It covers only loss or damage caused by fire, lightning, theft or attempted theft, windstorm, earthquake, hail, explosion, riot or civil commotion, falling or forced landing of an aircraft or part of an aircraft, rising water or the stranding, sinking, burning, derailment or collision of a conveyance in or on which a vehicle is being transported on land or water (*IVR*, s 150).

b) Limit on Liability

The limit on the amount of indemnity payable is determined, by whichever of the following is lesser (*IVR*, s 169 & Schedule 10 s 5):

- a) the cost of repair of the vehicle and its equipment;
- b) the actual cash value of the vehicle and its equipment; or
- c) the declared value of the vehicle and its equipment.

c) Exclusion of Liability

Own Damage Coverage does **not** cover loss or damage:

- to tires, unless the loss or damage is caused by fire, theft, or malicious mischief, or is coincidental with other loss or damage;
- to any part of the vehicle resulting from mechanical breakdown, rust, corrosion, wear and tear, explosion within the combustion chamber, or freezing, unless caused by fire, theft, malicious mischief or coincidental with other loss or damage;
- consisting of mechanical or physical failure of the vehicle or any part of it; or
- to contents of the vehicle including personal effects.

Other situations to which coverage does **not** apply are:

- embezzlement;
- conversion;
- voluntary parting of ownership, whether or not induced to do so by fraud; and towing of an uninsured vehicle that is required to be insured

d) Coverage Available Through ICBC Policy

Although Part 9 of the IMVAR has been repealed and many of its sections are not covered by the *IVA* or *IVR*, ICBC continues to implement much of the content of that Part through internal policy. The following are types of policies that are available through ICBC policy.

(1) Loss of Use Coverage

Loss of Use coverage can be purchased only in conjunction with Own Damage (collision, comprehensive, or specified perils coverage). It provides reimbursement up to the limits purchased by the insured for expenses incurred for substitute transportation when a valid claim can be made under Own Damage coverage. Subject to the regulations, an insurer may provide for exclusions and limits of loss in an OIC, in respect of loss of use of the vehicle (*IVA*, s 65).

An OIC providing insurance against loss of use of a vehicle may contain a clause to the effect that, in the event of loss, the insurer must pay only an agreed portion of any loss that may be sustained or the amount of the loss after deduction of a sum specified in a policy. For such a clause to have legal effect, it must be printed in a prominent place on the policy and in conspicuous lettering contain the words "this clause contains a partial payment of loss clause" (*IVA*, s 67).

(2) Limited Depreciation Coverage

This optional coverage is available for first owners of certain new vehicles who have purchased Own Damage Coverage. Its purpose is to protect the owner from the high rate of depreciation during the first two years of the vehicle's life, when such depreciation is a significant factor in payment of a claim by ICBC. Total Loss Payout is the full purchase price or the manufacturer's list price, whichever is less. Damage for other than a total loss will be repaired with similar kind and quality of parts, without depreciation.

e) Forfeiture of Claims and Breach of Conditions

Apart from exclusions described above, a claim may be forfeited:

- under s 75 of the *IVA*, which states that an insured must not falsely describe the vehicle in respect of which the application is made, misrepresent or fail to disclose in the application a fact required to be stated, violate a term or condition of the insurance contract, or wilfully make a false statement with respect to a claim;
- under s 169 of the *IVR*;
- if certain conditions are breached, including failure of the insured to comply with the *IVR*; or
- if any regulation is breached by the insured. For an exhaustive list, see *IVR*, s 55.

The principal examples of failure to comply with, or breach of, regulations are:

- a) being under the influence of liquor or drugs so as to be incapable of proper control of the vehicle;
- b) being convicted for an offence under ss 249, 252, 253, 254, or 255 of the *Criminal Code*;
- c) operating a vehicle when not authorized and qualified (*IVR*, s 55);
- d) using the vehicle in illicit trade, or to avoid arrest, or other police action (s 55);
- e) towing an unregistered, unlicensed trailer (s 55);
- f) permitting others to breach a condition (s 55);
- g) using a vehicle in a manner contrary to the insured person's statement in his or her application for coverage, the result being a form of breach of condition. This happens most commonly in cases where coverage of a vehicle for "pleasure purposes" is applied for, and the vehicle is damaged when in fact being used to take the insured person to or from work (s 55 sets out the specifics);
- h) failing, without reasonable cause and to the prejudice of ICBC,
  - (i) to make a police report within 48 hours after the discovery of theft, loss, or damage;
  - (ii) to obtain a police case file number; and
  - (iii) to advise ICBC within seven days of making the report to the police of the circumstances of that loss or damage as well as the police case file number (s 136 (a)); and
- i) failing, without reasonable cause and to the prejudice of ICBC, to comply with ss 67 or 68 of the *MVA*, or similar provisions in the law of another Canadian or American jurisdiction, relating to the duties of a driver directly or indirectly involved in an accident (*IVR*, s 136(b)).
  - **NOTE:** The *IA Regulations*, under s 128, sets out the circumstances in which ICBC may enforce a right of recovery against a person who, with the consent of the insured, has the care, custody or control of the insurer's vehicle.

f) Exceptions to Forfeiture

If a vehicle is used "contrary to statement in application", the right to indemnity is not forfeited when the damage occurs during a mere "occasional" use of the vehicle in violation of the statement in the application.

g) Reporting Accidents

Coverage may be denied where an insured person fails to comply with ss 67 or 68 of the *MVA*, without reasonable cause and to the prejudice of ICBC The onus of proving compliance lies on anyone who is bound to report.

Section 67 of the *MVA* deals with the duty to file accident reports in cases where aggregate damage apparently exceeds $1,000, or where there is any bodily injury, and provides that the reports are normally confidential.

Section 68 deals with the immediate duties of persons in charge of vehicles involved in a highway "incident", namely: to remain at the scene, render assistance, and provide identification of person and insurance coverage. If the other vehicle is

unattended, the driver of the colliding vehicle must leave full identification conspicuously posted.

Any breach of these duties is an offence punishable under the *MVA*. Similar duties are created by ss 249 and 252 of the *Criminal Code*. A breach of them can result in more severe penalties. These duties apply to any highway "incident" regardless of any insurance aspects of the case, and even if the driver was only "indirectly" involved in the incident.

h) Limitation

There is some confusion about which claims must be brought within one year of the accident and which have a limitation period of two years. The IVA stipulates that any action by an insured person against ICBC "shall be commenced within **one year** after the happening of the loss or damage, after the cause of action arose, or after the final determination of the action against the insured (*IVA*, s 17 & 76(7)). *IVR*, s 103, on the other hand, stipulates that no action shall be brought against the Corporation for loss or damage under Part 7 of the *IVR* after the expiration of two years from the occurrence of the loss or the last day benefits were provided. From a practical point of view, **it is almost always better to commence an action as soon as possible to avoid any problems with limitation periods**.

i) Dispute Resolution and Appeals Process

The Lieutenant Governor in Council may make regulations respecting mediation or arbitration including, without limitation, regulations providing to a party to a vehicle action the ability to require the parties to engage in mediation or arbitration and setting out when and how that ability may be exercised and prescribing any other results that flow from the exercise of that ability (*IVA*, s 96).

(1) How Decisions Regarding Liability are Made

Disputes frequently arise when the vehicle of a person insured by ICBC is damaged by another insured person. In that situation, an adjuster will decide the degree of fault between the two parties. The adjuster's decision is based on traffic regulations, and the rules of negligence, with the party in contravention of the *MVA* generally being found at fault. If both parties have contravened some regulation, however, a 50-50 assessment is often made. This is also the case when there are no independent witnesses.

(2) Appeal Process: Two Routes

If a client is dissatisfied with an adjuster's decision, there are two available courses of action:

- a) the client can go through ICBC's internal appeal procedure by asking the adjuster to review his or her decision and, if there is no change, by asking the claims manager to review it. If the client is still not satisfied, the third step is to present the client's case to an appeal panel; or
- b) the client can sue. This is commonly the most satisfactory course, particularly where the amount in issue is relatively small, as where the damage is about the same amount as the "deductible". Such an action is not brought against ICBC under the policy, but against the driver (and owner, *MVA*, s 86) whose negligence is said to have caused the accident. In such a case, that ICBC was not liable to pay the "deductible" to its own insured does not relieve the negligent party from liability, assuming always that negligence can be established.

There are two ways in which to frame the action. The plaintiff can either claim the total amount of damage resulting from the negligence, even though ICBC has already paid a portion of it, or the plaintiff can claim merely the amount that ICBC has not paid. Remember, however, that a plaintiff cannot collect twice, and if he or she sues for more than the deductible, he or she may be held to be acting as a trustee for the Corporation and therefore liable to account for anything in excess of the deductible. In either case, the plaintiff bears the onus of proving the negligence alleged against the defendant.

NOTE: If ICBC denied liability to indemnify a person insured by it and that person is sued, ICBC is entitled to apply to the court to be joined as a third party (*IVA*, s 77(3)). Upon being made a third party, ICBC can then defend the action fully, despite its previous denial of liability to indemnify the defendant (*IVA*, s 77(4)). In *West v Cotton* (1994), 98 BCLR (2d) 50 (SC), the third party, ICBC, conducted the defence of a defendant to whom it denied coverage and who did not participate in the proceedings. Having succeeded in proving his claims, the plaintiff was not entitled to recover his or her costs, with one exception: that being against the third party. In this case, ICBC would have suffered significant prejudice if it had been precluded from presenting its defences as third-party since the defendant did not demonstrate any interest in maintaining the action.

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V. Personal Injury Claims

A. Making a Claim with ICBC

The IVR provides for a number of benefits that are administered by ICBC, as the motorist's insurer, in instances where the motorist damages his or her automobile and/or sustains injuries after an accident. These regulations can be thought of as the motorist's "insurance policy". All of the benefits to which a motorist is entitled are explained in the *IA Regulations*. ICBC adjusters in claim centres around the province administer these benefits. The following outlines the general process to be expected.

A claimant must also keep in mind that drivers have certain responsibilities at the scene of an accident. For a full list of these responsibilities, please see Chapter 13: Motor Vehicle Law of the LSLAP Manual.

1. Dial-A-Claim

When calling Dial-a-Claim, the claimant will be put in touch with a representative who will take down pertinent details of the accident, including the time, date, place, license identification of the vehicles involved, etc The representative will ask the claimant to give a brief narrative of how the accident occurred. This narrative will be taken down and entered into the computer files at ICBC The claimant will then be given a claim number that will follow the claim and the claimant through the entire process. The claim number enables ICBC to find the claimant's file through any office and to quickly identify the adjuster who is dealing with the claim.

2. Meeting with the Adjuster

The Dial-a-Claim representative will schedule an appointment for the claimant at a local claim centre. When the claimant goes to the appointment, he or she will talk to an adjuster about the accident. The adjuster will ask the claimant to make a statement about how the accident occurred and about the injuries that the claimant sustained.

The adjuster will also ask the claimant to sign "No-Fault Benefit Claim Forms". These forms are not "releases" and by signing them, the claimant is not waiving any of his or her rights to benefits or to damages for injuries or loss emanating from the accident. The forms simply allow for the release of the claimant's MSP number, the claimant's SIN number, information from the claimant's doctor, and information from the claimant's employer. Nonetheless, it would be prudent for unsophisticated or illiterate claimants to have someone, other than the adjuster, go over the forms with them before

signing.

3. The Adjuster's Perspective

While the adjuster is an agent of the claimant's own insurance company, for purposes of administering the "no-fault benefits" the adjuster is also an agent of the tortfeasor's insurance company and, in that capacity, has an interest in minimizing the claimant's injuries and damages.

The adjuster will typically encourage the claimant to minimize the extent of the injuries or damages. The claimant should be aware of this and should guard against agreeing that everything is satisfactory when it is not. Claimants should be cautious not to express optimism about their injuries and should try to neither understate nor overstate their injuries.

Where fault is an issue, claimants may find the adjuster manipulating their narrative to place them in a negative light. This is often done in very subtle ways and claimants should be aware of it so that they can guard against it. Typically, an adjuster will draw a map or diagram of the accident scene and state that it is "not to scale". The Corporation may later claim that the diagram is an accurate depiction of the accident and tantamount to a confession of fault.

The claimant should avoid agreeing with interpretations of the accident that are made by the adjuster and should endeavour to have the adjuster transcribe the claimant's exact words. Typically, the adjuster will write out the claimant's statement in longhand and then ask the claimant to review it. The claimant may feel reluctant to make changes because the adjuster has taken the time to write out the statement. The claimant should not hesitate to make changes and initial them, or to ask the adjuster to start all over again.

The claimant should be extremely careful in making statements to the adjuster. The claimant must understand that these statements will later be scrutinized. In cases involving serious injury and cases where liability is disputed, the claimant should have a lawyer with him or her when he or she makes statements to the adjuster.

4. The "Independent" Medical Assessment

Under the *IVR*, ICBC may appoint a doctor to make an "independent" medical assessment of the claimant's condition even after your own doctor has assessed you'. While some of these doctors are objective, others may have a strong defence bias. Their task is to see if they can locate weaknesses in the claimant's case. The claimant should take care neither to exaggerate nor to minimize the injuries.

5. ICBC Private Investigators

The claimant should be aware that private investigators hired by ICBC, do exist. They check up on claimants and the evidence that they gather can be used against claimants. For example, if the claimant says that he or she cannot mow the lawn or lift a bag of flour, and then goes outside and does just that, he or she runs the risk of being photographed and/or videotaped by a person employed by ICBC.

6. "Minimal Damage" and ICBC Policy

The claimant should also be aware that ICBC has a well-publicized policy of declining to honour claims for injuries or losses where there is "minimal damage" to the automobiles and/or persons involved in the collision. Where the damages fall below $1,000, a claimant may find him or herself confronted with an adjuster who states flatly that ICBC has a policy of refusing to pay claims in certain cases where science has established that injuries and damages cannot occur. An adjuster may also tell a claimant that he or she is without discretion in settling claims, and that he or she is required to employ classifications and a system of scaling, with an unsuccessful or unsatisfactory result for the claimant. In all these situations, the claimant should know that these decisions do not represent the **law**, but are merely ICBC **policy**, and can

be and often are challenged successfully in court, where judges may give larger awards. Recently, it appears that ICBC is revoking this policy.

B. Identifying Parties to the Dispute

The plaintiff(s) in a given case may be any or all of the following:

- the injured party (which could be the driver, occupant, or bystander) or the estate of the deceased; the relatives of the injured party; the registered owner of the vehicle in the accident; and/or the guardian of a party lacking the requisite mental capacity to commence an action.

In general, anyone whose negligence may have caused or contributed to the motor vehicle accident should be joined as a defendant. This might include:

- the drivers; passengers; the estate of deceased defendants; registered owners of vehicles; ICBC or other insurers; the ministry of BC transportation; municipalities; the parties responsible for the manufacture or maintenance of the vehicle; and/or employers.

Appropriate third parties to the dispute will often include insurance companies (including ICBC) who, while not themselves tortfeasors, may be under an obligation to indemnify the defendant.

> **NOTE:** It is very important to properly determine who the parties are. Failure to do so may adversely affect the client's claim, and/or may result in an empty judgement. See Chapter 20: Small Claims for more information (the information holds true in Supreme Court as well).
>
> **NOTE:** When the accident occurred "in the course of employment", the *Workers Compensation Act* [*WCA*], RSBC 1996, c492, may apply. Where the *WCA* is engaged, the Act assumes exclusive jurisdiction over the case, and an action in tort is barred. It is therefore extremely important to fully explore the employment relationship(s) of both plaintiffs and defendants before proceeding. See Chapter 7: Workers' Compensation for more information.

C. The Fault Requirement

The present system of accident compensation is fault-based. The claimant sues in tort, which can be divided into two areas: intentional torts and negligence. Injuries that are caused with intent to contact (in the case of battery) are intentional torts. Injuries that are caused by a lack of reasonable care by one party are negligence claims. Negligence encompasses all departures from accepted reasonable standards.

A prerequisite to any tort action is that the damages suffered by the claimant were not caused by the claimant's own fault. If the claimant is partly at fault for the accident, damages will be reduced in accordance with the claimant's degree of fault. For example, if the claimant is 50 percent to blame for the accident, his or her damages will be reduced by a corresponding amount of 50 percent.

Cases where fault is an issue frequently go to trial. Claimants should be advised that often the adjuster will suggest a claimant is fully at fault for the accident, when in fact she or he may only be partially at fault. The claimant should recognize that the adjuster is trying to dissuade the claimant from litigating a claim. The claimant may well end up establishing 50 percent fault on the part of the other driver and obtaining a 50 percent settlement.

D. Private Settlements

Private settlements should be discouraged. Potential plaintiffs should always consult a lawyer prior to settling a claim, whether privately or with ICBC. Similarly, potential defendants in such matters should seek the advice of a lawyer and contact ICBC prior to paying out any sums, so as not to prejudice their rights and their plan of insurance with ICBC.

E. Inequality of Bargaining Power

The courts may set aside a release of claim for personal injuries on the grounds that it was in circumstances where it can be shown there was inequality of bargaining power between the parties.

In *Towers v Affleck* [1], [1974] 1 WWR 714 at 719 (BCSC), Anderson J. stated that the question to be determined is whether "the plaintiff has proved by a preponderance of evidence that the parties were on such an unequal footing that it would be unfair and inequitable to hold him or her to the terms of the agreement which he or she signed. While the court will not likely set aside a settlement agreement, the court will set aside contracts and bargains of an improvident character made by poor and ignorant persons acting without independent advice unless the other party discharges the onus on him or her to show that the transaction is fair and reasonable." See also *Pridmore v Calvert* [2] 1975 CanLII 1091 (BCSC).

On the basis of the preponderance of the evidence (or on a balance of probabilities), therefore, the following questions should be asked:

1. Was there inequality of bargaining power?
2. If so, would it be unfair or inequitable to enforce the release of claim against the weaker party?

Where a plaintiff signs a Release of Claim, the defendant will not be able to dismiss a claim the plaintiff subsequently makes using Rule 9-7 of the *BC Supreme Court Civil Rules*, if the evidence leads the court to conclude that the plaintiff was misled, even if unintentionally, into believing the document signed was releasing claims in areas that the plaintiff believed to be irrelevant.

This reasoning relies on the plea of *non est factum* (Latin for "not my deed"), a common law plea allowing a person who has signed a written document in ignorance of its character to argue that, notwithstanding the signature, it is not his or her deed. In other words, if the person's mind does not go with the deed of signing, the release is not truly his or her deed.

Unconscionability and misrepresentation may also be successful grounds for rendering an otherwise valid Release of Claim invalid. See *Clancy v Linquist* [3] 1991 CanLII 795 (BCSC), per Scarth J.

In *Mix v Cummings* [4] 1990 CanLII 1 (BCSC) [*Mix*], per Perry J., a general release discharging and releasing defendants from all claims, damages, and causes of action resulting, or that will result, from injuries received in an automobile accident was upheld on the following basis:

1. the court found no mutual mistake of fact based on a misconception as to the seriousness of the injuries sustained in the accident;
2. the release was not the product of an unconscionable or unfair bargain; and
3. the plea of *non est factum* and want of *consensus ad idem* were unfounded in the circumstances.

The implication of the *Mix* judgment is that the presence of any of the above factors in a particular set of facts may be sufficient to invalidate a general release. Note, however, that the mere fact that a plaintiff's injuries became more serious than he or she anticipated when signing a release will generally not invalidate the release.

F. Plaintiff's Duty to Mitigate

The plaintiff has a duty to mitigate his/her injuries after an accident. Generally, this means following your doctor's instructions so that recovery from any injuries is as quick as possible. Failing to follow your doctor's instructions can aggravate the injury and prolong recovery, thus increasing expenses. If this is the case, ICBC will argue that your failure to mitigate and speed up the recovery should decrease the amount of money to which you are entitled. This occurred in *Rasmussen v Blower* [5], 2014 BCSC 1697, , where the plaintiff was counselled to do physiotherapy and massage, but only attended one appointment of each. The trial judge stated that the plaintiff should have shown more perseverance and given time to allow the medical treatments to work. Due to the plaintiff's failure to mitigate, the trial judge reduced the plaintiff's award by 20%.

If you find that you are unable to afford certain treatments that are mandated, you should apply for coverage through Part 7 (no-fault) benefits (see Part III.C). A judge will not take a failure to apply for these benefits as an excuse for not continuing with treatment (*Rasmussen v Blower*).

G. Which Court has Jurisdiction?

1. Provincial Court, Small Claims Division

The Small Claims limit is $35,000 (effective June 1, 2017). Accordingly, claims for minor injuries may come within the jurisdiction of the Provincial Court. The procedure for bringing a case to trial in Small Claims Court is fully set out in this Manual in Chapter 20: Small Claims.

A claim commenced in Small Claims court can be transferred to Supreme Court on application by one of the parties or by a judge on his or her own initiative. Such an application should be made as early as possible for a greater chance of success. A judge at the settlement/trial conference, at trial, or after application by a party at any time, must transfer a claim to Supreme Court if he or she is satisfied that the monetary outcome of a claim (not including interest and expenses) may exceed $35,000. However, there may be exceptions. A claim will remain in the Small Claims Division if the claimant expressly chooses to abandon the amount over $35,000. For personal injury claims, a judge must consider medical or other reports filed or brought to the settlement/ trial conference by the parties before transferring the claim to the Supreme Court.

2. Civil Resolution Tribunal

Starting April 1, 2019, the Civil Resolution Tribunal (CRT) will make decisions on the following matters, when there is disagreement between a claimant and ICBC:

- 1. classification of an injury as a minor injury;
- 2. entitlement to receive accident benefits claimed;
- 3. entitlement to receive accident benefits claimed; and
- 4. decisions regarding who is at-fault in the crash and settlement amounts for all motor vehicle injury claims below a threshold that will not exceed $50,000.

For claims started before April 1, 2019, the upper limit of $5,000 applies and the claim must be made under the CRT's small claims jurisdiction – this is not the same as the Small Claims Court.

The Civil Resolution Tribunal is designed to be accessible, economical, and without the need for legal representation. Claimants will still be able to hire a lawyer for most motor vehicle claims made on or after April 1, 2019, should they choose to do so. In some circumstances, the claimant may have to ask the CRT for permission to hire a lawyer. Decisions made by the Civil Resolution Tribunal can be reviewed by the Supreme Court of British Columbia.

For more details, Chapter 20 of the LSLAP Manual on the CRT and its procedures: "https://www.lslap.bc.ca/manual.html" [6]

You can also find useful information on the CRT's website: "https:/ / civilresolutionbc. ca/ how-the-crt-works/ getting-started/motor-vehicle-accidents-and-injuries/" [7]

3. Supreme Court of British Columbia

The Supreme Court of British Columbia is governed by the *Supreme Court Civil Rules*.

Actions involving the ICBC for damages over $50,000 (effective July 2, 2019) come within the jurisdiction of the Supreme Court of British Columbia (Accident Claims Regulations, s 7). The following represents a brief overview of the procedure for bringing a case to trial at this level.

A claim commenced in Supreme Court can be transferred to the Small Claims on application by one of the parties or by a judge on his or her own initiative. The judge must be satisfied that the monetary outcome of the claim will not exceed $50,000. Such an application should be made as early as possible for a greater chance of success, and where appropriate, may be accompanied by an express statement by the plaintiff abandoning any claim to damages in excess of $50,000.

a) Regular Trial

(1) The Notice of Civil Claim

A claim in the Supreme Court of British Columbia is initiated by filing a Notice of Civil Claim. The Notice of Civil Claim is served upon ICBC and the defendant(s). The *IVR* deals with situations where there are unknown drivers, hit and run accidents, etc. Where the defendant is an uninsured motorist, ICBC will receive the pleadings and file a defence.

(2) The Response to Civil Claim

After the claim has been served, ICBC will appoint defence counsel on behalf of the insured, or on behalf of itself if there is an uninsured motorist, and file a Response to Civil Claim.

(3) Reserving a Trial Date

After the Response to Civil Claim is filed, the parties will reserve a trial date. The trial date usually falls approximately two to two-and-a-half years ahead. The reason for this delay is that the court registry is overbooked. The delay is not usually a problem since it takes some time to organize the trial and it is often not until some time after the accident that the full extent of the claimant's injuries can be determined. If additional time is required, when the trial date arrives, the trial can be adjourned by consent of the parties.

(4) The Examination for Discovery

Once the trial date is reserved, an Examination for Discovery may be held. Discovery of the plaintiff is initiated at the option of defence counsel and will typically occur six months to one year after the lawsuit is initiated. The Discovery will usually take one day but can last longer in certain cases. Prior to the Discovery, defence counsel will scrutinize the claimant's statements to the adjuster. At the Discovery, the defence counsel will cross-examine the claimant about the manner in which the accident occurred and the extent of the claimant's injuries.

Most cases are not settled until after the Discovery, since it is at this stage that defence counsel is able to assess the credibility and seriousness of the claim and make a determination respecting the sort of damages to which the claimant may be entitled.

b) Fast Track Litigation - Rule 15-1

This rule was introduced to provide an efficient and less expensive means of dealing with cases where the trial will last 3 days or less.

Fast track litigation may apply to an action if:

1. The only claims in the action are for money, real property, builder's lien, and/or personal property **and** the total of the following amounts is $100,000 or less, exclusive of interest and costs:
   - a) the amount of any money claimed in the action by the plaintiff for pecuniary loss;
   - b) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss; and
   - c) the fair market value, as at the date the action is commenced, of all real property, all interests in real property, all personal property and all interests in personal property claimed in the action by the plaintiff.
2. The trial of the action can be completed within 3 days
3. The parties to the action consent, **or**
4. The court, on its own motion or on the application of any party, so orders.

NOTE: The court is not prevented from awarding damages in excess of $100,000.

If this rule applies to an action,

1. any party may file a notice of fast track action in Form 61;
2. the filing party must serve all other parties on record with a copy; **and**
3. the words "Subject to Rule 15-1" must be added to the style of proceeding, immediately below the listed parties, for all documents filed after the notice of fast track action is filed or if the court so orders.

- This rule ceases to apply if the court, on its own motion or on application of any party, so orders.
- Parties to a fast track action can serve on another party a notice of application or an affidavit in support of an application ONLY after a case planning conference or a trial management conference has been conducted in relation to the action. This rule does not apply if:
  - a. The court orders the fast track action to cease;
  - b. If an application is made by a party, judge, or master to relieve a party from this requirement if
    - i. It is impracticable or unfair to require the party to comply; **or**
    - ii. The fast track litigation application is urgent;
  - c. If the action is scandalous, frivolous, or vexatious (as per Rule 9-5);
  - d. If the action will proceed by summary judgment or summary trial (Rule 9-6 and 9-7);
  - e. If an application is made to add, remove, or substitute a party; or
  - f. The parties consent.
- Fast track action must be heard by the court without a jury.
- Examinations for discovery of a party of record by all parties of record who are adverse in interest must not, in total, exceed 2 hours or any greater period to which the person to be examined consents, unless otherwise ordered by a court
- All examinations for discovery in a fast track action must be completed at least 14 days before the scheduled trial date, unless the court orders otherwise or the parties to the examination consent.
- If a party to a fast track action applies for a trial date within 4 moths after the date on which this rules becomes applicable to that action, the registrar must set a date for the trial that is not later than 4 months after the application for a trial date.
- Rule 11-8 is modified in a fast track action:
  - Rule 11-8 (3): Except as provided under this rule, a party to a vehicle action may tender, at trial, only the following as expert opinion evidence on the issue of damages arising from personal injury or death:

- (a) expert opinion evidence of up to 3 experts;
- (b) one report from each expert referred to in paragraph (a).

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Rule 11–8 (3) (a) is to be read as if the reference to “3 experts” were a reference to “one expert”.
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- Rule 11-8 (8): In a vehicle action, only the following amounts may be allowed or awarded to a party as disbursements for expert opinion evidence on the issue of damages arising from personal injury or death:
  - (a)the amount incurred by the party for up to 3 expert reports, whether or not the reports were tendered at trial, provided that each report was
    - (i)served in accordance with these Supreme Court Civil Rules, and
    - (ii)prepared by a different expert;
  - (b)the amount incurred by the party for
    - (i)a report allowed under subrule (4) or (5),
    - (ii)a report referred to in subrule (6) or (7), or
    - (iii)a report prepared by an expert appointed by the court under Rule 11-5 (1);
  - (c)the amount incurred by the party for an expert to give testimony at trial in relation to a report, referred to in paragraph (a) or (b), that was prepared by the expert.

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Rule 11–8 (8) (a) is to be read as follows: the amount incurred by the
party for one expert report, whether or not the report was tendered at
trial, provided that the report was served in accordance with these
Supreme Civil Court Rules.
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H. Damages

Claimants often have unrealistic expectations about the amount of damages they are likely to receive. Claimants should be cautious about listening to stories of awards told by relatives and friends as these stories may be exaggerated and/or may be missing crucial pieces of information.

1. How Damages are Assessed

The court will determine what damages a claimant is entitled to on the basis of precedent. It is, therefore, possible to project what the court will award by looking for similar cases. The judgments will outline the nature of the injuries sustained by the claimant and the court’s assessment of damages.

2. Heads of Damage

To understand an award, it is necessary to consider all the heads of damage. For example, a claimant who is a brain surgeon at the height of his or her career and who has a finger amputated might have a loss of prospective earnings claim in the millions and a relatively small claim for non-pecuniary losses. In contrast, a claimant who is retired and has a leg amputated may have a relatively low loss of prospective earnings claim but a relatively high claim for non-pecuniary damages.

The major heads of damage are as follows:

a) Non-pecuniary Damages

Non-pecuniary damages are awarded to **compensate** the claimant for pain and suffering, loss of enjoyment of life, loss of expectation of life, etc. In 1978, the Supreme Court of Canada placed a cap of $100,000 on awards for non-pecuniary damages in *Andrews v Grand & Toy Alberta Ltd* [8], 1978 CanLII 1 (SCC). This means that the limit for this head of damages after adjusting for inflation, is now about $380,000.

b) Loss of Prospective Earnings

Loss of prospective earnings is the capitalized value of the claimant's loss of income from the time of the accident to the claimant's projected date of retirement. The capitalization rate will be calculated by using present rates of return on long-term investments, and an allowance will be made for the effects of future inflation. In determining the value of prospective earnings, the claimant's earning capacity over his or her working life, prior to the accident, will be evaluated. In a claim for the capitalized value of lost prospective earnings, the defendant will seek to reduce that amount by introducing evidence of future contingencies.

c) Cost of Future Care

Cost of future care is the cost of the claimant's future care over his or her expected life span. As with loss of prospective earnings, cost of future care is capitalized and reduced for contingencies.

d) Special Damages

Special damages compensate the claimant for expenses like drugs, crutches, orthopaedic shoes, and artificial limbs. Claimants should keep every document, receipt and bill that relates to their accident. The claimant must have the originals to be reimbursed.

3. Lump Sum Awards and Structured Settlements

Damages can be paid in a lump sum or through a structured settlement. A structured settlement is an arrangement where the damages to which a claimant is entitled are left under the control of the insurer. The insurer enters an annuity contract with the claimant and agrees to pay that claimant a certain income for a set period of time. Structured settlements are often recommended in infant cases and cases where the claimant has a mental disability or infirmity. In rare cases, a court imposes a structured settlement.

Structured settlements are worth considering if the amount of the principal settlement exceeds $50,000 to $100,000. These arrangements offer advantages for the claimant and the insurer. One advantage for the claimant is that the interest gained on that settlement is not taxable. The claimant, therefore, gets much more money than if he or she took the lump sum and invested it. Another advantage is that the claimant does not suddenly come into a large sum of money and run the risk of spending it foolishly. The advantage to the insurer is that the Corporation doesn't have to pay out all of the money at once and is entitled to derive income from it.

Structured settlements can be set up through a number of licensed dealers in British Columbia. Various options are available. For example, the claimant could receive a lump sum every five years, an indexed monthly sum, a monthly sum that decreases over the years, or a monthly sum and periodic lump sum payments. Most dealers do not charge for providing projections of the various income streams and the costs associated with them.

I. Costs

In addition to the claim for damages, the claimant should claim costs. Courts award costs as crude compensation for the costs of pursuing the claim. Costs are calculated or assessed on the basis of a tariff set out in the *Supreme Court Act*, RSBC 1996, c 443. They do not fully compensate the claimant for the cost of pursuing the litigation but go some distance toward paying for the disbursements and a portion of the legal fees charged by the lawyer. Claimants in Small Claims court can claim “expenses” but not counsel fees.

J. Reaching a Settlement Before Trial

1. Negotiation

Following the discovery, defence counsel will write a detailed reporting letter to the adjuster making recommendations about a settlement. The adjuster will present the defence counsel’s recommendations to ICBC, which may or may not accept them. Upon reply, defence counsel will inform the claimant’s counsel of ICBC's position. If the claimant is unwilling to settle, the claimant’s counsel may contact the adjuster and submit a counter-offer. This process will likely be repeated several times. These types of negotiations are expensive, time consuming, slow, and frustrating.

2. Mediation

The Notice to Mediate is a new process by which any party to a motor vehicle action in Supreme Court may compel all other parties to the action to mediate the matters in dispute (*Notice to Mediate Regulation*, BC Reg 127/98, s 2 [*NMR*]). The Notice to Mediate process does not provide a blanket mechanism to compel parties into mediation. Rather, this process provides institutional support for mediation in the context of motor vehicle actions.

The party that wishes to initiate mediation delivers a Notice to Mediate to all other parties in the action no earlier than 60 days after the pleading period, and no later than 77 days before the date set for the start of the trial. Within 10 days after the Notice has been delivered to all parties, the parties must jointly agree upon and appoint a mediator (*NMR*, s 6). The mediation must occur within 60 days of the mediator’s appointment, unless all parties agree in writing to a later date (*NMR*, s 5). If one party fails to comply with a provision of the *NMR*, any of the other parties may file a Declaration of Default with the court (*NMR*, s 11). If this occurs, the court has a wide range of powers, such as staying the action until the defaulting party attends mediation, or making such orders as to costs that the court considers appropriate.

The parties will share the cost of the mediator equally, unless the parties agree on some other cost sharing arrangement (*NMR*, s 9(2)(b)). The hourly rates of mediators vary, and this is a factor to be considered in selecting a mediator. The mediator will probably spend about one hour preparing for the mediation, and the mediation session will last about three hours.

3. ICBC’s Obligations to the Insured

ICBC has an obligation to protect the insured by making an effort to settle the claim in the limits of the amounts of coverage. Insurers are under an obligation to consider the interests of their insured in deciding whether to settle a claim. The insurer assumes by contract the power of deciding whether to settle and it must exercise that power in good faith.

In *Fredrikson v Insurance Corporation British Columbia* [9], 1990 CanLII 3814 (BCSC), Esson CJ. summarizes the law respecting the insurer’s duty to its insureds in certain areas discussed therein. In this particular case, ICBC acted in good faith, and in a fair and open manner, followed the course the insured wished to take. Among the points raised in the judgment are:

- i) the exclusive discretionary power of ICBC to settle liability claims places the insured at the mercy of the insurer

- ii) this vulnerability imposes duties on the insurer to act in good faith and deal fairly, and to not act contrary to the interests of the insured, or, at least, to fully advise the insured of its intention to do so;
- iii) the insurer's duty to defend includes the obligation to defend by all lawful means the amount of any judgment awarded against the insured.

See also *Shea v Manitoba Public Insurance Corporation* [10] 1991 CanLII 616 (BCSC), per Finch J.

4. Formal Offers to Settle and Cost Consequences

Under Rule 9-1 of the *Supreme Court Rules*, a plaintiff or defendant who refuses a reasonable offer to settle may be penalized for needlessly dragging out the litigation.

NOTE: An offer to settle does not expire due to a counter offer being made.

For Rule 9-1 to be engaged, a formal offer to settle must be made in writing, and delivered to all parties of record, and must contain the language:

- "The ....*[party(ies)]*..........., ...*[name(s) of the party(ies)]*..........., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

Such an offer to settle must not be disclosed to the court/jury or set out in any proceeding until all issues in the proceeding, other than costs, have been determined. Also, an offer to settle does not constitute an admission.

If a plaintiff accepts an offer, the sum of which falls in the jurisdiction of the Provincial Court (*Small Claims Act*), they are **not** entitled to costs, other than disbursements. However, this rule can be overridden if the court finds a sufficient reason for the proceeding taking place in the Supreme Court.

The court, in assessing costs has broad discretion to consider a refusal to settle in making an order with respect to costs. The court may consider:

- whether the offer ought to have reasonably been accepted;
- relationship between the terms of settlement and the final judgment of the court;
- relative financial circumstances of the parties; and/or
- any other factor the court considers appropriate.

Based on such considerations, the court **may** do one or more of the following:

- if it determines that the offer ought reasonably to have been accepted, then the court may deprive a party of costs, to which it would otherwise be entitled, for steps taken after the date of service or delivery of the offer to settle;
- award double costs for all or some of the steps taken in the proceeding after the delivery date of the formal offer;
- award a party costs for all or some of the steps taken in the proceeding after the delivery date of the formal offer which that party would be entitled to had the offer not been made;
- Where the plaintiff refuses an offer to settle from the defendant, and the eventual judgement is no greater than the offer, the court may award the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of the offer.

The rules penalizing a plaintiff for overreaching the true value of a claim can be catastrophic, and can visit financial ruin upon a claimant who does not exercise a sober and realistic assessment of his or her claim as he or she proceeds into Supreme Court. It is entirely within the realm of possibility that a claimant who refuses to accept an offer of $30,000.00, after judgment for $29,000.00 (i.e. lower than the offer to settle) would finish the day, after paying the insurer's costs and disbursements, and his or her own disbursements, with **nothing** or **less than nothing**: a debt to the insurer and his or her own lawyer for disbursements.

It should be stressed to clients that the lawyer who is hired to do a personal injury case is supposed to be objective, realistic, and not inclined to simply tell the client what they want to hear. When a lawyer talks about the risks of litigation, this penalty for misjudging the value of a case is one of the most important risks to consider.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 12, 2019.

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VI. Out-of-Province

A. Conflict of Law Issues

Following *Tolofson v Jensen* [1]*, 1994 CanLII 44 (SCC), in Canada, the substantive law to be applied in torts is the law of the place where the activity occurred, rather than the place where the action is being tried.*

When foreign law applies to an action commenced in BC, unless all counsel can agree on the substantive law that applies, counsel seeking to rely on the foreign law has the burden of proof to establish the content of that law. This is often supported by expert opinion evidence in court.

1. Limitation Periods

Subsequent cases have confirmed that limitation laws are generally (but not always) substantive.

2. The assessment of damages

The court in *Wong v Wei* [2], 1999 CanLII 6635 (BCSC) drew a distinction between the availability of heads of damage, which is a matter of substantive law, and the assessment or quantification of damages, which is a matter of procedure.

B. Jurisdiction

In general, any claim will likely go through the court where the accident occurred (i.e. if the accident was in BC, it will go through the BC Provincial or BC Supreme Court).

If an accident occurs outside BC and the defendant(s) resides outside of BC, the issue of jurisdiction should be carefully examined before the limitation period expires in either jurisdiction.

Counsel should keep in mind that a plaintiff has two claims, one in tort and the other against a first party insurer for Part 7 or equivalent) benefits. The jurisdiction issue for the two claims should be considered separately.

The defendant can challenge BC court's jurisdiction on the basis that the BC court has no jurisdiction to hear the matter at all (i.e. the court lacks jurisdiction *simpliciter*) or that there is a more convenient jurisdiction within which the case may be heard (i.e. the defendant argues that the BC court is *forum non conveniens*).

The BC court has jurisdiction simpliciter where there is a real and substantial connection between BC and the defendant or between BC and the subject matter of the action. Section 10 of *Court Jurisdiction and Proceedings Transfer Act* [3], SBC 2003 c 28 [*CJPTA*] lists the circumstances in which it is presumed that there is a real and substantial connection.

In situation involving parallel proceedings in two jurisdictions, it may be necessary to engage in a *forum conveniens* analysis to determine the most convenient jurisdiction within which to hear the matter. In determining the most efficient forum to hold the trial, a court may consider, among other things: where witnesses live; whether injury or disability makes it difficult for one party to travel; and which substantive law will apply (applying complex foreign laws in a BC court may require expensive expert witnesses to be called).

C. Out-of-province Insurers

1. Interprovincial or International Reciprocity

Each Canadian province and territory and each U.S. state has legislation governing the licensing, operation, and insurance coverage of motor vehicles. Provinces cannot regulate insurers operating outside of their borders. However, out-of-province insurers often agree to be bound by the court rules in British Columbia if their insured vehicle causes an accident by way of B.C. business authorizations (licences) or a Power of Attorney and Undertaking ("PAU").

The Canadian Council of Insurance Regulators maintains a repository of all PAUs filed in Canada by U.S. and Canadian auto insurers. A listing of companies that have filed a PAU can be found on the CCIR's website [4]. A complete listing of all British Columbia and extraprovincial insurance companies that have been issued "business authorizations" in British Columbia is available from FICOM and can be downloaded from FICOM's website [5].

In the case of a claim made against the insured of an out-of-province insurer, PAUs or licences obligate the out-of-province insurer to:

- i) file an appearance in B.C. court;
- ii) not raise any coverage defence which would not be available to an insurer in B.C. respecting a B.C. insured; and

- iii) pay any motor vehicle judgment against the insured up to the minimum liability limits required by B.C. (i.e. $200,000).

  NOTE: Failure by an out-of-province insurer to disclose that it has signed a PAU cannot be grounds for claims of bad faith or negligence (*Pearlman v American Commerce Insurance Co* [6], 2009 BCCA 78).

2. Underinsured Motorist Protection (UMP) Entitlements

Underinsured Motorist Protection is mandatory first-party coverage provided by ICBC to compensate an insured in the case of injury or death caused by an at-fault motorist. Generally, most residents of B.C. will have access to UMP coverage as the definition of an "insured" set out at s 148.1 of the *IVA* includes:

- (a) an occupant of a motor vehicle described in the owner's certificate,
- (b) a person who is
  - (i) named as the owner or renter in the owner's certificate where that person is an individual,
  - (i.1) an assigned corporate driver, or
  - (ii) a member of the household of a person described in subparagraph (i) or (i.1),
- (b.1) a person who is
  - (i) an insured as defined in section 42 and who is not in default of premium payable under section 45, or
  - (ii) a member of the household of an insured described in subparagraph (i), or
- (c) a person who, in the jurisdiction in which the accident occurred, is entitled to maintain an action against the underinsured motorist for damages because of the death of a person described in paragraphs (a), (b) or (b.1), and, for the purpose of the payment of compensation under this Division, includes the personal representative of a deceased insured.

If a claimant is injured in an accident caused by an individual with limited or no insurance, the *IVA* still provides for compensation. However, UMP coverage is coverage of last resort, and ICBC often requires a claimant to exhaust all other avenues before accessing UMP, including litigating against an at-fault motorist with limited coverage.

Under UMP, the basic coverage received is $1 million. However, excess UMP coverage to $2 million can be purchased by paying a premium on ICBC insurance.

From the UMP coverage, ICBC is entitled to make various deductions under s 148.1 of the *IVR* (under the definition of "deductible amount"). The deduction of a plaintiff's other insurance entitlements can have a significant impact on the value of a legitimate claim.

3. Optional Insurance Contracts and Excess Coverage

Section 80 of *IVA* provides that if there is an optional insurance contract and any other vehicle insurance (none of which are identified as being issued "in excess" of the others) then each insurer is liable only for the rateable proportion of any loss, liability, or damage. For example, if Policy A provides coverage up to $100,000 and Policy B Provides coverage of $300,000 and the liability of the insured is assessed at $100,000 then Policy A would pay out $25,000 and Policy B would pay $75,000.

Policies providing coverage "in excess" will be triggered only if the limit of other insurance coverage is reached. Part 4 of the *IVA* regulates contracts for excess and optional insurance coverage.

There is no formal, established claims-handling protocol between ICBC and private excess auto insurers in B.C. Absent any express agreements between ICBC and the excess insurer, neither insurer has any control over the other. Therefore, the plaintiff's counsel should not assume that ICBC is sharing all information and documents with the excess insurer.

4. Service Outside BC

a) Without a Court Order

According to Rule 4(5) of the *Supreme Court Civil Rules*, in any of the circumstances enumerated in s 10 of the *CJPTA*, the B.C. plaintiff can serve the out-of-province defendant without an order of the court.

Notable circumstances for which this is the case include:

- Actions concerning a tort committed in B.C,; and
- Actions concerning contractual obligations, where:
  - the contractual obligations, to a substantial extent, were to be performed in B.C.; or
  - by its express terms, the contract is governed by the law of B.C.

In cases where a PAU operates, the claimant need not serve the out-of-province insured directly as the PAU appoints B.C.'s Superintendent of Financial Institutions as the out-of-province insurer's counsel to accept service for any lawsuit against the insured arising out of a motor vehicle accident that took place in B.C.

b) With Leave of the Court

The B.C. plaintiff must obtain an order for service outside B.C. if the facts of the claim do not fall within one of the recognized categories listed in s 10 of *CJPTA*.

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Chapter Thirteen - Motor Vehicle Law

I. Introduction

Motor vehicle law is a relatively complex area of law. There is significant overlap between federal and provincial laws, as well as laws relating to insurance provided by the Insurance Corporation of British Columbia. While reading this chapter or doing any research on motor vehicle law, it is important to remember that more than one law may cover the same situation, and that this may result in complex interactions between the legal regimes applicable to driving. It is advisable to consult a lawyer knowledgeable in motor vehicle law issues for advice on more complex motor vehicle law questions, particularly where there is a risk of jail time, loss of driver's license, or other serious consequences upon conviction such as immigration consequences.

Please note that this chapter is directed towards a general motoring audience.

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II. Governing Legislation and Resources

Motor vehicle law in BC is governed by several different pieces of legislation. This section briefly outlines these sections, and more information on the operation of this legislation is contained throughout the chapter.

A. Motor Vehicle Act

The *Motor Vehicle Act*, RSBC 1996, c 318 [1], or "*Motor Vehicle Act*", is the primary piece of provincial legislation (law) that creates offences related to operating a motor vehicle in British Columbia. The *Motor Vehicle Act* is a lengthy act, and it is not possible to provide a complete summary of all of its provisions in this chapter. This chapter endeavours to provide a summary of the most common *Motor Vehicle Act* issues, and to provide resources for further research.

B. Other Provincial Acts/ Regulations

- The *Offence Act*, RSBC 1996, c 338 [2] provides a general procedure for handling all provincial offences.
- The *Motor Vehicle Act Regulations*, BC Reg 26/58 [3], and the *Violation Ticket Administration and Fines Regulation*, BC Reg 89/97 [4], detail penalties for specific offences.
- Motor vehicle law intersects with the *Insurance (Vehicle) Act*, RSBC 1996, c 231 [5] and *Insurance (Vehicle) Regulation*, BC Reg 447/83 [6]. For more information, see Chapter 12: Automobile Insurance.

C. Criminal Code

The *Canadian Criminal Code*, RSC 1985, c C-46 [7], is the federal legislation that sets out most of the criminal offences in Canada, in ss 320.11 to ss. 320.4. The *Criminal Code* sets out several criminal offences related to driving, details of which are set out later in this chapter. Further information on criminal offences and procedures in general can be found in Chapter 1: Criminal Law.

It is worth noting, as discussed above, that there is significant overlap between the *Criminal Code* driving offences and the *Motor Vehicle Act*. In appropriate circumstances, the Crown may stay the proceedings under federal (criminal) legislation if the accused is prepared to plead guilty to a corresponding or similar charge under provincial legislation. This is often in the accused's best interest if the Crown has a strong case as no criminal record will result upon conviction of a provincial offence.

D. Resources

1. Online Resources

a) BC Ministry of Transportation/RoadSafetyBC Website

The Ministry, including its agency RoadSafetyBC, provides a wealth of online information on motor vehicle law, including information on the *Motor Vehicle Act*, driving prohibitions and suspensions.

Online	Website [8]

b) ICBC Website

The ICBC website provides information on driver licensing.

Online	Website [9]

c) University of Victoria Law Centre Guide to Defending Traffic Tickets

Although out of date, the Law Centre's summary provides a useful overview of the process for disputing a Violation Ticket.

Online	Website [10]

2. Services

d) Lawyer Referral Service

The Lawyer Referral Service, operated by the Access Pro Bono Society of BC, can provide referrals to lawyers practicing in the area of your issue. The first 30-minute consultation is free, with fees after that point agreed between the lawyer and the client.

Individuals with specific questions related to motor vehicle law, or who are concerned about the effect of a ticket or conviction on them, should consult with a lawyer practicing in the area.

Online	Website [11]

Phone	604-687-3221 Toll-free: 1-800-663-1919

e) Legal Services Society/Legal Aid

Legal Aid is available to individuals who are faced with significant consequences after a criminal conviction. These include jail time, or immigration complications that could lead to deportation. Legal Aid is also available where individuals have a physical or mental condition, illness, or disability that makes it impossible for an individual to represent themselves.

Online	Website [12]
Phone	604-408-2172 Toll-free: 1-866-577-2525

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[10] https://www.uvic.ca/law/about/centre/resources/defending%20traffic%20tickets.php
[11] http://www.accessprobono.ca/lawyer-referral-service
[12] http://www.legalaid.bc.ca

III. At the Roadside

Most motor vehicle law issues begin at the roadside, in an interaction with a police officer, or other peace officers. This section discusses common issues encountered at the roadside, and provides an outline of your rights when you are stopped by a peace officer.

A. Powers of Peace Officers

Police officers have the power to stop drivers to check for the fitness of the motor vehicle, possession of a valid driver's license, proper insurance, and sobriety of the driver. Police officers do not need a warrant, or even reasonable and probable grounds to perform such stops. **The fact that you are driving on a public highway is enough to justify a vehicle stop.**

According to the Supreme Court of Canada in *R v Ladouceur*, [1990] 1 SCR 1257, 56 CCC (3d) 22 [1], random checks by the police for motor vehicle fitness, possession of valid driver's license and proper insurance, as well as sobriety of driver constitute arbitrary detention contrary to s 9 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]. However, these checks are considered reasonable limits under s 1 of the Charter so long as they are "truly random routine checks": *R v McGlashen*, [2004] OJ No 468, 115 CRR (2d) 359 [2]. The *Ladouceur* decision was affirmed in *R v Orbanski*, 2005 SCC 37, [2005] 2 SCR 3 [3].

Pursuant to *Motor Vehicle Act s 79* a peace officer may arrest without warrant any person:

a) whom the officer finds driving a motor vehicle, and who the officer or constable has reasonable and probable grounds to believe was driving in contravention of *Motor Vehicle Act* ss 95 or 102 (driving while prohibited) (s 79(a)); or

b) whom the officer has reasonable and probable grounds to believe is not insured or who is driving without a valid and subsisting motor vehicle liability insurance card or financial responsibility card (s 79(b)); or

c) whom the officer has reasonable and probable cause to believe has contravened *Motor Vehicle Act* s 68 (leaving the scene of an accident) (s 79(c))

and may detain the person until he or she can be brought before a justice.

B. Your Obligations

When stopped by a peace officer while *driving*, you must, upon request, provide your driver's license, vehicle registration, and proof of insurance. If these items are located in the glove compartment or other out-of-sight location, it may be advisable to ask the officer for permission to retrieve them before reaching for them, so that the officer does not think that you are reaching for a weapon.

When a legal breath sample is demanded by a peace officer, a driver must forthwith provide a sample of breath to determine the concentration of alcohol in the driver's body. See s 320.15(1) of the *Criminal Code*. More information on breath samples is available in section IX of this chapter.

Additionally, if a police officer has reasonable suspicion that a driver is impaired by a drug other than alcohol they must submit to a Standardized Field Sobriety Test ("SFST"). More information on SFST is available in section IX of this chapter.

You have specific obligations at the scene of a collision. They are outlined in the next section of this chapter: Duties After a Collision

C. The Right to Silence

The right, under sections 7 and 11(c) of the *Charter of Rights and Freedoms*, to remain silent and not be required to make self-incriminating statements, generally applies in the motor vehicle context.

With the exception of providing license, registration, and insurance, providing a sample of breath, and providing a statement at the scene of a collision in which you were involved, you are not obligated to make a statement to the police, or to answer their questions.

If you are detained, you have the right to contact a lawyer before you make any statement. In *R v Suberu*, 2009 SCC 33 [4], the Supreme Court of Canada found that the right to speak to a lawyer arises as soon as a person is detained, even though they have not been formally arrested yet. In *R v Grant*, 2009 SCC 32 [5], the court found that "detention" begins as soon as there is physical or psychological restraint imposed by the police that prevents a person from leaving.

In summary, your right to silence continues to operate when you are stopped in a vehicle by the police. If the response to you (politely) asking whether you are free to go is anything other than an unqualified "yes", you should assume you are being detained, and may wish to exercise your right to remain silent so as to avoid making statements that may incriminate you. **Any admissions that you make at the roadside can be, and most likely will be, used against you in court.** Remember that police officers are collecting evidence at the roadside. If you are arrested, you should ask to speak to a lawyer as soon as possible, and avoid making any statements or admissions until you have had an opportunity to speak to a lawyer.

D. Vehicle Standards

1. Equipment Standards in General

The general rule is that a "person must not drive or operate a motor vehicle or trailer on a highway or rent a motor vehicle or trailer unless it is equipped in all respects in compliance with this Act and of the regulations" (*Motor Vehicle Act* s 219(1)). Section 219(2) permits a peace officer to require the inspection of a registered owner's motor vehicle and motor vehicles at a rental firm.

Under *Motor Vehicle Regulations* s 25.30, where a police officer has reasonable and probable grounds to believe that a vehicle is unsafe for use on a highway, regardless of whether or not the vehicle actually meets the standards prescribed under the *Motor Vehicle Act*, the officer may:

a) order the vehicle removed from the highway until repairs as ordered by the officer are completed or the peace officer revokes the order; and/or

b) order the surrender of the vehicle license and/or number plates.

Seat belt issues, discussed below, are the most common source of equipment standards issues, but for a complete list of required standards, please consult the *Motor Vehicle Act* and *Regulations*.

2. Seat Belt Assembly

Section 220 of the *Motor Vehicle Act* requires that any motor vehicle manufactured after December 1, 1963 must be equipped with at least two front seat belt assemblies before it is sold or operated.

Section 220(4) requires that when the motor vehicle is operated, these assemblies must be properly fastened except as per s 220(5):

a) when a person is driving in reverse, or

b) (Repealed)

c) in the case of a person engaged in work which requires frequent alighting and in which the maximum vehicle speed is 40 km per hour, or;

d) the person is under the age of 16

Courts have upheld the rules enforcing mandatory seat belt use as they are held not to be an infringement of an individual's *Charter* rights. The provisions are integral to the broad legislative scheme promoting highway safety and minimizing the overall human and economic cost of accidents. The alleged infringement of a person's right to free choice is so insignificant that it cannot be considered a measurable breach of *Charter* rights: *R v Kennedy*, [1987] BCJ No 2028, 18 BCLR (2d) 321 (CA) [6].

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IV. Duties after a Collision

A. Remain at Scene

1. Motor Vehicle Act Provisions

Pursuant to *Motor Vehicle Act* s 68(1), the driver of a vehicle involved in an accident must:

a) Remain at the scene or return immediately

b) Render all reasonable assistance, and

c) Produce, in writing, her or his name and address, the registered owner's name and address, the vehicle license number, and particulars of insurance.

It is an offence to omit to do the duties specified in *Motor Vehicle Act* s 68(1). The reason or motive for leaving the scene is irrelevant. Since this is a strict liability offence, the defence of due diligence may be available to an accused.

2. Criminal Code Provisions

Under *Criminal Code* s 320.16(1), "everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance and who fails, without reasonable excuse, to stop the conveyance, give their name and address and, if any person has been injured or appears to require assistance, offer assistance."

B. Provide information

1. Duty to Provide Information Under the Motor Vehicle Act

If asked, the owner or a person in a motor vehicle that a peace officer believes has been involved in an accident or a violation of the *Motor Vehicle Act* must provide any information respecting the identity of the driver at the time of the accident (*Motor Vehicle Act* s 84). The person has the right to remain silent until he or she speaks to a lawyer, which is advisable in most circumstances.

2. Police Accident Reports

Although accident reports are not open to public inspection, parties to the accident may obtain license numbers from the reports as well as names of drivers, registered owners, and witnesses (*Motor Vehicle Act* s 249(2)).

C. Duties where damage to unattended vehicles or property

1. Damage to Unattended Vehicles

Under the *Motor Vehicle Act* s 68(2), the driver, operator, or any other person in charge of a motor vehicle that collides with an unattended vehicle must stop, locate, and notify, in writing, the owner of the unattended vehicle of the name and address of the driver, the operator, or any other person in charge of the motor vehicle as well as the registered owner's name and address and the vehicle license number. The information must be left in a conspicuous place on the damaged vehicle.

2. Damage to Other Forms of Property

In the event of damage to property other than another vehicle, the driver, operator, or any other person in charge of the motor vehicle must take reasonable steps to locate and notify the owner of the property, in writing (*Motor Vehicle Act* s 68(3)). The driver must take reasonable steps to provide the following particulars to the owner of the property: the name and address of the driver, operator, or other person in charge of the vehicle as well as the license number of the vehicle and the name and address of the vehicle's registered owner.

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V. Violation Tickets

A. General Information

What is commonly referred to as a "speeding ticket", is known legally as a provincial "Violation Ticket", issued in accordance with the provisions of the *Offence Act*. This section provides information on Violation Tickets, including how to dispute a Violation Ticket.

An individual charged under the *Motor Vehicle Act* will receive a Violation Ticket issued under s 14 of the *Offence Act*. However, under s 11 of the *Offence Act*, a person can also be charged criminally for a violation of the *Motor Vehicle Act*. This is for serious offences such as *Motor Vehicle Act* ss 95 and 102 (driving while prohibited). When charged for serious motor vehicle offences you will be issued a promise to appear and court attendance is compulsory if an Information is laid. For Violation Tickets, court attendance is only required if a Violation Ticket is disputed. If you fail to appear in court for a Violation Ticket, your non-attendance is deemed not disputed and you will be found guilty of the offence.

B. How to Dispute a Violation Ticket

These procedures may change from time to time. Refer to the information on the back of your Violation Ticket for the most up-to-date information.

The special procedure for adjudicating Violation Tickets is set out in ss 14–18 of the *Offence Act*. To dispute a Violation Ticket, one must either go to an ICBC office or provincial court registry with the ticket, or mail a "Notice of Dispute Form PTR021", as well as a copy of the Violation Ticket to: Ticket Dispute Processing, Bag #3510, Victoria, BC, V8W 3P7. The Notice of Dispute must contain the address of the accused, a copy of the Violation Ticket, and if a copy of the the Violation Ticket is not available, sufficient information to identify the Violation Ticket and the alleged contravention or fine disputed (*Offence Act* s 15(3)).

You must file your Notice of Dispute within 30 days of the day on which the ticket was issued.

Motor Vehicle Act s 124 gives municipalities authority to create motor vehicle bylaws on matters such as parking and to enforce them by fine or imprisonment under s 124(1)(u). Municipalities cannot use this authority with respect to speeding (s 124(2)). An individual charged with a bylaw offence will receive a bylaw infraction notice or a Municipal Ticket Information. While the following generally applies to these offences, special procedures may be imposed. **Follow the procedures outlined on the bylaw infraction notice or Municipal Ticket Information.**

More information on disputing Violation Tickets is available on the BC Ministry of Justice website at: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/courthouse-services/fines-payments/disputing-paying-tickets/vt-brochure.pdf

1. What if you miss the 30-day time limit?

If you do not file your dispute within 30 days, you must file an "Affidavit Form PTR020", pursuant to s 16(2) of the *Offence Act*, available at any court registry, explaining the reasons for your delay, along with the "Notice of Dispute Form PTR021" and a copy of the ticket. Extensions are not guaranteed, and are at the judicial discretion of the justice of the peace considering your application. Be as detailed as possible and provide all evidence available in support.

2. How Do I Prepare for Court for a Violation Ticket?

In challenging a ticket, it is important to:

- Read the relevant sections of the *Motor Vehicle Act* to determine the elements of the offence and, if the Crown fails to lead evidence on any of these elements, motion for dismissal at the conclusion of the Crown's case can be made. The evidence must include identification of the alleged offender by name and address as well as the time, date, and location of the offence.
- Request for all relevant disclosure from the police detachment, this includes asking for police notes, all witness statements, and any information or training that the officer intends to rely on at trial.
- Pursuant to s 100 of the *Offence Act*, the Crown can apply to amend most mistakes on Violation Tickets, however there is a one-year statutory limit to make amendments.

For more detailed information on disputing Violation Tickets, you may wish to consult the University of Victoria Law Centre's information on defending traffic tickets at https://www.uvic.ca/law/about/centre/resources/defending%20traffic%20tickets.php.

3. What happens in traffic court?

When you attend traffic court, your case will generally be presided over by a Judicial Justice of the Peace ("the Justice"), and not a Judge. Justices of the Peace are addressed as "Your Worship". The Justice will guide the hearing process. There is generally no Crown Prosecutor in traffic court; police officers prosecute the tickets.

Arrive at court at least 15 minutes before the scheduled court time. This provides you with the opportunity to speak to the officer before the courtroom opens. If you are intending to take the matter to trial, it is recommended that you send in a disclosure request to the police detachment requesting: the police notes; general occurrence report, witness statements; if a speeding ticket, any evidence relation to the calibration of the laser or radar gun. The police officer has a disclosure obligation pursuant to "R v Stinchcombe", [1991] 3 SCR 326 [1].

Police officers can provide testimony in person, via video- or tele-conference, or by certificate. You cannot be convicted without the evidence of the officer who issued you the ticket. If the police officer who issued your ticket does not attend in person or electronically, and has not submitted a certificate, a different officer present cannot provide evidence to convict you.

If you plead guilty and are applying for a fine reduction, the offender must show economic hardship, the justice of the peace has the power to reduce the fine. Section 88 of the *Offence Act* states that the fine can be reduced based on the offender's means and ability to pay, subject to minimum fines specified in the *Motor Vehicle Act*.

A record of the finding is sent to the Superintendent of Motor Vehicles (hereinafter, the "Superintendent"). Any discretionary determination made by the Superintendent may, in certain circumstances, be subject to judicial review.

The decision of a Provincial Court judge or justice of the peace may be appealed to the Supreme Court of BC. However there is a strict 30 day appeal limit. Any individual looking to appeal a violation ticket should consult a lawyer.

4. What happens if the Police Officer Does Not Show Up?

The officer who issued the Violation Ticket must provide evidence beyond a reasonable doubt that you committed the offence in question. The officer must prove the offence beyond a reasonable doubt, and that the officer cannot prove the offence beyond a reasonable doubt if the officer who issued the ticket is not present. In such situations, you should plead “not guilty”. The presiding justice will most likely dismiss the ticket for “want of prosecution” and the ticket will be dismissed.

If you plead not guilty, the officer may attempt to adjourn the matter to another day when the other officer can attend. You should oppose this adjournment, and note that you were not given advance notice.

5. What happens if I cannot make the court appearance?

You can apply to a justice for an adjournment, by filing the “Application to Adjourn a Hearing PTR818” form. This form can be filed by mailing it to the Violation Ticket Centre address listed above, or filing it at any court registry. All applications should be made within 2 weeks of the scheduled hearing date. In urgent circumstances you can have a lawyer, friend or family member attend and make an application for an adjournment at the date and time of the scheduled hearing.

6. What if you miss the court date?

If you do not attend the hearing, the ticket will be deemed not disputed, the conviction will apply to your driving record, and the full fine amount will be immediately payable.

Within 30 days of missing the scheduled hearing date you may file an “Affidavit Form PTR019” pursuant to s 15(10) of the *Offence Act*, requesting a new hearing date at the registry of the provincial court where your ticket was set to be heard. After 30 days from the missed hearing date you must file “Affidavit form PTR020”, pursuant to s 16(2) of the *Offence Act*.

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VI. Provincial Offences

A. Common Offences

1. Speeding

The most common provincial offence committed in BC is speeding in violation of section 146 of the *Motor Vehicle Act*. Generally, drivers must not exceed 50km/h in a municipality or on treaty lands, 80km/h on other highways, and must not operate a motor vehicle at a rate of speed higher than that posted on a sign.

2. Careless Driving

Under s 144(1) of the *Motor Vehicle Act*, it is an offence to drive:

a) without due care and attention;

b) without reasonable consideration for other persons using the highway; or

c) at a speed that is excessive given the road, traffic, visibility, or weather conditions.

A person who commits an offence under (a) or (b) is liable on conviction to a fine of not less than $100 (s 144(2)) and six points added to his or her driving record. Subject to the minimum fine, s 4 of the *Offence Act* states that a fine must be less than $2,000. A person who commits an offence under (c) is liable on conviction to a fine of $173 and three penalty points as per the VTAFR and *Motor Vehicle Act Regulations*.

To convict a driver of any of these offences, the Crown must only prove inadvertent negligence: a lack of proper care or absence of thought. The standard of care is determined in relation to the circumstances and carelessness must be proved beyond a reasonable doubt: *R v Beauchamp*, [1952] OJ No 495, (1953)106 CCC 6 (Ont CA).

3. Road Racing

Part 9 of the *Motor Vehicle Act* includes street racing provisions. This offence has recently become a major public issue and authorities treat it very seriously. Street racing will also be considered an aggravating factor for other offences including those in the *Criminal Code*.

Per *Motor Vehicle Act* s 250, “Race” includes circumstances in which, taking into account the condition of the road, traffic, visibility, and weather, the operator of a motor vehicle is operating the motor vehicle without reasonable consideration for other persons using the highway or in a manner that may cause harm to an individual, by doing any of the following:

a) outdistancing or attempting to outdistance one or more other motor vehicles;

b) preventing or attempting to prevent one or more other motor vehicles from passing; or

c) driving at excessive speed in order to arrive at or attempt to arrive at a given destination ahead of one or more other motor vehicles.

According to *Motor Vehicle Act* s 251(1)(e), a peace officer may cause a motor vehicle to be taken to and impounded at a place directed by the peace officer if the peace officer has reasonable grounds to believe that a person has driven or operated a motor vehicle on a highway in a race or in a stunt and the peace officer intends to charge the person with a motor vehicle related *Criminal Code* offence or an offence under section 144 (1), 146 or 148 of this Act.

Per ss 253(2) and 3(a), the impoundment period for s 251(1)(e) is seven days, unless the owner of a motor vehicle has also had a motor vehicle impounded within the last two years before the present impoundment, in which case the vehicle

will be impounded for thirty days.

4. Use of Electronic devices

Part 3.1 of the *Motor Vehicle Act* outlines offences related to the use of electronic devices while driving. Section 214.2 defines an "electronic device" as (a) a hand-held cellular phone, (b) a hand-held device capable of receiving email or text messages, or (c) any prescribed class or type of electronic device. Prescribed electronic devices are further defined in s 3 of the *Use of Electronic Devices While Driving Regulation*, BC Reg 308/2009 [EDWDR] as any of the following:

- Electronic devices that include a hands-free telephone function;
- Global positioning systems;
- Hand-held electronic devices, one of the purposes of which is to process or compute data;
- Hand-held audio players;
- Hand microphones; or
- Televisions.

Exceptions for hands-free use of electronic devices are permitted under s 7 of the EDWDR. Further exceptions for persons carrying out special powers, duties, or functions are allowed under s 5.

Fines for the use of an electronic device while driving have increased significantly as of June 1st, 2016, and now stand at $368 per offence. As well, 4 penalty points are issued for a violation of this section.

"Use" of an electronic device is defined broadly. Per *Motor Vehicle Act* s 214.1 use means:

(a) holding the device in a position in which it may be used;

(b) operating one or more of the device's functions;

(c) communicating orally by means of the device with another person or another device;

(d) taking another action that is set out in the regulations by means of, with or in relation to an electronic device.

Additionally, *Use of Electronic Devices While Driving Regulation* s 2 adds watching the screen of an electronic device as use of an electronic device.

In *R v Baindridge* 2018, BCPC 101 [1] the accused was found guilty of the offence for simply holding the device in his hand while driving. The court held that any number of functions of the accused's phone **could** have been used in the position in which he held his phone. In *R v Jahani*, 2017 BCSC 745 [2], the accused was found guilty of the offence for plugging his phone into the cord to charge the phone.

In *R v Tannhauser*, 2018 BCPC 183 [3], the accused was acquitted of the offence because his cell was programmed with a software that immobilized the phone when a vehicle that is in motion. **Caution this case may be appealed: R v. Tannhauser, 2019 BCCA 220 [4].

In *R v. Partridge*, 2019 BCSC [5], The accused was observed by a police officer looking downwards whilst driving and when stopped, a cell phone was found wedged between the folds of the passenger seat such that the screen was facing the driver. Accused was convicted. However, the accused was acquitted on appeal because the mere presence of a cell phone within sight of a driver is not enough to secure a conviction, leaving aside a situation where, for example, the screen is illuminated and so the driver may then be utilizing the cell phone in some fashion.

B. Penalty Points

Penalty points are imposed in accordance with the schedule set out in Division 28 of the *Motor Vehicle Act Regulations*. It is important to note that conviction for *Criminal Code* offences also results in the imposition of penalty points. See Appendix A for examples of offences and their corresponding penalty points.

The number of penalty points will be taken into account under *Motor Vehicle Act* s 93 when the Superintendent suspends a license. **The Superintendent may suspend the license of a class 5 driver who accumulates 15 or more points in any two year period.** For a class 7 driver, or novice driver, the Superintendent may suspend the licence for receiving single a 3 point Violation Ticket. More information can be obtained from the Driver Improvement Program Policies and Guidelines [6].

As of December 2017, a class 5 drivers who incurs two high risk offences (Use of Electronic Device; Excessive Speed; and/or Drive Without Due Care or Attention) in a one year period risks losing their driver's licence up to 5 months.

1. ICBC Effects of Penalty Points

Drivers who have received 4 or more driver penalty points will be required to pay a premium to ICBC, even if they do not own or insure a motor vehicle. In essence, these premiums are a surcharge on Violation Tickets that put a driver beyond 3 penalty points. For more information, see http:/ / www. icbc. com/ driver-licensing/ tickets/ Pages/ Driver-Penalty-Points.aspx.

C. Vicarious Liability for Provincial Motor Vehicle Offences

Pursuant to *Motor Vehicle Act* ss 83 and 88, the owner of a motor vehicle is liable for any violation of the *Motor Vehicle Act* or *Motor Vehicle Act Regulations* unless he or she can prove that:

a) he or she did not entrust the motor vehicle to the person in possession or exercised reasonable care and diligence when doing so (*Motor Vehicle Act* s 83(3));

b) although the registered owner, he or she is not the actual owner (*Motor Vehicle Act* s 83(5)(b)); or

c) the person committing the offence was not the registered owner's employee, servant, agent or worker (*Motor Vehicle Act* s 88(3)).

Under *Motor Vehicle Act* s 83(4), if an owner is liable for an offence committed by the driver, a fine of not more than $2,000 may be imposed in place of the fine or term of imprisonment specified in the enactment.

Under s 83(7), no owner is liable if the driver was convicted under the *Motor Vehicle Act* for:

a) driving without a license or without the appropriate class of license (s 24(1));

b) driving while prohibited by order of peace officer or Superintendent (s 95);

c) driving while prohibited by operation of law (s 102);

d) impaired driving (s 224); or

e) refusing to give a blood sample (s 226(1)).

Generally, where the driver of a motor vehicle has been convicted of an offence, financial liability rests on him and further relief cannot be sought against the owner of the vehicle.

D. Limitation Period

An information or Violation Ticket in relation to a *Motor Vehicle Act* offence must be laid or issued within **12 months** from the date the alleged offence took place (*Motor Vehicle Act* s 78).

E. Fines

The Violation Ticket Administration and Fines Regulation prescribes fines for *Motor Vehicle Act* offences. Appendix A to this chapter provides examples of fines.

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[6] https://www2.gov.bc.ca/assets/gov/driving-and-transportation/driving/publications/driver-improvement-policies-guidelines.pdf

VII. Vehicle Impoundment

Your vehicle may be impounded for a variety of offences or reasons, including excessive speeding, driving while prohibited, or for alcohol-related offenses. If your vehicle has been impounded, this section details procedures for disputing that impoundment. For information on offences that may result in vehicle impoundment, consult the sections on particular offences in this chapter.

A. When can you dispute your vehicle impoundment

3 and 7 day impoundments cannot be disputed. Impoundments over 7 days can be disputed. Impoundments must be disputed within 15 days of being issued: *Motor Vehicle Act* s 256(1).

The Vehicle Impoundment review process is governed by ss 256 to 258 of the *Motor Vehicle Act*.

B. How to dispute

To dispute a vehicle impoundment, you must go to an ICBC vehicle driver licensing office with the notice of impoundment and apply for a review of the impoundment. For more information, you can consult the RoadSafetyBC website on impoundment at https:/ / www2. gov. bc. ca/ gov/ content/ transportation/ driving-and-cycling/ road-safety-rules-and-consequences/vehicle-impoundment?keyword=vehicle&keyword=impoundment.

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VIII. Superintendent

A. Reasons

1. Driver Improvement Program – Class 5 license

The driver improvement program is administered by the Superintendent of Motor Vehicles, and allows the Superintendent to prohibit from driving anyone whose driving record is not satisfactory to the Superintendent.

Drivers are first issued with a Notice of Intent to Prohibit, informing them that their record is not satisfactory. Such notices may be issued for reasons including:

- The Superintendent considers it in the public interest – for example, if you have a bad driving record
- If you incur nine or more active penalty points on your record in a two year period, that is generally sufficient to trigger a notice of probation.
- Your driver’s license was suspended in another province or state
- You haven’t provided the payment (referred to as damages) the court ordered you to pay for a vehicle accident in which you were the driver or vehicle owner
- You have not taken the medical exam required by the Superintendent

If any further offences are recorded during the probation period, or within six months afterwards, the superintendent will likely issue a “Notice of Prohibition”. Drivers may either accept the prohibition by signing and returning the Notice of Prohibition, in which case the prohibition starts immediately, or the driver may make a written submission giving reasons why they should not be prohibited from driving.

The Driver Improvement Program appeal process is detailed below.

If the written submissions are not accepted, or an individual does not respond to a notice of intent to prohibit, they will be issued with a notice of prohibition. They must immediately sign the notice, surrender their driver’s license to ICBC, and not drive for the term of the prohibition.

For more information on the Driver Improvement Program, see the Road Safety BC website [1].

2. Driver Improvement Program – Class 7 license/ Novice Drivers

Novice drivers, including those in the "L" or "N" categories may be referred to the Driver Improvement Program with as little as 2 points on their record. As well, drivers in the graduated licensing program cannot exit the program (i.e. get a full, non-N, license) until 24 months after a prohibition.

The Driver Improvement Program appeal process is the same as detailed above.

3. Other Reasons for Prohibitions

The superintendent may prohibit you from driving for other reasons, including:

- a failure to obtain automobile liability insurance;
- indebtedness to ICBC for reimbursement of money paid in respect of a claim; or
- indebtedness to the government for failure to pay fines.

B. Appeals

A person can apply for a review of a s 93(1)(a)(ii) driving prohibition under the Driver Improvement Program. The driver must within 21 days of receiving the notice of intent to prohibit, send in an application for review and written submissions as to why the driving prohibition should not be imposed or should be reduced. There is a $100 review fee that must be paid by way of money order or certified cheque, or at any ICBC driver licensing office.

For more information on the Driver Improvement Program and guidelines, see the Road Safety BC website [1]

The Superintendent is given discretion in determining which evidence he or she will consider in making the decision. A suspension cannot be quashed solely on the basis that the Superintendent did not consider certain relevant evidence (*Motor Vehicle Act* s 93(3)). The *Motor Vehicle Act* appears to permit the Superintendent to limit the period during which a license is suspended to certain times of the day or days of the week (*Motor Vehicle Act* s 25(12)(a)). An appeal of the Superintendent's decision to uphold the driving prohibition must be made in the BC Supreme Court and occur within 30 days of the Decision (*Motor Vehicle Act* s 94(1)).

C. Automatic Prohibitions

A driver convicted of a *Criminal Code* motor vehicle offence is automatically prohibited from driving for a period of one year (*Motor Vehicle Act* s 99). The automatic prohibition also applies to some offences under the *Motor Vehicle Act*, including:

a) s 95: driving while prohibited by order of peace officer or Superintendent;

b) s 102: driving while prohibited by operation of law;

c) s 224: impaired driving; or

d) s 226(1): refusing to give a blood sample.

Under *Motor Vehicle Act* s 100(3), an individual who refuses to stop for a police officer will receive a two-year prohibition from driving if he or she is also convicted of one of the following Criminal Code offences:

a) s 220: criminal negligence causing death;

b) s 221: criminal negligence causing bodily injury;

c) s 236: manslaughter; or

d) s 320.13(1), (2), or (3): dangerous operation of a motor vehicle.

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[1] https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/driver-medical/improvement-programs-for-high-risk-drivers/administration-of-the-driver-improvement-program?keyword=driver&keyword=improvement&keyword=program

IX. Drugs and Alcohol

A. Approved Screening Devices

Pursuant to s 320.27(1) of the *Criminal Code*, a peace officer may demand a breath sample into an Approved Screening Device (ASD) from a driver if the officer reasonably suspects that there is alcohol in the driver's body and they have operated a motor vehicle within the preceding 3 hours. This is permitted for both drivers who are operating a motor vehicle or have care or control of it. An ASD is different than a breathalyser device at the police station and it does not provide a numerical value for the readings of “warn” or “fail”. If the police do not administer the ASD right away, they may not be able to use the result's readings at trial.

Since the enactment of Bill C-46 in December 2018, police officers are also allowed to demand breath samples from drivers at any time if the officers are in possession of approved screening device.

Before requiring the driver to provide a breath sample into an ASD, the peace officer does not have to inform the driver of their *Charter* right, under s 10(b), to call a lawyer. At this time, the driver does not have the right to speak to a lawyer before deciding whether to blow or refuse: the driver must decide right away. If the driver refuses, they will likely be issued a refusal to provide a breath sample under s 320.15(1) of the *Motor Vehicle Act* or under s 254(5) of the *Criminal Code*.

The ASD tests for alcohol in the body and it will show a numerical value for a blood alcohol content (“BAC”) under 50 milligrams of alcohol in 100 millilitres of blood (.05), “warn,” or “fail.” It shows a warn for blood-alcohol levels between 50 and 79 milligrams of alcohol in 100 millilitres of blood (.05), and a fail for levels of not less than 80 milligrams. No numerical values are given for a “warn” or a “fail” and it is impossible to determine the actual BAC of the driver.

In contrast, a breathalyser machine measures alcohol in the breath to see if the driver's blood alcohol concentration is over the legal limit of .08. It is more accurate than the ASD and must be operated by a qualified technician. In practice, the breathalyser is no longer used, and the police rely solely on the ASD to form the basis of issuing the driving prohibition.

In summary, if police demand a breath sample, the driver must comply with the breath demand into the ASD. The driver is legally compelled to provide a breath sample unless there is a reasonable excuse not to do so. Refusing without a reasonable excuse constitutes a separate offence.

B. Provincial Alcohol Offences (Immediate Roadside Prohibitions)

The *Motor Vehicle Act* s 215.41 makes it an offence either to drive or to be in the care or control of a motor vehicle with a blood-alcohol reading in excess of 80 milligrams of alcohol per 100 millilitres of blood (.08; "fail"). There is also a separate offence for driving or being in care or control of a vehicle with a blood-alcohol reading in excess of 50 milligrams of alcohol per 100 millilitres of blood (.05; "warn"). Care or control of a vehicle means occupying the driver's seat with access to the ignition key, even if the vehicle is parked.

Consequences for these offences depend on a number of circumstances, including a history of previous offences. For clarity, these consequences are listed below, along with an indication which offences they apply to.

Beyond the penalties noted below, receiving multiple penalties, or just one 90-day driving prohibition or *Criminal Code* penalty, can result in referral to the Responsible Driving Program (RDP), or the Ignition Interlock Program (IIP). The RDP is a course taken over 8 or 16 hours, whereas the IIP requires the installation of an interlock device in the driver's vehicle. For more information, consult the Road Safety BC website [1].

1. Immediate Roadside Prohibitions

If an officer suspects you of being affected by alcohol while driving or in care or control, they may ask for a sample of breath into an ASD. You have the right to have a second sample taken, and to have the lower reading prevail.

If you register in the WARN (.05) range, the police may, at their discretion:

- Seize your driver's license
- Issue you a 'Notice of Prohibition' which will start immediately – removing your driving privileges – the length of which depends on prior IRP convictions (if any)
  - 3-day driving prohibition if it is the first time caught in the warn range
  - 7-day driving prohibition if it is the second time caught in the warn range within five years; or
  - 30-day driving prohibition if it is the third time caught in the warn range within five years.

If you register in the FAIL (.08) range, or refuse to provide a sample, the police may, at their discretion:

- Seize your driver's license
- Issue you a 'Notice of Prohibition' which will start immediately – removing your driving privileges for 90 days

As discussed above, your vehicle may be impounded if you are issued an Immediate Roadside Prohibition. This is discretionary for 3 and 7 day prohibitions, but mandatory for 30 and 90 day prohibition.

a) Challenging Immediate Roadside Prohibition (issued for 3, 7, 30, or 90 days)

A person may, within 7 days of being served with a notice of driving prohibition under section 215.41, apply to RoadSafetyBC for a review of the driving prohibition (*Motor Vehicle Act* s 215.48(1)) by attending any driver licensing center, and complete and submit the form, "Immediate Roadside Prohibition – Application for Review – Section 215.48 *Motor Vehicle Act*". Fill in the blanks and check all relevant boxes that indicate the 'grounds for review.' The grounds for review are:

- Not the driver or in care or control of a motor vehicle;
- Not advised of right to a second test on an ASD;
- Requested second test, but the officer did not perform the test;
- Second test was not performed on a different ASD;
- Prohibition was not served on the basis of the lower ASD result;
- The result of the ASD was not reliable;

- The ASD, which formed the basis of the prohibition, did not register a WARN or FAIL reading;
- The ASD registered a WARN, but the blood alcohol content was less than .05;
- The ASD registered a FAIL, but the blood alcohol content was less than .08;
- Prohibition should be reduced because did not have any previous IRPs; or
- Did not refuse or fail to comply with a demand to provide a breath sample, or had a reasonable excuse for refusing or failing to comply with a demand.

The applicant may attach any statements or evidences for the superintendent's review. Please note that the filing of an application for review does not stay the driving prohibition. (*Motor Vehicle Act* s 215.48(4))

To apply for a review of the Immediate Roadside Prohibition, the applicant must show proof of their identity, and provide a copy of the Notice of Driving Prohibition issued by the peace officer

There are two types of reviews: written and oral. The superintendent is not required to hold an oral hearing unless the driving prohibition is for 30 or 90 days, and the applicant requests an oral hearing at the time of filing the application for review and pays the prescribed oral hearing fees (*Motor Vehicle Act* s 215.48(5)). In a written review, all documents are reviewed by the adjudicator at the appointed time and location, but no oral submissions will take place. In an oral review, the adjudicator will listen to why the driving prohibition ought to be revoked. It is highly recommended that full written submissions are also provided. If the oral hearing is missed, the hearing will automatically change to a written review system. The payment for a written review is $100 whereas the payment for an oral review is $200. The payment is non-refundable.

To submit supporting documents for the oral or written review they must be provided in advance of the hearing. This can be done by submitting the supporting documents in advance of the hearing at any ICBC driver's licensing office or by faxing them to RoadSafetyBC at 250-356-6544.

For both oral hearings and written reviews, all written information you wish to be considered in your review hearing should be provided to the Superintendent by 4:30 p.m., two days prior to the date and time of the scheduled review.

A decision will be rendered within 21 days from the date the driving prohibition is issued.

Possible review outcomes include:

1. Driving prohibition revoked: will be advised to reapply for driver's license. The reinstatement fees and monetary penalties will be waived or refunded, however any outstanding debts owed to the province or ICBC must be paid.
2. Driving prohibition confirmed: terms of driving prohibition will remain unchanged.

It is highly recommended that individuals seeking to challenge an Immediate Roadside Prohibition be represented by a lawyer.

b) What Happens if you Lose the Hearing?

The administrative decision (review decision) is final. If the application is unsuccessful, the only recourse is through a judicial review. The application for the judicial review must be filed within 6 months of receiving the decision, and is made by filing a Petition in Supreme Court. It is highly recommended that individuals seeking to challenge the administrative decision by way of judicial review be represented by a lawyer.

2. 12 and 24 Hour Prohibitions

24-Hour roadside prohibitions are issued by the police where they believe on reasonable and probable grounds that your ability to drive is affected by alcohol or drugs. The police do not need a breath sample to issue a 24-hour prohibition, but you have the right to request an ASD test. Note, however, if you take an ASD test and test in the WARN or FAIL ranges, more serious penalties will apply to you.

If you are issued a 24 hour prohibition, the police will take your license, and you will have to retrieve it at the police station after 24 hours have passed.

Similarly to the Immediate Roadside Prohibition describe above, individuals wishing to challenge a 24 hour prohibition for **alcohol**, there is an internal review process available through RoadSafetyBC pursuant to s 251.1 of the *Motor Vehicle Act*. This must be done within 7 days.

There is no internal review process for challenging a 24 hour prohibitions issued for **drugs**. The only way to challenge this is by way of judicial review in the BC Supreme Court: *Giorio v Wilson*, 2014 BCSC 786 at para 3.

24 hour prohibitions may also lead to a 24 hour impoundment, as discussed above.

12 hour suspensions apply only to drivers in the Graduated Licensing Program ("L" or "N" drivers) for violations of the GLP rules. They are in other respects similar to 24 hour prohibitions.

While a suspension under *Motor Vehicle Act* s 215 will be placed on the driver's record, this is a preferable alternative to a charge and conviction under the *Criminal Code*.

C. Drug Offences

The BC government has passed legislation amending the *MVA* which received royal assent on May 17, 2018, and has come into force by regulation of the Lieutenant Governor in Council.

The new legislation includes a number of amendments. Section 25(10.101) allows the Lieutenant Governor in Council to impose a condition on driver's licenses that those who hold the license must not operate a motor vehicle while having a prescribed drug in their body.

Section 90.3(2.1) allows a peace officer to demand a sample of a bodily substance from a driver who holds a driver's licence on which a condition is imposed under section 25 (10.101) for analysis by means of approved drug screening equipment. If the analysis indicates the driver has a prescribed drug in their body, the peace officer may serve them with a notice of license suspension and request the driver to surrender their license. Section 90.3(3) allows the peace officer to apply the same consequence to a driver who declines to provide such a sample.

Similar amendments alter much of the *MVA* regulations for driving with alcohol in your system so that driving with a prescribed drug in your system can result in the same penalties. There is no blood drug concentration specified yet. It will be possible for a combination of drugs and alcohol to trigger penalties even if the blood concentration of each substance is less than the legal limit (section 94.1).

D. Federal Alcohol and Drug Offences

The *Criminal Code* provides a number of federal criminal offences related to impaired driving. These are serious criminal offences, with significant possible penalties. Individuals facing *Criminal Code* charges are strongly encouraged to consult with a lawyer.

1. Impaired Driving/ Driving Over 80

Section 320.14(1)(a) of the *Criminal Code* makes it an offence either to operate or to be in care or control of a motor vehicle while alcohol or drugs impair one's ability to drive. Section 320.14(1)(b) makes it an offence to either operate or be in the care or control of a motor vehicle with a blood-alcohol concentration reading in excess of 80 milligrams of alcohol per 100 millilitres of blood. With a charge under s 320.14, the Crown must prove operation if operation is charged or prove care or control if care or control is charged. These are two separate and distinct offences and neither is included in the other: *R v Henryi*, (1971), 5 CCC (2d) 201 (BC Co Ct); *R v James* (1974), 17 CCC (2d) 221 (BCSC); and

R v Faer (1975), 26 CCC (2d) 327 (Sask CA). Since it is difficult to conceive of a situation when driving is not also care or control, the Crown will almost always charge care or control.

The court in *R v Kienapple* [1974], 15 CCC (2d) 524 (SCC) held that an accused cannot have multiple convictions for the same act. **Therefore, an accused cannot be convicted of both impaired driving and having a blood alcohol concentration exceeding 80 milligrams.**

The Crown can establish acts of care or control in two ways:

1. Pursuant to *Criminal Code* s 258(1)(a), where a person is occupying the seat or position ordinarily occupied by the person who operates the motor vehicle, that person will be presumed to be in care or control unless he or she establishes that he or she did not occupy that seat or position for the purpose of setting the vehicle in motion; or
1. If the Crown is unable to rely on this presumption (i.e. the accused establishes that he or she did not enter the vehicle with the intent to set it in motion), the Crown must then prove acts of care or control which have been defined as any use of the vehicle or its fittings and equipment or some course of conduct associated with the vehicle which create the danger or risk of putting the vehicle in motion: *R v Toews* (1985), 21 CCC (3d) 24 (SCC).

A peace officer may demand a breath or blood sample pursuant to *Criminal Code* s 254(3) if the peace officer has reasonable and probable grounds to believe the individual is impaired or has a blood alcohol level over .08. Reasonable and probable grounds may include factors such as the physical condition of the person, if the person is incapable of providing a sample of his or her breath, or that it would be impracticable to obtain a breath sample (s 254(3)). Refusal to provide a sample is a criminal offence (s 254(5)).

For a charge under s 253(1)(b), the Crown may prove a blood alcohol reading in excess of .08 by producing a valid certificate of analysis or providing *vive voce* testimony at trial from a registered analyst or breathalyser technician about the blood alcohol concentration at the time the accused provided a breath sample.

Once a certificate has been prepared or the Crown has tendered *vive voce* evidence of the blood alcohol concentration, the Crown can rely on the presumption commonly known as the “presumption back” set out in *Criminal Code* s 258(1)(c). Under this section, where samples of breath are taken within two hours from the time the offence is alleged to have been committed, the concentration of alcohol in the blood reflected by those samples will be assumed to have been the concentration of alcohol in the blood at the time of the offence unless the accused raises evidence to the contrary (i.e. that he or she consumed more alcohol between being stopped and the time the sample was taken). Please note that the “presumption back” applies only to samples demanded pursuant to s 254(3) and not s 254(2), which is for screening purposes (see Section IX.D.2: Refusing to Provide a Sample). The “presumption back” also applies to a blood sample (s 258(1)(d)).

Note that this presumption pertaining to the evidence contained in the breathalyser certificate does not offend s 11(d) of the *Charter* which protects the presumption of innocence: *R v Bateman*, [1987] BCJ No 253; 46 MVR 155 (BC Co Ct).

As stated above, a conviction requires the production of a valid certificate or *vive voce* testimony at trial from a registered analyst or a breathalyser technician. However, the breathalyser technician or registered analyst must have the requisite qualifications.

2. Refusing to Provide a Sample

A peace officer can demand a breath sample if that officer reasonably suspects a driver has consumed alcohol (*Criminal Code* s 254(2)). This is for screening purposes only. An officer may also demand a breath or blood sample for later use as evidence in court under s 254(3) if that officer has reasonable and probable grounds to believe that the driver is impaired or has a blood alcohol concentration level over .08. Refusal to provide a sample in either circumstance is a criminal offence (s 254(5)). To demand the sample under s 254(3), the test is both subjective and objective. The peace officer

must hold an honest belief and there must be reasonable grounds for this belief (based on *Criminal Code* s 254(3) and *Charter* s 8 (protection against unreasonable search and seizure) as interpreted in *R v Bernshaw* (1994), 95 CCC (3d) 193 (SCC)).

> **NOTE: Providing a breath sample is not a voluntary procedure**: the peace officer demands the sample. The driver may refuse only if he or she has a "reasonable excuse".

In some cases, a reasonable excuse has been held to include the right to first consult with a lawyer in private. Where an accused chooses to exercise the right to retain counsel, the police officer must provide him or her with a reasonable opportunity to retain and instruct counsel: *R v Elgie* (1987), 48 MVR 103 (BCCA); *R v Manninen*, [1987] 1 SCR 1233. If the police officer does not inform the driver of his or her right to retain and instruct counsel (*Charter* s 10(b)), the breath or blood sample, if given, may be excluded from evidence if admitting it "would bring the administration of justice into disrepute" (*Charter* s 24(2)).

As with all *Charter* rights, the right to retain counsel is subject to reasonable limits prescribed by law and demonstrably justified in a free and democratic society: *R v Orbanski and Elias*, [2005] 2 SCR 3. The Court in *Thomsen v R* (1988) 63 CR (3d) 1 held that "[w]hile a demand for a breath sample into a screening device constitutes a detention under s 10 of the *Charter*, the suspension of the accused's ability to implement the right to retain and instruct counsel until arrival at the detachment for breath testing [under s 254(3)] is a reasonable limitation on the exercise of that right".

The length of time constituting a sufficient and reasonable opportunity for an accused to exercise the right to retain and instruct counsel will depend on the circumstances of each case. An otherwise short period of time may not be unreasonable due to the behaviour and attitude of the individual under investigation by the police. Police officers are always mindful of the fact that they must take a breath sample within two hours of the time the offence was allegedly committed (*R v Dupray*, (1987), 46 MVR (2d) 39 (BC Co Ct)).

Not only must the police officer provide a reasonable opportunity for the accused to retain and instruct counsel, but the officer must also refrain from attempting to elicit evidence until the detainee has been offered this opportunity.

Breach of *Charter* s 10(a) (failure to be informed of reason of arrest) may also result in exclusion of evidence under s 24(2) of the Charter.

3. Drug Impaired Driving

Bill C-46, received royal assent on June 21, 2018 and came into force and effect in 2018. The Bill makes significant changes to the *Criminal Code* and regulations.

The Bill creates the *Criminal Code* offences for driving while impaired by marijuana. The Bill proposes limits for the amount of THC, the main psychoactive ingredient in marijuana, that drivers can legally have in their system while driving.

The proposed amendments are to the Regulations, not the *Criminal Code*. The Regulations set out the per se limits.

- A driver who has over 2 ng of THC in their risks a fine of up to $1000 and a criminal conviction;
- A driver who has over 5 ng of THC in their system, is considered impaired and risks facing a criminal conviction, a $1000 fine and a one year driving prohibition; and
- A driver who has a combination of THC above 2.5 ng and a blood alcohol concentration of over 50 mg% of alcohol per 100 mL is also considered impaired and risks facing a criminal conviction, a $1000 fine and a one year driving prohibition.

4. Penalties

Under *Criminal Code* s 255, impaired driving is a hybrid offence. The minimum fine for a first offence is $1,000. If convicted of an indictable offence under s 255, the accused may be liable for a maximum of 5 years' imprisonment. If convicted on summary conviction, the accused may be liable for up to 18 months' imprisonment. Imprisonment is mandatory for repeat offences: at least 30 days for the second offence and at least 120 days for each additional offence.

In addition to facing the risk of a criminal conviction, drivers who are charged under the Criminal Code are also issued a 90-day Administrative Driving Prohibition pursuant to s 94.1 of the *Motor Vehicle Act*.

1. Provincial Driving Prohibitions for Criminal Convictions

If you are convicted of a federal criminal impaired driving or refusal offence, you may be prohibited from driving as follows:

- upon your 1st Conviction — a 1-3 year driving prohibition
- upon your 2nd Conviction — a 2-5 year driving prohibition
- upon your 3rd Conviction — a minimum 3 year to-lifetime driving prohibition)

Under s 259(1), a person's driver's license may be suspended for a period between one and three years. If convicted a second time, the suspension will be between two and five years. On each subsequent offence, the suspension would be a minimum of three years. Section 259(1.1) gives the court discretion to authorise an offender to drive during the prohibition period if the offender registers in an alcohol ignition interlock device program. Such an authorisation will not come into effect until the expiry of an absolute prohibition period of at least three months for a first offence, six months for a second offence, and one year for every subsequent offence (s 259(1.2)).

In addition, 10 penalty points are recorded pursuant to the Motor Vehicle Act Regulations and the offence may be a breach of certain conditions under s 55(8) of the *Insurance (Vehicle) Regulation*.

2. 90 Day Administrative Driving Prohibitions

If the police suspect that you have consumed alcohol and had care or control of a motor vehicle within the preceding three hours, the police may demand a breath or blood sample. If that sample indicates a BAC over .08, or you refuse a sample, you will be issued a 90-day Administrative Driving Prohibition. This is in addition to federal criminal charges you may face.

To apply for a review of the ADP the driver must do so within seven days from the date he or she receives the Notice of Driving Prohibition.

The Grounds of Review for challenging an ADP are more limited than challenging an IRP. The grounds of review are as follows:

- I did not operate or have care or control of a motor vehicle;
- The concentration of alcohol in my blood did not exceed 80 milligrams of alcohol in 100 millilitres of blood within three hours.
- I did not refuse or fail to comply with a demand under section 320.15 of the Criminal Code to supply a breath or blood sample.
- I had a reasonable excuse for failing or refusing to comply with a demand under section 320.15 of the Criminal Code to supply a breath or blood sample.

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References

[1] http://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/driver-medical/improvement-programs-for-high-risk-drivers/administration-of-the-remedial-programs

X. Federal Offences

A. Dangerous Operation

Under the *Criminal Code*, it is an offence to operate a motor vehicle in a manner that is dangerous to the public having regard to the nature, condition, and use of a highway or other public place as well as the amount of traffic that at the time is, or might reasonably be expected to be, at that place (*Criminal Code* s 249(1)(a)).

In the absence of death or bodily harm, an offender under s 249(1)(a) is guilty of an indictable offence and is liable to imprisonment for up to five years or is guilty of an offence punishable on summary conviction (s 249(2)).

If the dangerous driving results in bodily harm, an indictable offence has been committed and the driver may be liable to imprisonment for up to 10 years (s 249(3)). If the dangerous driving results in death, an indictable offence has been committed and the driver may be liable to imprisonment for up to 14 years (s 249(4)).

Dangerous driving (s 249) is included in the offences created under *Criminal Code* ss 220 (causing death by criminal negligence), 221 (causing bodily harm by criminal negligence), and 236 (manslaughter). If there is not enough evidence to prove one of the three offences above, it is still possible to convict under s 249 (*Criminal Code* s 662(5)).

B. Driving While Disqualified

Section 259(4) of the *Criminal Code* states that a person who operates a motor vehicle while disqualified under the *Criminal Code* or a provincial statute is guilty of an indictable offence and is liable to a maximum penalty of five years imprisonment or is guilty of an offence punishable on summary conviction.

C. Criminal Negligence

This section is not specifically aimed at motor vehicle operators, but is applicable in some circumstances. Under the *Criminal Code*, criminal negligence involves acts or omissions showing "wanton or reckless disregard for the lives or safety of other persons" (s 219). In Canada, the law surrounding the *mens rea* requirements for criminal negligence was clarified in *R v Creighton*, [1993], SCJ No 91. The standard is to be measured by a modified objective test: whether the accused's conduct constituted a marked departure from that of the reasonable person given all the circumstances. Characteristics personal to the accused will not be considered with the exception of accused's incapacity to appreciate the nature of the risks associated with his or her actions.

In *R v Beatty*, 2008 SCC 5, [2008] SCJ No 5, the Court addressed the issue of criminal negligence in the context of dangerous driving. Unlike *Creighton*, there is no substantive dissent, though five of the newer Supreme Court justices took a slightly different approach to the modified objective test. They noted that the actual (subjective) state of mind of the accused at the time of the accident is relevant in determining if there was a marked departure from the standard of the reasonable person. In Beatty, a momentary lapse of attention with no other evidence of dangerous driving was held **not** sufficient to warrant criminal sanction under s 249 (criminal negligence causing death).

If the negligence results in death, an indictable offence has been committed and the driver may be liable to life imprisonment (s 220). If the negligence results in bodily injury, an indictable offence has been committed and the driver may be liable to imprisonment for 10 years (s 221).

D. Limitation Period

Section 786(2) of the *Criminal Code* states that, with respect to summary offences, "[n]o proceedings shall be instituted more than **six months** after the time when the subject-matter of the proceedings arose". In contrast, **there is no limitation period for indictable offences**.

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XI. ICBC Breaches

A. Motor Vehicle Act/ Insurance (Vehicle) Act offences

Some violations of the *Motor Vehicle Act* or *Criminal Code* may also be breaches of ICBC insurance conditions, and serve to void your insurance. For more information, consult Chapter 12 – Automobile Insurance (ICBC).

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XII. Bicycles

A cyclist has the same rights and duties as a driver of a motor vehicle including the duties of safe operation, care, attention, consideration, and provision of information at the scene of an accident, of other highway users. In addition, the *Motor Vehicle Act* provides that an individual commits an offence if he or she operates or is a passenger on a bicycle on a "highway" and is not wearing a helmet (s 184). A "highway" is defined as any road, street, or avenue that a vehicle can drive on. Almost every municipality, including the City of Vancouver, has followed this section of the *Motor Vehicle Act* by passing bylaws requiring cyclists to wear bicycle helmets.

Furthermore, cyclists must ride on a designated bicycle path, if available, or if not, then in single file as near as practical to the right side of the road (s 183(2)). Lamps and reflectors are required for a cycle operated on a highway between one half-hour after sunset and one half-hour before sunrise (s 183(6)).

In the event of an accident, the cyclist must remain at the scene and lend assistance (s 183(9)). Cyclists are being considered increasingly responsible for accidents they are involved in. One particular area where cyclists are being held responsible is where they pass a driver on the right while the driver is also turning right at an intersection. If a cyclist is hit by a car turning right while the cyclist is passing on the right, it is possible the cyclist may be found at fault. This is indicative of a general trend of cyclists being treated like motor vehicles. If a cyclist is hit while breaking a traffic law, it is quite possible that the cyclist may be held at fault.

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XIII. LSLAP Program Information

LSLAP does not provide representation for provincial offences and will seldom provide representation in criminal motor vehicle offences. LSLAP will not provide representation for indictable offences or offences involving drugs or alcohol. If the offence is serious, the client should be referred to a lawyer, particularly through the Lawyer Referral Service. The Legal Services Society (Legal Aid) may represent the accused if there is a risk of imprisonment upon conviction. An accused may also receive Legal Aid representation if he or she faces a loss of livelihood upon conviction, has a mental or physical disability that is a barrier to self-representation, or faces immigration complications that may result in deportation.

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Appendix A: Examples of Penalty

This appendix lists fines and penalty points for some of the most common Motor Vehicle Act offences. As well, please note that many of these offences carry other penalties, discussed in this chapter. A comprehensive list of the penalty points from the Motor Vehicle Act Regulations and the fines from the VTAFR are available on the ICBC website at http://www.icbc.com/driver-licensing/tickets/Pages/fines-points-offences.aspx

Offence	Fine	Points
No Driver's License or Wrong Class of License (*MVA* s 24(1))	$276	3
Driving Without Insurance (*MVA* s 24(3)(b))	$598	0
Failing to Produce a Driver's License or Insurance (*MVA* s 33(1))	$81	0
Disobeying a Red Light at an Intersection (*MVA* s 129(1))	$167	2
Driving without Due Care and Attention (*MVA* s 144(1)(a)	$368	6
Speeding (including in and out of municipalities, and in violation of signs) (*MVA* ss 146(1),(3),(5),(7)	$138–196	3
Speeding in a School or Playground Zone (*MVA* ss 147 (1) and (2))	$196–253	3
Excessive Speeding (*MVA* s 148(1))	$368–483	3
Failing to Keep Right (*MVA* s 150(1)	$109	3
Failing to Signal a Turn (*MVA* s 170)	$121	2
Using an Electronic Device While Driving/ Emailing or Texting While Driving (*MVA* ss 214.2(1) and (2)	$368	4
Failing to Wear a Seatbelt or Permitting a Passenger Without a Seatbelt (*MVA* ss 220(4) and (6)	$167	0
Illegibile License Plate (*MVAR* s 3.03)	$230	0
Failing to Display and "N" or "L" Sign (*MVAR* ss 30.10(2) and (4)	$109	
Failing to Slow Down or Move Over Near a Stopped Official Vehicle (*MVA* s 47.02)	$173	3
Illegal Use or Possession of Permit or Insurance (*MVA* s 70(1)(a))	$115–2,300	0
Illegal Use or Possesion of Identification Card or Driver's License (*MVA* ss 70(1.1)(a) or (b)	$460–23,000	0
Motor Vehicle Related *Criminal Code* Offences	N/A (May be imposed by court)	6 or 10
Driving While Prohibited/ Suspended (*MVA* ss 95(1) / 234(1))	$575–2,300	10

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Chapter Fourteen - Mental Health Law

I. Introduction

Introduction

This chapter provides a very general overview of the rights of persons with mental illnesses, either as patients inside a mental health facility or as persons outside such a facility. The discussion of mental health law is intended to provide the reader with a general framework to use for their own information or as a basis for further research. An excellent resource for further information or referrals is the Community Legal Assistance Society (CLAS). CLAS runs a mental health law program that represents individuals at hearings before the BC Criminal Code Review Board, under Part XX.1 of the Mental Disorder provisions of the Criminal Code of Canada and the BC Mental Health Review Board under the MHA. CLAS also provides legal information and identifies potential test cases. See Chapter 22: Referrals for CLAS contact information.

This chapter deals with the legal issues that may arise due to a person's mental disorder. By 'mental disorder', we are referring to the range of illnesses and disorders dealt with by psychiatry. It is important to keep in mind that mental illness is not the same as mental incapacity. For legal matters concerning capacity, such as the capacity to enter a contract, make a will, or create a representation agreement, please consult Chapter 15: Guardianship.

For purposes of this Chapter, the most important statute is the *Mental Health Act*, RSBC 1996, c 288 [MHA]. Other legislation which may have relevance is listed Part II of this chapter, "Governing Legislation and Resources". If you have an issue with respect to a person who has come into conflict with the law and shows signs of psychiatric disturbance, you may also need to review the *Forensic Psychiatry Act*, RSBC 1996, c 156 [FPA]. This act governs the forensic psychiatry services, which assists with court ordered psychological examinations, including fitness to stand trial or "Not Criminally Responsible" designation.

Mental Health, Capacity, And the Law: An Overview

There are three distinct areas of concern in the intersection between the law, mental health, and capacity: persons who suffer or have suffered from psychiatric disorders, persons who have developmental disabilities, and persons who have diminished capacity. These issues are separated into three subcategories below to direct you to the pertinent chapter – some are covered in Chapter 14: Mental Health Law, while others are covered in Chapter 15: Guardianship. However, it is important to keep in mind that a client may experience several mental health challenges that overlap and blur the categories. For example, a client may have diminished cognitive capacity due to Alzheimer's in addition to an underlying schizophrenia disorder they manage with medication.

1. Psychiatric Disorders

The first group are those people who may not have a developmental disabilities or diminished capacity but who suffer from psychiatric disorders. These can range from mild delusions, to mood disorders, to pervasive and severe psychosis. These people are the ones most likely to fall under the provisions of the *Mental Health Act*. The legal issues faced by this group are the main focus of Chapter 14: Mental Health Law. Therefore, in Chapter 14 it is important to note that the term “mental disorder” refers to psychiatric illness and not to those with developmental delays or diminished capacity.

2. Developmental Disabilities

This category refers to people who are developmentally delayed or “intellectually impaired” due to genetic factors, birth trauma, or injury early in life, and who may or may not be able to live independently within the community. Many of these people function at the level of a minor and therefore may not have legal capacity to make legal decisions or treatment decisions. Their family members should be encouraged to use the planning tools found in Chapter 15: Guardianship to make provisions for the care of their person. To plan for their financial well-being, their family members may wish to consult the Chapter 15 section “ Overview of Incapacity – Section D. Wills and Estates.” However, developmental delays are not covered in-depth in the LSLAP Manual. The Ministry of Children and Family Development website [1] provides basic background information in this area and may be a starting point for further research.

3. Cognitive Incapacity

The third area of concern affects those people who, due to disease or trauma, become mentally incapable. It is important to note that the threshold for capacity may differ depending on the legal matter at stake – for example, there may be a different level of capacity needed for the decision to appoint a representative as opposed to the decision to draft a will. Family members and caregivers for this group would most likely be served by the information in Chapter 15: Guardianship.

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References

[1] http://www.mcf.gov.bc.ca/spec_needs/

II. Governing Legislation and Resources

A. Legislation

Adult Guardianship Act, RSBC 1996, c 6 [AGA].

Adult Guardianship and Planning Statutes Amendment Act, S.B.C 2007, c 34 [AGPSAA].

Criminal Code, R.S 1985, c. C-46 (Part XX.1, Mental Disorder provisions) [CC].

Forensic Psychiatry Act, RSBC 1996 c 156 [FPA].

Health Care (Consent) and Care Facility (Admission) Act, RSBC 1996, c 181 [HCCFA].

Mental Health Act, RSBC 1996, c 288 [MHA].

Mental Health Amendment Act, S.B.C 1968, c 27 [MHAA].

Mental Health Regulations, B.C Reg. 233/99; O.C. 869/99; B.C. Reg. 96/2018, May 15, 2018

Patients Property Act, RSBC 1996, c 349 [PPA].

Power of Attorney Act, RSBC 1996, c 370 [PAA].

Public Guardian and Trustee Act, RSBC 1996, c 38 [PGTA].

Representation Agreement Act, RSBC 1996 c 405 [RAA]

B. Resources

1. Counselling Services

Counselling is an invaluable resource for those experiencing distress resulting from legal issues. Some counsellors may also provide integrated case management for people that are suffering from more severe disorders and require greater support.

Broadway Youth Resource Centre (BYRC)

Offers counselling and support services in areas of youth and family, anger management, addictions, and sexual orientation and/or gender identity issues.

Online	Website [1]
Address	2455 Fraser Street Vancouver, BC V5T 0E6
Phone	Telephone: (604)-709-5720 Fax: (604) 709-5721

Peace Portal Counselling Centre

Provides professional counselling services, including services of a clinical psychologist. Office is wheelchair accessible to serve clients from Abbotsford, Delta, Langley, Surrey, and White Rock. Evening appointments are available two days per week.

Online	Website [2] Email: counselling@peaceportalalliance.com
Address	c/o Peace Portal Alliance Church 15128 27B Avenue Surrey, BC V4P 1P2
Phone	(604) 542-2501 Fax: (604) 542-2504

New Westminster UBC Counselling Centre

Provides personal and career counselling from counsellors in training. Appointments are available days and evenings from **September to June**. Priority is given to New Westminster residents, but all lower mainland residents are welcome. They do not charge a fee for their services.

Address	University of British Columbia 821 8th Street New Westminster, BC V3M 3S9
Phone	(604) 525-6651 Fax: (604) 517-6102

Oak Counselling Services Society

Offers professionally-supervised counselling for issues such as grief, relationships and life transitions. Fees are based on a sliding scale, ranging upwards from $10 per session.

Online	Website [3] E-mail: info@oakcounselling.org
Address	949 West 49th Avenue Vancouver, BC V5Z 2T1
Phone	Voicemail: (604)-266-5611 Fax: (604) 261-7205

2. Advocacy Resources

Access Pro Bono (Greater Vancouver and Victoria)

Provides advice on rights pertaining to mental health law upon appointment. May also be available for *habeas corpus* applications, s 33 applications under the *MHA*, as well as applications for judicial review of Mental Health Review Board hearing decisions.

Address	300 - 845 Cambie St Vancouver, BC
Phone	Toll-free: 1-877-762-6664

Peer Navigation (Canadian Mental Health Association)

Provides peer-based support on a wide breadth of issues surrounding mental health, housing, income assistance, legal aid and community connections.

Online	Website [4] Email: peer.navigation@cmha.bc.ca
Address	110 - 2425 Quebec St. Vancouver, BC 5TB 4L6
Phone	(604) 872-3148

Disability Alliance BC

- A self-help umbrella group that raises public awareness of issues affecting people with disabilities.
- A great resource for people with any type of disability (mental or physical) that can provide help with a wide range of legal and non-legal issues.
- Clients should contact the Advocacy Access number, below.

Online	Website [5]
Phone	(604) 875-0188 TTY: (604) 875-8835 Toll-free: 1-800-663-1278

Disability Alliance BC Advocacy Access team

Informs people with disabilities of their legal and social rights, provides lawyer referrals in disputes and holds educational workshops.

Online	
Phone	(604) 872-1278 Toll-free: 1-800-663-1278

B.C Human Rights Clinic

Provides informational services and an advocacy programme to protect human rights and prevent discrimination.

Online	Website [6]
Phone	(604) 622-1100 Toll-free: 1-855-685-6222 Fax: (604) 685-7611

Community Legal Assistance Society (CLAS)'s Mental Health Law Program

Provides representation for involuntarily detained patients who have tribunal hearings either under the MHA or the mental disorder provisions of the Criminal Code. Other CLAS programs provide free legal services in specific areas such as tenants' rights, E.I., WCB and human rights.

Online	Website [7]
Phone	(604) 685-3425 Fax: (604) 685-7611

COAST Foundation Society

Provides a variety of mental health services, including a mental health resource centre and community or shared housing options.

Online	Website [8] Email: info@coastmentalhealth.com
Phone	(604) 872-3502 Toll-Free: 1-877-602-6278 Fax: 604-879-2363

Crisis Centre of Greater Vancouver

24 hour hotline that provides emotional support for clients in distress and refers them to other resources for food, shelter, counselling and legal advice. **Please note this is not a counselling hotline.**

Online	
Phone	(604) 872-3311 Toll-free: 1-800-SUICIDE (784-2433)

The Kettle Friendship Society

A non-profit agency providing support and services to those suffering from mental illness. Services include providing housing assistance, employment advocacy and an on-site health clinic.

Online	Website [9]
Address	1725 Venables St. Vancouver, BC V5L 2H3
Phone	(604) 251-2801 Fax: 604-251-6354

Legal Services Society

Website: www.lss.bc.ca/ [10] Telephone: (604)-408-2172 Toll-free:1-866-577-2525

May be available for habeas corpus applications, section 33 applications under the MHA, as well as applications for judicial review of Mental Health Review Board hearing decisions. The request for assistance in these areas would go through the Legal Aid appeals department.

Motivation, Power, and Achievement Society (MPA)

Offers information, counselling and representation for Review panels.

Online	Website [11]
Phone	(604) 482-3700 Fax: (604) 738-4132

Nidus Personal Planning Resource Centre and Registry

- A non-profit organization that provides information about personal planning, specializing in Representation Agreements and operates a centralized Registry for personal planning documents.
- Website includes self-help guides and templates.

Online	Website [12]

3. Government Resources

British Columbia Review Board

- Makes review dispositions where individuals charged with criminal offences have been given verdicts of not criminally responsible on account of mental disorder or unfit to stand trial on account of mental disorder, by a court.

Online	Website [13]
Phone	(604) 660-8789 Toll-free: 1-877-305-2277 Fax: (604) 660-8809

Canadian Mental Health Association, BC Division

Online	Website [14] Email: info@cmha.bc.ca
Phone	(604) 688-3234 Toll-free: 1-800-555-8222 Fax: (604) 688-3236

Department of Justice

- Website contains all federal statutes and links to related sites.

Online	Website [15]

Guide to the Mental Health Act

Online	Website [16]

Mental Health Review Board

- Responsible for conducting reviews of involuntarily admitted patients.
- Website provides FAQ, Rules, and other helpful links.

Online	Website [17]
Phone	(604) 660-2325

Ministry of Health Services

- Provides downloadable *Mental Health Act* forms on their website.

Online	Website [18]

MPA Court Services

Court workers assist clients with a mental health disability during the criminal court process. Clients may also be assisted following court appearances (e.g. with bail or probation orders).

Online	
Phone	(604) 688-3417 Vancouver area: (604) 660-4292 Surrey area: (604) 572-2405

Public Guardian and Trustee of BC (PGT)

- An independent, impartial public official and Officer of the Court who serves to balance protection with autonomy and to ensure people may live as they choose with the support of family and friends.
- Offers **Child and Youth Services**; namely upholds and protects the rights of those under the age of 19 by reviewing all personal injury settlements, legal contracts, trusts and estates involving minors and ensuring that children are properly represented in all legal matters that affect their lives.
- Acts as guardian of estate for children who are in provincial government care and for those undergoing adoption.
- **Services to Adults** are primarily to uphold the rights of adults who are unable to manage their own affairs. This role includes helping them with financial and legal matters and supporting their lifestyle and health care decisions.
- **Estate Administration** settles the estates of deceased persons when there is no named executor or when there is no one willing or able to act as executor. This includes securing assets, settling debts and claims against the estate and identifying and locating heirs and beneficiaries.

Online	Website [19]
Phone	(604) 660-4444 Fax: (604) 660-0374

Planned Lifetime Advocacy Network (PLAN)

Provides advocacy services and up-to-date legal information on wills and estates, trustees and financial planning. Also, works with families in developing personal support networks for relatives with disabilities and provides advocacy and monitoring services for families whose parents have passed away

Online	Website [20]
Phone	(604) 439-9566 Fax: (604) 439-7001

Vancouver Access & Assessment Centre (AAC)

Located at Vancouver General Hospital, the AAC offers short term treatment on-site, by telephone and by mobile response. Clinical staff, including registered nurses, social workers, and psychiatrists, provide 24/7 support, stabilization, and crisis management to clients.

Online	Website [21]
Phone	1-604-675-3700

Vancouver Mental Health Emergency Services

- A partnership between Vancouver Coastal Health and the Vancouver Police Department that provides rapid assistance in cases of mental health-related emergencies within the city limits of Vancouver
- Offers a 24 hour Crisis Line and can provide specially trained police and nurse services when necessary

Online	
Phone	(604) 874-7307 or via 911

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References

[1] http://www.pcrs.ca/
[2] http://www.peaceportalalliance.com/
[3] http://www.oakcounselling.org/
[4] http://www.vancouver-fraser.cmha.bc.ca/
[5] http://www.bccpd.bc.ca
[6] http://www.bchrcoalition.org
[7] http://www.clasbc.net/
[8] http://www.coastmentalhealth.com
[9] http://www.thekettle.ca
[10] http://www.lss.bc.ca/
[11] http://www.mpa-society.org
[12] http://www.nidus.ca
[13] http://www.bcrb.bc.ca/
[14] http://www.cmha.bc.ca/
[15] http://www.justice.gc.ca/eng/
[16] http://www.health.gov.bc.ca/mhd/mentalhealthact.html
[17] http://www.mentalhealthreviewboard.gov.bc.ca/
[18] http://www.health.gov.bc.ca/mhd/mental_health_act_forms.html
[19] http://www.trustee.bc.ca
[20] http://www.plan.ca
[21] http://www.vch.ca/your-care/mental-health-substance-use/vancouver-access-assessment-centre

III. Theory and Approach

Admission to a mental health facility can seriously affect an individual’s rights. Textbooks have advocated a “functional” approach to mental health law, encouraging courts to consider only how the disability may relate to the specific issue brought before them. Incapacity in one area does not necessarily mean incapacity in all areas. Most mental health legislation, however, is over-inclusive, and therefore impairs the rights of mentally ill persons in areas where they might have the mental capacity to act for themselves. The common-law tests for capacity can be found in Chapter 15: Adult Guardianship.

Section 15(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*] has made it easier to preserve the rights of those affected by mental health law. While most discriminatory legislation in BC remains unchallenged, the MHA "deemed consent provisions" and the HCCFA and Representation Agreement Act "substitute decision making" provisions, are currently being challenged as unconstitutional at the BC Supreme Court (see MacLaren v British Columbia (Attorney General), 2018 BCSC 1753). This litigation isn’t expected to be resolved for quite some time however.

All *Charter* challenges have been directed towards either the MHA, the HCCFA, or the *Criminal Code*. The Community Legal Assistance Society may be able to assist with serious *Charter* challenges, including test litigation.

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IV. Legal Rights

A. Income Assistance

Mentally ill persons may be eligible for benefits under the Persons with Disabilities (PWD) or Persons with Persistent and Multiple Barriers to Employment (PPMB) designations. Qualification requirements are strict, but decisions concerning eligibility can be negotiated with the Ministry of Employment and Income Assistance or if need be appealed. Disability Alliance BC assists with applications and appeals (for further details, see Chapter 21: Welfare Law). There may be strict deadlines for these applications so it is important to not delay in these cases.

B. Employment/Disability Income

If a person cannot work because of mental health issues, the person may be entitled to employment insurance, disability benefits, or CPP disability benefits, or WCB benefits if the mental illness is work related. For information on CPP disability benefits, see Section IV.D: Canada Pension Plan, below. Be aware that there are strict time limits involved when applying for these benefits.

If a person is hospitalized in a psychiatric facility because of an injury at work, he or she may be eligible for WCB benefits. Please contact the Workers Advisory Group through CLAS for more information, or refer to Chapter 7, Workers' Compensation.

C. Employment Insurance

Individuals either voluntarily or involuntarily admitted to a psychiatric facility may still be eligible to collect Employment Insurance benefits. However, the *Employment Insurance Act*, SC 1996, c 23 is a very complicated piece of legislation, detailing numerous requirements to qualify for benefits (e.g. number of hours worked, previous claims, unemployment rate, etc.). If a person is denied benefits, it is best to consult the Act directly as a first step or to contact a lawyer knowledgeable in the issues (e.g. CLAS). Be aware that there may be strict timelines in applying for benefits or appealing a denial of benefits. For more information, please consult Chapter 8 Employment Insurance.

D. Canada Pension Plan

Long-term patients may apply for disability pensions. A claim takes four or five months to process. Hospitalization does not affect a person's right to collect a pension and it is possible to receive CPP benefits for periods of time when an individual was hospitalized. Disability Alliance BC assists people with these applications if they reside in the community. For people who are hospitalized, contact the hospital social worker to assist with these applications as strict time limits may apply.

E. Driving

A mental disorder does not automatically disqualify a person from driving. The Superintendent of Motor Vehicles or a person authorized by the Superintendent does have the discretion to deny a licence to those deemed "unfit" under s 92 of the *Motor Vehicle Act*, RSBC 1996, c 318. This decision is based on The 2010 BC Guide in Determining Fitness to Drive [1]. Chapter 6 of that guide provides assessment policies and procedures. Assessments of cognitive function can be requested (see section 6.6 of the Guide). Chapter 19 of the Guide discusses Psychiatric Disorders while Chapter 27 discusses cognitive impairment (including dementia). Appeals can be made to the Superintendent, but only where medical reports were not properly interpreted, where proper allowances were not made for surgical procedures that the applicant was undergoing, or where the physician has not properly reported the patient's medical condition. An appeal may also require that the appellant undergo examination and/or testing.

F. The Right to Vote

Both voluntary and involuntary patients in mental health facilities have the right to vote. This has been the case since *Canada (Canadian Disability Rights Council) v Canada* (1988), 3 F.C 622, where it was decided that a person is not disqualified from voting on the basis that a committee has been appointed for him or her. Polling stations are normally set up at long-term psychiatric care facilities; because enumeration also takes place at the facility, patients must vote in the riding where the hospital is located.

G. Human Rights Legislation

Under both BC and federal human rights legislation, it is contrary to human rights to discriminate with regard to housing, employment or services available to the public against a person who is mentally ill. For information on launching a human rights complaint, see Chapter 6: Human Rights.

H. Civil Responsibility

In general, mental incompetence or disability is no defence to an action for intentional tort or negligence. However, where a certain amount of intent or malice is required for liability, the fact that the defendant lacked full capacity to understand what he or she was doing may relieve him or her of liability. A defendant who lacks the ability to control his or her actions will not be liable. Involuntary actions do not incur liability. Anyone responsible for the care of a mentally ill person may be held responsible if the plaintiff proves a failure to take proper care supervising the person.

In civil suits, a guardian *ad litem* may be appointed to start or defend an action where a mentally ill person is a party and lacks the capacity to commence or defend that action. A person involuntarily detained under the MHA appears to meet the definition in the BC Supreme Court Rules of Court of a person under a legal disability for filing or defending a court action. Therefore, the person would need to proceed through a guardian *ad litem*. The guardian ad litem could be a friend or a relative of the person, but could also be an organization, or another individual chosen and appointed by the court.

Additionally, any person found not criminally responsible by reason of a mental disorder under the *Criminal Code* may not be liable for damages as a result of the offence.

I. Immigration and Citizenship

Section 38 of the *Immigration and Refugee Protection Act* deals with inadmissibility on health grounds. Pursuant to s 38(1)(c), foreign nationals will be inadmissible if they "might reasonably be expected to cause excessive demand on health or social services." This rule could potentially present a bar to admission for individuals determined to be developmentally delayed or those with a history of mental illness. However, s 38(2) lists certain exceptions. If a person may be classified as (a) a member of the family class and the spouse, a common law spouse, or a child of a sponsor; (b) a refugee or a person in similar circumstances; (c) a protected person, or; (d) where prescribed by regulation, one of their family members, that person will be exempted from the rule under section 38(1)(c).

J. The Charter

Sections 7 (the right to liberty), 9 (the right to protection against arbitrary detention) and 15 (the equality provision) of the *Charter* are particularly relevant to protecting the rights of the mentally ill. Rights protection provisions may also be applicable, including section 12, which concerns cruel and unusual punishment.

Fleming v Reid, (1991) OR (2d) 169 at paras 52-59 dealt with the impact of section 7 on provisions of Ontario's mental health legislation. Mentally competent involuntary patients refused treatment despite their doctors' opinions that it would be in their best interest. The Court held that the section of Ontario's *Mental Health Act*, RSO 1980, c 262 that allowed a Review Board to override the refusal for treatment made by a substitute consent-giver of an involuntary patient based on the patient's prior competent wishes violated the right to security of the person and was not in accordance with the principles of fundamental justice. However, the effect this case will have on BC's legislation is yet to be determined.

In *Mazzei v British Columbia (Director of Adult Forensic Psychiatric)*, 2006 SCC 7 at paras 46-47 [*Mazzei*], it was decided that Review Boards have the power to issue binding orders to parties other than the accused. This power is usually exercised on the director of a hospital party to the proceedings, to whom the Review Board cannot dictate a

specific treatment, but can impose conditions regarding treatment. This power was granted to ensure that treatments are culturally appropriate. In *Mazzei*, conditions were imposed regarding drug and alcohol rehabilitation to ensure that the process was appropriately adjusted to the individual's First Nations' ancestry.

A more recent Supreme Court decision, *R v Conway*, 2010 SCC 22 at para 78 [*Conway*] responded to the issue of whether the Ontario Review Board (ORB) has the authority to grant remedies under section 24(1) of the *Charter*. The challenge was brought by Paul Conway, an individual found not responsible by reason of a mental disorder in 1983. He argued that his treatment and detention violated his *Charter* Rights, and therefore entitled him to an absolute discharge. The Supreme Court developed a test to determine whether an administrative tribunal is authorized to grant *Charter* remedies. The Supreme Court ruled that pursuant to section 24(1), the ORB is a "court of competent jurisdiction", but that an absolute discharge was not a remedy that could be granted by the ORB under the particular circumstances. Ultimately, the *Conway* decision affirms the application of the Charter to administrative tribunals, including MHA Review Boards. However, this decision limits the scope of available remedies under section 24(1) to those that have been specifically granted to a given body by the legislature. In *Conway*, the Review Board could make a determination that the provision was unconstitutional, but did not have the authority to strike it down.

In another case in which CLAS acted as an intervener (*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, (2012) 2 SCR 524 at paras 73-74) opened the door for groups of individuals to bring *Charter* challenges. In this case sex workers were granted public standing as a group to bring *Charter* challenges. This decision impacts mentally ill people as well. It means that in the future, patients that are detained in mental health facilities could bring *Charter* challenges as a group, rather than being forced to do so on an individual basis. Organizations can start an action on behalf of a group of vulnerable people if there is no other way for the issue to be brought in front of a court.

K. Legal Rights of Those in Group Homes

Throughout the greater Vancouver area there are many "group homes" run by and/or for mentally ill persons who do not need to be confined in a provincial mental health facility. Additionally, "Supportive Apartments" are a new tool government has been using. These homes, run by groups such as COAST and the Motivation, Power, and Achievement Society (MPA), are governed by the *Community Care and Assisted Living Act*, SBC 2002, c 75. Foster homes and group homes of the provincial government fall under different Acts: the *Child, Family and Community Service Act*, RSBC 1996, c 46 and the *Hospital Act*, RSBC 1996, c 200.

These types of homes have some interesting interactions with the *Tenancy Act*, in that they may or may not be covered on a case by case basis. There is no definitive answer at this point - individuals in group homes with tenancy issues can contact CLAS or seek other legal help.

Municipalities often place restrictions on the location of group homes. A Winnipeg bylaw requiring a minimum distance between group homes was struck down for violating s 15 of the *Charter* (*Alcoholism Foundation of Manitoba v The City of Winnipeg* (1990), 69 DLR (4th) 697 (Man. C.A.)).

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References

[1] https://www.bcma.org/files/2010_BC_Fitness%20to%20Drive_Guide.pdf

V. Patient Admission

Admissions to mental health facilities under the MHA may be either voluntary under s 20 or involuntary under s 22 (see Section VII). Admission can also occur due to a verdict of “Not Criminally Responsible by reason of Mental Disorder” or “Unfit to Stand Trial” for criminal charges. This is not considered an “involuntary” admission, but rather an “NCRMD” or “UST” admission. NCRMD and UST will see matters of treatment and release governed by a Review Board. Involuntary admission under the MHA revolves around doctors renewing the patients’ involuntary admittance status.

It should be noted that patients who are initially admitted voluntarily may later have their status changed to involuntary using the admission procedure for involuntary patients described later in this chapter.

A. Charges for Mental Health Services

Section 4 of the *Mental Health Regulations* (BC Reg 233/99) provides a formula for calculating the charges for care of persons admitted voluntarily (under s 20 of the MHA) to a mental health facility. The formula is calculated by adding the daily Old Age Security maximum to the daily Guaranteed Income Supplement and multiplying by 85%.

It does not authorize or mention any charges for care to be paid by those persons who are admitted involuntarily (MHA, s 22). According to *Director of Riverview Hospital v Andrzejewski* (1983), 150 DLR (3d) 535 (BC County Court), section 11 of the MHA does not authorize any charges for mental health services where an individual is admitted involuntarily. Check for any changes to the *Mental Health Regulations* to determine the authorized charges for different classes of patients (i.e. voluntary and involuntary).

B. Consent to Treatment

Psychiatric treatment is legally considered a type of medical treatment. The *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181 [HCCFA] sets out the requirements for consent from the patient before a health care provider can legally provide health care. Generally, adults are presumed to be capable of consenting to treatment, and they have the right to give or refuse consent to treatment. However, there are significant exceptions in the realm of mental health.

The HCCFA does not apply to the provision of psychiatric treatment where an individual is involuntarily detained under the MHA and/or is on leave from a psychiatric facility or has been transferred to an approved home (HCCFA s 2). For those individuals, the director of the relevant psychiatric facility has the right to consent to health care on the patient’s behalf (see Section VII). Additionally, for patients not involuntarily admitted, s 12(1) of the HCCFA allows an adult to be treated without their consent in an emergency situation in order to preserve that adult’s life, or to prevent serious mental or physical harm, or to alleviate severe pain, if certain other conditions are also met.

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VI. Voluntarily Admitted

The following subsections apply **only** to patients voluntarily admitted to a mental health facility or voluntarily receiving treatment from a health care/psychiatric service provider. Patients admitted involuntarily lose certain rights (see Section VII).

A. Adult's Right to Consent

Every adult is presumed to be capable of giving, refusing or revoking consent to health care and to their presence at a care facility (HCCFA, s 3).

Every adult who is capable has the right to give, refuse and revoke consent on any grounds (including moral and religious), even if refusal will result in death (HCCFA, s 4).

Every adult who is capable has the right to be involved to the greatest degree possible in all case planning and decision making (HCCFA, s 4).

B. Care Provider's Duty to Obtain Consent

A health care provider must not provide health care to an adult without consent, except in an emergency situation or when substitute consent has been given and the care provider has made every reasonable effort to obtain a decision from the adult (HCCFA, ss 5, 12).

For consent to be valid, it must be related to the proposed health care, voluntary, not obtained by fraud or misrepresentation, informed (see HCCFA, s 6(e)), and given after an opportunity to make inquiries about the procedure (HCCFA, s 6).

C. Emergency Situations

A care provider may provide care to an adult without the adult's consent in an emergency situation where the adult cannot give or refuse consent and no personal guardian or representative is present (HCCFA, s 12). If a personal guardian or representative later becomes available and refuses consent, the care must stop (HCCFA, s 12(3)).

However, the above does not apply if the care provider has reasonable grounds to believe that the adult, while capable and after attaining 19 years of age, has expressed an instruction or wish applicable to the circumstances to refuse consent to the health care (HCCFA, s 12.1).

D. Personal Guardians and Temporary Substitute Decision Makers

A care provider may provide care to an adult without the adult's consent if the adult is incapable of giving or refusing consent and a personal guardian or representative gives consent (HCCFA, s 11).

If a personal guardian or representative refuses consent, the health care may be provided despite the refusal in an emergency if the person refusing consent did not comply with their duties under the HCCFA or any other act (HCCFA, s 12.2).

A temporary substitute decision maker (TSDM) can be chosen by the care provider in accordance with HCCFA, s 16. See HCCFA, ss 16-19 for the authority and duties of a TSDM. There is a statutory list of those assigned to be a TSDM, beginning with a spouse, and moving down. More details can be found in Chapter 15: Adult Guardianship.

In situations where a mentally ill person is judged to be incapable of making a health care decision, the provisions for a substitute decision maker under the HCCFA continue to apply. However, if the person is declared an involuntary patient under s 22 of the MHA, then psychiatric treatment can be provided under the deemed consent provisions of s 32 of the MHA.

E. Consent to Treatment Forms

When admitted to a mental health facility, voluntary patients (or their committees, parents, guardians or representatives) may be asked to sign a "consent to treatment" form, which purports to "authorize the following treatment(s)". There is no basis in law for requiring this form be signed as a prerequisite of a voluntary admission, but the law does not prohibit such a requirement.

Under the HCCFA, consent will be considered to be "informed" only where the patient has been informed of the nature of the risks and benefits of the specific treatment, and of alternative treatments, and has agreed to be subject to the treatment. Signing the form may not be sufficient to indicate informed consent on its own.

1. Refusal to Sign Consent Treatment Form: Possible Consequences

A person who refuses to sign the consent form may be deemed a patient who "could not be cared for or treated appropriately in the facility" under s 18(b) of the MHA. This person runs the risk of being refused admission to the facility or being discharged if already admitted.

Under the *Patients Property Act* (PPA) hospitals could circumvent the issue of consent by seeking a court order, supported by two medical opinions, to have the patient declared incapable of managing his or her person. Minor changes were made to the PPA in September 2011. Under the PPA, a legal guardian or public trustee is appointed as committee to give consent for the patient. It is not sufficient for a family member to give consent for a voluntary informal patient without first obtaining legal guardianship or committeeship, or becoming a substitute decision maker under the HCCFA.

A recent decision in Nova Scotia regarding guardianship found that some of the central provisions of the Incompetent Persons Act, R.S.N.S., 1989, c. 218 are unconstitutional (Webb v. Webb, 2016 NSSC 180). This legislation allows for the appointment of a guardian where a person is found incompetent (similar to the PPA), but it was found that the legislation was overbroad, not allowing a court to tailor a guardianship order so that a person subject to that order can retain the ability to makes decisions in respect of those areas in which they are capable. This may have an impact on the PPA in BC in the future

Sections 50 to 59 of the Adult Guardianship Act (APA) allow for a person from a designated agency to make unilateral decisions which affect the adult's support and assistance without their consent, including treatment and removal from a residence. For instance, section 56 allows a person from a designated agency to apply for a court order which can determine an adult's mode of treatment. Furthermore, section 59 gives a person from a designated agency broad powers in regard to an adult, such as enter their premises without a warrant, remove them from their premises and convey them to "a safe place", and provide emergency medical care, so long as it is within the context of an emergency situation or the adult is incapable of providing consent.

The facility could also proceed under the HCCFA by declaring the patient incapable of consenting, using a temporary substitute decision maker (TSDM) and/or claiming that a state of emergency exists such that the patient must be treated without his or her consent.

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VII. Involuntarily Admitted

Patients who are admitted to a mental health facility without their consent are admitted involuntarily. The MHA provides mechanisms for both short-term emergency admissions and long-term admissions. The HCCFA or the *Representation Agreement Act* and all of their requirements regarding consent to treatment do not apply to psychiatric treatment of involuntarily admitted patients. Involuntarily admitted patients therefore have few legislative rights, but some parts of the MHA could be challenged under the *Charter*, such as the current CLAS challenge in BC to the "deemed consent" provisions of the *BC Mental Health Act* (see *MacLaren v British Columbia (Attorney General)*, 2018 BCSC 1753).

Such a challenge occurred in Ontario, in *PS v Ontario*, 2014 ONCA 900. The constitutionality of the provisions of the *Mental Health Act*, R.S.O. 1990, c. M.7 providing for involuntary committal as they apply to long-term detainees were challenged and found to violate section 7 of the *Charter*. The judgement stated that the patient must be provided meaningful procedural avenues to seek the accommodation and treatment they need to be rehabilitated, while being involuntarily detained. It was determined that the province does not have the power to detain mental health patients indefinitely, where such procedural protections are absent. This will likely change the role patients themselves play in determining the course and nature of their treatment in Ontario. It is unclear at this stage what effect this Ontario case may have in British Columbia.

The Mental Health Law Program (MHLP) at CLAS assists involuntarily admitted patients at Mental Health Review Board (Review Panel) hearings. Since 2017, the Attorney General has agreed to fund representation for all involuntarily detained patients who cannot afford counsel at their Review Panel hearings. If CLAS is unavailable to make these representations, they have a roster of contracted lawyers who may provide counsel. Access Pro Bono also provides telephone assistance for people who are facing involuntary detention, and who wish to know their rights under the MHA.

Section 22 of the MHA provides that a person may be admitted involuntarily and detained for up to 48 hours on the completion of one involuntary patient certificate (Form 4 – BC MHR). The person must first be examined by a doctor and the doctor must provide a medical certificate stating that he or she is of the opinion that the person has a mental disorder and requires treatment to prevent "the substantial mental or physical deterioration" of the person or to protect that person or others. A second doctor must provide a second certificate if the person is to be detained for longer than the initial 48 hours. *Mullins v Levy* 2009 BCCA 6 at paras 105-110, the leading case in this area, applied a broad definition of "examination" and stated that the MHA does not require a personal interview of the patient in every instance. However, a patient is entitled to request a Review Panel hearing after the second certificate is completed, in accordance with section 25 of the MHA. The involuntary detention can be renewed for a period of one month, three months, and subsequent six-month periods. The involuntarily detained patient has a right to apply for a Review Panel hearing within each renewal period.

When the patient is re-evaluated, the facility must determine whether the involuntary admission criteria still apply and whether there is a significant risk that if the patient is discharged, he or she will be unable to follow the prescribed treatment plan and be involuntarily admitted again in the future.

The MHA also potentially allows involuntarily committed patients to be granted leave or extended leave under certain conditions, as authorized by their doctor. This means that the patient may be permitted to live outside the facility, but will still be considered to be involuntarily committed, and will remain subject to the provisions of the MHA.

A. Restraint and Seclusion While Detained Under the MHA

BC's MHA is silent on the issues of restraint and seclusion. Section 32 merely provides that every patient detained under the Act is subject to the discipline of the director and staff members of the designated facility. Issues around restraint and seclusion have yet to be thoroughly considered in BC, and there are few cases in Canada that address them. In *Mullins v Levy* 2009 BCCA 6, the plaintiff sued a hospital and its staff for negligence, false imprisonment and battery after he was detained and medicated for five days against his wishes after doctors decided he required treatment for mania. The plaintiff also argued that his *Charter* rights were violated, and challenged the MHA and the HCCFA as unconstitutional, though the Court did not rule on the *Charter* arguments. The claim was denied at the BCCA on factual grounds, and the Supreme Court declined to hear Mullins' appeal.

This leaves the patient's rights in the hands of facility policy-makers. Such policy focuses on the benefits that seclusion may give to a patient for treatment purposes and regard is given to the safety of hospital staff. The uncertainty of the law in this area, combined with a serious potential for the deprivation of patients' rights, leaves open the possibility of a *Charter* argument to uphold patients' rights.

B. Short-Term and Emergency Admissions

A person may be detained in a psychiatric facility upon the receipt of one medical certificate signed by a physician (MHA, s 22(1)). Such involuntary confinement can last for a maximum of 48 hours for the purposes of examination and treatment. A second medical certificate from another physician is required to detain the patient for longer than 48 hours (MHA, s 22(2)). As an alternate to the admissions criteria under the MHA, a patient may be given emergency treatment under section 12 of the HCCFA if they have not been involuntarily admitted.

1. Authority of a Police Officer

If a police officer believes a person has an apparent mental disorder and is acting in a manner likely to endanger that person's own safety or the safety of others, the police officer may apprehend and immediately take the person to a physician for examination, which includes admission to a psychiatric facility for examination by a physician there. (MHA, s 28(1)).

2. Authority of a Provincial Court Judge

Anyone may apply to a Provincial Court judge to issue a warrant authorizing an individual's apprehension and conveyance to a mental health facility for a period not to exceed 48 hours. To grant this warrant, the judge must be satisfied that admission under s 22 is not appropriate and that the applicant has reasonable grounds to believe that s 22(3)(a)(ii) and (c) of the MHA describe the condition of the individual (see MHA, s 28(4)).

C. Application for Long-Term Admissions

A person can be admitted to a facility by the director of a provincial health facility on receipt of two medical certificates, each completed by a physician in accordance with s 22(2). The patient will be discharged one month after admittance unless the detention is renewed in accordance with s 24 of the MHA.

D. Contents of Medical Certificates (MHA, s 22 (3))

The certificates must contain:

1. A physician's statement that the individual was examined and the physician believes the person has a mental disorder;
2. An explanation of the reasons for this opinion; and
3. A separate statement that the physician believes the individual requires medical treatment in a provincial mental health facility to prevent the person's substantial mental or physical deterioration, to protect the person, or to protect others, and cannot be suitably admitted as a voluntary patient.

For admission to be valid, the physician who examined the person must sign the medical certificate and must have examined the patient not more than 14 days prior to the date of admission. For a second medical certificate to be valid, it must be done within 48 hours of the patient's admission. The MHA does not give details about the type of examination required, nor does it require that the patient be told the purpose of the examination or that the examination is even being conducted. This practice has been the subject of a *Charter* challenge in the past, but was dismissed for other reasons (see *Mullins v Levy*, (2009), 304 DLR. (4th) 64 (BCC.A.)).

E. Consent to Treatment

Under s 31, a patient who is involuntarily detained under the MHA is deemed to consent to any treatment given with the authority of the director. This will override any decisions made by a patient's committee, personal guardian or representative.

An involuntary patient or someone on his or her behalf may request a second medical opinion on the appropriateness of the treatment authorized by the director. Under s 31(2) a patient may request a second opinion once during each detention period. Under s 31(3) upon receipt of the second medical opinion, the director need only consider whether changes should be made in the authorized treatment for the patient. There is no statutory right of appeal from the director's decision. Currently this being subjected to a *Charter* challenge, but a decision has yet to be made. Please refer to *MacLaren v British Columbia* (Attorney General), 2018 BCSC 1753.

F. Right to Treatment

Section 8 of the MHA requires directors to ensure that patients are provided with "treatment appropriate to the patient's condition and appropriate to the function of the designated facility." However, the content of such treatment and the scope of what this entitles patients to is unresolved. It is unclear what would constitute a failure to provide treatment and whether a facility would be bound to discharge a patient should a failure be found.

A patient held without any treatment whatsoever may be able to claim civil damages on the basis of non-administration of treatment, constituting a breach of a statutory duty. Decisions regarding what amounts to appropriate treatment fall within the discretion of the institution. However, it is important to note that the common law of medical malpractice applies to treatment administered in a mental health facility, thus imposing certain limitations on that discretionary power.

G. Right to be Advised of One's Rights

Pursuant to s 34 of the MHA, directors must fully inform patients orally and in writing of their s 10 *Charter* rights and the MHA provisions relating to: duration, review, and renewal of detention; review hearings; deemed consent and requests for second opinions; and court applications for discharge. Directors are bound to ensure that patients are able to understand these rights.

H. Transfer of Patients or Extended Leave

Section 35 of the MHA gives the director authority to transfer a patient from one facility to another where the transfer is beneficial to the welfare of the patient. Under s 37, a patient may be given leave from the facility (no minimum or maximum time periods are specified for the duration of the leave). Under s 38 a patient may also be transferred to an approved home on specified conditions.

A person released from a provincial mental health facility on leave or transferred to an approved home is still considered to be admitted to that facility and held subject to the same provisions of law as if continuing to live at the institution (s 39(1)). The patient is still detained under the MHA and will be subjected to treatment authorized by the director, which is still deemed to be given with the consent of the patient. If the conditions of the leave or transfer are not met, the patient may be recalled to the facility he or she is on leave or was transferred from, or to another authorized facility (s 39(2)). There is no statutory obligation on the institution to inform the patient that the leave is conditional or has expired, leaving the possibility that a patient may unknowingly violate the terms of his or her leave.

Under s 25(1.1) if a patient has been on leave or transferred into an approved home for more than 12 consecutive months without a request for a review panel hearing, his or her treatment record must be reviewed, and if there is a reasonable likelihood that the patient could be discharged, a review panel must be conducted. However, in practice, the review panel contacts the patient to ask if they want a hearing.

I. Discharge of Involuntary Patients

1. Through Normal Hospital Procedure

The director may discharge or grant leave to a person from an institution at any time (ss 36(1) and 37 of the MHA). Under s 23 "a patient admitted under s 22 may be detained in a provincial mental health facility for one month after the date of their admission, and they shall be discharged at the end of that month unless the authority for their detention is renewed in accordance with s 24", for further periods of one month, three months and six months.

2. Through a Review Panel Hearing

An involuntary patient is entitled to a hearing before a Mental Health Review Board (Review Panel). Generally, a patient is entitled to one hearing during each period of involuntary detention. The application for a Review Panel hearing may be made by the patient or by someone acting on the patient's behalf (MHA, s 25). The application is completed by filling out an "Application for Review Panel" (Form 7 under the Mental Health Regulations), Section 6 of the MHR describes the process of a Review Panel hearing.

A Review Panel hearing takes place before a panel of three people, which must include a medical practitioner, a member in good standing with the Law Society of British Columbia (or a person with equivalent training) and a person who is not a medical practitioner or a lawyer. Under the MHA, the Minister, appoints the Chair and all the legal, medical and community members authorized to sit as Review Panel members. The Chair serves fulltime and the members serve part-time. The Chair appoints three members for each Review Panel hearing from the list of people previously chosen by

the Minister.

In order to maintain a quasi-judicial character, it is policy that those who sit on the Review Panel do not have access to the patient prior to the hearing. Decisions are based on evidence and testimony presented at the hearing only. Section 24.3 of the MHA gives the Review Panel power to compel witnesses and order disclosure of information.

The hospital's position is usually presented by another medical practitioner acting as the hospital's representative, who is usually the involuntarily detained person's attending psychiatrist. The involuntary patient has a right to representation by a lawyer or trained legal advocate, who can present the patient's position at the hearing.

The Review Panel members generally rely on the hospital presenter ant the patient's counsel to provide documents and evidence during the Review Panel hearing. However, the Review Panel does have the power to order disclosure of records that are relevant to making a decision. Procedure at review panel hearings is subject to the principles of fundamental justice under section 7 of the *Charter* and due process under the common law, as well as the provisions of the *Administrative Tribunals Act* listed under s 24.2 of the MHA.

a) Patients' Rights at Review Panel Hearings

The patient may retain counsel for representation at the hearing. This representative need not be a lawyer. Representation at a panel is provided free of charge by the Mental Health Law Program of the CLAS staff within the lower mainland or on an ad hoc basis outside of the lower mainland (see Section II.B.2: Resources for contact information).

The fundamental principles of justice dictate that one has a right to appear at one's own hearing. However, under section 25(2.6) of the MHA, the chair of the Review Panel may exclude the patient from the hearing or any part of it if they are satisfied that exclusion is in the patient's best interests. This power is rarely used, and often in accordance with the patients' wishes, as Review Hearings may cause a lot of stress. The patient or counsel can call witnesses to give evidence that supports the patient's argument in favour of discharge.

Within 48 hours of the end of the hearing, the Review Panel must decide (by majority vote) whether the patient's involuntary detention should continue. Decisions must be in writing. Reasons must be provided no later than 14 days after the hearing. Section 25(2.9) of the MHA compels the panel to deliver a copy of the decision without delay to the mental health facility's director and the patient or his or her counsel. If the decision is that the patient be discharged, the director must immediately serve a copy of the decision on the patient and discharge him or her.

b) What the Review Panel Must Consider

Under section 25(2) of the MHA, the Review Panel is authorized to determine whether the detention of the patient should continue. The patient's detention must continue if sections 22(3)(a)(ii) and (c) continue to describe the patient. That is, the patient is a person with a mental disorder who requires treatment in or through a designated mental health facility; the patient requires care, control and supervision in or through a designated mental health facility; the patient is a threat to him or herself or others; or detention is necessary to prevent substantial deterioration of the patient's mental or physical person and he or she is unsuitable as a voluntary patient. A Review Panel hearing must be conducted notwithstanding any defects in authority (Form 4 and Form 6) for the initial or renewed detention pursuant to section 22 of the MHA.

The Review Panel must consider the past history of the patient, including his or her past history of compliance with treatment plans. The panel must assess whether there is a significant risk that the patient will not comply with treatment prescribed by the director. Presumably, if the panel concludes that there is a significant risk that the patient will not comply with the treatment plan, it is open to them to conclude that sections 22(3)(a)(ii) and (c) continue to describe the patient (i.e. the patient may get worse if not compelled to continue treatment). Again, the MHA amendments have made the criteria for detention broader and it would seem likely that it will be more difficult for patients to end their detention under the MHA.

3. Through Court Proceedings

A person may apply to the Supreme Court for a writ of *habeas corpus*, which is a writ requiring a detained person to be brought before a court that will evaluate the lawfulness of the involuntary detention based on the documents used to detain them. This is most suitable where there were procedural defects in the patient's admission or defects in the involuntary detention certificates (Form 4 and Form 6 under the MHR). If the Court finds that the detaining authority did not strictly adhere to the statutory requirements regarding involuntary detention, there may exist an action in false imprisonment and civil battery for unauthorized treatment and a possible award of damages (*Ketchum v Hislop* (1984), 54 BCLR 327 (SC)).

Under section 33 of the MHA, a request can be made to the Supreme Court for an order prohibiting admission or directing the discharge of an individual. This request may be made by a person or patient whose application for admission to a mental health facility is made under section 20(1)(a)(ii) or 22, a near relative of a person or patient or anyone who believes that there is not sufficient reason for the admission or detention of an individual.

Legal Aid and Access Pro Bono may be available for *habeas corpus* applications, section 33 applications under the MHA, as well as applications for judicial review of Mental Health Review Board hearing decisions. Please see the “Advocacy Resources” section on page 3 for more details.

J. Escapes From Involuntary Detention

1. Apprehension Without a Warrant

A patient, detained involuntarily in a mental health facility who leaves the facility without authorization is, within 48 hours of escape, liable to apprehension, notwithstanding that there has been no warrant issued (s 41).

2. Warrant Constituting Authority for Apprehension

Where a person involuntarily detained has been absent from a mental health facility without authorization, the director of the facility may within 60 days issue a warrant for apprehension, which serves as authority for apprehension and conveyance back to the facility (s 41(1)).

3. Patient Considered Discharged After 60 Days

A patient is deemed to have been discharged if he or she has been absent for over 60 days without a warrant being issued (s 41(3)). However, if the patient is “charged with an offence or liable to imprisonment or considered by the director to be dangerous to him or herself or others,” the person is not deemed discharged and a warrant may still be issued.

4. Aiding Escapees

Under the MHA, s 17 any person who helps an individual leave or attempt to leave a mental health facility without proper authority, or who does or omits to do any act that assists a person in so leaving or attempting to leave, or who incites or counsels a patient to leave without proper authority, commits an offence under the *Offence Act*, RSBC 1996, c 338.

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VIII. Criminal Code

A. Fitness to Stand Trial

An accused is presumed fit to stand trial until the contrary is proven on a balance of probabilities (s 672.22 of the *Criminal Code*). The burden of proof is on whichever side raises the issue, either the accused or Crown Counsel (s 672.23(2)).

An accused is deemed "unfit to stand trial" under s 2 of the *Criminal Code* if he or she is incapable of understanding the nature, object or possible consequences of the criminal proceedings, or is unable to communicate with counsel on account of mental illness. If the verdict is that the accused is unfit to stand trial, any plea that has been made will be set aside and the jury will be discharged (s 672.31). Under s 672.32 the accused may stand trial once he or she is fit to do so. For more information on the test of fitness see *R. v Taylor* (1992), 77 CCC (3d) 551, which outlines the various tests in greater detail.

The court may order a trial (not an assessment) on the issue of the accused's fitness to stand trial at any stage in the proceedings prior to a verdict, either on its own motion or on an application of either the prosecution or the defence (s 672.23).

If a person is found unfit to stand trial, he or she may be detained in a mental health facility until he or she recovers sufficiently to be able to proceed with the trial (Criminal Code, s 672.58). However, the court cannot make a disposition order to have an accused detained in a health facility without the consent of the hospital or treating physician (Criminal Code, s 672.62(1)). A recent Supreme Court of Canada case, *R v Conception*, 2014 SCC 60 at para 3, confirmed the need for such consent. The court found that "[t]he hospital consent was required for the disposition order in its entirety, and not simply the treatment aspects of it." The exception to this is the rare case in which a delay in treatment would breach the accused's rights under the Charter and an order for immediate treatment is an appropriate and just remedy for that breach. An inquiry by the court must be held no later than two years after the verdict of "unfit" and every subsequent two years after that. The court may now extend the period for holding an inquiry where it is satisfied that such an extension is necessary to determine if sufficient evidence can be adduced to put the person on trial (Criminal Code, s 672.33).

After the court deems a person unfit to stand trial, a disposition hearing must be held by the Review Board within 45 days, taking into account the safety of the public and the needs of the accused. While the term in section 672.54 "least onerous and least restrictive" has been replaced by "necessary and appropriate", the intent of the legislation has not changed, as explained under Disposition Hearings after NCRMD.

The BC Court of Appeal reviewed a Review Board decision regarding custody in a fitness case; *Evers v British Columbia (Adult Forensic Psychiatric Services)*, 2009 BCCA 560. The BCAA stated that the Review Board erred in proceeding with a disposition hearing in the absence of the accused without first attempting to ensure the accused's presence by issuing a warrant or allowing a short adjournment. Further, the court stated that fear of non-compliance with medical treatment cannot be the main objective motivating a custody disposition order, nor can the Review Board impose treatment as a condition on the accused.

In *R v Demers*, 2004 SCC 46, the court found that the former sections 672.33, 672.54 and 672.81(1) violated the Charter rights of permanently unfit, non-dangerous accused persons. The court wanted to ensure that an accused found unfit will not be detained unnecessarily when he or she poses no risk to the public. Pursuant to this decision, these sections have been amended.

Now, a Review Board may make a recommendation to the court to enter a stay of proceedings if it has held a hearing and is of the opinion that the accused remains chronically unfit and does not pose a significant threat to public safety. Notice

of intent to make such a recommendation must be given to all parties with a substantial interest in the proceedings (Criminal Code, s 672.851).

The Review Board, the prosecutor, or the accused may apply for an order of assessment of the accused's mental condition if necessary to make a recommendation for a stay of proceedings, or to make a disposition if no recent assessment has been made (Criminal Code, s 672.121). A medical practitioner or any person designated by the Attorney General may also make an assessment. An assessment order cannot be used to detain an accused in custody unless it is necessary to assess the accused, or the accused is already in custody, or it is otherwise required.

An appeal from an order for a stay of proceedings may be allowed if the Court of Appeal finds the assessment order unreasonable or unsupported by evidence.

A recent case (*R v JJG*, (2014) BCSC 2497 at paras 17-27) considered the issue of whether statements made by an accused during the fitness to stand trial hearing are admissible in the trial. In this case, the accused made an admission of guilt during the fitness hearing. The court ruled that the statements were inadmissible at trial.

B. Criminal Responsibility

1. Defence of Mental Disorder – Criminal Code, Section 16

An accused may be found "Not Criminally Responsible on account of a Mental Disorder" (NCRMD), if an accused is found to have been suffering from a mental illness at the time of the offence which resulted in:

- A lack of appreciation of the nature and quality of the offence (i.e. he or she could not foresee and measure the physical consequences of the act or omission) (*R. v Cooper* (1980), 1 S.C.R. 1140; or
- A failure to realize that the act or omission was wrong (i.e. he or she did not know it was something that one should not do for moral or legal reasons (*Chaulk v The Queen* (1990), 3 S.C.R. 1303;

This is a verdict distinct from either guilty or not guilty. If an accused is found NCRMD, the court can decide whether the accused will receive an absolute discharge, a conditional discharge, or a custody disposition to be detained in a psychiatric hospital. Alternately, and more often in practice, the court can defer this decision to the provincial Review Board designated under section 672.38 of the Criminal Code. If the accused is not found to be a significant threat to public safety (discussed below), he or she must be given an absolute discharge.

When dealing with the question of the accused's mental capacity for criminal responsibility, the court has much the same power to order an assessment to obtain evidence on this question (Criminal Code, s 672.11(b)) as it does with respect to an accused's fitness to stand trial. Pre-trial detention of an accused while awaiting in-custody assessments was held to violate section 7 of the Charter by an Ontario court (*R v Hussein and Dwornik* (2004), 191 CCC (3d) 113 (OSCJ) [*Hussein*]). However, *Hussein* was not followed in a more recent Ontario case (*Her Majesty the Queen in Right of Ontario v Phaneuf* [Indexed as: *Ontario v Phaneuf*] (2010), 104 OR (3d) 392 at para 19). The Ontario Court ruled that the relevant provisions in the Criminal Code, specifically s.672.11, cannot be interpreted as requiring accused individuals who are ordered to be assessed in custody in a hospital to be taken immediately to that hospital. It cannot be read as prohibiting their detainment in a detention centre pending transfer to the hospital. Accordingly, it was held that Hussein was wrongly decided.

The accused is always entitled to raise a lack of mental capacity when facing criminal liability by calling evidence relating to it. The Crown may adduce evidence on the accused's mental capacity for criminal responsibility where the accused has raised the issue or has attempted to raise a reasonable doubt using a defence of non-mental disorder automatism (a mental state lacking the voluntariness to commit the crime). Where the accused pleads not guilty, does not put mental capacity in issue and does not raise the defence of non-insane automatism, the court may allow the Crown to

adduce evidence on the issue of mental capacity only after it has been determined that the accused committed the act or omission (*R v Swain* (1991), 63 CCC (3d) 481 (SCC)).

An accused is presumed to not suffer from a mental disorder that exempts him or her from criminal responsibility until the contrary is proven on a balance of probabilities (Criminal Code, s 16(2)). An official finding that the accused is NCRMD will only occur when the Crown has otherwise proven the guilt of the accused beyond a reasonable doubt, and the mental disorder exempting the accused from criminal responsibility is proven on a balance of probabilities. The burden of proof is on the party that raises the issue (Criminal Code, s 16(3)).

C. Disposition Hearings After NCRMD

A finding of NCRMD ends criminal proceedings against the accused. There will then be a disposition hearing either in court or by the review board (s 672.38). Under s 672.54 a person found NCRMD may be:

- a) discharged absolutely where the review board or court finds that the accused is not a significant threat to the safety of the public;
- b) discharged subject to conditions considered appropriate by the court or review board; or
- c) detained in custody in a psychiatric hospital subject to conditions considered appropriate by the court or review board.

With the passage of 2014 Bill C-14, discussed fully below, the court may also designate a person as a high-risk accused, and then the Review Board would only be able to make a narrow custody order. Amendments from Bill C-14 have also made changes to other sections of the Mental Disorder provisions of the Criminal Code. Some of them are highlighted below.

When the Review Board renders a decision under section 672.54, it must take into consideration "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused." The 2014 Bill C-14 amendments have changed the wording from requiring the Review Board to make a decision that is "least onerous and least restrictive" to one that is "necessary and appropriate". However, subsequent Review Board decisions and court decisions have confirmed that the intent and guiding principles from the Supreme Court of Canada case of *Winko v the Director of the Forensic Psychiatric Hospital* [1999] 2 SCR 625 [*Winko*] still apply. Therefore, the principle of making the least onerous and least restrictive order still applies to Review Board decisions. For further related case law please see *Ranieri (Re)* 2015 ONCA 444; *Re Osawe*, 2015 ONCA 280; *McAnuff (Re)* 2016 ONCA 280.

The Review Board must review cases in which a person is found NCRMD at least once a year if the person is still detained in a mental facility or is fulfilling conditions pursuant to the disposition hearing (Criminal Code, s 672.81). However, as a result of the operation of section 672.54, it is possible for individuals found NCRMD to be subjected to prolonged or indeterminate detention or supervision by the Review Board, even for committing relatively minor offences.

In response to a number of cases challenging the constitutionality of section 672.54, the Supreme Court in *Winko* rejected arguments that section 672.54 violates the Charter. According to *Winko*, a "significant risk to the safety of the public" means a real risk of physical or psychological harm to members of the public. The conduct giving rise to the harm must be criminal in nature. The process of determining whether the accused is a significant threat to public safety is non-adversarial, and the courts or Review Board may take into consideration a broad range of evidence. This includes the accused's past and expected course of treatment, present medical condition, past offences, plans for the future and any community support that exists. See *Winko* for a complete discussion of the application of section 672.54. Bill C-14, discussed fully below, codifies some of this decision, such as the definition of "significant harm".

Two Supreme Court of Canada cases considered the "least onerous and least restrictive" requirement of s 672.54. In *Pinet v St Thomas Psychiatric Hospital*, [2003] SCJ No 66, it was held that the "least onerous and least restrictive" requirement applies not only to the bare choice among the three potential dispositions – absolute discharge, conditional discharge or custody in a designated hospital, but also to the particular conditions forming part of that disposition. In *Penetanguishene Mental Health Center v Ontario (Attorney General)*, [2004] SCJ No 67, the court decided that this applied not only to the choice of the order, but also to the choice of appropriate conditions attached to the order, considering public protection and maximisation of the accused's liberties.

The Review Board's powers were considered in *Mazzei v BC (Director AFPS)*, [2006] SCC 7. It has the power to place binding orders and conditions on any party to the Review Board hearing, including the director of the psychiatric hospital. It does not prescribe or administer treatment. It may supervise and require reconsideration of treatment provided. Treatment is incidental to the objectives and focus on public safety and reintegration. The Review Board aids in only these two goals.

For information on pleading "Mental Disorder" and "Non-Mental Disorder" automatism, please consult the Continuing Legal Education Society's manual on "Criminal Law and Mental Health Issues".

1. Recent Changes

Bill C-14, the "Not Criminally Responsible Reform Act", which received royal assent in April 2014, came into force on July 11, 2014. This new legislation is meant to strengthen the *Criminal Code*'s decision-making process relating to accused persons found NCRMD, in order to make public safety the primary consideration, enhance victim safety, and provide victims with a stronger voice in the process.

The primary function of the amendments is to create a new designation of "high-risk accused". Section 672.64 of the Criminal Code allows the court to designate a person who was found NCRMD to also be a high-risk accused. This designation is available when the offence was a serious personal injury offence, as defined in section 672.81(1.3), the accused was over 18 when the offence occurred, and one of two additional factors are present. The first of these factors is when the court finds that there is a substantial likelihood that the accused will use violence that could endanger the life or safety of another person. The second is when the court is of the opinion that the acts underlying the offence were of a brutal nature, which indicates a risk of grave physical or psychological harm to another person.

When deciding whether to render this designation, the court must consider certain factors, outlined in section 672.64(2) of the Criminal Code. Some of the factors pertain to the nature of the offence, the accused's current mental state, as well as expert opinion. Once a person is found to be a "high-risk accused", they are subject to mandatory hospital detention and may have increased time between Review Board hearings.

In order for the high-risk accused designation to be removed, the Review Board must first refer the finding to a superior court. The court may only revoke the designation if satisfied that there is not a substantial likelihood that the accused will use violence that could endanger the life or safety of another person.

Bill C-14 also aims to improve victim's rights, by providing notice to victims of the intended place of residence of any NCRMD accused who receives an absolute or conditional discharge. The victim is informed of the general location where the offender resides, but not the specific address. Furthermore, when the high-risk status of an accused is being reviewed by the court, victims may file impact statements which then must be considered by the court.

Significant criticism has been directed at these provisions prior to their coming into force, suggesting that they will do little to improve the rights and safety of victims, and are unnecessarily punitive in nature. Furthermore, it was argued that by placing the "high-risk" designation in the hands of the courts, the ability for the Review Board and hospitals to appropriately assist, treat and manage NCMRD patients will be diminished. For a full discussion of these concerns, see

Lisa Grantham's "Bill C-14: A Step Backwards for the Rights of Mentally Disordered Offenders in the Canadian Criminal Justice System". However, since the provisions came into force, there have not been any significant changes to the Review Board and its authority.

In BC there is no person currently designated as a "high-risk accused". The only BC case involving a determination of "high-risk accused" status is *R v Schoenborn*, (2010) BSCS 220 [*Schoenborn*]. The accused was found NCRMD and was currently held in a mental health facility. In April 2015, the BC Review Board granted Schoenborn escorted community access at the discretion of the Director of the facility in order to aid his rehabilitation. In 2017, the Attorney General of BC applied unsuccessfully to the BC Supreme Court to have Schoenborn designated as a "high-risk accused". After many days of evidence in court, the judge found that Schoenborn did not meet the criteria for a "high risk accused" (*R v Schoenborn*, 2017 BCSC 1556.

There is some discrepancy between the provinces as to whether one can be retroactively classified as a "high-risk accused". In British Columbia, it has been found that applying a retroactive "high risk" designation to trials that occurred before the legislation came into effect is not unconstitutional (*Schoenborn* 2015 BCSC 2254).). However, in Quebec it was decided that a retroactive application is unconstitutional (see *R v CR*, 2015 JQ No 2448).

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IX. Complaints

Complaints concerning provincial mental health facilities, their practices or their treatment of patients may be taken to the BC Ombudsperson. This office has the authority to investigate patient complaints, make recommendations to the facility, mediate problem situations that may arise between a patient and the facility and make recommendations to the Lieutenant-Governor and the Provincial Cabinet regarding the results of these investigations.

Complaints must be made in writing. The office is careful to ensure that, where necessary, the identity of the complainant is kept secret from hospital staff. Common complaints include concerns about over-medication, seclusion, or providing rights information. In such cases, the Ombudsperson has the authority to take the issue to an outside medical source to verify whether the patient is receiving appropriate levels of medication, to ensure the facility follows necessary protocols and reviews for placing people in seclusion and provides immediate rights information for those involuntarily detained. Complaints can be filed through the website at www.ombudsman.bc.ca [1] or by calling the Ombudsperson's office at 1-800-567-3247.

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Appendix A: Second Opinion

	This appendix is available from its source for download in PDF [1]. A permanent archive version is also available at https://perma.cc/DV4Y-HJKD. Readers of the print edition please see the "Supplementary Documents for Appendices" section.

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References

[1] http://www2.gov.bc.ca/assets/gov/health/forms/3511.pdf

Appendix B: Near Relative

	This appendix is available from its source for download in PDF [1]. A permanent archive version is also available at https://perma.cc/P5AC-D35X. Readers of the print edition please see the "Supplementary Documents for Appendices" section.

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References

[1] http://www2.gov.bc.ca/assets/gov/health/forms/3515.pdf

Chapter Fifteen – Guardianship

I. Introduction

A. The Scope of Guardianship and Substitute Decision-Making Law in BC

Adult guardianship laws apply to adults over the age of 19. There are four key legal issues addressed in adult guardianship or substitute decision-making legislation:

1. **Mental Capacity**: The law presumes that an adult is capable of making decisions and provides statutory tests for determining incapability in different contexts.
2. **Advance Planning Documents**: The law allows a capable adult to appoint a substitute decision-maker for financial or health care decisions in two types of legal documents:
   - **Enduring Power of Attorney (EPOA)**: for financial decisions only; and
   - **Representation Agreement (RA)** for health care consent, personal care decisions, and routine financial decision-making.
   - The law also allows a capable adult to provide instructions giving or refusing consent to specific health care in an **Advance Directive**.
3. **Guardianship**: Where an adult is incapable and does not have Advance Planning Documents in place, the court may appoint a guardian (called a "committee of estate" or "committee of person") to act on behalf of an incapable adult. Under the *Adult Guardianship Act*, RSBC 1996, c 6 [AGA] the Public Guardian and Trustee (PGT) may also be appointed committee of estate by a statutory process. This non-court process requires a health authority designate to issue a certificate of incapacity.
   - NOTE: Effective December 1, 2014 Part 2.1 of the AGA replaced the *Patients Property Act*, RSBC 1996, c 349 [PPA] rules governing the process for issuing and terminating a certificate of incapacity. Under the new rules, when a certificate is issued the PGT becomes a "statutory property guardian". However, the PPA defines a "committee" to include a statutory property guardian under the AGA and the PPA applies except for the rules governing reassessment and ending the authority. Note also that if a certificate was issued before December 1, 2014 under the PPA, the AGA applies for purposes of the new rules for reassessments and termination.
4. **Abuse, Neglect and Self-Neglect**: The law establishes a legal framework for Designated Agencies to receive reports and respond when adults experience abuse, neglect or self-neglect and need support and assistance to protect themselves from further harm. The law also authorizes the PGT of BC to investigate concerns about financial abuse, neglect and self-neglect when it has reason to believe the adult is not capable, and to take steps to protect assets in urgent situations.

Under each of these areas of the law, it is crucial that substitute decision-makers, court-appointed guardians, legal and financial advisors, social workers and health care providers consult with the adult to determine how to act in accordance with their wishes, values and beliefs. Substitute decision-maker(s) and guardian(s) are legally obligated to act according to the wishes, values and beliefs of the adult who appoints them or is in need of a guardian. The guiding principle behind BC's adult guardianship legislation is that the adult is presumed to be capable, and should receive support to make decisions. The key is to foster the independence of the adult through support, meaning involving the adult to the greatest degree possible when making decisions on their behalf.

B. Mental Capacity

> **NOTE:** For the purposes of this manual, there is no distinction between "mental capacity", "capacity" and "capability". The terms are used interchangeably.

In BC the law presumes that an adult is capable to make personal and legal decisions (e.g. decisions regarding health, life, property, assets, financial arrangements, etc.), unless there is evidence to the contrary (PAA s 11). A person may become incapable at a point in their life due to illness, disability or accident. If an adult is, or becomes incapable, another person (or persons) can become the substitute decision-maker(s), who acts on the wishes and values of the incapable adult. A substitute decision-maker can be appointed in either of the following ways:

1. An adult who meets the appropriate test for mental capacity can name the substitute decision-maker(s) in an Advance Planning Document (e.g. an Enduring Power of Attorney or a Representation Agreement,).
   - Note: an adult may also make an Advance Directive that consents to or refuses specified health care.
2. An adult who is no longer capable of making financial or health care decisions may have a guardian (called a committee of estate or committee of the person) appointed by the courts to make decisions. The Public Guardian and Trustee may also become a Statutory Property Guardian if a certificate of incapability is issued by a "health authority designate" stating the adult is incapable of managing their financial affairs.
   - Note that pursuant to s 9 of the PPA an adult may nominate a committee and the nomination document may be one of an adult's Advance Planning Documents.

An adult who has made a Power of Attorney, Representation Agreement or Advance Directive, maintains the right to make decisions about legal, financial and health care matters, even after these legal documents are made. Once the adult is incapable, the substitute decision-maker has a legal duty to act in accordance with the adult's instructions, values, wishes and beliefs, regardless of capacity (s 19(2), *Power of Attorney Act*, RSBC 1996, c 370 [PAA]; s 16, *Representation Agreement Act*, RSBC 1996, c 405 [RAA]; s 19, *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181 [HCCFA]). The substitute decision maker also has a duty, to the extent reasonable, to foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult.

The statutory tests for incapability are summarized below. In many cases, Advance Planning Documents will specify what is required to determine incapability to bypass a court process.

1. Power of Attorney (POA)

As mentioned above, an adult is presumed to have capacity, unless proven otherwise. According to s 11 of the PAA, an adult is presumed capable of making decisions about financial affairs and understanding the nature and consequences of making, changing, or revoking an Enduring Power of Attorney (EPOA).

Difficulties or barriers in communicating are not adequate grounds for determining that an adult is incapable. Instead, incapacity is determined by a more thorough assessment, often as specified in Advance Planning Documents (i.e. a Springing POA will normally specify under what conditions a person is considered incapable, such as on the basis of medical opinions from two doctors or by an assessment of the court).

The PAA sets out a specific statutory test of incapability in s 12, which reaffirms that an adult is presumed capable to make an EPOA, unless there is evidence that the adult is unable to understand the nature and consequences of the EPOA. According to s 12(2) of the PAA, an adult is considered incapable of understanding the nature and consequences of an EPOA if the adult cannot understand all of the following:

- The property the adult has and its approximate value
- The obligations the adult owes to their dependants

- That the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney
- That, unless the attorney manages the adult's business and property prudently, their value may decline
- That the attorney might misuse the attorney's authority
- That the adult may, if capable, revoke the enduring power of attorney
- Any other prescribed matter

> **Note**: This is a complex and rapidly changing area of the law. The above statutory test in s 12(2) of the PAA came into effect on September 1, 2011. This test is significantly broad in scope and appears to only apply to an EPOA. However, it remains to be seen how this test will be interpreted by the courts. As of June 21, 2019, there has been no judicial interpretation of this test. The case of *Serban v Serban* 2016 BCSC 2419, demonstrates how incapacity is approached in court proceedings.

2. Health Care Consent

The *Health Care (Consent) and Care Facility (Admission) Act* states that every adult who is capable of giving or refusing consent to health care has the right to (s 4):

- Give consent or to refuse consent on any grounds, including moral or religious, even if the refusal will result in death
- Select a particular form of available health care on any grounds, including moral or religious
- Revoke consent
- Expect that a decision to give, refuse or revoke consent will be respected
- Be involved to the greatest degree possible in all case planning and decision making

According to s 3 of the HCCFA, an adult is presumed capable, unless proven otherwise, when:

- Giving, refusing or revoking consent to health care
- Deciding to apply for admission to a care facility, accepting a facility care proposal, or moving out of a care facility

Difficulties or barriers in communicating are not adequate grounds for deciding that an adult is incapable. For example, in *Bentley (Litigation guardian of) v. Maplewood Seniors Care Society*, 2014 BCSC 165 at paragraph 55 Justice Greyell stated that the legislature "precluded the possibility that a challenge to an adult's capability could be premised on her method of communicating". Instead, incapacity is determined in accordance with s 7 of the HCCFA, which requires a health care provider to decide whether or not the adult understands the information given by the health care provider and that the information applies to the situation of the adult in need of health care.

3. Temporary Substitute Decision Makers

If a health care provider determines that an adult is not capable of consenting to health care that is being proposed, they will need to obtain consent from another adult, who is able to give or refuse consent on behalf of the incapable adult. The health care provider can get consent from a substitute decision-maker named in a Representation Agreement. An individual may also document consent or refuse consent in advance through an Advance Directive. With the exception of the provision of emergency health care (HCCFA s 12(1)), the health care provider will need to get consent from a Temporary Substitute Decision-maker (TSDM) if neither a Representation Agreement nor an Advance Directive are in place (or the AD does not address the medical issue for which consent is needed), and there is no appointed guardian (committee of person).

The HCCFA provides a hierarchical, default list of TSDMs, as follows (s 16):

- spouse/partner

- adult child (over 19 years old)
- parent
- sibling
- grandparent
- grandchild
- other relatives by birth or adoption (not in-laws or step-children)
- close friend
- person immediately related by marriage (includes in-laws or step-children)

A TSDM has authority to decide whether to give or refuse consent, in accordance with the adult patient's wishes, values and beliefs. The authority of a TSDM to give or refuse consent is generally valid for 21 days, but this time period may be extended upon written confirmation by the health care provider (HCCFA s 17 and 19). If the health care provider has reasonable grounds to believe that the adult patient may be capable during this time period, the health care provider must again determine the adult's capability in accordance with s 7 of the HCCFA. If an adult patient is deemed to be capable again, consent must be given or refused by the adult patient. For more information, refer to section **V. H. 1: Temporary Substitute Decision-makers (TSDM)** in this chapter below.

4. Representation Agreement (RA)

An adult who meets the requisite mental capacity test may create a Representation Agreement (RA). An RA is a legally-binding document that appoints a substitute or supportive decision-maker and provides instructions with respect to health care decisions, personal care, and/or routine financial decisions. See s 7 and 9 of the RAA. Section 7 and 9 RAs deal with different types of decisions (see section **V. A: Types of Representation Agreements**) and are subject to different mental capacity standards.

In British Columbia, an adult is presumed to have capacity, unless proven otherwise. According to s 3(1) of the RAA, an adult is presumed to be capable of:

- Making, changing or revoking a s 7 or s 9 RA
- Making decisions about personal care, health care and legal matters
- Conducting the routine management of their own financial affairs

An adult who has diminished capacity may still be allowed to make, change or revoke a s 7 RA, even when the adult is incapable of: (RAA s 8(1))

- Making a contract
- Managing their health care, personal care or legal matters
- The routine management of their financial affairs

The statutory test to determine incapacity for a standard s 7 RA is set out in s 8(2) of the RAA. In determining whether an adult is incapable of making a s 7 RA, all relevant factors are considered. Examples of relevant factors mentioned in the statute include:

- Whether the adult communicates a desire to have a representative make, help make, or stop making decisions
- Whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others
- Whether the adult is aware that making the RA or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult
- Whether the adult has a relationship with the representative that is characterized by trust

The statutory test to determine incapability for non-standard, s 9 RAs, is set out in s 10 of the RAA. An adult is incapable of making a s 9 RA if the adult is "incapable of understanding the nature and consequences of the proposed agreement".

For more information and an explanation of the differences between a s 7 RA and a s 9 RA, refer to section **V. A: Types of Representation Agreements** in this chapter.

5. Advance Directive (AD)

A capable adult may also choose to make an Advance Directive (AD), which is a legally-binding document that provides instructions with respect to giving or refusing consent to health care treatment or procedures. According to s 19.1 of the HCCFA, an adult is presumed to have capacity to make an AD, unless there is evidence that they are incapable of understanding the nature and consequences of the AD.

An adult is incapable of understanding the nature and consequences of an AD, if the adult cannot understand:

- The scope and effect of the health care instructions set out in the AD
- That a TSDM will not be chosen by the health care provider to make decisions on behalf of the adult about the health care described in the AD except in circumstances set out in s 19.8 of the HCCFA

For more information about the requirements and scope of ADs, refer to section **VI: Advance Directives** in this chapter.

> **NOTE**: Health care consent is a complex and rapidly changing area of the law. Care should be taken in assessing capacity to make an RA or AD and assessing the legal validity of these documents.

6. Designated Agencies – Support and Assistance

Another area where the issue of capacity may be raised is when an adult is experiencing abuse, neglect or self-neglect. Under Part 3 of the AGA anyone can make a report to a Designated Agency who will meet with the adult, investigate whether or not the adult is experiencing abuse, neglect or self-neglect, and, if necessary, establish a support and assistance plan to protect the adult.

An adult in need of support and assistance does not necessarily lack mental capacity. In fact, according to s 3(1) of the AGA, an adult is presumed to be capable of making decisions about personal care, health care and financial affairs, regardless of whether the adult is vulnerable to abuse, neglect or self-neglect.

An adult's way of communicating with others is not grounds for determining that an adult is incapable. Instead, the statutory tests of incapacity apply. For applications concerning guardianship, a formal assessment of capacity must be done in accordance with the *Adult Guardianship (Abuse and Neglect) Regulation*, BC Reg 13/2011 [AGR]. According to s 3(4) of the AGR, a capacity assessor must base the decision of incapability on whether the adult understands:

- The services described in the support and assistance plan
- Why the services are being offered to the adult
- The consequences to the adult of not accepting the services

The AGA states that the adult in need of support and assistance must be involved in decisions about how to prevent abuse or neglect. It is also important to remember that an adult with capacity has the legal right to refuse support or assistance. For more information about responding to abuse and neglect, refer to section **VIII: Abuse and Neglect** in this chapter.

C. Advance Planning Documents

An adult who has mental capacity can execute various documents to appoint another person to make financial and health care decisions on their behalf. These documents may come into effect immediately, or only when certain events come to pass (e.g. upon loss of capacity), as follows:

- **Power of Attorney (POA)**: an adult (the 'adult' in legislation) with capacity may choose to appoint another person (called the 'attorney') to act on their behalf, only in matters concerning financial affairs (e.g. property, finance, banking, business, etc).
- **Representation Agreement (RA)**: an adult with the requisite mental capacity may choose to appoint another person (called a 'representative') to act as a substitute decision-maker to act on their behalf for both s 7 and s 9 RAs (For differences between s 7 and s 9 RAs see Section **V. A: Types of Representation Agreements**).
- **Advance Directive (AD)**: an adult with capacity may choose to give or refuse consent to health care or give health care instructions in an AD, which will only come into effect when the adult is incapable and in need of health care.

In BC, various laws define what is required to validly execute each of these documents, the duties and powers held by the appropriate substitute decision-maker(s), and the legal authority or scope of decisions made.

For more information on preparing documents, consult the **Appendix** or organisations such as Nidus Personal Planning Resource Centre and Registry. Contact information may be found in section **II. D: Resource Organizations** of this chapter.

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II. Governing Legislation and Resources

A. List of Acronyms

AD – Advance Directive

AGA - Adult Guardianship Act

AGR - Adult Guardianship (Abuse & Neglect) Regulation

DAR – Designated Agencies Regulation

EPOA – Enduring Power of Attorney

FIA – Financial Institutions Act

HCCFA – Heath Care (Consent) & Care Facility (Admission) Act

HCCR – Health Care Consent Regulation

HPA – Health Professions Act

LA – Limitations Act

LTA – Land Title Act

PAA – Power of Attorney Act

PAR – Power of Attorney Regulations

PGT – Public Guardian and Trustee

PGTA – Public Guardianship and Trustee Act

PLA – Property Law Act

POA – Power of Attorney

PPA – Patients Property Act

PPAR – Patients Property Act Rules

RA – Representation Agreement

RAA – Representation Agreement Act

RAR – Representation Agreement Regulation

RPP – Registered Pension Plan

RRIF – Registered Retirement Income Fund

RRSP – Registered Retirement Savings Plan

SCCR- Supreme Court Civil Rules

SPGR – Statutory Property Guardianship Regulation

TA – Trustee Act

TSDM – Temporary Substitute Decision Maker

WESA – Wills Estates and Succession Act

B. Governing Legislation

Adult Guardianship Act, RSBC 1996, c 6 [AGA].

Adult Guardianship (Abuse and Neglect) Regulation, BC Reg 13/2011 [AGR].

Designated Agencies Regulation, BC Reg 38/2007 [DAR].

Family Law Act, SBC 2011, c 25 [FLA].

Financial Institutions Act, RSBC 1996, c141 [FIA].

Health Care (Consent) and Care Facility (Admission) Act, RSBC 1996, c 181 [HCCFA].

Health Care Consent Regulations, BC Reg 17/2011 [HCCR]

Land Title Act, RSBC 1996, c 250, ss 45, 51–57, 283(2) [LTA].

Limitation Act, SBC 2012, c 13, ss 1, 11, 19–21, 24–26 [LA].

Patients Property Act, RSBC 1996, c 349 [PPA].

Power of Attorney Act, RSBC 1996, c 370 [PAA].

Power of Attorney Regulations, BC Reg 111/2011 [PAR].

Property Law Act, RSBC 1996, c 377, ss 16, 26–7 [PLA].

Public Guardian and Trustee Act, RSBC 1996, c 383 [PGTA].

Representation Agreement Act, RSBC 1996, c 405 [RAA].

Representation Agreement Regulations, BC Reg 162/2011 [RAR].

Statutory Property Guardianship Regulation, BC Reg 152/2018/2014 [SPGR].

Trustee Act, RSBC 1996, c 464 [TA].

Wills, Estates, and Succession Act, SBC 2009, c 13 [WESA].

C. Secondary Sources

A Guide to the Certificate of Incapability Process Under the Patients Property Act, Public Guardian and Trustee of BC, May 1, 2016, online here [1].

A Practical Guide to Elder Abuse and Neglect Law in Canada, Canadian Centre for Elder Law, July 2011, online here [2].

Act on Abuse and Neglect: A Guide to Prevent and Respond, Vancouver Coastal Health, online here [3].

Adult Guardianship Update, Continuing Legal Education Society of British Columbia, 2007.

Decision Tree: Assisting an Adult Who is Abused, Neglected or Self Neglecting, Public Guardian and Trustee of BC, May 2015, online here [4]. See also the accompanying videos.

Elder and Guardianship Mediation Report, Canadian Centre for Elder Law, 2012, online here [5].

Elder Mediation, Continuing Legal Education Society of British Columbia, 2012. Note: there are a number of useful publications by searching “Elder Law” on the CLEBC website.

Enduring Powers of Attorney: Areas for Reform, Western Canada Law Reform Agencies, 2008, online here [6].

How You Can Help: Option for Helping Adults Who Cannot Manage Financial and Legal Matters on Their Own, Public Guardian and Trustee of BC, December 2014, online here [7].

It’s Your Choice: Personal Planning Tools, Public Guardian and Trustee of BC, December 2014, online here [8].

Life Matters Too: Incapacity Planning with Powers of Attorney and Representation Agreements, Continuing Legal Education Society of BC, 2016.

O'Brien's Encyclopaedia of Forms, 11th ed, V., c 34, 1988. This chapter is a good reference for examples of specific clauses one could include in a Power of Attorney document. Copies are available at the Vancouver Public Library.

Protecting Adults from Abuse, Neglect and Self Neglect, Public Guardian and Trustee of BC, December 2014, online here [9].

Protecting Vulnerable Adults: Recent Legislative Reform, Continuing Legal Education Society of British Columbia, 2014.

Public Guardianship & Trustee Handbook, Continuing Legal Education Society of British Columbia, 2015 (Cunningham et al.).

Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, BC Law Institute, October 2011, online here [10].

Review of Representation Agreements and Enduring Powers of Attorney: Undertaken for the Attorney General of the Province of British Columbia, A J McClean, 2002. Online here [11].

Services to Adults Assessment and Investigation Services, Public Guardian and Trustee of BC, March 2015, online here [12].

Wills Precedents: An Annotated Guide, Continuing Legal Education Society of British Columbia, 2019 (Bogardus, Wetzel & Hamilton).

D. Resource Organizations

Seniors First BC (Formerly known as the BC Centre for Elder Advocacy and Support)

Seniors First BC is a provincial organization dedicated to providing legal information on issues related to older adults and the law, particularly issues involving abuse, Powers of Attorney, Representation Agreements, and consumer fraud. Seniors First BC also staffs an Elder Law clinic that provides free legal services to older adults who would not otherwise be able to access justice due to low income or other barriers.

Online	Website [13] Email: info@seniorsfirstbc.ca
Address	150-900 Howe Street Vancouver, BC V6Z 2M4
Phone	Seniors Abuse and Information Line (Confidential) Toll Free: 1-866-437-1940 (604) 437-1940 Fax: (604) 437-1929

Canadian Center for Elder Law (CCEL)

CCEL is a national non-profit organization that conducts legal research, law reform, outreach and public education on the law as it relates to older adults. The CCEL has produced a number of practical tools and guidance for legal professionals, financial service providers, social workers, health care workers, caregivers, advocates, volunteers, and the public.

Online	Website [14] E-mail: bcli@bcli.org
Address	Faculty of Law, University of British Columbia 1822 East Mall Vancouver, BC V6T 1Z1
Phone	(604) 822-0142 Fax: (604) 822-0144

BC Association of Community Response Networks (BC CRNs)

CRNs are located throughout BC. They seek to increase community coordination in response to abuse and neglect, through a focus on community development, education, prevention, and advocacy. They work to establish networks of community and government agencies, and local businesses to facilitate these goals.

Online	Website [15]
Phone	

Vancouver Coastal Health – Re:Act Adult Protection Program (VCH ReAct)

VVancouver Coastal Health is a Designated Agency under the AGA. VCH React provides educational materials to help health care providers recognize and respond to abuse, neglect and self-neglect of vulnerable adults. Each health authority has a similar program. The following contact and phone numbers are provided by the Public Guardian and Trustee website Assessment and Investigations page http:/ / www. trustee. bc. ca/ services/ services-to-adults/ Pages/ assessment-and-investigation-services.aspx

- **Fraser Health:** 1-877-REACT-08 (1-877-732-2808)
- https://www.fraserhealth.ca/health-topics-a-to-z/adult-abuse-and-neglect/getting-help-for-adult-abuse-and-neglect#.W9vJ-GhKiUk
- **Interior Health:** For direct community numbers visit https://www.interiorhealth.ca/FindUs/Pages/default.aspx
- **Northern Health:** Prince George Adult Protection Line 250.565.7414
- **Vancouver Island Health Authority:**
  - South Island: 1.888.533.2273
  - Central Island: 1.877.734.4101
  - North Island: 1.866.928.4988

Nidus Personal Planning Resource Centre and Registry

Nidus provides public legal education on personal planning and related matters, specializing in Representation Agreements. They have made available on their website various factsheets and guides on personal planning matters, as well as self-help forms for creating Representation Agreements. Nidus also operates a centralized registry for personal planning documents, which allows for secure, online storage of planning documents and the option to allow third parties like hospitals and financial institutions to search for your record.

Online	Website [16] E-mail: info@nidus.ca
Address	1440 West 12th Avenue Vancouver BC V6H 1M8
Phone	(604) 408-7414 Toll Free: 1-877-267-5552 Fax: (604) 801-5506

Public Guardian and Trustee of BC

The Public Guardian and Trustee produces publications on various aspects of adult guardianship as noted above. The PGT can conduct investigations where there are concerns of financial abuse, neglect or self-neglect. The PGT acts as a committee, when required, and may agree to act as an attorney. The PGT may also make health care decisions as a Temporary Substitute Decision Maker. The PGT remains bound by statutory law, and is established under the *Public Guardian and Trustee Act*, RSBC 1996, c 383 [PGTA].

Online	Website [17] E-mail: mail@trustee.bc.ca
Address	700 - 808 West Hastings Street Vancouver, BC V6C 3L3
Phone	(604) 660-4444 Fax: (604) 660-0374

E. Designated Agencies

In BC, anyone can make a report to a Designated Agency when there are concerns that an adult is experiencing abuse, neglect or self-neglect, and needs support or assistance to protect themselves. For more information about the statutory role of Designated Agencies and the Public Guardian and Trustee, refer to section **VIII: Adult Abuse and Neglect**, below.

The Designated Agencies for BC are: (see s 61 of the *Adult Guardianship Act*, RSBC 1996, c 6 [AGA], and the *Designated Agencies Regulation*, BC Reg 38/2007 [DAR])

Community Living BC

Online	Website [18]
Phone	(604) 664-0101 Toll Free: 1-877-660-2522

Vancouver Coastal Health Authority

Online	Website [19]
Phone	(604) 736-2033 Toll Free: 1-866-884-0888

Fraser Health Authority

Online	Website [20]
Phone	(604) 587-4600 Toll Free: 1-877-935-5669

Island Health Authority

Online	Website [21]
Phone	(250) 370-8699 Toll Free: 1-877-370-8699

Interior Health Authority

Online	Website [22]
Phone	(250) 469-7070 Toll Free: 1-844-870-4754

Northern Health Authority

Online	Website [23]
Phone	(250) 565-2649 Toll Free: 1-866-565-2999 Adult Protection Line: 250-565-7414 Toll Free: 1-844-465-7414

Providence Health Care Society

Online	Website [24]
Phone	St. Paul’s Hospital: (604) 862-2344 Mount St. Joseph’s Hospital: (604) 874-1141 Holy Family Hospital: (604) 321-2661

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[1] http://www.trustee.bc.ca/reports-and-publications/Documents/A%20Guide%20to%20the%20Certificate%20of%20Incapability%20Process%20under%20the%20Adult%20Guardianship%20Act.pdf
[2] http://www.bcli.org/sites/default/files/Practical_Guide_English_Rev_JULY_2011.pdf
[3] http://www.vch.ca/locations-services/result?res_id=1238
[4] http://www.trustee.bc.ca/Documents/adult-guardianship/Decision%20Tree.pdf
[5] http://www.bcli.org/sites/default/files/EGM_Report_Jan_30_2012.pdf
[6] https://lawreformcommission.sk.ca/EPA_final.pdf
[7] http://www.trustee.bc.ca/documents/adult-guardianship/How%20You%20Can%20Help.pdf
[8] http://www.trustee.bc.ca/documents/STA/It's_Your_Choice-Personal_Planning_Tools.pdf
[9] http://www.trustee.bc.ca/Documents/adult-guardianship/Protecting%20Adults%20from%20Abuse,%20Neglect%20and%20Self%20Neglect.pdf
[10] https://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/guide-wills.pdf
[11] http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/351806/mcclean-report.pdf
[12] http://www.trustee.bc.ca/documents/adult-guardianship/Assessment%20And%20Investigation%20Services.pdf
[13] http://seniorsfirstbc.ca/
[14] http://www.bcli.org/ccel
[15] http://www.bccrns.ca
[16] http://www.nidus.ca
[17] http://www.trustee.bc.ca
[18] http://www.communitylivingbc.ca/
[19] http://vchreact.ca/report.htm
[20] http://www.fraserhealth.ca
[21] http://www.viha.ca/
[22] http://www.interiorhealth.ca/
[23] http://www.northernhealth.ca/
[24] http://www.providencehealthcare.org

III. Overview

Capacity or incapacity relates to the effect of mental disability, illness, or impairment of a person's ability to create or enter into legal relations. Capacity to make a legally binding decision depends on the type of decision at hand. The legal capacity standards for carrying out transactions, entering into relationships, or managing a person's affairs, are set out in different legal sources—some are created by statute and others by court decisions. The various common law capacity standards are discussed in great length in the upcoming BC Law Institute's Report on the Common Law Tests of Incapacity (http:/ / www. bcli. org/ wordpress/ wp-content/ uploads/ 2013/ 09/ 2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL. pdf), which covers capacity to do the following:

- Make a will
- Make an inter vivos gift
- Make a beneficiary designation
- Nominate a committee
- Enter into a contract
- Retain legal counsel
- Marry
- Form the intention to live separate and apart from a spouse
- Enter into an unmarried spousal relationship

The following is an overview of the between incapacity and legal decisions and responsibilities.

A. Guardianship and Committeeship

When an individual is mentally incapable of managing their affairs, it is possible for someone else to be legally enabled to manage the individual's affairs or to make decisions about their personal care. This can be done through a court order (outlined in s 6 of the PPA).

A court may appoint a person or the Public Guardian and Trustee of BC to be a "committee" (pronounced caw-mi-TEE, with emphasis on the end of the word). Consult *Re Matthews*, 2013 BCSC 1045, for an example of where the court had to choose between two people as to who to appoint as committee. See section **VII: Guardianship in BC: Committeeship**.

The Public Guardian and Trustee of BC can also be appointed as "statutory property guardian" to manage that individual's financial affairs (outlined in Part 2.1 of the AGA).

B. Marriage and Guardianship of Children

1. Marriage

A person entering a marriage contract must have the mental capacity to understand the nature of the contract and the duties and responsibilities it creates. Mental disability may be grounds for annulment if, at the time of the marriage, the mentally disabled person did not understand the nature and consequences of marriage (e.g. that a partner can marry only one person, has a financial obligation to that person and marriage can only end by death or divorce).

2. Divorce

To proceed with a divorce, a person must have the capacity to form the intention to "live separate and apart". For more information, refer to **Chapter 3 (Family Law)** of this manual.

3. Children

The new *Family Law Act*, SBC 2011, c 25 [FLA], came into force March 18, 2013. Under s 55 of this act, a child's guardian who is facing permanent mental incapacity may appoint a person to be the child's guardian in addition to the appointing guardian. As per s 55(4), in carrying out their parental responsibilities, a guardian appointed under s 55 must consult with the appointing guardian to the fullest possible extent regarding the care and upbringing of the child. The guardian appointed under s 55 continues as the child's guardian on the death of the appointing guardian unless the appointing guardian revokes to appointment while still capable, or the appointment conditions provide otherwise (s 55(5)).

In addition, s 51(1) of the FLA provides generally that a court may appoint a person as a child's guardian if there is sufficient evidence that it is in the best interests of the child.

C. Capacity to Make a Contract

To enter into a contract, a person must have the mental capacity to understand both the nature of the contract and its effect on their interests. If a contractor is unaware that the contractee has an impairment or illness that impacts capacity, the contract may be enforceable against the contractee and/or the committee. Some cases indicate, however, that even if the contractor had no notice of the contractee's incapacity, the contract may still be set aside as "unfair". If the contractor knows or a reasonable person would have known that the contractee was mentally ill, the contract is voidable.

D. Drafting a Will

Section 36(1) of the *Wills, Estates and Succession Act*, SBC 2009, c13 [WESA] provides that "[a] person who is 16 years of age or older and who is mentally capable of doing so may make a will". However, the capacity necessary to draft a will is not set out in the Act, but has been developed through common law.

To possess testamentary capacity an individual must be of "sound mind, memory and understanding" (*Banks v Goodfellow* (1870), LR 5 QB 549 at 560 (Eng CA)). A testator must be capable of understanding the following at the time the will is created, both at the time of providing instructions and executing the will:

- The nature and effect of making a will
- The extent of the testator's property that may be disposed by a will
- The persons who are to receive the property under the will, and the moral claims of persons (such as family members and others who are close to the testator) who should receive a share of that property

- The way in which the assets are to be distributed under the will

For more information, please refer to the **Making and Executing a Will** section in **Chapter 16 (Wills and Probate)** of this manual.

There is no statutory authority specifically declaring that a person with a developmental disability or cognitive impairment cannot draft a will. However, it is advised that a mentally disabled person have a written doctor's opinion confirming their capacity to draft a will. The appointment of a committee prior to the testator having made the will in question does not in itself demonstrate incapacity to make a will, though there is a much heavier burden on the person making the will to prove testamentary capacity under such circumstances.

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IV. Power of Attorney

A Power of Attorney (POA) is a legally-binding document that allows a capable adult (called the 'adult') to grant the authority to other capable adult(s) (called the 'attorney(s)') to make financial and legal decisions on their behalf. A mentally capable adult does not give away their authority to an attorney. Rather, the effect of a POA is to share the authority with the attorney. POAs can vary in scope, depending on the:

- Specific needs of the adult
- Types of decisions an attorney is permitted to make
- Time period (i.e. ongoing or set for a limited period)
- How many attorneys are appointed
- Need for unanimous decisions or task-specific roles

The adult can make very individualized and specific provisions in a POA. For example, a POA can be very narrow in scope, allowing the attorney(s) to do one specific act (e.g. cashing a pension cheque, transferring property, or paying insurance). Alternatively, the adult can make a POA that is intentionally broad in scope, allowing the attorney(s) to handle all financial decisions on their behalf.

Anyone aiding another to create a POA should ensure that the adult understands and appreciates the nature and consequences of a POA. Also, note that an adult should not be required to have a POA as a condition of receiving any good or service.

The following sections explain: what type of POAs can be made; who is involved in a POA; how a POA can be made, changed, or revoked; the duties and powers of an attorney; and what can be done if an adult is incapable and does not have a valid POA in place.

A. Types of POA (POA)

There are two types of POAs. It is important to find out what type of POA would best suit the adult's needs. The first is governed by Part 1 of the PAA, and is sometimes called a "General POA". The second is governed by Parts 2 and 3 of the PAA, and is sometimes called an "Enduring POA". The key difference between the two is that a POA under Part 1 ends once the adult becomes incapable, while a POA under Parts 2 and 3 continues even when the adult becomes incapable. Questions to ask include:

- What tasks does the adult want the attorney to be able to perform?
- When does the adult want the attorney to begin to act?
- Does the adult want the POA to be used for a limited time only?
- Does the adult want the POA to be in effect immediately or only when they become incapable?
- How will incapacity be decided?
- Does the adult's powers terminate if and when the adult becomes incapable?

The two types of POA are as follows:

1. **General**: General POAs are governed by Part 1 of the PAA, and by common law for agency relationships. They are effective immediately, or as specified on the document, and ongoing until the loss of capacity, revocation or death. The test for capacity for making general POAs can be found in the BCLI's Report on Common Law Test of Capacity [1]. General POAS are rarely used in incapacity planning, as they become no longer in effect when an adult becomes incapable (which is often when a POA is most needed).
2. **Enduring**: Enduring POAs (EPOAs) are governed by Parts 2 and 3 of the PAA. These can be effective immediately, or "springing". (See below). Enduring POAs continue in the event that the adult loses capacity, and only ends upon revocation or death. These are the most common type of POA, they allow the attorney to act while the adult is capable and **continue** when/if the adult becomes incapable.
   - **NOTE**: A "springing" EPOA stays dormant until a future date or event (i.e. the loss of capacity) and ends only upon death. The adult can decide in advance how capacity is to be determined, such as by requiring the agreement of a family member and two doctors. A springing EPOA is not active until the adult loses capacity.

     See *Goodrich v British Columbia (Registrar of Land Titles)*, 2004 BCCA 100. (The BCCA decided that even though the PAA does not explicitly allow for a springing power of attorney, it is nevertheless possible to make one.)

Both general POAs and EPOAs can be **limited** in relation to assets, duration, or specific types of transactions. For example, an adult could draft a POA for the attorney to manage their bank accounts and pay their bills while they are on vacation, but not give authority to the attorney over their real estate and investments. A bank's POA will be limited to transactions at that institutions for the accounts identified.

In most cases, the POA will be effective immediately, once signed and witnessed by the adult and attorney(s), and will continue on an ongoing basis.

NOTE: Unless otherwise specified, all usage of the term "POA" in the subsequent sections of this chapter refers to an Enduring Power of Attorney as governed by Part 2 of the PAA.

B. Who is Involved in a Power of Attorney?

Only a capable adult may make a POA. A POA requires at least one person to act as an attorney. The adult may name multiple or alternate attorneys.

In some situations, the Public Guardian and Trustee (PGT) can be appointed as the attorney, particularly where an adult does not have family or friends who can act on their behalf (PAA s 18). The PGT may also become involved where there is financial abuse, neglect or self-neglect, particularly if there are concerns that an attorney is misusing a POA, or failing to fulfill their legal duties (PAA s35).

Below is a brief description of how an adult, attorney(s) and the PGT are involved in a POA. For more detailed information about the mental capacity of an adult, refer to section **I. B. 1: Mental Capacity – Power of Attorney**, above. For more information about reporting abuse or neglect to the Public Guardian and Trustee, refer to section **VIII: Abuse and Neglect** in this chapter.

1. The Adult

The "adult" is any adult who makes a POA to appoint an attorney to make financial decisions on their behalf. The Adult must be (PAA s10 and 12):

- An individual who is 19 years of age or older
- Mentally capable of making a POA
- Acting voluntarily, or on their own

The adult must have mental capacity at the time that the POA is signed, understanding the nature and implications of a POA. An adult who has mental capacity has the legal right to make decisions, including the legal right to choose whether to:

- Determine the type, scope or purpose of the POA
- Define the roles and authority of the appointed attorney(s)
- Provide instructions to the attorney(s)
- Express wishes, values and beliefs
- Change or revoke a POA

2. Attorney(s)

An attorney is an adult who is capable and willing to carry out the financial tasks and/or make financial decisions on behalf of the adult. An attorney must be: (PAA s 18 and s 19)

- An adult (i. e. at least 19 years of age), the PGT or certain financial institutions
- Mentally capable to carry out the financial tasks
- Able to understand and fulfill their legal duties
- Able and willing to act in accordance with the instructions, wishes, values and beliefs of the adult
- Acting voluntarily/on their own.

Section 18 of the PAA states who may act as an attorney. One or more of the following persons can be named:

- An individual, other than:
  - An individual who provides personal care or health care services to the adult for compensation or,
  - An employee of a facility where the adult resides and where the adult receives personal care or health services.
  - Exception: if the individual is a child, parent or spouse of the adult, in which case they may be named as attorney
- The Public Guardian and Trustee
- A financial institution authorized to carry on trust business under the *Financial Institutions Act*, RSBC 1996, c 141 [FIA].

The "attorney" in a POA does not need to be a lawyer. However, the adult may wish to appoint their lawyer to act as an attorney.

More than one person can act as an attorney. An adult who names more than one attorney may assign each a different area of authority, or all or part of the same area of authority (PAA s 18(4)). The adult might prefer to define distinct roles for each attorney (i.e. appoint one as the attorney for certain transactions, such as personal banking and a second individual as their attorney over different matters, such as property). The POA should be clear about the roles and responsibilities of each attorney and whether or not unanimous consent is necessary in each type of transaction.

According to s 18(5) of the PAA, where an adult appoints multiple attorneys for all or part of the same area of authority, the attorneys must act unanimously in exercising their authority. The exception to this rule is where the adult specifically does the following in the POA:

- Describes circumstances where the attorneys do not have to act unanimously
- Sets out how a conflict between attorneys is to be resolved
- Authorizes an attorney to act only as an alternate and sets out:
  - (i) The circumstances in which the alternate is authorized to act in place of the attorney, for example, if the attorney is unwilling to act, dies or is for any other reason unable to act, and
  - (ii) The limits or conditions if any, on the exercise of authority by the alternate.

Where a POA appoints two or more attorneys to act for an adult, all the attorneys will need to be in agreement regarding decisions made for the adult, **unless otherwise specified in the POA**.

Appointing more than one person has potential advantages and disadvantages. The practice can reduce the potential for an attorney to misuse their power by providing built in scrutiny by a second attorney. However, having multiple attorneys may make the decision-making process complicated and inefficient.

NOTE: As of September 1, 2011, a signature by the attorney(s) on the POA is required to signify acceptance of the role and responsibility. If an attorney is not willing to accept this role, then the attorney should not sign the POA.

3. The Public Guardian and Trustee (PGT)

An adult who does not have relatives or friends who are willing and able to serve as an attorney may ask the PGT to consider acting as an attorney in the event of incapacity. According to s 6(c) and s 23 of the PGTA, the PGT may agree to act as attorney for a fee. If an adult needs to appoint the PGT as attorney, contact the Public Guardian and Trustee.

> **NOTE**:The PGT will only act as a representative for finance – not for health care decisions.

Another circumstance where the PGT may become involved is where an attorney is misusing a POA or otherwise failing to fulfill their legal obligations. Any person may notify the PGT if there is a reason to believe that fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke financial or legal document. Any person may also notify the PGT where an attorney is:

- Incapable of acting as attorney
- Abusing or neglecting the adult
- Failing to follow the instructions in the POA
- Otherwise failing to comply with legal duties of an attorney

For more information about the role of the PGT where there is financial abuse, neglect or self-neglect, refer to section **VIII: Adult Abuse and Neglect** in this chapter.

C. Creating a Power of Attorney

The most important aspect of drafting a POA is to ensure that the document accurately reflects the adult's specific wishes. Questions to ask include:

- What does the adult want to do?
- Does the adult have capacity to make this POA?
- Does the adult understand the nature of this POA?
- Does the adult understand the potential legal impact of this POA?
- Has the adult received suitable independent legal advice?
- What type of authority does the attorney need?
- Does the adult want to limit the attorney's authority?
- When should the POA be in effect (i.e. ongoing or limited)?

- Has the adult created other POAs?

Any adult can draft a POA. However, it is advisable to consult a lawyer or notary prior to finalizing a POA. Independent legal advice will help ensure the POA only grants an attorney the powers and authority that the adult wants to give.

An adult with capacity is free to choose to sign a POA or not. It is important to be aware of situations where a person may be putting undue pressure (including physical, financial or emotional threats, manipulation or coercion) on the adult. For more information, refer to the discussion of undue influence below in section *VIII: Adult Abuse and Neglect in this chapter*. Also refer to the BCLI guide on Undue Influence, which is helpful for understanding the dynamics surrounding undue influence in relation to other legal documents like POAs. The Guide can be found at http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf.

1. Formalities

Formalities are the specific requirements for a POA to be considered valid (i.e. whether the POA has to be signed or witnessed). According to s 16 and s 17 of the PAA, an enduring POA must be:

- In writing
- Signed and dated by the adult in the presence of two witnesses (only one witness is required if that witness is a lawyer who is a member of the Law Society of British Columbia or a notary who is a member in good standing of the Society of Notaries Public of British Columbia)
- Signed and dated by the attorney(s) who agree to act in the presence of two witnesses (unless one witness is a lawyer or a notary)

A new POA will need to be signed by both the adult and the attorney(s). These signatures do not need to be in each other's presence. In other words, the attorney and adult may sign the document separately. However, these signatures must each be witnessed by two capable adults (unless one witness is a lawyer or notary).

As of September 1, 2011, an attorney must sign an EPOA in the presence of two witnesses before assuming their authority (PAA s 17). If a person who is named as an attorney does not sign the POA, then the person is not required or legally able to act as an attorney. If a person named as attorney does not sign, the authority of any other named attorney is not affected (unless the POA states otherwise).

According to s 16(6) of the PAA, the following persons must not act as a witness to the signing of an EPOA:

- A person named as an attorney
- A spouse, child or parent of a person named as an attorney
- An employee or agent of a person named as an attorney, unless the person named as an attorney is a lawyer, a notary, the PGT or a financial institution authorized to carry on trust business under the Financial Institutions Act
- A person who is not at least 19 years of age
- A person who does not understand the type of communication used by the adult (unless interpretive assistance is used)

The PAA provides a standard form that can be used to create a POA. The most up-to-date version of this form is generally also posted on the government of BC website: www.bclaws.ca.

Although there is no legal requirement to register a POA, an EPOA can be registered through the Personal Planning Registry. More information about this service is available on their website: http://www.nidus.ca.

2. Land Transactions

An adult might authorize the attorney(s) to make a transaction involving land (i.e. transfer of title, closure of sale of property, etc) on behalf of the adult. If the authority of an attorney involves land transactions, then the POA must be executed and witnessed in accordance with the *Land Title Act*, RSBC 1996, c 250 [LTA].

A POA that grants authority to the attorney to make land transactions will expire after 3 years of its execution. There is an exception to this where an adult signs an EPOA, or the POA expressly exempts itself from these provisions (LTA s 56).

A POA that confers the power to deal with land transactions and registration of land titles must be witnessed and notarized by a lawyer who is a member of the Law Society of British Columbia or a notary who is a member of the Society of Notaries Public of British Columbia. This is because POAs that involve land transactions require more care and consultation to ensure that the adult is aware of the legal impact of conveying this authority to the attorney(s).

3. Banks, Credit Unions and Other Financial Service Providers

Financial institutions and agents (e.g. banks, credit unions, investment advisors, customer service representatives, estate planners, etc.) may ask individuals to complete their institution's POA. This request normally occurs where an adult wishes to grant the attorney access to bank accounts to pay bills, make transfers, etc. The financial institution may request that the adult and attorney to fill out their institution's Limited POA. For more information about financial institution's POA requirements and joint accounts refer to the Canadian Bankers Association website: https://cba.ca/powers-of-attorney-bank-requirements?l=en-us. If the adult signs an institution's POA, this can sometimes create a conflict between POAs. These important questions should be asked:

- What does the adult want to do?
- What kind of POA should apply?
- Is the financial institution's form suitable?
- Has the adult received suitable independent legal advice?

The adult should not sign a POA form without seeking legal advice. For more information on preparing documents, consult the Appendix or organisations such as Nidus Personal Planning Resource Centre and Registry. Contact information may be found in section **II. D: Resource Organizations** of this chapter.

NOTE: It is good practice to notify financial institutions and agents that a new POA has been made and/or that the previous POA has been revoked. This can be done in writing, with a copy of the new POA.

D. Other Jurisdictions

As of September 1, 2011, Enduring POAs (EPOAs) that have been made in some jurisdictions outside of BC, including other Canadian provinces and territories, or some other countries (e.g. United States, United Kingdom, Australia and New Zealand) may be recognized as legally valid in BC. These new provisions are set out in s 38 of the PAA, and subject to the *Power of Attorney Regulation*, BC Reg 111/2011 [PAR].

Section 4(3) of the PAR currently requires that the EPOA from another jurisdiction be accompanied by a certificate, from a solicitor who is permitted to practice in the jurisdiction where the EPOA was made. The certificate must indicate that the EPOA meets the requirements set out in s 2(a) to (c) of the PAR.

According to s 4(2)(a) to (c) of the PAR, a EPOA from outside BC will be deemed a valid EPOA in BC where it:

- Grants authority to an attorney that comes into effect or continues to have effect while an adult is incapable of making decisions about their own affairs

- Was made by a person who was, at the time of its making, residing elsewhere in Canada or in the United States, the United Kingdom, Australia or New Zealand
- Is in accordance with the laws and continues to have legal effect in the jurisdiction in which it was made

Section 4(4) states that the EPOA is limited by the PAA and the jurisdiction in which the deemed enduring power of attorney was made. Section 4(4) also requires that an attorney and the adult must both be at least 19 years of age before the attorney can exercise any powers or perform any duties.

E. Acting as an Attorney

Below is a description of the various duties and powers held by an attorney. In most POAs, the attorney(s) will immediately be able to act on behalf of the adult. However, in some types of POAs (e.g. a Springing or Limited), the terms of the POA will specify a “triggering event” or date when an attorney has the authority to act on the adult’s behalf. Regardless of when an attorney is permitted to act, the following duties and powers apply.

1. Duties

The primary responsibility of an attorney is to act in accordance with the adult’s instructions, wishes, beliefs and values. The PAA explicitly sets out a number of statutory duties and powers. According to s 19(1) of the PAA, an attorney must:

- Act honestly and in good faith
- Exercise the care, diligence and skill of a reasonably prudent person
- Act within the authority given in the POA
- Keep prescribed records and produce these records for inspection and copying upon request

An attorney must act in the adult’s best interest, taking into account the adult’s current wishes, known beliefs and values and explicit directions in the POA (PAA s 19(2)). Where reasonable, an attorney must give priority to meeting the personal care and health care needs of the adult, foster the independence of the adult, and encourage the adult’s involvement in any decision-making (PAA s 19(3)).

Concerning the adult’s personal property and real property, an attorney must keep the adult’s property separate from their own property (PAA s 19(4)). If the property is jointly owned by the adult and the attorney as joint tenants, or has been substituted for, or derived from, property owned as joint tenants, an attorney must also:

- Only invest the adult’s property in accordance with the Trustee Act, RSBC 1996, c 464 [TA]
- Not dispose of property that is subject to a specific testamentary gift in an adult’s will
- Keep the adult’s personal effects at the disposal of the adult

If an EPOA explicitly says that an attorney will be exempt from these provisions, then the attorney is not legally obligated to fulfill these duties.

2. Powers

An adult may grant general or specific powers to an attorney in a POA. An attorney may also be permitted to exercise statutory powers to act on behalf of the adult. According to s 20 of the PAA, an attorney named has the statutory power to:

- Make a gift or loan, or charitable gift, if the POA permits or certain conditions set out in the PAA are met (see below)
- Receive a gift or loan, if the POA permits
- Retain the services of a qualified person to assist the attorney
- Change or make a beneficiary designation, in limited circumstances (see below)

The scope of an attorney's powers can be limited or expanded in the express wording of a POA. An attorney is **exercising authority improperly** if:

- The attorney acts when the authority of the attorney is suspended or has ended
- Or the EPOA is not in effect, is suspended, terminated or invalid

3. Gifts, Loans and Charitable Donations

An attorney may make a gift or loan, or a charitable gift from the adult's property if the EPOA permits the attorney to do so, or if (PAA s 20):

- The adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependents, and to satisfy other legal obligations
- The adult, when capable, made gifts or loans, or charitable gifts, of that nature; and

the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value (set out in s 3 of the PAR)

According to s 20(2) of the PAA, an attorney may receive a gift or loan, if the EPOA permits.

4. Creating a Will and Designating Beneficiaries

Attorneys are **not allowed to make a will** on behalf of an adult. According to s 21 of the PAA, any will that is made or changed by the attorney on behalf of an adult is not legally valid. Further, if the adult has given instructions prohibiting delivery of the will to the attorney(s), then a person must not provide the will to the attorney(s).

An attorney is also **not allowed to dispose of property** that is designated as a testamentary gift in the adult's will. Section 19(3)(d) of the PAA provides an exception to this only where the disposition is necessary to comply with the attorney's duties. According to s 20(5), an attorney is allowed to change a beneficiary designation, in an instrument other than a will, in very limited circumstances set out in s 20(5)(b) of the PAA, including:

- A change to a beneficiary designation if the court authorizes the change
- The creation of a new beneficiary designation if the designation is made in
    - An instrument that is renewing, replacing or converting a similar instrument made by the capable adult, and the designated beneficiary remains the same
    - A new instrument that is not renewing, replacing or converting a similar instrument made by the capable adult, and the newly designated beneficiary is the adult's estate

5. Deeds

Where there exists a POA, an attorney may execute a deed under the seal of the attorney on behalf of the adult (whether an individual or a corporation). According to s 7 of the PAA, as long as it is within the scope of the attorney's authority, such a deed is binding on the adult and hasnthe same effect as if it were under the seal of the adult.

6. Delegating and Retaining Services

An attorney is not allowed to delegate their authority to another person. According to s 23 of the PAA an attorney must not delegate powers and authorities to others, unless expressly empowered to do so in the POA. An attorney may delegate financial decisions concerning investment matters to a qualified investment specialist (e. g. mutual fund manager) in accordance with the PGTA or the TA, s 15.5.

An attorney is permitted to retain services. According to s 20(4) of the PAA, an attorney may retain the services of a qualified person to assist the attorney in doing anything the adult has authorized.

7. Liability

An attorney who acts in the course of their legal duties is not liable for any loss or damage to the adult's financial affairs, if the attorney complies with the following (PAA s 22):

- The statutory duties of the attorney, as set out in s 19 of the PAA
- Any directions given by the court under s 36(1)(a) of the PAA
- Any other duty that may be imposed by law

To protect innocent persons from liability arising from transactions made after the POA relationship has been terminated, BC's PAA modifies the common law regarding the effects of termination. If the attorney or a third party has acted in good faith, the PAA shifts the loss from the attorney or third parties to the adult.

Section 3 of the PAA protects the attorney from liability for acts done in good faith and in ignorance of the termination of their authority. Section 4 protects third parties who deal in good faith with the attorney, where the third party and attorney are unaware of the termination.

NOTE: Section 57 of the LTA provides that the principal may file the termination of the agency in the Land Title Office. Filing the notice protects the principal from registration of "instruments" (as defined in the LTA) executed by the attorney after the termination of their authority, even though the attorney and a third party may have been ignorant of the termination.

8. Records and Accounts

The adult's account must be kept up to date (PAR s 2). The adult's assets and accounts must also be kept separate from those of the attorney and any third parties (PAA s 19(4)). Per s 2 of the PAR, all assets belonging to the adult held by the attorney, and all books, documents, and account records entrusted to the attorney must be available for production to the capable adult at a reasonable time (usually during annual reviews).

9. Expenses and Remuneration

Payment to an individual (as opposed to the PGT) for service as an attorney under a POA is less common. However, s 24 of the PAA allows for an attorney to be compensated where authorized in an EPOA, provided that the rate or amount is set out in the EPOA. An attorney may also be reimbursed for reasonable expenses properly incurred in acting as the attorney.

F. Changing, Revoking, or Ending a POA

A POA will be suspended or end in the following circumstances (see s 29(2) of the PAA):

- Death of the adult or the attorney
- Bankruptcy of the adult
- Court appointment of a committee
- Revocation by the adult, who is still capable
- Resignation of the attorney(s)
- If the attorney is the adult's spouse and their marriage (or marriage-like relationship) ends
- If the attorney is a corporation and that corporation dissolves
- If the attorney is convicted of a prescribed offence, or an offence where the adult is the victim
- Per s 19.1 of the PPA, a POA is suspended if the PGT becomes the statutory property guardian

Adults who are making a POA should be informed of the procedure for ending (revoking) or changing the POA. Likewise, adults should also know how an attorney may resign. In many situations, adults are unaware of their right to end a POA. As long as an adult has capacity, they can revoke a POA. Details of how this is done appear below.

1. Revocation by an Adult

An adult who has capacity can change, revoke or end a POA at any time. A POA must be revoked in writing. This is called a "Notice of Revocation". Telling someone that the POA is no longer in effect is not enough. Each attorney must be given a signed Notice of Revocation (PAA s 28(2)), and the revocation will not be effective until such notice has been given (PAA s 28(4)).

Although the PAA does not set out how a Notice of Revocation is to be delivered to the attorney(s), it is suggested that the adult deliver it by one of the following methods:

- By registered mail to the person's last known address
- By leaving it:
  - With the person
  - At the person's address
  - With an adult who appears to reside with the person
  - If the person operates a business, at the business, with an employee of the person
  - By transmitting it by fax to the person with the number they provided for notification purposes

An adult should check if their POA lists other requirements or steps related to revoking in addition to the requirements from the legislation.

In addition to informing the attorney(s) in writing of the revocation, a capable adult who wishes to revoke an existing POA should:

- Request that the original POA be returned, if it has been given to someone
- Contact all businesses, institutions, and individuals to whom the existence of the POA was known, and notify them in writing that the POA has been revoked, effective immediately, requesting that they destroy all copies of the document which they possess;
- Register the revocation at the Land Title Office (only applies where the POA deals with land transactions)
- Inform Nidus, if the POA was registered with Nidus

2. Resignation of the Attorney(s)

An attorney can also formally resign at any time. An attorney must give written notice to the adult and any other attorney(s). The resignation of an attorney is effective when written notice is given, or on a later date specified in the notice.

An attorney who loses the capacity to fulfill legal duties should resign. Likewise, if an attorney is unable or unwilling to act on behalf of the adult, according to the adult's instructions, wishes and values, then the attorney should resign.

As of September 1, 2011, s 17(1) of the PAA outlines that an attorney who does not sign a POA is not obligated or authorized to act as an attorney. It is possible to refuse becoming an attorney by simply choosing not to sign the POA. Section 17(4) also states that an attorney who does not sign is not required to provide any notice of any kind but ethically the attorney should let the adult know. If a person does sign the POA, and wishes to resign from acting as attorney, then written notice must be provided to the adult, any other attorneys and, if the adult is incapable, a spouse, near relative or, if known to the attorney, close friend of the adult.

If an adult who has capacity does not want the attorney to act, then the adult can revoke or change the POA. If an Aadult no longer has capacity and others are concerned about the conduct of an attorney, then you may wish to contact the PGT. Refer to section **VIII. B. 2: Responding to Adult Abuse and Neglect—Public Guardian and Trustee**.

3. Duties After Termination

Even after a POA has come to an end, an attorney may not use any information gathered during the course of duties as attorney for personal or private profit. Nor can an attorney solicit customers from the adult's business.

Regarding POAs dealing with Land: a POA which authorizes the attorney to deal in land transactions for the adult will expire automatically after t**hree years from the date of its execution**, unless it is an EPOA or the document expressly exempts itself from that requirement in s 56 of the LTA.

G. No Capacity and no POA

If an individual does not complete a POA while they are capable, and later becomes incapable of managing their financial affairs, the adult may be able to create an Representation Agreement, which has a lower test of capacity. Alternatively, a capable, interested person can apply to the court for committeeship, in order to manage the incapable adult's affairs. If the adult owns land or operates a business, a committeeship will be required.

The PGT may take steps to become committee of estate if:

- There is no valid enduring power of attorney
- The individual is incapable
- There is a need for someone to make financial decisions
- There is no suitable person available and willing to apply to be committee
- There are no other less intrusive options

The PGT charges a fee to provide estate management services in accordance with the *Public Guardian and Trustee Fees Regulation*, BC Reg 312/2000 [PGT Fees Regulation].

H. Note on POAs for LSLAP Students

When a client approaches LSLAP for assistance with creating a POA, the following a series of questions should be asked to ascertain the kind of POA that would best suit the needs of the client without putting the person at risk of being taken advantage of:

1. Is the client (mentally) capable, in the view of the clinician, of granting a POA? The presumption is that all adults are capable. The general test is the ability to understand and appreciate the meaning of what they are trying to do in each particular case. Warning signs of temporary or ongoing incapacity can include the following (bear in mind the list below is not comprehensive and the indicators below do not necessarily indicate incapacity):
   - Sudden confusion, short term memory problems, disorientation
   - Signs of depression
   - Appears worried, distressed, overwhelmed
   - Signs of substance abuse
   - Inability to answer open ended questions
   - Refer to BCLI Guide on Undue Influence for a full checklist at: http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf
2. Why does the client want a POA?
3. For what purpose does the client require someone else to manage their financial affairs?
4. Does the client need to authorize broad powers, or can powers be narrowly defined and still meet the needs of the client?
5. What tasks does the attorney need to be authorized to do to meet the client's needs?
6. When does the POA need to start?
7. Is it appropriate for the POA to have a built-in expiration date?
8. Has the client thought about who they wish to appoint as attorney(s)?

It may be helpful for students to provide information or guidance to clients on who the client should appoint as attorney, to reduce the risk of financial abuse, based on the following considerations:

- Appoint someone who will respect the client's unique values and interests
- Appoint someone who is familiar with the duties and limitations of the role of attorney, or who will take the time and initiative to become educated about them
- Consider who is best placed to carry out the responsibility of handling the client's financial matters: Does the person live nearby? Is the person easy to communicate with? Does the person like to deal with finance and money, or have some training or education in this regard?
- A spouse is not always the best choice – a partner could be in a situation of crisis when the older adult becomes incapable and the client should consider whether it is best for the partner to take on the additional responsibility at such a difficult time.
- Appointing more than one attorney could create practical problems. For example, appointing all of the client's children can create a situation of conflict where it may be challenging for the adult children to come to an agreement. Having two attorneys under a joint power of attorney can also make it harder to make decisions quickly as consultation and discussion will be required to make any decision. Nonethelesss, multiple attorneys can be appropriate in some contexts.

Students should confer with their Supervising Lawyer if there is any doubt that the client understands and appreciates the POA. Also note that an adult should not be required to have a POA as a condition of receiving any good or services, such as residence in an assisted living or community care facility.

1. Misuse and Abuse of a POA

The misuse or abuse of a POA is a criminal act and can be prosecuted under s 331 (theft by person holding Power of Attorney), s 332 (misappropriation of money held under direction), s 215 (failure to provide necessaries of life), or s 380 (fraud) of the *Criminal Code*.

If a student or client has concerns that a person may be abused or neglected, or is at risk of being abused or neglected, then in most instances the student should discuss these concerns with the client and provide them with access to appropriate support services (e.g., the Seniors Abuse & Information Line at: 604-437-1940 or 1-866-437-1940).

If a crime is suspected, consult with the Supervising Lawyer about how and whether to make a report to the appropriate authority. Students need to remember their legal responsibility to maintain professional conduct and client confidentiality. If there is concern that the adult is not capable, it may also be appropriate to refer the concern to the PGT. For example, s 17 of the PGTA allows the PGT to investigate potential abuse of POA relationships. Similar authority for the PGT to investigate abuse and neglect are provided by s 34 to 36 of the PAA.

Power of Attorney abuse is a constant concern and unfortunately a frequent occurrence. The abuse may manifest in pressure to grant a POA, or misuse of funds or property under a POA. Try to meet with the client alone, or at least without the potential attorney in the room, to be certain that the client truly wishes to create a POA and grant powers to the potential attorney in question. Make sure to inquire about the relationship between the client and the proposed attorney, and be on alert for possible undue influence or fraud. Refer to BCLI Guide on Undue Influence, above, for a full checklist of considerations and what to watch for. For more information about abuse and neglect of older adults, you can also consult the following resources:

- BC Centre for Elder Advocacy and Support: www.bcceas.ca [2]
- Canadian Centre for Elder Law: www.bcli.org/ccel [3]
- Public Guardian & Trustee: www.trustee.bc.ca [4]
- Vancouver Coastal Health: Resource: www.vchreact.ca [5]
- Advocacy Centre for the Elderly website: www.acelaw.ca [6]

NOTE: It is possible, and even common, for an adult to appoint an attorney under the PAA (to make financial decisions) and appoint a different person as a representative, under the RAA (to make health care decisions). This commonly happens where a person who knows the personal wishes and values of the adult is adept at handling health care decisions, and a more financially astute person is chosen as attorney.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 21, 2019.

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V. Representation Agreements

Representation Agreements (RAs) are governed by the Representation Agreement Act (RAA). A primary goal of the RAA is to give legal recognition to substitute decision-makers, and status for informal helpers that are family and friends. Another important change has been a shift of focus toward support for capacity rather than assessments of incapacity, as the latter can take away an individual's personal autonomy.

RAs are an instrument by which an individual can proactively plan for the possibility of future incapacity, by appointing another person to make decisions on their behalf. RAs are the primary method by which adults in BC can plan for future health care substitute decision making. An RA can also be used to give legal authority to a person's **supportive decision-maker—**a person appointed under the RA to help the adult make their decisions, not necessarily to make their decisions for them. As the capacity test for creating an RA is lower than the test for creating a POA, a person with limited cognitive capacity may have the capacity to create an RA.

In the BC health care system, health care providers must speak directly to an individual to inform them about health care choices and consequences. An adult with capacity has the right to give or refuse consent for treatments. Due to illness, accident or disability, an individual needing health care may not be capable of understanding advice, making informed decisions, or providing meaningful consent to proposed treatment. If the adult has previously enacted an RA, then the representative(s) will be able to give or refuse consent on behalf of the capable adult, acting as appointed substitute decision-maker(s) to make decisions according to the incapable adult's personal wishes, values and beliefs.

An individual making an RA may be in a vulnerable position due to family dynamics, cognitive challenges, discriminatory beliefs about people with disabilities, or other factors. Vulnerability may create more opportunities or potential for abuse. Anyone helping another create an RA should be aware of indicators of abuse and follow guidelines outlined in this chapter that will help them to notice abuse. If necessary, the adult should be met with alone to ensure that the adult truly wishes to create an RA and give powers to the potential representative.

Also note that, according to s 3.1 of the amended RAA, an adult must not be required to have an RA as a condition of receiving any good or service.

RAs may come into effect immediately or upon future incapability. The vast majority of registered RAs come into effect immediately. The first duty of a representative is to consult and abide by the personal wishes, values and beliefs of the adult, at all times.

A. Types of Representation Agreements

Under the current RAA, there are two levels of RAs that an adult can choose to create, named for the section which governs them: s 7 RAs and s 9 RAs. Both types of RAs allow the adult to select any or all areas of decision-making created by the statutory section in which they will authorize the representative to act on their behalf.

Some RAs allow a routine financial substitute decision making. This includes all s 7 RAs, as well as some s 9 RAs executed prior to September 1, 2011 which authorize a representative to make financial support arrangements as described in s 9(1)(f) of the repealed provisions of the RAA (see s 44.2 of the current RAA). After September 1, 2011, a s 9 RA may only be made concerning personal and health care decisions.

1. Section 7 Representation Agreements

Section 7 RAs designate a substitute or supportive decision-maker to make personal care decisions, **major and minor health care decisions** for the adult, and routine legal and financial decisions.

These health care decisions cover the majority of health and personal care related choices that an individual can make over the course of their life. The list of decisions includes decisions regarding:

- Personal care, including where and with whom the adult is to reside
- Consent to treatment
- Medication
- Minor or major surgery
- Diagnostics and tests
- Palliative care
- Living arrangements of the adult

A s 7 RA may also allow the representative to take care of routine financial affairs of the adult. “Routine management of financial affairs” is defined in the RA Act Regulation s 2(1) as:

> (a) Paying the adult's bills;
>
> (b) Receiving the adult's pension, income and other money;
>
> (c) Depositing the adult's pension, income and other money in the adult's accounts;
>
> (d) Opening accounts in the adult's name at financial institutions;
>
> (e) Withdrawing money from, transferring money between or closing the adult's accounts;
>
> (f) Receiving and confirming statements of account, passbooks or notices from a financial institution for the purpose of reconciling the adult's accounts;
>
> (g) Signing, endorsing, stopping payment on, negotiating, cashing or otherwise dealing with cheques, bank drafts and other negotiable instruments on the adult's behalf;
>
> (h) Renewing or refinancing, on the adult's behalf, with the same or another lender, a loan, including a mortgage, if
>
> > (i) The principal does not exceed the amount outstanding on the loan at the time of the renewal or refinancing, and
> >
> > (ii) In the case of a mortgage, no new registration is made in the land title office respecting the renewal or refinancing;
>
> (i) Making payment on the adult's behalf on a loan, including a mortgage, that
>
> > (i) Exists at the time the representation agreement comes into effect, or
> >
> > (ii) Is a renewal or refinancing under paragraph (h) of a loan referred to in that paragraph;

(j) Taking steps under the Land Tax Deferment Act, RSBC 1996, c 249 for deferral of property taxes on the adult's home;

(k) Taking steps to obtain benefits or entitlements for the adult, including financial benefits or entitlements;

(l) Purchasing, renewing or cancelling household, motor vehicle or other insurance on the adult's behalf, other than purchasing a new life insurance policy on the adult's life;

(m) Purchasing goods and services for the adult that are consistent with the adult's means and lifestyle;

(n) Obtaining accommodation for the adult other than by the purchase of real property;

(o) Selling any of the adult's personal or household effects, including a motor vehicle;

(p) Establishing an RRSP for the adult;

(q) Making contributions to the adult's RRSP and RPP;

(r) Converting the adult's RRSP to a RRIF or annuity and creating a beneficiary designation in respect of the RRIF or annuity that is consistent with the beneficiary designation made by the adult in respect of that RRSP;

(s) Making, in the manner provided in the Trustee Act, any investments that a trustee is authorized to make under that Act;

(t) Disposing of the adult's investments;

(u) Exercising any voting rights, share options or other rights or options relating to shares held by the adult;

(v) Making donations on the adult's behalf to registered charities, but only if

(i) This is consistent with the adult's financial means at the time of the donation and with the adult's past practices, and

(ii) The total amount donated in any year does not exceed 3% of the adult's taxable income for that year;

(w) In relation to income tax,

(i) Completing and submitting the adult's returns,

(ii) Dealing, on the adult's behalf, with assessments, reassessments, additional assessments and all related matters, and

(iii) Subject to the *Income Tax Act*, 1996 RSBC, c 215 and the *Income Tax Act (Canada)*, 1985 RSC, c 1 signing, on the adult's behalf, all documents, including consents, concerning anything referred to in subparagraphs (i) and (ii);

(x) Safekeeping the adult's documents and property;

(y) Leasing a safety deposit box for the adult, entering the adult's safety deposit box, removing its contents and surrendering the box;

(z) Redirecting the adult's mail;

(aa) Doing anything that is:

(i) consequential or incidental to performing an activity described in paragraphs (a) to (aa), and

(ii) necessary or advisable to protect the interests and enforce the rights of the adult in relation to any matter arising out of the performance of that activity.

For greater clarity, the Regulations state that the routine management of the adult’s financial affairs do **NOT** include the following (s 2(2) RAR):

(a) Using or renewing the adult's credit card or line of credit or obtaining a credit card or line of credit for the adult;

(b) Subject to subsection (1) (h), instituting on the adult's behalf a new loan, including a mortgage;

(c) Purchasing or disposing of real property on the adult's behalf;

(d) On the adult's behalf, guaranteeing a loan, posting security or indemnifying a third party;

(e) Lending the adult's personal property or, subject to subsection (1) (v), disposing of it by gift;

(f) On the adult's behalf, revoking or amending a beneficiary designation or, subject to subsection (1) (r), creating a new beneficiary designation; and

(g) Acting, on the adult's behalf, as director or officer of a company.

The creation of a s 7 RA does not require the services of a lawyer.

A s 7 RA does not permit a representative to make health care and personal decisions that involve decisions to refuse health care necessary to preserve life, or to physically restrain, move or manage the adult against the adult's objections.

If there is a conflict between an enduring POA and a s 7 RA which includes routine management of financial affairs, the enduring POA will take priority.

2. Section 9 Representation Agreements

Section 9 RAs designate a substitute decision-maker for significant and sometimes very personal or more controversial health or personal care decisions. Under this section, representatives can do anything that the representative considers necessary in relation to the personal care or the health care of the adult, including:

- Where the adult is to live and with whom, including whether the adult should live in a care facility
- Whether the adult should work and, if so, the type of work, the employer, and any related matters
- Whether the adult should participate in any educational, social, vocational or other activity
- Whether the adult should have contact or associate with another person
- Whether the adult should apply for any licence, permit, approval or other authorization required by law for the performance of an activity
- Day-to-day decisions on behalf of the adult, including decisions about the diet or dress of the adult
- Giving or refusing consent to health care for the adult, including giving or refusing consent in the circumstances specified in the RA to specific kinds of health care, even where the adult refuses to give consent at the time the health care is provided
- Physically restraining, moving and managing the adult and authorizing another person to do these things, if necessary to provide personal care or health care to the adult

A representative under s 9 RA must not do the following, unless expressly provided for in the RA:

- Give or refuse treatment in accordance with s 34(2)(f) of the HCCFA
- Make arrangements for the temporary care and education of the adult's minor children, or any other person who is cared for or supported by the adult
- Interfere with the adult's religious practices

Section 34(2)(f) of the HCCFA pertains to refusing substitute consent to health care necessary to preserve life (HCCFA s 18). In a s 9 RA, if a representative is provided the power to give or refuse consent to health care for the adult, then the representative may give or refuse consent to health care necessary to preserve life (RAA s 9(3)). Some other health decisions are also excluded from potential powers, e.g. "sterilization for non-therapeutic purposes" (RAA s 11(2)).

The creation of a s 9 RA no longer requires the services of a lawyer. However, careful attention should be paid to the requirements and powers given under s 7 and s 9 RAs to determine which one best suits the needs of the adult.

Prior to September 2011, a s 9 RA could include broad financial powers, equivalent to those given in a POA. The new PAA says this broad authority in an RA is now treated as if it were an enduring POA, and the representative must follow the requirements under the PAA to use these powers (s 44. 2 Transitional Provision of the PAA).

3. Note on Medical Assistance in Dying

The Criminal Code of Canada was amended on June 17th, 2016, to permit the Medical Assistance in Dying (MAiD) under certain conditions. This means that a medical or nurse practitioner may, at the person's request, administer a substance to cause their death, or prescribe a substance so that the person can self-administer a substance that causes their death.

Consent given through substitute decision makers, such as representatives under the RAA, and Advanced Directives are **NOT** sufficient for medical practitioners to provide MAiD. MAiD can only be provided to patients who are able to give consent as of July 15th, 2016.

This is because the College of Physicians and Surgeons of British Columbia's "Professional Standards and Guidelines" regarding MAiD clearly prohibit consent given through ADs and RAs. The Professional Standards and Guidelines have weight in law pursuant to section 5(2) of the Medical Practitioners Regulation under the Health Professions Act.

For more information on the Standards and Guidelines of the College of Physicians, please see their document on MAiD at: https://www.cpsbc.ca/files/pdf/PSG-Medical-Assistance-in-Dying.pdf

B. Who Can Be a Representative?

Section 5(1)(a) of the RAA specifies that an individual who is 19 years of age or older can be appointed as representative unless that person is:

- providing personal care or health care services to the adult for compensation, unless the caregiver is a child, parent, or spouse of the adult, or;
- working as an employee of a facility in which the adult resides and through which the adult receives personal care or health care services.

The Public Guardian and Trustee can also be named as a representative.

According to s 5(1)(c) of the RAA, a credit union or trust company can only have authority to make (limited) financial decisions listed in a s 7 RA. A credit union or trust company cannot make decisions regarding health care or personal care.

Under s 5(2) of the RAA, an adult can also name more than one Representative either:

a) over different areas of authority; and/or

b) over the same area of authority, in which case, the representatives must be unanimous in exercising their authority.

RAA s 5(4) requires that all representatives for RAs made under s 7 complete a certificate in the prescribed form.

C. Acting as a Representative

The law defines several duties that representatives owe to the adult. There are several statutory parameters with respect to what a representative must do (e.g. consult with the adult) and what a representative must not do (e.g. make a will). Below is an outline of the legal "do's and don'ts" that a representative must follow.

1. Duties

Under s 16(1) o the RAA, a representative must:

- Act honestly and in good faith
- Exercise the care, diligence and skill of a reasonably prudent person
- Act within the authority given in the RA

When making decisions with the adult or on behalf of the adult, the representative must consult with the adult to determine their current wishes, and comply with the wishes if reasonable (RAA s 16(2)).

If the current wishes of the adult cannot be determined, then the representative needs to comply with the instructions or wishes the adult expressed while capable (RAA s 16(3)). A representative cannot make decisions based on their own opinion, but must represent the adult's own wishes to health care providers and others. In other words, a representative must "stand in the shoes" of the adult and base health care decisions on what the adult would want.

If the adult's instructions or wishes are not known, the representative must act on the basis of the adult's known beliefs and values, or in the adult's best interests, if their beliefs and values are not known (RAA s 16(4)).

Upon application by a representative, the court may exempt the representative from the duty to comply with the instructions or wishes the adult expressed while capable (RAA s16(5)).

Adults should communicate instructions and wishes to the named representative(s). This should be done in writing (including by e-mail or recorded transmission), but can also be done orally, for as long as the adult has capacity. It is best that the representative(s) know exactly what the adult would want.

2. Delegation of Authority

A representative is not permitted to delegate authority to another person (RAA s 16(6)). The exception to this is that a representative who has been appointed to make financial investments on behalf of an adult may delegate authority to qualified investment specialist, including a mutual fund manager (RAA s 16(6.1)). A representative may also retain the services of a qualified person to assist in carrying out the adult's instructions or wishes.

3. Accounts and Records

A representative must also keep accounts and records concerning the exercise of authority (RAA s 16(8)). These accounts and records must be produced upon request of the adult, the appointed monitor, or the PGT. A representative who has been appointed to make financial decisions must keep the adult's assets separate from their own (RAA s 16(9)). An exception to this exists where the assets are owned by the adult and the representative as joint tenants or have been substituted for, or derived from, assets owned by the adult and the representative(s) as joint tenants.

4. Access to Information

A representative may request information and records respecting the adult, if the requested information or records relate to the incapacity of the adult or an area of authority granted under the RA (RAA s 18).

A representative also has a duty to keep information confidential. A representative must not disclose information or records, except where it is necessary to perform the duties owed to the adult, for an investigation by the PGT, or to make an application to or comply with an order of the court (RAA s 22).

5. Creating a Will

A representative must not make or change a will for the adult for whom the representative is acting, and any change to a will that is made for an adult by their representative has no force or effect (RAA s 19.01).

6. Remuneration and Expenses

A representative (or an alternative representative or monitor) is not entitled to be paid for acting on behalf of the adult, unless the RA expressly sets out and authorizes the amount or rate of remuneration, or upon application by a representative, the court authorizes the remuneration (RAA s 26(1)). In addition, an RA cannot authorize a representative to be paid for making any decision under Part 2 of the HCCFA (RAA s 26(1.1)).

A representative, alternative representative, or monitor is entitled to reimbursement for reasonable expenses incurred in the course of performing the duties or exercising the powers. Accounts and records of the reasonable expenses paid must be kept.

D. Monitors

The role of the monitor is to ensure that the representative appointed under an RA is carrying out their duties. The monitor acts as an extra safeguard and support to ensure that the RA is working for the adult

1. Appointment and Resignation

An adult may appoint a monitor to oversee their chosen representative who is acting under a s 7 or s 9 RA (RAA s 12(3)). The monitor can be appointed to oversee personal, health care and financial decisions.

If an adult has a s 7 RA which authorizes their representative to make routine financial decisions, the adult MUST appoint a monitor to oversee their chosen representative unless:

a) The representative is the adult's spouse, the PGT, a trust company or a credit union, or

b) The adult has appointed two representatives who must act unanimously (RAA s 12(1)).

Failure to comply with this requirement will make the provision of the RA authorizing the representative to make routine financial decisions invalid (RAA s 12(2)).

A monitor must be 19 years or older and must be willing and able to perform the duties and to exercise the powers of a monitor (RAA s 12(4)). An individual named in a representation agreement as a monitor must complete a Monitor's Certificate (RAA s 12(5)).

A monitor may resign by giving written notice to the adult, each representative and any alternate representatives. The resignation will be effective upon giving notice or at a later date specified in the written notice (RAA s 12(6)). See s 12 of the RAA for general provisions regarding the appointment and resignation of a monitor.

2. Duties and Powers

The monitor's duties and powers are outlined in s 20 of the RAA. The monitor must:

- Make reasonable efforts to ensure that the representative is fulfilling their duties (these duties are set out in s 16 of the RAA)
- Act honestly and in good faith and use the care, attention and skill of a responsible person

However, a monitor cannot make decisions on behalf of the adult.

If the monitor is concerned that the representative is not fulfilling their duties, the monitor must raise their concern with the representative(s) and the adult and try to solve the problem through discussion and communication. The monitor may require the representative to report to them or produce accounts (RAA s 20(4)). The monitor has a right to visit and speak with the adult at any reasonable time (RAA s 20(2)) and any person with custody or control of the adult is prohibited from hindering the monitor's access to the adult (RAA s 20(3)). If, after checking and discussion, the monitor believes that the representative is not following their duties or is abusing the adult in any way, the monitor is legally required to contact the PGT to make a complaint (RAA s 20(5)).

3. Payment and Expenses

The monitor can be reimbursed for expenses incurred in carrying out their duties (RAA s 26(2)) but can only be paid a fee if provided for in the RA and authorized by the BC Supreme Court (RAA s 26(1)). Alternatively, if the PGT appoints a replacement monitor, the PGT may authorize payment of a fee (RAA s 21(3)).

4. Replacement Monitor

The PGT may appoint a replacement monitor at the request of the representative or other interested person if the initial monitor is unsuitable, no longer able to act or has ceased acting and the adult is no longer capable of making a new RA (RAA s 21(1)).

E. Creating a Representation Agreement

The adult who executes the Representation Agreement (RA) must have mental capacity. For guidance on mental capacity, refer to section **I. B. 4: Mental Capacity—Representation Agreement** in this chapter.

The RA must also be in writing, signed and witnessed (RAA s 13). The adult and each of the representative(s) must sign the RA (RAA s 13(2)). Two adults must witness the signatures. However, only one witness is necessary if that witness is a lawyer and member in good standing with the Law Society of BC or is a member in good standing of the Society of Notaries Public.

Witnesses cannot be (RAA s 13(5)):

- One of the representatives
- An alternate representative
- A spouse, child, or parent of anyone named in the RA as a representative or alternate representative
- An employee or agent of a representative or alternate representative
- Anyone under 19 years of age
- Anyone who does not understand the type of communication used by the adult who wishes to be represented

Each representative and each witness for a s 7 RA must also complete a certificate in the prescribed form (RAA s 13(1.1) and s 13(6)). Please consult Nidus Personal Planning Resource Centre for more information about prescribed forms.

An RA becomes effective on the day it is executed, unless the RA specifies that it is to become effective at some later time based upon a triggering event (e.g. loss of capacity). According to s 15 of the RAA, the RA must specify how a triggering event is to be confirmed and by whom (e.g. loss of capacity confirmed by two medical professionals).

For more information on preparing documents, consult organisations such as Nidus Personal Planning Resource Centre and Registry. Contact information may be found in section **II. D: Resource Organizations** of this chapter.

Although there is no legal requirement to register an RA, registration may be done through the Nidus e-Registry. When a person registers, they can decide which organizations can access their record. For more information contact Nidus Personal Planning Resource Centre.

F. Changing, Revoking or Ending a Representation Agreement

An RA can be changed or revoked by the adult at any time (as long as the adult has mental capacity) (RAA s 27(1)). The adult must provide written notice to the representative(s), alternative representative(s) and the monitor. The change or revocation is effective either when written notice is given to each of these persons, or on a later date specified in the written notice (RAA s 27(3.1))

An RA ends where:

• The adult who made the agreement revokes the RA • The adult who made the agreement or the representative dies • The court issues an order that cancels the RA • The representative becomes incapable or resigns • As provided for under s 19 of the PPA

Where the adult who made the agreement and the representatives are spouses, then an RA will normally end when the marriage or marriage-like relationship ends. However, if the RA explicitly says that the RA will continue to be in effect after the end of the marriage or marriage-like relationship, then the RA will continue.

G. Other Jurisdictions

As of September 1, 2011, RAs from other jurisdictions may be accepted in BC. Subject to any further limitations or conditions set out in the regulations, the criteria for accepting an extra-jurisdictional RA is that it must (RAA s 41):

- Perform the function of an RA
- Be made in a jurisdiction outside BC
- Comply with any prescribed requirements.

The certificate in the prescribed form must be completed by an extra-jurisdictional solicitor. Please consult Nidus Personal Planning Resource Centre for more information about prescribed forms.

NOTE: These recognition rules only apply to s 9 RAs for personal and health care decisions. See s 9 of the *Representation Agreement Regulations*.

H. No Capacity and No RA

Where there is no representative previously appointed and an adult no longer has capacity, various provincial laws apply. The statutory framework of the HCCFA allows for the appointment of a temporary substitute decision-maker (TSDM).

1. Temporary Substitute Decision-makers (TSDM)

In BC, a health care provider is legally required to get consent prior to treating a patient.

- A capable adult can give or refuse consent to health care treatment
- Consent to health care may be expressed orally or in writing or be inferred from conduct (HCCFA s 9(1)). Where a patient is incapable (i.e. due to illness, loss of consciousness or injury), health care providers are required to get consent from a substitute decision-maker. However, there is an exception when urgent or emergency health care is required (HCCFA s 12)
- If the patient has a Representation Agreement (RA) in place, then the instructions for consent will need to be obtained from the representative (HCCFA s 19)
- If the patient has an Advance Directive (AD) in place, then consent may be given in the AD (HCCFA s 19.7)
- If no representative and no committee are in place, then the health care provider will need to find a temporary, substitute decision-maker (TSDM) to give or refuse consent (HCCFA s 19.8)

The HCCFA outlines the specific procedures that health care providers must follow to obtain legally valid consent. Section 16(1) of the HCCFA sets out the “default list,” which health care providers must follow (in hierarchical order) to determine the appropriate person to act as a TSDM.

To obtain substitute consent to provide major or minor health care to an adult, a health care provider must choose the first, in listed order, of the following who is available and qualifies under s 16 of the HCCFA:

- The adult's spouse or partner
- The adult's child who is over 19
- The adult's parent
- The adult's sibling
- The adult’s grandparent
- The adult’s grandchild
- Other relatives by birth or adoption (but not in-laws or step-children)
- Close friend
- Persons immediately related by marriage (including in-laws and step-children)

To qualify to give, refuse or revoke substitute consent to health care for an adult, a person must under s 16(2) of the HCCFA:

- Be at least 19 years of age
- Have been in contact with the adult during the preceding 12 months
- Have no disputes with the adult
- Be capable of giving, refusing or revoking substitute consent
- Be willing to comply with the duties in section 19

If no one listed in subsection (1) is available or qualifies under subsection (2), or if there is a dispute about who is to be chosen, the health care provider must choose a person authorized by the Public Guardian and Trustee (which can include a person employed in the Office of the Public Guardian and Trustee).

The TSDM must act in accordance with the adult patient’s wishes, values and beliefs, when the patient is unable to provide their own consent, and does not have an appointed committee or a representative.

2. Admission to Care Facilities

Part 3 of the HCCFA will come into force on November 4, 2019. This part describes consent requirements for admission of adults into care facilities. If an adult is incapable of providing consent for admission into a care facility, a manager of the facility may admit an adult to the facility if consent is provided by a committee of person. If an adult does not have a committee of person, a substitute will be chosen from the following list, in this order, to give or refuse consent:

- The adult's representative, if they have authority to give consent to admission
- The adult's spouse
- The adult's child
- The adult's parent
- The adult's sibling
- The adult's grandparent
- Anybody related by birth
- A close friend
- A person immediately related to the family by marriage

If no person meets these requirements, or if there is a dispute over who is chosen, the manager of the facility must notify the PGT. The PGT can authorize a person to give or refuse consent, including one of their staff.

In providing consent, the substitute decision maker must consider:

- The adult's current wishes
- The adults previously expressed wishes and known beliefs and values
- Whether the adult would benefit from admission
- What other options may be available and appropriate or less restrictive to support the adult's care

I. Note on RAs for LSLAP Students

When a client approaches LSLAP for assistance with creating an RA, students should ask the following questions in order to ascertain the kind of RA that the client needs and whether LSLAP can assist them:

1. Is the client capable of creating an RA? The presumption is that all adults are capable. The test for capacity depends on whether it is a s 7 or s 9 agreement at issue.
2. Why does the client want to create an RA?
3. Who is the client considering to be their representative?
4. What is the relationship between the client and their chosen representative?
5. Are there signs of abuse, neglect or self-neglect? Does the adult have access to community resources? Is there a need to involve a Designated Agency?
6. Which specific authorities would the client like their representative to have?
7. Have they spoken to their chosen representative to see if they are willing to serve?
8. What is the status of the client's will? Explain that wills do not provide direction or authority if testators become incapable, and POAs/RAs do not function like wills.
9. Would the client like to appoint a substitute or supportive decision-maker?

Students should refer to their Supervising Lawyer if there is any doubt that the client understands and appreciates the RA. Also note that, according to s 3.1 of the RAA, an adult must not be required to have an RA as a condition of receiving any good or service.

If there are concerns that a person may be abused or neglected, or at risk of being abused or neglected, the student should discuss these concerns with the client and provide information and access to appropriate support services (e.g., Seniors Abuse & Information Line at: 604-437-1940 or 1-866-437-1940).

Students also need to remember their legal responsibility to maintain professional conduct and client confidentiality. If abuse or neglect is suspected, consult with the Supervising Lawyer about how to make a report to the appropriate authority. Refer to sections **II. D: Resource Organizations** and **VIII: Adult Abuse and Neglect** in this chapter.

J. The Bentley (Litigation guardian) v. Maplewood Seniors Care Society Case

An important case for both Representation Agreements and Advance Directives is *Bentley (Litigation guardian) v. Maplewood Seniors Care Society*, 2014 BCSC 165. The case highlights issues of consent, the ability of an adult to change their consent from written instructions, and the meaning of health care verses personal care. A discussion of the case is available by case brief through CLE online: http://canliiconnects.org/en/summaries/33208.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 21, 2019.

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VI. Advance Directives

An Advance Directive (AD) is a written document made by a capable adult that gives or refuses consent to health care, in the event that they become incapable of giving health care instructions. The legal provisions for AD's are set out in Part 2.1 of the HCCFA.

NOTE: As of September 1, 2011, a valid AD executed in accordance with the requirements set out in the HCCFA is legally binding upon health care providers and substitute decision-makers. Prior to this date, an AD was useful in that it expressed the wishes of the adult, but it was not legally binding.

A. Significance of an Advance Directive

The law provides detailed guidelines for how a health care provider is to respond when an AD is in place. The new legislation recognizes a written AD which, when made in accordance with the HCCFA, provides a valid consent on the basis of which health care provider can provide treatment, without involving any substitute decision-maker.

In order to be valid, the new AD must be executed in accordance with the legislation and contain two "informed consumer" acknowledgements in writing to the effect that:

1. The refusal of treatment is binding; and
2. There is no substitute decision-maker.

(See below regarding circumstances where a substitute decision-maker, such as a committee or representative, does exist.)

According to s 19.7 of the HCCFA, health care providers are to rely on the instructions given in a valid AD when:

- The health care provider is of the opinion that an adult needs care
- The adult is incapable of giving or refusing consent to the health care

- The health care provider does not know of any personal guardian or representative who has authority to make decisions for the adult in respect of the proposed health care
- The health care provider is aware that the adult has a valid, binding AD that is relevant to the proposed health care

The health care provider is to make a reasonable effort in the circumstances to determine whether the adult has an AD, representative or guardian. If the adult has both an RA and an AD, then the health care provider must seek consent from the representative. According to s 19.3 of the HCCFA, instructions in the AD will be treated as wishes expressed while capable, which are binding on a representative. However, the health care professional can act on the instructions in an AD without the consent of a representative if the AD expressly states that: “a health care provider may act in accordance with the health care instructions set out in the advance directive without the consent of the adult’s representative.”

The central purpose of an AD is to give or refuse consent to health care. If the adult has given consent in a valid AD, then the health care provider should provide that health care, and need not obtain the consent of a substitute decision-maker. Similarly, if the adult has refused consent in a valid AD, then the health care provider must not provide that health care, and need not obtain the consent of a substitute decision-maker.

It remains necessary for a health care provider to obtain consent from a substitute decision-maker in the following situations:

- If there is a committee of person in existence or a representative under an RA
- If there is a verbal instruction or wish
- If there is a written instruction but it is not in a properly completed AD
- If there is a written instruction from another jurisdiction
- If there is a wish in an AD that is not properly signed and witnessed
- If there is an AD that does not contain the mandatory informed consumer clause

In addition, an AD does not apply in certain circumstances. According to s 19.8 of the HCCFA, a health care provider is not to rely on an AD where:

- Instructions in the AD do not address the health care decision to be made
- Instructions in the AD are so unclear that it cannot be determined whether the adult has given or refused consent to health care
- Since the AD was made, while the adult was capable, the adult’s wishes, values or beliefs in relation to a health care decision significantly changed
- Since the AD was made, there have been significant changes in medical knowledge, practice or technology that might substantially benefit the adult in relation to health care

If a health care provider is not aware that the adult has an AD that refuses consent to specific health care and provides that health care to the adult, but subsequently becomes aware of an AD in which the adult has refused consent, then the health care provider must withdraw the health care.

It is possible for an adult who does not complete an AD to still receive health care. Completion of an AD **must not be mandatory** prior to providing any good or service (i.e. health care). In other words, an adult has the right to not complete an AD. For example, where an adult is being admitted to a care facility and instructed to “fill out these forms” prior to treatment, the adult does not have to fill out the AD.

In the absence of an AD, if the adult has not appointed a representative, then the health care provider will seek consent from a Temporary Substitute Decision-Maker (TSDM), as set out in s 16 of the HCCFA.

B. Note on Medical Assistance in Dying

The Criminal Code of Canada was amended on June 17th, 2016, to permit the Medical Assistance in Dying (MAiD) under certain conditions. This means that a medical or nurse practitioner may, at the person's request, administer a substance to cause their death, or prescribe a substance so that the person can self-administer a substance that causes their death.

Consent given through substitute decision makers, such as representatives under the RAA, and Advanced Directives are **NOT** sufficient for medical practitioners to provide MAiD. MAiD can only be provided to patients who are able to give consent as of July 15th, 2016.

This is because the College of Physicians and Surgeons of British Columbia's "Professional Standards and Guidelines" regarding MAiD clearly prohibit consent given through ADs and RAs. The Professional Standards and Guidelines have weight in law pursuant to s 5(2) of the Medical Practitioners Regulation under the Health Professions Act.

For more information on the Standards and Guidelines of the College of Physicians, please see their document on MAiD at: https://www.cpsbc.ca/files/pdf/PSG-Medical-Assistance-in-Dying.pdf [1].

C. Making an Advance Directive

An AD must include or address any prescribed matter and indicate that the adult knows the following:

- A health care provider may not provide any health care for which the adult refuses consent in the AD
- A person may not be chosen to make decisions on behalf of the adult in respect of any health care for which the adult has given or refused consent

For more information, refer to section **I. B. 2: Mental Capacity – Health Care Consent** in this chapter.

For more information on preparing documents, consult organisations such as Nidus Personal Planning Resource Centre and Registry. Contact information may be found in section **II. D: Resource Organizations** of this chapter.

D. Changing, Revoking or Ending an Advance Directive

An adult with capacity is able to revoke or change an AD at any time. According to s 19.6 of the HCCFA, an adult who has made an AD may change or revoke the AD as long as the adult is capable of understanding the nature and consequences of the change or revocation.

A change must be made in writing. The amended AD must also be signed and witnessed by two capable adults (unless one witness is a lawyer or notary).

A revocation may be made by expressing an intention to revoke an AD and then making another document, including a subsequent AD. Alternatively, an AD may be revoked by destroying the AD with the intention to revoke it.

E. Examples of Advance Directive Provisions

Examples of directives made in an AD might include consenting or refusing consent to the following:

- CPR (if cardiac or respiratory arrest occurs)
- Artificial nutrition through intravenous or tube feedings
- Prolonged maintenance on a respirator (if unable to breathe adequately alone)
- Blood cultures, spinal fluid evaluations, and other diagnostic tests
- Blood transfusions

Note that it is not likely that simple refusals like "I refuse CPR" are going to be sufficient for health care providers. It is important to describe the circumstances to the best degree possible under which consent will be refused, such as only refusing CPR if cardiac arrest occurs, rather than stating only to refuse CPR. The adult may use the phrase "under any circumstances" to make it clear to health care professionals that consent is not given in any case.

NOTE: The adult should have their AD added to their doctor's patient files, their hospital records, and any other relevant agencies. If the AD is revoked or altered, the adult should advise each of these agencies or provide them with the new or revised AD.

1. Do Not Resuscitate Orders ("DNR Orders")

Do Not Resuscitate Orders are a common form of AD which instruct medical professionals not to perform CPR. This means that doctors, nurses, emergency medical personnel, or other healthcare providers will not attempt emergency CPR if a person's breathing or heartbeat stops. DNR Orders may appear in a patient's advance directive document.

However, DNR orders can also be made in a hospital or personal care home, and noted on that person's chart, or be made by persons at home. Hospital DNR Orders tell the medical staff not to revive the patient if cardiac arrest occurs. If a patient is in a personal care home or at home, a DNR Order tells the staff and/or medical emergency personnel not to perform emergency resuscitation and not to transfer the patient to a hospital for CPR.

Each hospital will have its own policies regarding the implementation of DNR Orders, but such policies are guided by the Joint Statement on Resuscitative Interventions (1995) which was approved by the Canadian Healthcare Association, the Canadian Medical Association, the Canadian Nurses Association and the Catholic Health Association of Canada and was developed in cooperation with the Canadian Bar Association. The Joint Statement can be located at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1488016/.

Guiding Principles of the Joint Statement include:

- A competent person has the right to refuse, or withdraw consent to, any clinically indicated treatment, including life-saving or life-sustaining treatment (Principle 3). In this situation, the healthcare professional will discuss with the patient whether the patient wishes to be resuscitated and a notation will be made on the person's chart.
- When a person is incompetent, treatment decisions must be based on his or her wishes, if these are known. The person's decision may be found in an advance directive or may have been communicated to the physician, other members of the health care team or other relevant people. In some jurisdictions, legislation specifically addresses the issue of decision-making concerning medical treatment for incompetent people; the legislative requirements should be followed (Principle 4).

F. Note on ADs for LSLAP Students

When a client approaches LSLAP for assistance with creating an AD, students should ask the following series of questions in order to ascertain whether LSLAP can assist them:

1. Is the client capable of creating an AD? The presumption is that all adults are capable. The test is the ability to understand and appreciate the meaning of what they are trying to do in this particular case.
2. Why does the client want to create an AD?
3. What types of health care provision does the client want to give consent to?
4. What types of health care provision does the client want to refuse consent to?
5. Does the client have an RA in place? What is the relationship between the client and their chosen representative?
6. Does the client want the representative to be able to give or refuse consent, notwithstanding the AD?

It is common for practitioners to refer the client to their doctor for discussion of the types of health care that the client may want to give or refuse consent to, and to obtain the appropriate wording of an AD from that doctor. Students should discuss this option with the client and consider referring them to their doctor in the first instance.

Students should refer to their Supervising Lawyer if there is any doubt that the client understands and appreciates the AD. Also note that an adult is not required to have an AD as a condition of receiving health care treatment.

If there are concerns that a person may be abused or neglected, or at risk of being abused or neglected, the student should discuss these concerns with the client and provide information and access to appropriate support services (e.g., Seniors Abuse & Information Line at 604-437-1940 or 1-866-437-1940). Students must also remember their legal responsibility to maintain professional conduct and client confidentiality. If abuse or neglect is suspected, consult with the Supervising Lawyer about how and whether to make a report to the appropriate authority. Refer to section **VIII: Adult Abuse and Neglect**.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 21, 2019.

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References

[1] https://www.cpsbc.ca/files/pdf/PSG-Medical-Assistance-in-Dying.pdf

VII. Committeeship

In BC, adult guardianship (called “committeeship”) is currently governed by two acts: the *Patient’s Property Act*, [PPA] and the *Adult Guardianship Act*, [AGA]. The PPA allows a judge to appoint a committee (pronounced caw-mi-TEE, with emphasis on the end of the word). Part 2.1 of the AGA contains a statutory process by which the Public Guardian and Trustee (PGT) becomes the “Statutory Property Guardian”. All committees, whether an individual or the PGT, are legally authorized to make decisions for the patient.

The two different processes for creating a committeeship are quite different and are governed by different legislation. It is important to identify which type of committeeship is present or being sought. In the rest of this section a committeeship created under the PPA is referred to as a “court order committeeship” while one created under the AGA is referred to as a “statutory process committeeship”. These are not technical or legal phrases but used solely for clarity. Details for the two types are produced below.

An individual subject to committeeship, or the possibility of committeeship, may present as extremely upset, angry or confused. To best assist this individual, it is important to understand of the gravity of the situation for the individual, and why the individual may be feeling this way. Keep in mind that the effect of a committeeship is that the adult loses their decision-making rights.

NOTE: A court ordered committeeship and its application is a Supreme Court procedure. Provincial courts do not have the jurisdiction required.

Adults may consult CLAS and the Public Guardian and Trustee for more information on committeeship. The Public Guardian and Trustee produces a number of helpful publications on committeeships. The resources can be found at http:/ / www. trustee. bc. ca/ reports-and-publications/ Pages/ default. aspx. It is also advisable to contact an Estate and Guardianship Litigation Lawyer, possibly through the Law Society’s Lawyer Referral Service (604-687-3221).

A. Court Ordered Committeeship

A court may appoint a committee to manage a patient’s affairs (the estate), their person or both.

Section 1 of the PPA provides the following definitions:

• A “**patient**” is a person who is in incapable of managing their affairs or themselves, due to mental infirmity, disease, age etc. • A “**committee**” can be an appointed individual, the PGT, or a statutory property guardian

Refer to section **III: Overview of Incapacity** of this chapter for more information.

1. Committee of the Estate

A committee of the estate has the authority to make financial and legal decisions on the patient’s behalf. This routinely includes:

- Controlling the patient’s income
- Conducting banking
- Paying expenses

A committee of estate can be appointed by the court (family, friend or PGT), or after a medical “Certificate of Incapability” has been issued (Public Guardian and Trustee only). See *A Guide to the Certificate of Incapability Process Under the Adult Guardianship Act* available at http:/ / www. trustee. bc. ca/ reports-and-publications/ Documents/ A%20Guide%20to%20the%20Certificate%20of%20Incapability%20Process%20under%20the%20Adult%20Guardianship%20Act. pdf

2. Committee of the Person

A committee of the person holds the authority to make decisions regarding the patient's health and well-being, place of residence, and admission to a care facility.

A committee of the person can only be appointed by the court.

A patient may have either a committee of the estate, a committee of the person, or both. Usually, but not always, a person who is incapable of managing their personal health care decisions is also incapable of handling financial and legal decisions. Therefore, a committee of the person is frequently coupled with a committee of the estate. It may be that the same individual is appointed to a committeeship comprising both estate and person, or it may be that separate individuals are appointed to each committeeship

B. The Court Ordered Committeeship Process

There are two steps involved in appointing a committee for an individual who is incapable:

- An order must be made by the Supreme Court declaring that the patient is incapable of managing their own affairs and/or person
- The court appoints one or more individuals as Committee of the estate and/or the person

1. Declaration of Patient Incapability

An individual must be declared incapable of managing their affairs (either financial, personal, or both) before the court can appoint a committee.

1. Section 2 of the PPA provides that the Attorney General, a near relative or the subject, or any other person may file an application to the court for an order declaring incapability.

2. The court will then consider the affidavits of two medical practitioners who provide their opinion on the incapacity of the subject.

Note: the medical practitioners must be members of the BC College of Physicians and Surgeons.

3. In addition to the medical practitioners' affidavits, the applicant must swear an "affidavit of kindred and fortune", which as the name suggests, set out particulars of the patient's family and financial affairs.

Note: the affidavit of kindred and fortune must be in a prescribed form (Form 3), as set out in the *Patients Property Act Rules*.

4. The court then may decide whether the subject is incapable based on the affidavit material before it on the application, or it may proceed:

a) To direct the issue to be tried, following the Supreme Court Civil Rules

b) By order, to require the person to undergo an additional examination with either:

i) One or more medical practitioners other than those whose affidavits were before the court, or

ii) A board of 3 or more medical practitioners designated by the College of Physicians and Surgeons of British Columbia at the request of the court

This additional examination can be requested by the patient and cannot be refused by the court unless the court believes the patient is not mentally competent to form and express the request (PPA s 5)

Note: it is very rare for the issue to be tried, most often the court will order a reassessment.

5. Notice of the application to the courts must be personally served on the subject **not less than 10 days prior** to the date of the application hearing. See s 2(2) of the PPA. This requirement may be waived if the court is satisfied

that to serve notice of the application would injure the subject's health, or would otherwise be inadvisable in the interests of the subject.

- In order for a waiver of notice to be granted, there must be a medical affidavit advising the court that it would be injurious to the health of the adult to be served with notice of the application. The affidavit must demonstrate this clearly and provide evidence, it is not sufficient to simply restate the language of the statute. A discussion on this can be found in *T.H.N et al v Q.VL.* 2000 BCSC 24.

In summary, the court application must include:

- Petition (Supreme Court Civil Rules, BC Reg 168/2009 2-1(2))
- Affidavit of Service (unless notice requirement was waived)
- Affidavit of Kindred and Fortune setting out next of kin and financial circumstances of patient (PPA Rules, Rule 2(3))
- Affidavit from two physicians (PPA, s 3(1))
- Notice of Application to Appoint a Committee (PPA Rules, Rule 2(2))
- Chamber Order to Appoint a Committee

While it is not required to include consent of the next of kin, it is recommended. See below.

2. Resisting a Declaration of Incapability

If the subject of the application wishes to oppose it, they are well advised to have a lawyer for the application hearing.

a) Challenging Affidavits

The affidavits of the medical practitioners may be challenged. Under the PPA, s 5(2), the judge may order that the subject be examined by one or more duly qualified medical practitioners other than those whose affidavits were before the court. The judge may also order an examination by a board of three or more duly qualified medical practitioners designated by BC's College of Physicians and Surgeons. The medical affidavits provided should not be older than 6 months, and should clearly lay out the diagnosis, clinical findings and prognosis of the patient.

Section 5(3) of the PPA provides that the judge must order such an examination if the subject asks, unless the court or judge is satisfied that the person is not mentally competent to form and express the request.

b) Subsequent Applications

If a person is declared incapable by the court, that person can apply to the court after one year, for a declaration that they are no longer incapable. However, such an application cannot be made by the person or anyone else more than once per year, except by leave of a judge. Affidavit evidence of two medical practitioners will be required to support the application (PPA s 4).

3. Appointment of a Committee

Once the patient has been declared incapable, the judge will appoint a committee. This appointment is governed by the PPA.

a) Private Committee

A family member, friend, or any other person can apply to the court to become a committee of the patient.

The PPA, *Patient Property Act Rules*, BC Reg 311/76 (PPA Rules) and the *Supreme Court Civil Rules*, BC Reg 168/2009 govern the application process.

Although the PPA does not say who else should be served, in practice the proposed committee should obtain consents to their appointment as committee from next-of-kin, or if they do not consent, serve the next-of-kin with the application and supporting affidavits.

If the committee was nominated by the patient prior to incapability, then the written nomination should also be included (see below). In addition, if the applicant was appointed attorney, representative or executor, it would be useful to include proof of this in the application. If they were appointed as attorney, representative or executor, they will likely be exempted from the requirement to post security.

b) Notice to the Public Guardian and Trustee

Section 7 of the PPA provides that notice in writing of the application must be served on the Public Guardian and Trustee not less than 10 days prior to the hearing of the application and, if applicable, to a committee already appointed. The PGT can review the application and oppose the appointment if the applicant is considered unsuitable. The PGT may also impose terms on the committee or make recommendations to the court that conditions be imposed on the committee. If the PGT does not oppose the appointment, it will issue a letter to that effect. The applicant must present this letter to the judge at the time of the committee application.

c) Nomination of Committee by Patient

Under s 9 of the PPA, an individual has the power to nominate a committee of their choice. However, the person nominated cannot serve as a committee until appointed by the court. The nomination must be in writing and signed by the person when they were of full age and of sound and disposing mind (i.e. before the court declares them incapable). A person may want to execute a nomination and have a lawyer hold it in reserve to be released if there is an application for the appointment of a committee.

The nomination must be executed in accordance with the requirements for the making of a will under the *Wills, Estates and Succession Act*, which are that it must be in writing, signed by the nominator and properly witnessed (WESA s 37).

Note that members of military forces are exempt from some of the formal requirements; see the WESA s 38.

Other than compliance with the WESA, there are no formal requirements for the nomination of a committee. Therefore, a brief, clear statement may be best.

E. g.: "In the event of my becoming mentally incapacitated, I hereby nominate <name of nominee> as my committee. <Signed and Dated. > Witnessed in the presence of the signatory, who signed in our presence. <Signature of Witnesses>."

Each witness must be present at the time the other witness ascribed their name on the document. For a full precedent, see *Wills Precedents: An Annotated Guide*, Continuing Legal Education Society of British Columbia, 2019 (Bogardus, Wetzel & Hamilton).

If the nomination is in proper form, it will later be submitted with the application for the appointment of a committee. The judge shall appoint the committee that has been so nominated "unless there is good and sufficient reason for refusing the appointment" (PPA s 9).

d) Costs

The costs of all proceedings are in the discretion of the court (PPA s 27). Generally, the court orders payment of all the committee's reasonable legal fees from the patient's estate, theoretically so the applicant does not suffer losses for doing what, in many cases, is considered their moral obligation. Even though the patient's estate initially pays costs, the PGT later reviews the costs to ensure they are reasonable. If the fees paid by the patient's estate are unreasonable, the committee must return the excess amount to the patient's estate. The committee should have legal fees reviewed by the registrar of the court if unsure of their reasonableness.

e) Public Guardian and Trustee as Committee =

The PGT is a corporation established under the *Public Guardian and Trustee Act* with a unique statutory role to protect the interests of British Columbians who lack legal capacity to protect their own interests. This may include acting as committee of estate and/or person where a person needs assistance and there is no other family member or friend who can assume this role, or where there is conflict among family members and a neutral party is preferred. The PGT can become committee of estate and/or person in one of two ways:

1. The PGT may become committee of estate and/or person by Court Order. The PGT may bring an application for the appointment or, in a proceeding to appoint a committee, where there is a conflict, one or more of the parties may seek an Order that the PGT be appointed. The PGT will provide a response in the proceedings setting out whether they are prepared to take on this role. Typically, the PGT will only agree to act as committee of estate. A committee of person is required to make very personal decisions on behalf of the person and a family member or friend is usually more appropriate to act in this role if it is required.
2. Since December 1, 2014 the PGT may also become committee of estate by a legislative process set out in the Adult Guardianship Act. See below.

C. Legislative Process Committeeship (Statutory Property Guardian)

The other process by which a committeeship can be created is through the legislative process outlined by the AGA. The major difference over a court order committeeship is that only the PGT can become committee and only over the adult's financial affairs. The term used in the legislation is a Statutory Property Guardian [SPG]. However, once the Public Guardian and Trustee becomes a Statutory Property Guardian, the PPA states that the Statutory Property Guardian is a committee under the PPA. In short, the process for the PGT to become a SPG is through the AGA but then their duties are defined by the PPA.

1. Assessment of Incapability

For an adult to be certified as incapable under the AGA there are a number of steps.

1. Any individual can notify the PGT and the PGT can conduct an investigation to determine whether intervention is warranted. If it is found to be so, the PGT can request an assessment of incapability by a qualified health care provider.
    a) A "qualified" health care provider is defined in s 3(2) of the *Statutory Property Guardianship Regulations* [SPGR]. It includes a health care provider as defined in the *Health Professions Act* and the *Social Workers Act*, as well as registrants of the British Columbia College of Social Workers; BC College of Nursing Professionals; College of Occupational Therapists of British Columbia; and registrants of the College of Psychologists of British Columbia.

2. The qualified health care provider then assesses the adult according to the prescribed procedures and if satisfied, prepares a Report of Assessment of Incapability along with a Details of Assessment for review by a health authority designate.

a) The proper procedures of an incapability assessment are outlined in s 5 through 10 of the SPGR. These procedures are also required for any subsequent reassessment of the adult's incapability such as a review requested by the adult or an order ordered review.

i) The assessment is composed of two parts: a medical component and a functional component.

ii) Prior to conducting the assessment, the adult must be given notice of the purpose of the assessment and their rights

iii) Section 10 outlines that an assessment report must be completed by filling out a Form 1 and that details of the assessment must be attached. The qualified health care provider must also inform the adult of the result and the determination and offer the adult a copy of Form 1 and the details attached.

iv) The qualified health care provider does not need to inform the adult or offer a copy of the report if they have reason to believe that doing so may result in serious physical or mental harm to the adult or significant damage or loss to the adult's property.

b) A health authority designate is defined by s 4 of the SPGR.

3. Upon receiving Form 1, the health authority designate may issue a report of incapability if they are satisfied of the criteria. The designate must also have consulted with the PGT and notified the adult and, if possible, any spouse or near relative of the adult, of the intention to issue a certificate.

a) The criteria are provided by sections 32(3)(a) to (e) of the AGA. It is important to note, the certificate cannot be signed if the adult has granted power over all of the adult's financial affairs to an attorney under an enduring power of attorney, unless that attorney is not complying with the attorney's duties under the *Power of Attorney Act* or the enduring power of attorney, as applicable (AGA s 32(3)(e)).

b) The notice required to the adult and a near relative is outlined in s 11 of the SPGR. Section 11(3) states that the adult or near relative be given at least 10 days to respond. The BC Government has created a form called the “Health Authority Designate Notice of Intention to Issue a Certificate of Incapability” for the purposes of this notification.

i) Notification does not need to be provided to the adult or near relative if the designate has reason to believe that doing so may result in serious physical or mental harm to the adult or significant damage or loss to the adult's property.

c) The certificate of incapability is Form 2 (SPGR s 12).

4. Once the Certificate of Incapability is signed by the health authority designate, the certificate must be forwarded to the PGT. The adult and a spouse or near relative must be informed of the certificate and provided with a copy.

a) The BC Government has created a form called “Health Authority Designate Concluding Letter” for the purpose of providing notice to the adult.

b) The PGT becomes the committee of the adult on the date that the certificate was signed by the health authority designate.

i) The PGT must inform the adult and, a spouse or near relative that the PGT has power to manage the adult's financial affairs and that the adult has the right to request a second assessment and potentially a court review (AGA s 33).

ii) The adult or someone on behalf of the adult, may request a second assessment within 40 days of being notified (AGA s 60(2))

2. Reassessment of Incapability

Once a Certificate of Incapability has been issued and the time for a second assessment has passed, or the second assessment confirms the assessment of incapability, s 34 of the AGA outlines three different ways that a reassessment can be made of an adult's incapability

1. If the PGT informs the body that designated the health authority designate who issued the certificate of incapability that a reassessment should occur.
2. If the adult requests a reassessment and has not been reassessed within the preceding 12 months
3. The court orders a reassessment under s 35(3) of the AGA.

3. Court Review of Assessment of Incapability

After a second reassessment has occurred and the adult is still declared incapable, the adult can apply for a court review.

The parties to the court review are:

- The adult
- The body that designated the health authority who issued the certificate of incapability
- If ordered by the court, a person appointed under the *Patients Property Act*, as committee for the adult following a declaration under that Act that the adult is incapable of managing themselves

The court may order another reassessment of the adult's incapability.

During this review, the court may confirm the determination of incapability, or reject the determination of incapability and order that the statutory property guardianship is ended.

4. Ending Committeeship (Statutory Property Guardian Authority under the AGA)

A statutory process committeeship can be ended in one of four ways:

1. The PGT is satisfied that the adult no longer needs a SPG.
    a) Notice must be provided to the adult that they no longer have a SPG
2. After a second assessment, the health authority designate accepts that the adult is no longer incapable.
    a) The BC government has created a form for this purpose called "Health Authority Designate Acceptance of Determination of Capability"
    b) Notice must be provided to the PGT
3. A court order after a review of an incapability assessment under s 35 of the AGA
4. The court appoints a committee under the PPA

D. Serving as a Committee

1. Duties

The committee's general duty is to exercise their powers for the benefit of the patient, having regard to the nature and value of the patient's property, and the patient's circumstances and needs and those of their family (PPA s 18). **The committee is not allowed to use or take any benefit from their position**. When the patient has assets, the PGT will often recommend that the committee post a bond to secure the proper performance of these duties or seek a restriction on accessing the patient's funds. The committee may use professional services to assist them in some duties. However, professionals cannot be retained to do actions an ordinary person could perform. The cost of professional services is paid for by the patient's estate.

Specific duties of the committee include:

- Passing accounts before the PGT, at the times directed by the PGT (PPA s 10(d)). This includes, if the PGT requires it, a true inventory of the whole estate of the patient. The patient's assets are not the committee's, and thus the committee must account to the PGT for all transactions. Provisions regulating this duty are contained in s 10 of the PPA and in Rule 21-5 of the rules governing the Act in the *Supreme Court Civil Rules*, BC Reg 168/2009
- Upon the patient's death, the committee is no longer required to pass accounts before the PGT, but must provide the committee's accounts to the executor or administrator of the patient's estate, or, if the committee and the executor or administrator of the patient's estate are the same person, to the beneficiaries of the patient's estate (PPA s 24)
- Paying patient's maintenance, care and treatment costs out of the estate (PPA s 23)
- Bringing an action, if necessary, on behalf of the patient as their litigation guardian (PPA s 22)
- Exercising the rights, powers, duties, and privileges of the patient after the patient's death, as if they had not died, and serving as executor or administrator until letters probate of the will or letters of administration to the estate of the patient are granted and notice in writing is served upon the committee (PPA s 24)
- Filing income tax returns and applying for pensions
- If a person is appointed as committee for a person under disability, that person must be the litigation guardian of the patient in any proceeding unless the court otherwise orders as per Rule 20-2 of the *Supreme Court Civil Rules*

2. Powers

The committee of the estate has all the rights, powers, and privileges over the patient's estate as the patient would have if they had legal capacity (PPA s 15). This includes power to buy and sell property, open and close bank accounts, pay accounts etc. These powers include that would have been exercisable by the patient as a trustee, guardian of a person, holder of power of appointment or as the personal representative of a person (PPA s 17). For example, if the patient was acting as personal representative to their spouse prior to incapacity, the committee would now have the responsibility to make decisions for the spouse under the Representation Agreement. However, the court has discretion to place limits on any powers that the committee could otherwise perform (PPA s 16). In such a case, any powers that were limited by the court would fall to the PGT.

A committee of the person has the "custody of the person" of the patient. This means the committee is responsible for the person's welfare and well-being.

For investing money, a committee is a trustee within the meaning of the *Trustee Act* (PPA, s 15(2)), which means a committee must comply with the provisions of this Act when it comes to investing the patient's money. For example, the Committee must meet a certain standard of care in making investment decisions and freedom to delegate investment decisions is limited.

If a patient (as opposed to the committee) transfers their property while incapable, for instance, by selling land or giving a gift, the transfer will be voidable (i.e. deemed to never have occurred at the option of the committee), unless full and valuable consideration was paid for the property, or a reasonable person would not have known that the adult was incapable (AGA s 60(2)).

NOTE: An Enduring Power of Attorney or representation agreement is terminated when a person becomes a 'patient' by being declared incapable of managing their affairs by court order (PPA s 19). Therefore, the authority of a court order committee will never conflict with that conferred by a power of attorney. Where a committee is appointed under the AGA statutory property guardianship rules, any EPOA or s 7 RA for routine financial affairs is suspended (PPA s 19. 1).

3. Remuneration

Under s 14 of the PPA, a person is allowed "reasonable" compensation from the patient's estate for services rendered as committee. However, a person does not have to claim compensation. The amount of compensation is fixed on the passing of the accounts to the PGT.

If the PGT acts as the committee of estate, its fees are charged in accordance with the *Public Guardian and Trustee Fees Regulation*. Fees may be reduced or waived where the PGT is satisfied that hardship or injustice would result from charging the full fee (*PGT Fees Regulation* s 3).

A committee has a first lien upon the estate of the patient or the person who has ceased to be a patient (PPA s 14(4)).

NOTE: The Public Guardian and Trustee has helpful information for private committees at: www.trustee.bc.ca [1].

E. Discharge of a Committee

1. Rescission of a Committee

On application by the Attorney General, the PGT, or any other person, a judge may rescind the appointment of a person (other than the PGT) appointed as committee (PPA s 6(2)). The rescission is subject to the committee complying with the requirement to pass accounts set out in s 13 of the PPA. This application may be filed along with an application for a new committee. This process cancels the committee's authority to act for the patient.

2. Discharge of a Committee

If a person regains their mental capability and ceases to be a "patient," that person, or the committee (other than the PGT), may apply to the court for the discharge of the committee (PPA s 12). Notice in writing of this application must be provided to the PGT 10 days prior to the application. The judge who hears the application may, and shall if asked by the PGT, order the committee to pass accounts. There will almost always be outstanding accounts. The fees payable will be rescinded as of the date of the order and discharged on the passing of accounts.

An order of discharge or a discharge by the passing of accounts before the PGT is required before a security bond, if any, can be cancelled. Once the committee is discharged, the committee has no further powers or duties with respect to the estate of the person who has ceased to be a patient (PPA s 13(4)(a)).

NOTE: At this time there is no section under the PPA governing the discharge of the PGT as committee.

3. Release from Liability

A discharged committee, whether it be a private committee or the PGT, is released from liability concerning the management of the estate except in respect of undisclosed acts, neglects, defaults, or accounts, or where the committee was dishonest or unlawful in their conduct (PPA s 13(4)(b)). A difference of opinion between the person and committee as to how the estate should have been handled is not by itself a reason to support a committee's discharge.

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References

[1] http://www.trustee.bc.ca

VIII. Adult Abuse

A. What is Adult Abuse and Neglect?

An adult might be experiencing, or be vulnerable to experiencing, abuse, neglect or self-neglect. In situations where an adult is in need of support or assistance in order to prevent abuse or neglect, the following legislation applies: Part 3 of the AGA; s 34 and 35 of the PAA; s 31 of the RAA; and s 17 to 19 of the PGTA.

The law defines abuse, neglect and self-neglect to include acts and a failure to act. Refer to the *Practical Guide to Abuse and Neglect Law in Canada* for a summary of the law and practical guidelines on how to identify and respond to situations of abuse or neglect. This guide is produced by the Canadian Centre for Elder Law (CCEL) and is available online at: https://www.bcli.org/project/practical-guide-elder-abuse-and-neglect-law-canada.

Section 1 of the AGA defines the terms abuse and neglect broadly as follows:

- "Abuse" means the deliberate mistreatment of an adult that causes the adult

  (a) physical, mental or emotional harm, or

  (b) damage or loss in respect of the adult's financial affairs, and includes intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors

- "Neglect" means any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage or loss in respect of the adult's financial affairs and includes self neglect

B. Responding to Adult Abuse and Neglect

Sometimes the most appropriate and helpful response to abuse or neglect is not a legal response. In some instances, it may be appropriate to contact a designated agency, or the Public Guardian and Trustee. However, the key response is generally to listen to the individual's description of their experience, and to help the person get support and assistance, often through identifying an appropriate referral agency. You will want to consider whether there is an urgency to the circumstances that suggests a need for immediate action. For example:

- Is the person in immediate danger of harm?

- Will money be stolen or spent?
- Will property be taken away?
- Does the person appear to lack mental capacity?

BC's PGT office has prepared a useful "decision tree" to help with deciding where to refer someone who is abused or neglected. The front half is the decision tree itself, a flow chart of where to refer. The back contains a table setting out the response from the three resources – the police, the designated agency, and the PGT's office. Please see the **Appendix B** for the Decision Tree.

The CCEL has published the following guiding principles for responding to concerns about abuse, neglect or self-neglect: (*A Practical Guide to Elder Abuse and Neglect Law in Canada* (2011)).

1. Talk to the individual Ask questions. Talk to the person about their experience. Help the person to identify resources that could be helpful.

2. Respect personal values Respect the personal values, priorities, goals and lifestyle choices the individual. Identify support networks and solutions that suit their individuality.

3. Recognize the right to make decisions Mentally capable adults have the right to make decisions, including choices others might consider risky or unwise.

4. Seek consent or permission In most situations, you should get consent from the adult before taking action.

5. Respect confidentiality and privacy rights Get consent before sharing another person's private information, including confidential personal or health information.

6. Avoid ageism Prevent ageist assumptions or discriminatory thinking based on age from affecting your judgment. Avoid stereotypes and show respect for the inherent dignity of all human beings, regardless of age.

7. Recognize the value of independence and autonomy Where this is consistent with the adult's wishes, assist the adult to identify the least intrusive way to access support or assistance.

8. Know that abuse and neglect can happen anywhere and by anyone Abuse and neglect of older adults can occur in a variety of circumstances from home care to family violence.

9. Respect rights An appropriate response to abuse, neglect, or risk of abuse or neglect should respect the legal rights of the individual, while addressing the need for support, assistance, or protection in practical ways.

10. Get informed Ignorance of the law is not an excuse for inaction when someone's safety is at stake. If you work with older adults you need to educate yourself about elder abuse.

Another useful document provided by the Public Guardian and Trustee is called *Decision Tree: Assisting an Adult Who is Abused, Neglected or Self Neglecting* and the related videos (See Section **II. C: Secondary Sources**).

1. Designated Agencies

There is no duty for the general public to report abuse, neglect or risk in BC. However, if an older adult is experiencing, or particularly vulnerable to, abuse, neglect or self-neglect and is unable to access the necessary support or assistance on their own, anyone may notify a Designated Agency (DA). A representative of the DA will then meet with the adult to decide on what steps can be taken. The DAs are legally required under the AGA to respond to reports of abuse, neglect and self-neglect. The DA process includes involving the adult in decisions about how to seek support and assistance, providing the necessary support and assistance to prevent abuse or neglect, and respecting the right for an adult with capacity to refuse support or assistance.

The DAs are set out in the AGA, and the DAR. They include BC Community Living, Providence Health Care Society, and each of the provincial Health Authorities (i. e. Vancouver Coastal Health, Interior Health, Fraser Health, Vancouver

Health Authority and Northern Health Authority). For contact information, refer to section **II. E: Designated Agencies** in this chapter.

A DA must determine whether an adult needs support and assistance if the agency receives a report of abuse or neglect, has reasons to believe that an adult is abused or neglected, or receives a report that the adult's representative, guardian or monitor has been hindered from visiting or speaking with the adult (AGA s 47). Where an adult is found to be in need of support or assistance, a DA may take any of the following courses of action: (See s 47(3) and s 51 of the AGA).

- Investigate whether abuse or neglect is happening
- Provide assistance to obtain care, social support, or legal guidance
- Assist in obtaining an appropriate representative or guardian
- Inform the Public Guardian and Trustee
- Prepare and implement a support and assistance plan with the adult
- Apply to the court for an order authorizing the provision of services

Designated Agencies must involve the adult, to the greatest extent possible, in decisions about how to seek support and assistance, and in decisions regarding the provision of support and assistance necessary to prevent abuse or neglect in the future (AGA s 52). DAs are also legally required to respect the right for an adult with capacity to refuse support or assistance (AGA s 2).

Legal professionals need to remember their responsibility to maintain professional conduct and client confidentiality with respect to their clients. There is not a mandatory requirement to report abuse, neglect or self-neglect in BC However, a report to a DA can be made anonymously.

Make sure that the adult has access to all available resources. If the situation is an emergency, call 9-1-1. If the situation is not an emergency, but the older adult is in need of support and assistance to protect themselves, then you may need to contact a DA. Refer to sections **II D: Resource Organizations and II. E: Designated Agencies** in this chapter for further relevant information, as well as the CCEL tool "Elder Abuse and Neglect: What Volunteers Need to Know", found at: http://www.bcli.org/project/elder-abuse-and-neglect-what-volunteers-need-know

2. Public Guardian and Trustee

Although not a designated agency under the AGA, the Public Guardian and Trustee (PGT) has the statutory authority to investigate all situations where there appears to be financial abuse, neglect, or self-neglect. A designated agency discussed above may refer an investigation of abuse to the PGT.

The statutory powers, set out in s 17 of the PGTA, allow the PGT to investigate and audit the affairs, dealings and accounts of:

- A trust, a beneficiary of which is a young person, an adult who has a guardian, or an adult who does not have a guardian but who is apparently abused or neglected, as defined in the RAA
- If the PGT has reason to believe that the interest in the trust, or the assets of the young or adult, may be at risk, or that the representative, guardian or attorney has failed their duties
- An adult who does not have a guardian, a representative or an attorney under an EPOA but who is apparently abused or neglected, as defined in the RAA
- An attorney under a POA or EPOA, where the PGT has reason to believe assets are at risk or person is not fulfilling their duties
- A representative
- A guardian committee

The statutory powers also allow the PGT to:

- Require trustee, attorney, representative, guardian to provide accounts necessary for an audit (PGTA s 18(2))
- Ask the court for an order allowing access to information previously denied when undertaking an audit or investigation (PGTA s 18 (4))
- Protect a person's financial affairs and freeze assets in urgent situations for up to 30 days and renew the instructions up to three times for a total of 120 days (PGTA s 19)

Any person may notify the PGT where a representative or attorney is: (RAA s 30(1)(h); PAA s 34(2)(c))

- Abusing or neglecting the person for whom the representative or attorney is acting
- Failing to follow the instructions in the RA
- Incapable of acting as representative or attorney
- Failing to fulfill the duties of a representative or attorney
- Otherwise failing to comply with an RA, or an EPOA

Any person can also make an objection to the PGT if there is a reason to believe that fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke a financial or legal document (PAA s 34(2)(b)), or a Representation Agreement (RAA s 30(1)(b)).

On receiving an objection concerning Representation Agreements, the PGT must promptly review the situation and may do one or more of the following (RAA s 30(3)):

- Conduct an investigation to determine the validity of the objection
- Apply to the court for an order confirming a change to, or the revocation of, the RA or cancelling part of the RA
- Apply to the court for an order that the RA is not invalid
- Recommend that someone else make a court application
- Make a report to a designated agency, requesting support and assistance in accordance with s 46 of the AGA
- Appoint a monitor
- Authorize remuneration for a monitor out of the adult's asset
- Take any other action considered necessary

On receiving a report concerning Power of Attorneys, the PGT must promptly review the situation and may do one or more of the following (PAA s 34(3)):

- Conduct an investigation to determine the validity of the report;
- Apply to the court for an order described in s 36 of the PAA
- Advise the person who made the report to apply to the court for an order described in s 36 of thePAA
- Make a report under s 46 of the AGA
- Take steps under the PPA to become a committee
- Take no action, or take any action that the PGT considers necessary

See Part 3 of the PGTA for the planning and accountability obligations of the PGT.

3. Additional Resources for Older People Experiencing Abuse or Neglect

Refer to section **II. D: Resource Organizations** in this chapter, for contact information for the BC Centre for Elder Advocacy and Support, and the Public and Guardian Trustee of British Columbia.

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Appendix A: EPOA

Important note to students regarding this precedent: If students use this precedent (produced by the Ministry of the Attorney-General of BC) students should ensure that the automatic revocation of prior POAs (para 2) should not be included in the POA without very clear instructions from client that the client WANTS all prior POAs revoked (e. g. this would include prior bank POAs).

In addition, students should be aware that the "effective date" (para 9) works if there is only one attorney appointed. If more than one attorney is appointed, the POA cannot be used and will not be effective unless all attorneys have signed.

Note that this POA precedent does not include custom clauses e. g. delegation, gifts, loans etc. If the client wishes to include custom clauses, the student should refer to *Wills Precedents: An Annotated Guide*, Continuing Legal Education Society of British Columbia, 2019 (Bogardus, Wetzel & Hamilton) for precedent clauses.

This appendix is available from its source for download in PDF [1].
A permanent archive version is also available at https://perma.cc/T7FZ-TEYK.
Readers of the print edition please see the "Supplementary Documents for Appendices" section.

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References

[1] http://www2.gov.bc.ca/assets/gov/health/managing-your-health/incapacity-planning/enduring_power_of_attorney.pdf

Appendix B: Notice of Revocation

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http://www.trustee.bc.ca/Documents/adult-guardianship/Decision%20Tree.pdf

Chapter Sixteen A – Wills and Estate Planning

I. Introduction

This chapter provides a brief summary of will preparation and estate administration procedure. In this chapter, any reference to a court is to the BC Supreme Court. The *Wills, Estates and Succession Act*, SBC 2009, c 13 [WESA], came into force on 31 March 2014. WESA substantially revised wills and estates law in BC by repealing and consolidating the *Estate Administration Act*, RSBC 1996, c 122; the *Probate Recognition Act*, RSBC 1996, c 376; the *Wills Act*, RSBC 1996, c 489; and the *Wills Variation Act*, RSBC 1996, c 490. *WESA* now applies to all wills in BC if the deceased dies on or after 31 March 2014, except where:

- The will was validly made before *WESA* comes into force, but would be invalid under WESA; or
- The will was revoked before the Act comes into force (i.e. *WESA* will not revive validly revoked wills);

If you are seeking legal advice on an existing will, remember that except for sections 16, 25 30 and 44(3), the *Wills Act* applies only to wills made after 31 March 1960 (s 44(1)). WESA also applies to estates where there is no valid will, known as an "intestacy".

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II. Governing Legislation and Resources

A. Legislation

- *Wills, Estates and Succession Act*, SBC 2009 [*WESA*].
- *Trustee Act*, RSBC 1996, c 464

B. Texts

Many texts are available that provide more information on this area of the law. Be aware that the law on wills & estates has significantly changed since *WESA* came into force on 31 March 2014, so earlier resources may be outdated.

1. General

Kate Bake-Paterson et al, *BC Estate Planning & Wealth Preservation*, (Vancouver: CLEBC, 2019)

James Baird et al, *Wills, Estates, and Succession Act Transition Guide* (Vancouver: CLEBC, 2014)

2. Drafting

Peter Bogardus, Sadie Wetzel & Mary Hamilton, *Wills and Personal Planning Precedents - An Annotated Guide* (Vancouver: CLEBC, 2019)

3. Probate

Shelley Bentley et al, *Probate and Estate Administration Practice Manual* (Vancouver: CLEBC, 2018)

C. Bureaus and Web Sites

Department of Vital Statistics

605 Robson Street, Room 250

Vancouver, B.C., V6B 5J3

Telephone: 1 (888) 876-1633

Website: https:/ / www2. gov. bc. ca/ gov/ content/ family-social-supports/ seniors/ health-safety/ health-care-programs-and-services/vital-statistics

Canadian Legal Information Institute ('CanLII')

Website: http://www.canlii.org/en/

CanLII is a non-profit organization that provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions.

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III. Making and Executing

A. Assessing Will-maker's Competence

To make a valid will, a person must be:

- 16 years of age or older;
- Have testamentary capacity;
- Intend to make a will; and
- Comply with the formalities in *WESA*.

1. Testamentary Capacity

a) Generally

The will-maker must have the requisite testamentary capacity. No person of unsound mind, who lacks testamentary capacity, is capable of making a valid will. Testamentary capacity is defined through the common law, not statute. The basic test is found in *Banks v Goodfellow*, (1870) LR 5 B 549 (QB) at para 569; for a recent application of this test, see *Halliday v Halliday Estate*, (2019) BCSC 554, at para 26.

According to the Goodfellow case and subsequent decisions, to have testamentary capacity a will-maker must:

- Understand the nature of the act of making a will and its effects;
- Understand the extent of the property he or she is disposing;
- Be able to comprehend and appreciate the claims to which he or she ought to give effect; and
- Form an orderly desire as to the disposition of the property.

b) Presumption of Requisite Capacity

The law presumes that a will-maker has the requisite capacity, if a will was duly executed in accordance with the formal statutory requirements after being read over to a will-maker who appeared to understand it.

However, a student or lawyer taking instructions from the will-maker should nevertheless always assess the will-maker's capacity. This decision should be based on the will-maker's instructions, not any assertion from the will-maker that they are capable. To this end, avoid asking the will-maker direct questions about capacity, such as “are you capable?”

Some helpful lines of inquiry to assess capacity include: whether the will-maker can understand the nature of the testamentary act (that he or she is making a will), can recall the property, and can comprehend that he or she is excluding possible claimants under intestacy or through a wills variation claim. Delusions or partial insanity will not destroy testamentary capacity unless they directly affect testamentary capacity or influence the dispositions in the will.

c) Presumption of Validity

At common law, if a will is duly executed in accordance with the formal statutory requirements after being read by a testator who appears to understand the will, it is presumed that the testator possessed the requisite capacity and knew and approved the contents of the will. This presumption may be rebutted where "suspicious circumstances" exist (see below).

d) Undue Influence

A will or a portion of it that is made as a result of undue influence is not valid. Undue influence is not mere persuasion, but is physical or psychological coercion. There must be capacity to influence and the influence must have produced a will that does not represent the will-maker's intent. Section 52 of WESA now provides that, if it is shown that the will-maker was in a position where the potential for domination or dependence was present, the burden shifts to the party seeking to defend the will to show that the will was not procured through undue influence. A spouse, parent, or child, etc. may put his or her claims before the will-maker for recognition. This does not constitute undue influence unless it amounts to coercion. If the will-maker continues to be capable of making decisions freely, the advice or persuasion does not amount to undue influence. See Leung v Chang, 2013 BCSC 976.

In order to challenge a will on the grounds of undue influence, the asserting party must show that the will does not represent the will-maker's true intentions due to the coercion. If this can be shown, undue influence is presumed. The party that wishes to defend the will may rebut this presumption by showing that the will was a result of the testator's own "full, free and informed thought". See Stewart v Mclean, 2010 BCSC 64. Factors that can assist with rebutting the presumption includes proof that: a) No actual influence was used or there was a lack of opportunity to influence; b) The will-maker obtained independent legal advice or had the opportunity to do so; c) The will-maker had the ability to resist the influence; or d) The will-maker had knowledge and appreciation about what he/she was doing.

Notwithstanding section 52 of WESA, an individual challenging a will on the basis of undue influence should have sufficient evidence to establish actual undue influence – in challenging the validity of a will, it may be insufficient to simply point to a relationship where there was a potential for the testator's domination or dependence, without more. An allegation of undue influence is a serious allegation which should not be made lightly. See Ali v Walter Estate, 2018 BCSC 1032, Geffen v Goodman Estate, [1991] 2 SCR 353, Cowper-Smith v Morgan, 2016 BCCA 200.

Allegations of undue influence should not be readily brought. A failed allegation of undue influence may attract severe monetary consequences against the accuser. When one alleges undue influence, they are accusing another of being a fraudster. A failed allegation of fraud more readily justifies an award of special costs against the accuser. Therefore, a party who fails to prove a case of undue influence runs the risk of having to pay the full legal costs of the defending party. As such, undue influence should be carefully considered and investigated prior to commencing a court action. See Mawdsley v Meshen, 2011 BCSC 923.

The will drafter should ensure that the will represents the will-maker's intentions and that he or she is not being coerced into making the will or disposition against his or her wishes. This is especially relevant where the aged or infirmed are concerned.

e) Suspicious Circumstances

Suspicious circumstances may arise where a person who prepares a will also takes a benefit under it, though this is not exhaustive of all circumstances that raise a suspicion. The suspicion is that the will-maker did not know or approve of the contents of the will, and this suspicion must be removed before probate will be granted (see *Riach v Ferris*, [1934] SCR 725; see also more recent applications in *Clark v Nash*, (1989) 61 DLR (4th) 409 (BCCA) and *Johnson v Pelkey*, (1997) 36 BCLR (3d) 40 (SC)).

Suspicious circumstances surrounding the making of a will is not a stand-alone ground to challenge the validity of a will; however, if a challenger of a will can demonstrate that suspicious circumstances existed when the will was drafted, this may shift the burden on propounders of the will to prove that the testator had knowledge and approved of the contents of their will when it was made. In *Vout v Hay*, [1995] 2 SCR 876 at para 25 [*Vout*], the Court held that suspicious circumstance may be raised by: (1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborn by acts of coercion or fraud.

The Court in *Vout* held that where suspicious circumstances are proven, the burden of proof shifts to the propounder of the will to prove on a balance of probabilities that the will-maker knew and approved of the will's contents and had the necessary testamentary capacity. This problem is best avoided by ensuring the will is prepared by the will-maker or some independent party (e.g., a student or lawyer) and not by a beneficiary, or the spouse of a beneficiary, under the will.

B. Finding and Appointing a Personal Representative

1. Duties of a Personal Representative

The Executor or Administrator is responsible for the administration of the Estate, including inventorizing and realizing assets, distributing assets, and winding up the Estate.

2. Executor

An Executor is appointed by the will-maker in the will to handle all aspects of the estate after the will-maker's death. Any person, trust company or financial institution may be an Executor depending on the size of the estate. Although not recommended, a minor may be appointed; however, if he or she has not reached the age of majority on the will-maker's death, probate may be delayed.

The will-maker should appoint a person that is willing to act, familiar with the estate, young enough to outlive him or her, and preferably living in BC. An alternative Executor should also be appointed in case the first Executor is unavailable. The Executor, if he or she accepts the position, must carry out the duties of Executor. The Executor may renounce under section 104 of *WESA*, if he or she has not already intermeddled with the estate. In this scenario, the administration of the estate passes as if he or she had never been appointed Executor.

3. Administrator

An Administrator is appointed by the court to administer the estate of a person who dies intestate (without a valid will). Section 130 of WESA provides the order of priority among applicants for administration of an intestate estate. An Administrator cannot act until the court issues a Grant of Administration. A "Grant of Administration with Will Annexed" may be granted where there is a will, but the Executor named in the will cannot or will not act (e.g. due to refusal to act, incapacity, or death of the Executor). The order of priority for administration with will annexed is provided in section 131 of *WESA*. The Administrator's legal capacity to act starts from the date of the issuance of the Grant of Administration.

4. Personal Representative is Accountable

A personal representative is a fiduciary at law and must act to the benefit of the estate and the beneficiaries. He or she cannot purchase from the estate unless he or she is given specific power to purchase in a will. He or she is accountable to the estate for any profit made while acting as Executor or Administrator. If the personal representative makes mistakes and causes loss to the estate, unless the court finds that he or she acted honestly and reasonably, that person could be held personally liable and could be required to replace the loss.

5. Remuneration and Benefits

A personal representative may be entitled to remuneration under a remuneration contract or pursuant to an express authority under the will. Otherwise, he or she is entitled to a fair and reasonable remuneration, not to exceed 5 percent of the gross aggregate value of the estate under section 88 of the *Trustee Act*, RSBC 1996, c 464, and an annual care and management fee not exceeding 0.4 percent of the average market value of the assets. A personal representative may be a beneficiary under the will, though it is a rebuttable presumption that any benefit other than a residuary bequest under the will is in lieu of compensation. See *Canada Permanent Trust Co v Guinn*, (1981) 32 BCLR 288 (SC).

A trust company can be appointed Executor but usually will not consent unless the assets are substantial. **If the client requires a trust company to be appointed as the Executor, the client should be referred to a private lawyer.**

C. Drafting a Will

Section 37 of *WESA* requires that a will be in writing. The will-maker and two or more witnesses in the presence of the will-maker must sign the will. It may be typed or handwritten, or both, as in the case of printed will forms.

1. Intention and Precision

A fundamental rule of drafting is to ascertain the will-maker's intent regarding how the estate will be divided. Have the will-maker consider present desires as well as future possibilities. A beneficiary may predecease the will-maker and the will-maker may want the deceased's share to go to someone else. Potential will variation claims must be anticipated. A qualified lawyer should be consulted if a wills variation claim may occur. See Section VI: Will Variation Claims, to determine when this issue might arise.

Use clear, and precise language. Those drafting a will should make an effort to use fewer technical legal terms and more common language. The concepts of Latin maxims may be difficult for some to comprehend and cause unnecessary frustration. Using simple language will reassure clients that those who read it will understand what is being conveyed.

Do not use words and phrases that are open to more than one interpretation. Be clear in describing property and time periods. Remember that certain terms used to describe property or relationships have precise legal meanings. Do not use them casually. Be careful when describing property and beneficiaries. For example, the clause "I give the assets in my bank account to John" is poorly drafted. It may mean a savings account, checking account, or both. John may be a son, nephew or lover.

It is well-settled that courts will allow a successful party in litigation to recover costs from an unsuccessful party. However, the rule that costs follow the event is generally modified in wills variation and interpretation actions. In the absence of misconduct, where the opinion, advice or direction of the Court is sought on a question relating to the validity or interpretation of a will, the Court may order the costs of all parties to be paid out of the estate.. See Wilson v Lougheed, 2012 BCSC 1166.

- NOTE: The clauses given below are merely examples. You should ensure that the clauses you use are appropriate and that the will is internally consistent. For example, if specific bequests are given to various persons, another clause in

the will should not dispose of the entire estate, but may dispose of the residue. Consult a qualified lawyer, the CLEBC *Wills and Personal Planning Precedents* resource or any other books on will precedents for additional assistance with the structure of various clauses.

2. Actual Drafting

A will contains instructions about what should happen after the will-maker's death. As a result, keep in mind the importance of precision and consistency when drafting a will. Generally, there are several paragraphs common to all wills. To see full will templates, consult the sources on page 4. The CLEBC's *Wills and Personal Planning Precedents - An Annotated Guide* is especially useful.

In addition, the top of each page of the will should identify the page by number and indicate "the Last Will and Testament of <will-maker's name>" and should be initialled by the will-maker and witnesses.

3. Part One

The first part of the will deals with initial matters. The opening clause of a will is called the "domicile clause" and identifies the will-maker and the place where the will was made. The first paragraph is known as the revocation clause, which cancels any wills previously made. The next paragraph appoints the Executor and Trustee and an alternate Executor and Trustee of the will. Following this paragraph is the guardian clause, which appoints someone to look after any minor children. This is important in cases where the death of both parents occurs at the same time.

a) Opening and Revocation Clause

The opening clause is fairly standard. It identifies the will-maker, gives his or her place of residence and may state his or her occupation:

- SAMPLE: "This is the last will of me, [name], of [address], British Columbia." (See *2019 CLE Wills Personal Planning Precedents*, 1.5).

Though the last testamentary disposition of property is generally the effective one, it is standard practice to insert a general revocation clause that revokes all previous wills and codicils. This clause should be included even though the will-maker has never before made a will. It follows the opening clause.

- SAMPLE: "I revoke all my prior wills and codicils." (*2019 CLE Wills and Personal Planning Precedents*, 1.11).

The revocation clause will not revoke other non-will testamentary dispositions such as designations made on insurance policies, RRSPs, etc. It is more effective to designate the estate as the beneficiary to such policies or RRSP if the will-maker wishes for these monies to fall into the estate.

This revocation clause may need to be modified in some situations. For example, a will-maker may have a will in another jurisdiction disposing of assets in that jurisdiction. One should be careful to not unintentionally revoke wills that deal solely with assets in another jurisdiction. Further, a will-maker may elect to create dual wills for the purpose of separating assets that require probate (e.g. real property and most bank accounts) and those do not require probate (e.g. shares in private companies). Dual wills can help save probate fees and were given effect under section 122(1)(b) of WESA. See s 7.5 of the 2019 edition of the CLE *Wills and Personal Planning Precedents*. A will-maker who wishes to create dual-wills should seek assistance from a lawyer.

b) Appointing the Executor and Trustee

- SAMPLE: "(a) I appoint my [relationship] [full name of executor/trustee] ("[executor/trustee name]") of [executor/trustee's address] to be my Trustee. (b) If my [relationship] [executor/trustee name] is unwilling or unable to act or continue to act as my Trustee, I appoint my [relationship] [full name of alternative executor/trustee] of [alternative executor/trustee's address] to be my Trustee." (See *2019 CLE Wills and Personal Planning Precedents*, 3.5)

The Executor also takes the role of a Trustee during the administration of the estate. However, the will-maker may wish to establish a continuing trust and thus appoint different people to be Executor and Trustee of a specific trust. A Trustee is appointed where the will-maker wishes to prevent the beneficiaries from squandering all or part of the estate and to provide for more capable management funds or property, or to provide for infant children until they attain the age of majority. A trustworthy and competent person should be chosen to be the Trustee. This person will have legal title to the property.

A bank or trust company may also be appointed. Their expertise and trustworthiness make them an excellent choice, although the cost may be prohibitive, especially with small and simple estates.

c) Appointing a Guardian

A will-maker may wish to appoint a guardian for his or her children during their age of minority (see *Family Law Act*, SBC 2011, c 25 s 53 (1) (a)) Financial assistance should be provided to the guardian to cover the costs of raising the children. This arrangement is made with the Trustee. The guardian must be prepared to accept the position and should be consulted beforehand.

A will-maker cannot grant a greater level of guardianship than he or she possesses. Also note that under section 176 of the *Family Law Act*, a child's guardian does not automatically become a trustee of the child's property. If there is any uncertainty regarding what type of guardianship the client has, or whether the client even has guardianship, the client should be referred to a family law lawyer, as LSLAP cannot deal with questions of family law.

Those appointing a guardian should be aware that the court could review such a decision. As well, members of the family can apply to have a decision in the will set aside. However, it must be strictly proven that the guardian appointed by the will-maker is unsuitable for the position.

- SAMPLE: "I appoint [guardian name] to be the guardian of my minor children. It is my hope that, in accordance with the provisions of the *Family Law Act* of British Columbia, [guardian name] will appoint a guardian in [his/her] will, or otherwise, to be the guardian of my minor children." (*2019 CLE Wills and Personal Planning Precedents*, 4.9)

For more information, see **Chapter 5: Children and the Law** and **Chapter 3: Family Law**.

4. Part Two

The second part of the will addresses the disposition of the estate. The Executor/Trustee is given the power to deal with the estate as he or she sees fit, namely, to sell assets and convert into money or postpone such conversion of the estate for such a length of time as he or she thinks best. Further, the Executor/Trustee directs payment of debts, specific bequests, cash legacies, gifts to spouse, and gifts to children (gifts of the residue of the estate).

a) Vesting Clause

This clause gives the Executor/Trustee the power to deal with the estate as he or she sees fit, in keeping with the will-maker's wishes under the will and the Trustee's fiduciary duties.

- SAMPLE: “I give my Trustee all my property of every kind and wherever located to administer as I direct in this Will. In administering my estate, my Trustee may convert or retain my estate as set out in paragraph(s)... [referring to the "convert, keep or invest" clause]” (*2019 CLE Wills and Personal Planning Precedents*, 7.3)

Immediately after this clause, the student should insert the clause “I direct my Trustee to hold that property on the following trusts:” See the sample will template in *2019 CLE Wills and Personal Planning Precedents*, 48.2, to better understand how this would look.

b) Payment of Debts

This clause is usually inserted even though the Executor/Trustee is legally required to pay debts outstanding at death, reasonable funeral expenses, taxes, and legal fees out of the estate.

- SAMPLE: “(a) to pay out of my estate:

1. my debts, including income taxes payable up to and including the date of my death [and any financial charges with respect to any property which, pursuant to this will, is transferred free and clear to a beneficiary for beneficiaries];
2. my funeral and other expenses related to this Will and my death; and
3. all estate, gift, inheritance, succession, and other death taxes or duties payable in respect of all property passing on my death, including:

    A. insurance proceeds on my life payable as a consequence of my death (but excluding the proceeds of insurance upon my life owned by any corporation or owned by any partnership of which I am a partner);

    B. any registered retirement savings plan, registered retirement income fund, annuity, pension, or superannuation benefits payable to any person as a result of my death;

    C. any gift made by me in my lifetime; and

    D. any benefit arising by survivorship,

    E. and my Trustee may pay these taxes whether they are imposed by the law of this jurisdiction or any other, and my Trustee may prepay or delay payment of any taxes or duties;

(*2019 CLE Wills and Personal Planning Precedents*, 8.4)"

c) Items-in-Kind

The will-maker may wish to make a specific bequest of a personal article. The appropriate item must be listed.

- SAMPLE: “(a) to deliver absolutely my [article 1] to my [relationship] [article 1 recipient name], if [he/she] is alive on the date that is 5 days after the date of my death, and if [he/she] is not alive on that date, add [article 1] to the residue of my estate.

“(b) [to pay [all/a specified portion] of the packing, freight, and insurance costs my Trustee decides [are/is] appropriate for delivering any items of the Articles as required by this will].” (*2019 CLE Wills and Personal Planning Precedents*, 11.8)

d) Cash Legacies

The will-maker may wish to make a specific bequest of cash legacies.

- SAMPLE: “to pay: $ [amount] without interest to [name of recipient of cash gift] of [address], if [he/she] is alive on the date that is 30 days after the date of my death, and if [name of recipient of cash gift] is not alive on that date, that amount will form part of the residue of my estate,”

If the client feels that his or her estate may not be large enough to pay all desired legacies, the client may wish to express an order of priority for the legacies. See *2019 CLE Wills and Personal Planning Precedents*, 14.2.

e) Gift to Spouse

In the event of a common accident where both spouses die, and it cannot be determined who died at what particular time, then each spouse’s estate passes as if they had outlived the other spouse (WESA s 5). In the case of a joint tenancy, the property is treated as if it were held as a tenancy in common (WESA s 5). These presumptions will be subject to contrary intention made in a will or other applicable instrument. Also, if a spouse does not survive the deceased spouse by five days, that person is deemed to have predeceased the deceased spouse (WESA s 10). Disposition of life insurance is dealt with differently under the *Insurance Act*, RSBC 2012 c 1, ss 59 and 61-64.

To ensure that property passes according to the will-maker’s intention, a 30-day survivorship clause should be added, which requires the surviving spouse to survive the will-maker by 30 days (or such period as the will-maker wishes). A sample clause when the deceased spouse leaves the residue to the surviving spouse is:

- SAMPLE: “(a) to give the residue of my estate to [residue name], if [he/she] is alive on the date that is 30 days after the date of my death; “(b) if [residue name] is not alive on the date that is 30 days after the date of my death, [specify what to do with residue].” (*2019 CLE Wills and Personal Planning Precedents*, 15.4) If the will-maker is not giving a residue but the entire estate, the appropriate words would be “to give all my assets, both real and personal, of whatsoever kind and wheresoever situate, to…”

Because of the presumption that a reference in a will to a relationship is presumed to refer to those that are legally married, a “common law spouse” should not be referred to as “my husband” or “my wife” but should be identified by name, such as, "my partner, [name]".

f) Gift to Children

If the will-maker’s spouse does not survive the will-maker, often the will-maker will want to leave the estate to his or her children. A will-maker must decide whether he or she wishes to divide the estate between only those children alive at the will-maker’s death, or if he or she wishes to benefit the issue of any pre-deceased child as well (i.e. grandchildren).

- SAMPLE: “If <spouse's name> is not alive on the date that is 30 days after the date of my death, to divide the residue of my estate in equal shares [between/among] those of my children who are alive on the date that is 30 days after the date of my death, except that if [either/any] child of mine has died before that date and one or more of his or her children are alive on that date, that deceased child of mine will be considered alive for the purposes of the division and the share creates for that deceased child of mine will be divided equally among those of his or her children who are alive on that date." (2019 CLE Wills and Personal Planning Precedents, 15.8)

[The will should then go on to detail the terms upon which the shares will be distributed to the beneficiaries: e.g. the age at which the trustee should pay out the shares.]

If the children are under 19, usually a trust should be created for them until they reach majority age. See Part III-b, Gifts to Children, immediately below. If a trust needs to be created for a minor child, the student should refer the client to a private lawyer.

5. Part Three

a) Implied and Expressed Powers of Executor

The third part of a will deals with the administration of the estate. This section outlines the Trustee's general powers and responsibilities: trusts for minors, payments for minors, and valuation of the estate. The only implied power of an Executor to deal with assets is a power to "call in" and sell the assets which are not specifically gifted in the will. Therefore, a well drafted will should involve several express powers so that the Executor can efficiently deal with the assets of the estate.

NOTE: There is an important distinction that must be made between the duties and powers of the Executor. On the one hand, duties are non-discretionary. They dictate a course of action that the Executor must take according to the intentions of the will-maker as set out in the will. On the other hand, powers are discretionary. They allow the executor to make decisions within a range of possibilities according to the intentions of the will-maker.

b) Gifts to Children

As a general rule, anyone named in a will can inherit under that will. However, minors cannot sign a valid receipt for their share in an estate. In practical terms, this means that minors must wait until they reach the age of majority to inherit under a will. The parent, guardian, or other trustee for the benefit of the child would hold title to any real property until the child reaches age 19. When property is held by a trustee in trust for a child under the age of 19, the trustee is deemed to have the power to encroach and may, at his or her discretion, apply all or part of the income to which the child may be entitled towards the maintenance and/or education of the child (*Trustee Act*, RSBC 1996, c 464, s 24).

The clause creating the trust should:

- Create the trust for the benefit of the children;
- Set out a discretionary schedule of payments;
- Grant a power of encroachment and/or a direction to pay income;
- Leave a deceased beneficiary's share to his or her children if he or she dies before reaching the age of vesting. If he or she has none, then the trust should direct who receives the remainder of the share.
- Give the Trustee discretion to invest outside the *Trustee Act*, only if he or she is acquainted with business matters.
- SAMPLE: "If anyone becomes entitled to any part of my estate, is under the age of majority, and I have not specified terms in this will on which my Trustee is to hold that part, I direct my Trustee to hold that part, and:

1. Pay as much of the income and capital as my Trustee decides for that person's benefit until that person reaches the age of majority;
2. Add any unused income to the capital of that person's part of my estate and then pay the capital to that person when he or she reaches the age of majority, but if that person dies before reaching the age of majority, I direct my Trustee to pay that person's part of my estate to that person's estate; and
3. Regardless of paragraph X (a) and (b) above, and at any time my Trustee decides, pay some or all of that part of my estate to that person's parent or guardian, to hold, and if that parent or guardian decides, apply some or all for that person's benefit." (See *2019 CLE Wills and Personal Planning Precedents*, 20.4)

The intended beneficiaries (i.e. the children) need not be alive at the time of execution to be included if a general term such as "children" is used.

Section 153 of *WESA* provides that where there is no trustee in the estate, money bequeathed to a minor is paid to the Public Guardian in trust for that minor. The *Infants Act* (s 14(1)) states that, subject to the terms of a trust set up in a will, the Public Guardian may authorize payment of all or part of the trust for the maintenance, education or benefit of the infant.

If part of an estate is distributed to a minor, the Executor or Administrator of an estate is left open to an action by the minor (upon reaching the age of majority) to repay all the monies distributed in a manner not in accordance with the terms of the will.

If a will-maker wants a clause to limit the Trustee's investment powers, a wills precedent book must be consulted. If any of the persons the will-maker wishes to benefit are stepchildren, the will should clearly identify that person by name rather than merely by relationship (i.e. "children"). **Stepchildren are not considered children under *WESA*, and should be referred to by name.** Adopted children, however, are for all purposes the children of the adopting parents, and not the legal children of the natural birth parents, per section 3 of *WESA*.

It is possible for a minor to receive monetary gifts before he or she reaches the age of 19. However, before probate will be granted, the Public Guardian and Trustee of BC must be notified. The Trustee's foremost concern is protecting the child, and it is in the Trustee's discretion whether or not a gift will be given. Factors such as the amount of the gift and its intended purpose will be considered.

c) Valuation of Estate

This section of a will outlines the Trustee's general power and discretion to fix the value of the estate.

NOTE: While the Trustee has a general discretion to fix the value of the estate, there must be some factual basis to support this valuation. The Trustee has a fiduciary responsibility to act to the benefit of the estate and the beneficiaries.

- SAMPLE: "When my Trustee divides or distributes my estate, my Trustee may decide which assets of my estate to allocate to any share or interest in my estate (and not necessarily equally among those shares or interests) and the value of each of those assets. Whatever value my Trustee places on those assets will be final and binding on everyone interested in my estate." (*2019 CLE Wills and Personal Planning Precedents*, 20.8)

6. Part Four

The fourth part of a will is concerned with the elimination of potential beneficiaries, funeral directions, and finally, execution and attestation.

a) Eliminating Potential Beneficiaries

See Section VI, Wills Variation Claims for more information regarding why eliminating potential beneficiaries can be problematic.

b) Funeral Directions

These directions are binding. The Executor must arrange for a funeral that is fitting having regard to the will-maker's position and manner of life. Prudent practice is to advise the will-maker that he or she should make these wishes known to the Executor.

- SAMPLE: "I want my remains to be [buried/cremated]. I hope that if any funeral or memorial service is held as a result of my death it will be conducted with unostentatious simplicity." (See *2019 CLE Wills and Personal Planning Precedents*, 21.2)

c) Execution and Attestation Clause

The execution and attestation clause should not be on a page of its own. It must follow the final clause of the will on the same page. This is required to prevent the insertion of additional clauses after the will is signed. Always have the will-maker sign it at the end of the will in the presence of two witnesses who do not have an interest in the estate (i.e. is not a beneficiary or executor) and are not the spouses of any individual who has an interest in the estate; there must be room for the two witnesses' signatures (see Section III.D: Executing the Will and Section III.E: Attesting the Will).

NOTE: Execute only the original will. Copies should not be signed by the will-maker and witnesses, but can be photocopied or have facsimile signatures and dates inserted. Students should write or stamp the word "copy" on all photocopies.

SAMPLE:

"I have signed this Will on *[month, day, year]*.

We were both present, at the request of *[will-maker name]*, and we were both 19 years of age or older, when this Will was read to *[him/her]*. *[Will-maker name]* seemed to thoroughly understand it and approve its contents. We remained present while [he/she], then signed this Will with the name of *[will-maker name]*. We then signed as witnesses in the presence of both *[will-maker name]* and *[signor]* and in the presence of each other.

________________________ Signature of Witness ________________________

Printed Name ________________________

Address (Street) ________________________

City

____

Occupation ________________________

Signature of Witness

____

Printed Name

____

Address (Street)

____

City

____

Occupation

____

[full name of will-maker]

(*2019 CLE Wills Personal Planning Precedents*, 22.35)

D. Executing a Will

1. Presumption of Proper Execution

Inclusion of a signed attestation clause will raise a presumption that the will is properly executed (*Singh Estate (Re)*, 2019 BCSC 272 paras 58-60). An attestation clause is a clause at the end of the will where the will-maker signs his or her name testifying to the fact that he or she is signing the approved will. This is also the place where the two witnesses must sign to show that they have witnessed the will-maker approving of the will.

If special circumstances exist, e.g. the will-maker is blind or illiterate, a wills form manual should be consulted in order to draft the appropriate attestation clause.

2. Beneficiary's Debt to Estate

According to *Re Johnston Estate*, 2017 BCSC 272, the rule in *Cherry v Boultbee*, 41 ER 171 applies in Canada. This means that the beneficiary is required to bring his or her debts towards the estate into account, even if the debt claim would otherwise be statute barred by the *Limitations Act*. *Re Johnston Estate* states that "the purpose of the rule was to prevent a beneficiary who owed money to an estate from receiving more than his or her fair share of the estate."

E. Attesting the Will

1. Signature of a Will-Maker

a) Meaning of Signature

There must be a signature or a mark on the will intended to be a signature. Thus, something less than a signature, e.g. initials, will be sufficient where it is intended to represent the name and to be a signature (*In the Goods of Chalcraft*, [1948] 1 All ER 700; *Bradshaw Estate*, [1988] NBJ No 709. Where necessary, the will-maker's hand may be guided by another person; however, this requires the will-maker's clear direction or consent (*Re: White*, (1948) 1 DLR 572 (NS App Div)).

The will-maker need not sign the will himself or herself. Section 1(1) and (2) of *WESA* provides that the will-maker's signature includes "a signature made by another person in the will-maker's presence and by the will-maker's direction." Where someone else signs on behalf of the will-maker, there must be some act or word by the will-maker constituting a direction or request. When someone else signs, that person may sign in either the will-maker's name or his or her own name, but this circumstance should be noted in the attestation clause (*Re: Fiszhaut Estate*, (1966) 55 WWR 303 (BCSC)). If this issue should arise, there must be further review to ensure the signature's legal validity.

b) Position of Signature

Section 37(1)(b) of *WESA* requires the signature be at the end of the will. Section 39 defines when a will is deemed to be signed at the end and provides that a disposition made below or after the signature is of no effect. Case law has taken a liberal view of these requirements, finding a signature not at the end to have been intended to be at the end (*In the Goods of Henry Hornby*, [1946] All ER 150 and *Currie v Potter* [1981] 6 WWR 377 (Man QB)) and finding a disposition after the signature to have been intended to precede the signature (*Palin v Ponting*, [1930] para 185, considered in *Beniston Estate v Shepherd*, (1996) 16 ETR (2d) 71 (BCSC)). However, to ensure the validity of the will and all dispositions, the will should be signed at its end, after all dispositions. When a will is more than one page, it should be signed at the end of the last page and there should be a portion of the will on the last page. The last page of the will should indicate the will-maker is signing this page as the last of all the pages constituting the will. Although not required, the will-maker and

witnesses should initial the other pages of the will.

2. Signature of Witnesses

a) Generally

The will-maker must make or acknowledge the signature in the joint presence of two attesting witnesses present when the will is signed (*WESA*, s 37) A beneficiary of the will or their spouse should never witness the will, as it may void the gift they receive through the will (*WESA*, ss 40 & s 43). It will be sufficient if the will-maker has made his or her signature in the joint presence of the witnesses. If he or she has not, the will-maker must acknowledge the signature in the witnesses' presence, as it becomes a question of fact that witnesses must have actually seen or been able to see the signature when the will-maker acknowledged it (see *Re Schafner*, (1956) 2 DLR (2d) 593 (NSSC)).

Both witnesses must also attest after the will-maker makes or acknowledges his or her signature in their joint presence. Though they need not sign in each other's presence, they must each sign in the presence of the will-maker who must actually see or be able to see the witnesses sign (*WESA*, s 37(1)(c)). Attesting witnesses must be able to confirm the will-maker's execution of the will; they do not need to be aware of the contents of the will.

b) Competence of Witnesses

Any person 19 years of age or older may be a witness (*WESA*, s 40(1)).

A will is not invalid if the only reason for invalidity is that a witness is legally incapable of proving the will either at the time the will was signed by the will-maker or afterwards. However, if the witness is not 19 years old or older at the time the will was signed by the will-maker, then the will is invalid.

c) Gifts to Witnesses

Section 43 of WESA provides that a gift to a witness, or the spouse of a witness, to a testamentary document is void. Section 43(3) of WESA explicitly provides that, even if such a gift is void, this has no effect on the validity of the remainder of the will.

There is one exception to this rule. Section 43(4) of WESA provides that, if the court is satisfied that the will-maker intended to make the gift to the person, the gift to the witness will not be void. In Bach Estate, Re, 2017 BCSC 548 at para 54, the Court held that section 43(4) of WESA empowers the court to declare a presumptively void gift valid if it "is satisfied the document represents the testamentary intentions of that deceased person". The court also held that "extrinsic evidence is admissible on the question of testamentary intent, and the Court is not limited to the evidence that an inspection of the document provides." See also Re Estate of Le Gallais, 2017 BCSC 1699.

F. Court's Power to Cure Deficiencies and Rectify Wills

Section 58 of *WESA* gives the courts the power to recognize any "record" that gives effect to the testamentary disposition of the deceased, even if it does not comply with the formalities of *WESA* and/or the common law. This means that the court can give effect to a document or other record that contains a testamentary disposition. As such, individuals should be cautious about drafting documents that may be construed as a testamentary disposition.

The leading case on section 58 is *Estate of Young*, (2015) BCSC 182, in which the court considers case law from Manitoba with a similar provision (section 22 of The *Wills Act*, CCSM W150) in order to interpret section 58.

The court observes that the curative power of section 58 is very fact-sensitive and that the purpose of the section is to cure formal invalidities and not to be used to uphold a will that is invalid for any substantive reasons. For example, the court can uphold a will that does not adhere to the format that a will should take under *WESA*; however, it cannot uphold

a will that is deemed invalid because of testamentary incapacity or undue influence.

There are two principal issues for consideration that the court takes into account when assessing whether an impugned document should be recognized:

1. Whether the document is authentic.
2. Whether the non-compliant document represents the deceased's testamentary intentions. The court then goes on to specify: "the key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death."

The court includes a non-exhaustive list of factors that may be taken into consideration when assessing a document:

- the presence of the deceased's handwriting;
- witness signatures;
- revocation of previous wills;
- funeral arrangements;
- specific bequests; and
- the title of the document.

Although section 58 gives the court broad powers to give effect to the intentions of the will-maker, this power does have limitations. Therefore, every effort should be made to follow the proper procedure when drafting a will in order to avoid future complications. As the court notes in *Estate of Young*, 2015 BCSC 182, "[w]hile imperfect or even non compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention." See also Hadley Estate, Re, 2017 BCCA 311.

Section 59 of WESA gives the courts the power to rectify an error or omission in a will in order to give effect to the intentions of the will-maker. Extrinsic evidence is permissible to determine the intent of the will-maker.

This is a significant provision, as it allows the courts to consider evidence that would otherwise not be admissible in order to determine the intent of the will-maker.

Revocation of wills is governed by section 55 of WESA. These sections outline the only ways in which a will may be revoked. Section 56 of WESA provides that if a will-maker gifts, appoints as an executor, or confers power to a person who subsequently ceases to be the spouse of the will-maker under section 2(2) before the will-maker's death, only that gift, appointment, and/or conferment is revoked, not the entire will. The gift to the ex-spouse must be distributed as if he/she died before the will-maker. The application of section 56 of WESA is subjected to any contrary intention in the will.

G. Filling a Wills Notice

After the will is complete, a Wills Notice should be filed with the Department of Vital Statistics in Victoria (*WESA*, at s 73). The purpose of the notice is to record the existence and location of the will and make it easier to find the will after the will-maker's death. A will-maker is not required by law to file a Wills Notice. However, it is recommended as a wills search must be undertaken by the Executor or Administrator before the Grant of Probate or Grant of Administration are issued.

A Wills Notice should be filed whenever a will is made, revised, revoked or moved or whenever a codicil is executed. In order to file a Wills Notice, the will-maker must have the following information:

- Legal name and date of birth
- Place of birth

- Date the will was signed
- Location of the will; and
- The date the note was filed with the Vital Statistics Agency

There are three ways of filing a Wills Notice, either online, by mail, or in person. All three methods require a $17.00 charge for filing, payable to the Minister of Finance. Forms are available from: BC Government Forms Finder, website: www2.gov.bc.ca/gov/content/home/forms-a-z. If filing by mail is preferred, then the VSA 531 form must be completed and mailed to: Vital Statistics Agency, PO Box 9657 Stn Prov Govt, Victoria, BC V8W 9P3.

Finally, the VSA 531 form can be submitted in person to any Service BC Counter. Locations can be found at www.servicebc.gov.bc.ca

If a will is made with LSLAP, the forms are also on file in the LSLAP office. A copy of the notice should be made and the original notice should be sent to the Vital Statistics Agency. The copy should be either kept with the will or with the personal representative. Do not send a copy of the will. Students may not sign the notice as the client's solicitor. The client must sign the form.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 4, 2019.

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IV. Mistakes and Alterations

A will may be changed by executing a new will, executing a codicil, or altering the will before it is executed. Where a Will-maker wants to alter a will, section 54(2) of *WESA* requires that the Will-maker sign and the witnesses attest the signature in the margin or near to the alteration, or at or near to a memorandum written in the will referring to the alteration. An alteration should be so attested even if made before the will itself is executed. This will avoid subsequent litigation, which may arise if an unattested alteration appears to have been made after the execution of the will. **Where a mistake is made when drafting a will, the safest course is to draw up a new, corrected will.**

There are three reasons why executing a new will may be a preferable course of action:

1. a new will avoids any danger of a codicil not adequately referring to the correct will;
2. when only one document exists (i.e. the new will) there is less likelihood of misinterpretation; and
3. if a codicil is used to revoke a gift made in the will, the party who would have received the gift will be informed of the change made by the will-maker, which could cause personal discord in the Will-maker's relationship with that person.

An unattested alteration made after the will is executed is invalid and may also invalidate any existing part of the will that the alteration obliterated or made impossible to decipher. However, it is important to note that section 58 of *WESA* allows a court to recognize any document that gives effect to the testamentary disposition of the deceased, even if it does not comply with the formalities of *WESA*. (See Section III.F, above, which also discusses the power of rectification under section 59).

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V. Revocation

A. By Subsequent Writing

A subsequent instrument in writing that is not a subsequent will but is in compliance with the provisions of *WESA* (e.g. signed by two witnesses, etc.) may have the effect of revoking the will (*WESA*, s 55(1)(b)).

Where a will is revoked in this way, a wills notice should be filed with the Department of Vital Statistics to record the revocation of the will (see Section III.G: Filing a Wills Notice).

B. By Destruction or Loss

A will may be revoked by destruction, per section 55(1)(c) of *WESA*. There must be some physical act of destruction: "burning, tearing, or destruction of it in some other manner by the will-maker." Though copies need not be destroyed, it would be safer to do so to ensure revocation. If a will is in the will-maker's custody and is found destroyed, or if a lost will was last known to be in the will-maker's custody, it will be presumed that the will-maker destroyed it. There is a presumption that a lost will has been destroyed and revoked, therefore, care must be taken in storing the will.

To prevent subsequent litigation, if a will is accidentally lost or destroyed, the will-maker should make a new one even though a copy of the lost or destroyed one survives. The will-maker should maintain clear custody of his or her will in a safe place known by the personal representative to guard against accidental loss or destruction. There is a presumption that a lost will has been destroyed and revoked, therefore, care must be taken in storing the will.

Furthermore, for a will-maker to revoke a will by destruction, the will-maker must have the intention of revoking the will. Though there is a presumption that a will-maker who destroys a will does so with the intention of revoking it, this does not apply where he or she lacks capacity to form the requisite intention.

Also, there is the question of whether the intention to revoke the will was absolute or conditional. If it was absolute, revocation is complete. However, if the intent depended on the condition of reviving an old will or writing a new one and the condition or contingency has not been satisfied, the revocation is ineffective. This is known as the doctrine of dependent relative revocation: see Jung v Lee Estate, 2005 BCSC 1537.

C. By Subsequent Will

A will may be revoked by another will made in accordance with section 55(1)(a) of *WESA*. Nevertheless, it is common practice to clearly provide for such by the inclusion of a revocation clause at the beginning of a will. Notwithstanding an express revocation clause, a second will does not necessarily absolutely revoke a former will. There may be partial revocation only; where the second will does not completely dispose of the estate both documents may be admitted to probate. The will-maker should therefore ensure that the second will disposes of the entire estate, which may be accomplished through the use of an effective residuary clause.

D. Effect of Marriage on Will Revocation

Under *WESA*, a subsequent marriage will no longer revoke a prior will.

E. Effect of Divorce, Separation, and Change in Circumstances on Will Revocation

Neither marriage nor divorce of the will-maker will revoke a will. However, a change in circumstances may lead to an individual no longer being considered a spouse. This will bar the former spouse from a claim to vary a will.

Additionally, if a will-maker wishes to leave anything in a will to a former spouse, wishes to appoint a former spouse as executor, or wishes to confer any powers of appointment on a former spouse, the will-maker should explicitly state that this is being done contrary to section 56(2) of *WESA*.

F. Effect of Family Law Act

According to Howland Estate v. Sikora, 2015 BCSC 2248: “The death of the claimant, prior to the coming into force of the [*Family Law Act*], does not override the respondent's right to commence an action against the claimant's estate so long as it occurs within the two year period contemplated in section 198 [of the *Family Law Act*], as happened here.” In summary, this means that *Family Law Act* claims can continue even past death as long as the claimant brings suit within two years.

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VI. Will Variation Claims

A. Application Under the Act

WESA gives the court the power to vary a will. **Only the spouse of the will-maker or the will-maker's children can commence an action to vary a will.** However, it should be noted that in the situation of common law spouses, one spouse can unilaterally terminate a relationship and thereby remove the will from the variation provisions in *WESA*. On the other hand, for married spouses, the spousal relationship can only be terminated by divorce. Please see Chapter Three: Family Law for more information regarding divorces. The **limitation period** for commencing an action to vary a will is **180 days** from the grant of probate, per section 61(1)(a) of *WESA*.

A wills variation action is commenced by a claim that the will-maker failed to "make adequate provision for the proper maintenance and support of the will-maker's spouse or children" (*WESA*, s 60).

When determining what constitutes adequate provision in a will, courts have considered the following:

- actual need, which varies with age and dependency;
- justifiable expectation based upon a dependency upon the will-maker or an actual contribution made by the claimant to the will-maker's estate;
- will-maker's intention and reasons for making his or her will; and
- the size of the will-maker's estate.

See *Lukie v Helgason & Lukie* (1976), 26 RFL 164 (questioned) and *Newstead v Newstead Estate* (1996), 11 ETR (2d) 236 (BCSC) for detailed discussions of the above factors.

The Supreme Court of Canada decision in *Tataryn v Tataryn Estate* (1994), 93 BCLR (2d) 145 provides a different focus for the determination of a wills variation claim. This is the leading authority in British Columbia on wills variation. The court considered the following factors in deciding what constitutes an "adequate, just, and equitable" provision in a will:

- the will-maker's **legal obligations –** maintenance and property allocations which the law would support during the will-maker's lifetime; and
- the will-maker's **moral obligations –** society's reasonable expectations, based on community standards, of what a judicious person would do in the circumstances.

In the more recent case of *Dunsdon v Dunsdon* (2012) BCSC 1274 (CanLII) [*Dunsdon*], the court provides a list of overlapping considerations that "have been accepted as informing the existence and strength of a testator's moral duty to independent children:

- Relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other
- Size of the estate
- Contributions by the claimant
- Reasonably held expectations of the claimant
- Standard of living of the testator and claimant
- Gifts and benefits made by the testator outside the will
- Testator's reasons for disinheriting
- Financial need and other personal circumstances, including disability of the claimant
- Competing claimant and other beneficiaries"

As the court notes in Dunsdon, "[t]he concept of adequate provisions is a flexible notion and is highly dependent upon the individual circumstances of the case. The adequacy of a provision is measured by asking whether a testator has acted as a judicious parent or spouse, using an objective standard informed by current legal and moral norms. The

considerations to be weighed in determining whether a testator has made adequate provisions are also relevant to the determination of what would constitute adequate, just and equitable provisions in the particular circumstances."

Where the size of the estate allows, surviving spouses and children are entitled to an equitable share under *WESA*, **even in the absence of need**.

The court may consider the applicant's character or conduct, and variation may be refused on this basis (*WESA*, s 63(b)). If the estate is large and the spouse or children were not mentioned in the will, or they think they were inadequately or unfairly provided for, they should consult a lawyer. LSLAP cannot assist clients with wills variation claims.

> **NOTE:** In a decision of the BC Supreme Court, *Ward v Ward Estate*, 2006 BCSC 448 and it was more recently in Kuzyk v Czajkowski, 2016 BCSC 1109, it was held that a signed pre-nupital agreement where both parties gave up any right or interest to the other's estate was not determinative in a claim under the *Wills Variation Act*.

B. Definition of Spouse in WESA

The definition of spouse in section 2 of *WESA* reads:

(1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and

(a) they were married to each other, or (b) they had lived with each other in a marriage-like relationship for at least 2 years.

(2) Two persons cease being spouses of each other for the purposes of this Act if, (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the *Family Law Act*, to arise, or (b) in the case of a marriage-like relationship, one or both persons terminate the relationship.

(2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation, (a) they begin to live together again and the primary purpose for doing so is to reconcile, and (b) they continue to live together for one or more periods, totalling at least 90 days.

(3) A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.

> **NOTE:** See *Gosbjorn v Hadley* 2008 BCSC 219 for a list of factors used by the courts to determine if there is a marriage-like relationship. More recently, see the discussion in *Connor Estate*, 2016 BCSC 1934.

> **NOTE:** In *BH v JH*, 2015 BCSC 1551, the BC Supreme Court varied the husband's will so that the wife, who was separated from but who has not divorced the husband, was entitled to part of the husband's estate. This significantly deviated from what the wife would have received if they had divorced immediately before the husband's death.

C. Exclusion of Potential Beneficiaries

A will-maker who wishes to exclude a spouse or child should state precisely why the person is being "disinherited," or why they are less than "adequately" provided for. LSLAP's policy is not to draft a will where the will-maker wishes to exclude a spouse or child, or unevenly divide the assets between children. Such clients should be referred to a private lawyer, unless the supervising lawyer gives approval.

As per section 60 of WESA, the court is not bound by the will-maker's decision and reasons, but will consider them. Therefore, the will-maker is not assured of success in his or her attempt to exclude or less than adequately provide for a spouse or child. For more detail, see above Section VI.A: Application Under the Act.

The chances of the will-maker's will being upheld will be greater if the will-maker provides **reasonable and rational reasons for the exclusion**. For example, where the will-maker has already given the person substantial benefits during her or his lifetime, where the reason is based upon the person's character, or on the relationship between the will-maker and the potential claimant, the court will be more likely to uphold the will-maker's wishes.

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VII. Intestacy

A. Generally

If a person dies intestate (without a valid will), his or her assets are distributed to intestate successors in accordance with *WESA*. Where a will exists but does not cover all assets, there will be a partial intestacy and those assets outside the will that do not pass by contract or survivorship will pass according to *WESA's* intestacy distribution scheme.

1. Spouses

Under *WESA*, it is possible to have more than one spouse by having a spouse by marriage in addition to a common law spouse. It is also possible to have multiple common law spouses. However, it is not possible to have more than one spouse by marriage.

The spouse of the deceased is always entitled to a preferential share of the estate, as well as the "household furnishings" defined as the personal property usually associated with the enjoyment by the spouses of the spousal home (*WESA*, s 21(1)).

If there are two or more spouses, they must agree as to how to divide the preferential share, otherwise it will be determined by the courts (*WESA*, s 22).

2. Spousal Home

In intestacy, the surviving spouse no longer has a right to the spousal home, but has a right to acquire it under section 31 of *WESA*. Section 33 allows the surviving spouse to make an application to retain the spousal home, considering factors such as whether requiring the surviving spouse to purchase the spousal home would be a significant hardship, and whether a greater prejudice would be imposed on the surviving spouse by being unable to continue to reside in the spousal home than would be imposed on the descendants entitled to share in the intestate estate.

3. Preferential Share

If all the descendants of the will-maker are also the descendants of the surviving spouse, the preferential share of the spouse is $300,000 (*WESA*, s 21(3)). If all the descendants of the will-maker are **not** also those of the surviving spouse, the preferential share of the surviving spouse is $150,000 (*WESA*, s 21(4)).

Situation	WESA Section	Distribution
Intestate dies leaving a spouse but no descendants.	20	Entire estate passes to surviving spouse.
Intestate dies leaving one or more descendants, all of whom are descendants of the surviving spouse.	21(3)	Household furnishings plus preferential share of $300,000 to the spouse. One half of remainder distributed to the spouse, the other half distributed equally to the descendants.
Intestate dies leaving one or more descendants, some of whom are **NOT** descendants of the surviving spouse.	21(4)	Household furnishings plus preferential share of $150,000 to the spouse. One half of remainder distributed to the spouse, the other half distributed equally to the descendants.
Intestate dies, leaving descendants but no spouse.	23(2)(a)	Estate distributed equally to descendants.
Intestate dies leaving no spouse or descendants.	23(2)	Order of Priority: Parents, siblings, nieces/nephews, grandparents, aunts/uncles, etc. See section 23(2) for complete order of priority. If there are no beneficiaries entitled to the estate, the estate passes to the government subject to the escheat act.

B. Separated Spouse

Under *WESA*, two persons cease being spouses if:

a) In the case of a marriage, they live separate and apart for at least two years, with **one or both of them** having formed the intention during that time to live separate and apart **permanently**, or an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the *Family Law Act*, to arise pursuant to section 2(2)(a) of *WESA*. or

b) In the case of a marriage-like relationship, one or both persons terminate the relationship.

NOTE: See *Gosbjorn v. Hadley*, 2008 BCSC 219 and more recently and more recently *Mother 1 v Solus Trust Company*, 2019 BCSC 200 at paras 149-151 for a discussion of when a marriage-like relationship ceases.

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for a list of factors used to determine if a relationship has ended.
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C. Miscellaneous Provisions

- Children conceived before the intestate's death but born after the intestate's death and living for at least 5 days, inherit as if they had been born in the lifetime of the intestate and had survived the intestate., (*WESA*, s 8).
- Adopted children are the children of the adopting parent (*Adoption Act*, s 37).
- Adopted children are not entitled to the estate of their natural parent except through the will of the natural parent (*WESA*, s 3).

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VIII. Property

A. Joint Tenancy and Tenancy in Common

Where property is owned by more than one individual, it may be held in "joint tenancy" or "tenancy in common". The main difference between a joint tenancy and a tenancy in common is that, in the case of a true joint tenancy, each joint tenant receives the right of survivorship. The result is that, upon the death of one joint tenant, the other becomes entitled to the whole of the property. The testator's interest in the property does not form a part of their estate and does not pass under the will. Instead, it passes "outside the will" to the surviving joint tenant(s).

The right of survivorship has its benefits as well as problems. Because the testator's interest in the property held under joint tenancy does not become a part of the estate, probate fees related to the property can be avoided as the interest passes outside the will. Placing assets in joint tenancy may also avoid costs and delays associated with obtaining probate. Furthermore, a beneficiary of a will who is not satisfied with his or her gift under the will cannot make a claim under the Wills Variation Act to obtain a greater share in the estate for property that passes outside of the estate. One drawback of placing assets in joint tenancy is that the surviving tenant owns the asset and does not need to respect the will-maker's wishes on how they may have wanted to asset dealt with after their death.

In contrast, where owners hold an interest in the property as tenants in common, each has a separate undivided share. Upon death, each owner's individual share forms part of his or her estate.

B. Joint Bank Accounts

When a joint bank account is created, many assume that when one owner dies, the survivor is automatically entitled the remaining balance in the account. However, this is not always the case. In Pecore v Pecore, 2007 SCC 17, the Supreme Court of Canada held that when a parent creates a joint bank account with an adult child, it is presumed that this arrangement is made out of convenience, and there was not an intent by the parent for the balance of the account to pass to their adult child by way of survivorship. Unless the intention for the account to pass to the adult child through survivorship is clear when the bank account is set up, courts will presume that the balance in the joint account is to be held by the child in a resulting trust for their parent's estate. It is then up to the child to prove that their parent intended to gift the bank account to them. If the child fails to establish such an intention, the balance of the account forms a part of their parent's estate and is distributed according to their will or the law of intestacy. The Court will consider many factors when determining the deceased's intention in situations involving joint bank accounts. For a detailed discussion of these factors, see http://www.lerners.ca/lernx/joint-accounts-is-the-surviving-owner-really-entitled-to-the-money/

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IX. First Nations and Wills

A student must decide whether or not the client comes within the scope of the *Indian Act*, RSC 1985, c I-5. Section 45(3) is the relevant section of the Act; it provides that a will executed by an Indian, as defined by the Act, is of no legal force and effect as a disposition of property until the Minister has approved the will or a court has granted probate pursuant to the *Indian Act*.

The definition of "Indian" in the Act means "person registered as an Indian or is entitled to be registered as an Indian". The *Indian Act* states that "[t]he Minister may accept as a will any written instrument signed by an Indian in which they indicate their wishes or intention with respect to the disposition of their property upon his death". "Instrument" in this context does not mean anything special: letters, wills, and notes are all "instruments".

The student must be aware of the on-reserve/off-reserve Indian dichotomy. A First Nations person living off-reserve is essentially under the same rules and constraints as any other Testator who isn't classified as an "on-reserve Indian".

Finally, if a registered First Nations person "living on reserve dies intestate, or their will is not clear or not valid, the Department of Indian Affairs will apply to the estate the rules set out in the *Indian Act* and the *Indian Estates Regulations*, CRC 1978, c 954".

For further information on wills for First Nations persons, consult "Wills for First Nations Persons" in Practice Points: Aboriginal Law, available on the BC Continuing Legal Education website at http://www.cle.bc.ca/PracticePoints/ABOR/wills.html.

> **NOTE:** It is important to determine whether there exist any applicable treaties that may affect a First Nation client's will. For example, the Nisga'a Treaty provides that a Nisga'a citizen's cultural property devolves according to Nisga'a law.

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X. Health Care Decisions

British Columbia law provides for three formal instruments by which direction for health care and personal care decisions may be made in advance:

1. Representation Agreements, which allow a donor to appoint representatives to make decisions regarding health and personal care. These are discussed further in in Chapter 15: Adult Guardianship and Substitute Decision-Making.
2. Advance Directives, which contain specific directions regarding health care, that are binding on health care providers.
3. Nominations of Committees, which permits an individual to express their preferences regarding who may be appointed as a person's committee in case of incapacity.

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XI. LSLAP File Administration Policy

This section is specific to LSLAP clinicians. It sets out internal LSLAP practices and policies regarding Wills & Estates.

A. LSLAP File Administration Policy – Wills and Estates

The only wills and estates issues LSLAP can responsibly provide assistance to the public is the drafting of certain types of simple wills. Students should refer clients to qualified wills and estates lawyers for all other issues. In addition, student should only prepare a will for persons meeting our income criteria and whose estates are:

- Small (under $25,000); and
- Consist entirely of personal property, no real property (the future as well as present situation must be considered), with all of the estate located in British Columbia.

In addition to simple wills for individuals, LSLAP is only able to prepare "mirror wills" for clients, not "mutual wills". A mirror will is designed for couples with similar wishes. The wills of the couple "mirror" each other: each leaves the same gifts to the other and each names the other as Executor.

By contrast, a mutual will includes a statement that the will-maker agrees not to change or revoke his or her will without the consent of another party (usually the spouse). This agreement will potentially bind the will-maker even if the other party predeceases the will-maker. Thus, a mutual will has a contractual component, in theory creating a constructive trust. However, a will-maker can always change his or her last will and testament. If a will-maker changes his last will and testament after the other party has died, the will -maker may create a right of action for beneficiaries of the preceding mutual will (which created the constructive trust) for breach of the trust.

Note that signing mutual wills are not a widespread practice. If a client is seeking LSLAP's assistance in preparing a mutual will, the client must be directed to a qualified practitioner. It can be suggested that the client discuss with a qualified practitioner the possibility of creating an inter vivos trust instead of preparing a mutual will. Note that if you are assisting two clients to make mirror wills (or any time you are jointly representing clients), you should provide both clients with a joint representation agreement. This agreement must contain the information required by the Law Society of British Columbia.

LSLAP's policy is that anyone who can afford a lawyer should be referred to one. A practitioner's fee might vary from $300 to $500 for a relatively simple will. However, this material has been prepared for appropriate cases where the client meets LSLAP's income criteria.

Because the law on wills is strictly applied, precedents should be used to provide certainty. Any lack of clarity may defeat the intention of the will-maker, who will not, of course, be available to clarify contentious points once they have passed away. Also, students should not take instructions from a person on behalf of someone else; they can prepare a will only for the client. The final will must then be reviewed with the client to ensure that it reflects his or her wishes and that he or she understands what the document means (see Section III.D: Executing the Will and Section III.E: Attesting the Will).

Important changes to wills and estates law due to *WESA* have been highlighted in this chapter. However, students should refer clients to private lawyers if they are unsure how certain WESA provisions should be interpreted.

Finally, LSLAP will not draft a will that disinherits potential beneficiaries. In other words, LSLAP is unable to help with clients wishing to eliminate spouses and children. Clients wishing to disinherit potential beneficiaries should be referred to a private lawyer.

- **NOTE**: Before drafting a will for a First Nations person, please consult with the supervising lawyers. The client will most likely have to be referred to an outside lawyer. There are many complexities with First Nations wills, and LSLAP will likely not be able to assist.
- **NOTE**: LSLAP's Supervising Lawyer must be consulted on every will and must review the final product before it is sent to the client to be executed.

B. Taking Instructions During the Initial Interview

The purpose of the initial interview is for the LSLAP student to complete the Will Instructions Questionnaire (Appendix A) with the client in order to later actually draft the will. Students should never draft a will for a client during the initial interview. All wills must be approved by the supervising lawyer before they can be mailed or delivered to clients. At the end of the interview, the student should have a clear and full understanding of the client's personal circumstances, assets, and desired distribution of his or her estate. The student should also have sufficient information to later assess the client's testamentary capacity with the supervising lawyer. If there is any doubt as to a person's capacity, consult LSLAP's Supervising Lawyer.

The student should keep the following things in mind during the initial interview:

1. Speak directly with the will-maker, never an intermediary.
2. Interview the will-maker alone, not in the presence of the beneficiaries or spouses, except where taking joint instructions from spouses for mirror wills.
3. Inquire into the nature and extent of the will-maker's property. Ask about any prior wills (to ensure that all property and prior wills are satisfactorily dealt with, and to ensure that the will-maker knows of all the property being disposed of). Ask the will-maker about existence of property that may not form part of the estate (e.g. real estate in joint tenancy, joint bank accounts with survivorship rights, insurance policies and pension plans with named beneficiaries, Tax Free Savings Accounts (TFSAs), Registered Retirement Savings Plans (RRSPs), and Registered Retirement Income Funds (RRIFs)). Ensure that the will-maker understands that such properties, if there are valid beneficiary designations in place, do not form part of the estate and their dispositions are independent of the will and its effects.
4. Have the will-maker read the Will Instructions Questionnaire over, section by section, or read it aloud to him or her.

- **NOTE**: The LSLAP office has a precedent file, which may be consulted for the structure of various clauses. Clinicians may also see the Legal Support Staff Desk Reference, the Continuing Legal Education wills precedent

book, or any book on will precedents.

C. Undue Influence and Suspicious Circumstances

In order to ensure there is no undue influence, clinicians should follow the British Columbia Law Institute guidelines below when conducting an interview with a client looking for assistance on making a will. Refer to the British Columbia Law Institute's Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide for more details on each of the points listed below. The guide can be accessed at http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf

1. Interview the will-maker alone

This practice allows the interviewer to satisfy him or herself that the will-maker has testamentary capacity. The exception to the practice of meeting the client alone is where one is taking joint instructions from spouses for mirror wills. Should it appear that the instructions are not reciprocal, other than differing specific bequest of personal items (e.g. jewellery to daughter, tools to son) one should not take further instructions. Some lawyers will not take instructions for a new will from one of the parties if that lawyer had previously taken mirror or mutual wills instructions for both. Some lawyers will take unilateral instructions that conflict with the earlier mirror will, provided they are also given express instructions to inform the client's spouse that new will instructions have been received.

2. Ask non-leading, open ended questions to determine factors operating on the will-maker's mind

Examples of this type of questions include:

- How/why did you decide to divide your estate this way?
- Why did you choose [proposed executor] as the executor of your will?
- What was important to you in making these decisions?

Again, this ensures what the will-maker tells the interview and wishes to include in his/her will truly represents his/her wishes.

3. Explore whether the will-maker is in a relationship of dependency, domination or special confidence or trust

Examples of questions to ask include:

- Do you live alone? With family? A caregiver? A friend?
- Has anything changed in your living arrangements recently?
- Are you able to go wherever and whenever you wish?
- Does anyone help you more than others?
- Who arranged/suggested this meeting?
- Does anyone help you make decisions? Who does your banking?
- Has anyone asked you for money? A gift?

4. Explore whether the will-maker is a victim of abuse or neglect in other contexts

When interviewing, the interviewer should be aware of the will-maker's physical safety. If necessary and appropriate, refer the will-maker to support resources. Sample questions to consider include:

- Has anyone ever hurt you? Has anyone taken anything that was yours without asking?
- Has anyone threatened you? Are you alone a lot?
- Has anyone ever failed to help you take care of yourself when you needed help?
- Are there people you like to see? Have you seen these people or done things recently with them?
- Has anyone ever threatened to take you out of your home and put you in a care facility?

5. Obtain relevant information from third parties when possible and if the will-maker consents

6. Obtain a medical assessment if mental capacity is also in question, but remember that mental capacity to make a will is ultimately a legal test 7. Compile a list of events or circumstances indicating undue influence. See section below for red flags. 8. Make and retain appropriate records whenever red flags are present 9. If suspicion remains high after reasonable investigation, decline retainer to prepare the will.

D. Undue Influence and Suspicious Circumstances

The British Columbia Law Institute's list of red flags below may indicate the presence of undue influence on a will-maker. The list is non-exhaustive, and the presence of some factor does not provide an affirmation of undue influence. Use the list as a cautionary guide when preparing a will. Refer to the British Columbia Law Institute's Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide for more details on each of the facts listed below. The guide can be accessed at http:/ / www. bcli. org/ sites/ default/ files/ undue%20influence_guide_final_cip.pdf

Some examples of red flags that may indicate the presence of undue influence include:

- Will-maker invests significant trust and confidence in a person who is a beneficiary or is connected to a beneficiary (e.g. lawyer, doctor, clergy, financial advisor, accountant, formal or informal caregiver, new "suitor" or partner)
- Will-maker experiences isolation due to dependence on a beneficiary for physical, emotional, financial or other needs
- Physical, psychological and behavioural characteristics of the will-maker
- Circumstances related to the making of the will and/or the terms
- Characteristics of influencers in the will-maker's family or circle of acquaintance
- Interviewer's "gut feeling"

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Appendix A: Questionnaire

	This appendix is available on Clicklaw Wikibooks for download in PDF. A permanent archive version is also available at https://perma.cc/3TEE-CY69. Readers of the print edition please see the "Supplementary Documents for Appendices" section.

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Appendix B: Checklist

This checklist will help ensure students have considered and dealt with all relevant factors when drafting a will. The checklist is **not** a substitute for a thorough reading of appropriate sections of the Manual.

1. Is there a competent Will-maker (testamentary capacity, age)?
2. Were instructions properly taken? Do directions received represent the Will-maker's true wishes?
3. Are there any previous subsisting wills or codicils?
4. Is all property adequately dealt with? Have the Will-maker make a list of assets and any obligations that may bind the estate (agreements, guarantees, etc.).
5. Is there a proper revocation clause, and a clause confirming that this is the last will?
6. Have a suitable Executor and alternative Executor been appointed?
7. Has a 30-day survivorship clause with alternate beneficiaries been included?
8. If minor children are or may be involved, is a proper trust created with a Trustee and a guardian appointed? Note: if the client wants to create a trust for a child, refer the client to a private lawyer.
9. Are all beneficiaries properly identified with proper name, whether adopted, etc? Is a common law spouse or stepchild properly described?
10. Does the will properly deal with an existing separated legal spouse or a divorced spouse?
11. Is there any provision made for the client's spouse(s) and children? Is it adequate? If not adequate, is there a statement of the Will-maker's reasons for not making adequate provisions or an explanation why the Will-maker feels the provision made is adequate? Note: if the client wishes to inadequately provide for his/her spouse(s) and children, refer the client to a private lawyer.
12. Is the will, as a whole, internally consistent? Are mistakes and alterations properly dealt with?
13. Is marriage imminent, or has marriage occurred since the Will-maker's last will?
14. Has there been proper execution followed by proper attestation by disinterested witnesses? Has the will been dated and have the Will-maker and witnesses initialled the bottom of each page? Is each page identified as the X page of the Will-maker's will?
15. Has the client been advised to keep his or her will in a safe place known to the personal representative, and to review and possibly update his or her will as circumstances change (death of Executor or beneficiary, marriage or separation, acquisition of property not adequately dealt with in the will, etc.)?
16. Has a Wills Notice been filed (or delivered to the Will-maker with the completed will)?
17. Is the Will-maker satisfied with the present beneficiary designations made with respect to any insurance policies, RRSPs, or pensions?

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Appendix C: Glossary

Administrator

- a person appointed by the court to manage the estate of a person who dies intestate (without a will)

Attestation

- an act of authenticating, affirming to be true, genuine, or correct, in an official capacity of a legal document

Beneficiary

- (a) a person named in a will to receive all or part of an estate, or
- (b) a person having a beneficial interest in a trust created by a will Cash legacy – a grant by will of money

Cash legacy

- a grant by will of money

Codicil

- an addition to a will, that changes, explains, revokes, or adds provisions

Equitable title

- a title to property in which a party has a beneficial interest and will eventually acquire legal title. For example, the beneficiary of a trust has an equitable title in assets held in the trust

Estate

- properties of a deceased person

Exclusion clause

- a provision in a will that leaves something or someone out of the will

Execution

- an act of signing and otherwise completing a testamentary document, such as acknowledging the signature if required to make the document valid

Executor

- a person appointed to manage the estate of a person who has died leaving a will which nominates that person. The executor must insure that the person's desires expressed in the will are carried out. Practical responsibilities include gathering up and protecting the assets of the estate, obtaining information in regard to all beneficiaries named in the will and any other potential heirs, collecting and arranging for payment of debts of the estate, approving or disapproving creditor's claims, making sure estate taxes are calculated, forms filed and tax payments made, and in allways assisting the lawyer for the estate (which the executor can select)

Express powers

- stated rights, authorities and abilities in a will of the Executor to take some action or accomplish something, including demanding action, executing documents, contracting, taking title, transferring, exercising legal rights and other acts

Indemnify

- to guarantee against any loss which another might suffer

Intestacy

- a situation where a person dies without a legally valid will

Joint tenancy

- an ownership of real property in which each party owns an undivided interest in the entire property, with both having the right to use all of it and the right of survivorship

Legal title

- the ownership of real propert, which stands against the right of anyone else to claim the property. In real property, legal title is evidenced by a deed, judgment of distribution from an estate, or other appropriate document recorded in the public records

Living will

- a document in which a person appoints another as his/her proxy or representative to make decisions on maintaining extraordinary life-support if the person becomes too ill, is in a coma or is certain to die. Living wills are not legally valid in B.C.

Mirror wills

- the wills of an individual and his/her spouse which are identical except that each leaves the same gifts to the other, and each names the other as executor

Mutual wills

- the wills made by two partners in which each gives his/her estate to the other, or with dispositions they both agree upon. A later change by either is not invalid unless it can be proved that there was a contract in which each makes the will in the consideration for the other person making the will

Personal representative

- the individual that winds up the estate and distributes the assets

Probate

- the process of proving a will is valid and thereafter administering the estate of a dead person according to the terms of the will

Revocation clause

- a provision in a will that cancels any wills previously made

Survivorship

- the right to receive full legal title or ownership of a property due to having survived another person in a joint tenancy

Tenancy in common

- the title to real property held by two or more persons, in which each has an "undivided interest" in the property and all have an equal right to use the property, even if the percentage of interests are not equal or the living spaces are different sizes. Unlike "joint tenancy," there is no "right of survivorship" so that if one of the tenants in common dies, and each interest may be separately sold, mortgaged or willed to another

Testamentary capacity

- having the mental competency to execute a will at the time the will was signed and witnessed

Will-maker

- a person who has made a will which is in effect at the time of his/her death.

Trust

- an entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding title on behalf of the trust)

Trustee

- a person or entity who holds the assets (corpus) of a trustee for the benefit of the beneficiaries and manages the trust and its assets under the terms of the trust stated in the declaration of trust which created it

Wind up

- to liquidate (sell or dispose of) assets of an entity

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Chapter Sixteen B – Probate and Estate Administration

I. Introduction

A. Introduction

The area of law known as "estate administration" is primarily concerned with legal rights and responsibilities that arise after death. The death of an individual will give rise to a number of immediate legal questions: Who will have authority to deal with assets and liabilities? What are the rights and responsibilities of that person? What assets form part of the Estate? How is the Estate to be divided? How are liabilities to be paid? This section will answer these questions in a summary fashion, and will aim to give readers a sense of the basic principles and practices of estate administration. Readers are advised to seek professional legal advice for their own individual situations.

B. Testate and Intestacy

The authority to administer the estate of a deceased individual vests with the personal representative., whose identity will depend largely on whether the deceased individual had a valid will when he or she died. If the deceased individual died with a valid will, it is said that that individual died "testate," and the executor named under the last valid will, if he or she accepts the appointment, will be vested with legal authority over the estate. In theory, an executor takes authority from the will, and accordingly has authority immediately upon death. This concept is expressed through the legal adage that a will "speaks from death." In practice, although an executor has legal authority from the date of death, most third parties (e.g. banks and the Land Title and Survey Authority) will not recognize that authority without a representation grant from the Court. If the deceased individual died without a valid will, he or she is said to have died "intestate". In such a case, an application must be made to the Court for the appointment of an administrator for the estate. As there is no valid will, the authority to deal with the estate originates from the Court grant of administration. This concept is codified in section 102 of *the Wills, Estates and Succession Act ("WESA")*, which provides that in the case of an intestacy, or if an executor is not named in a will, the estate of the deceased person "vests in the court".

C. Representation Grants Generally

Grants of probate and grants of administration are two types of "representation grants". As a valid will grants authority to the named executor, there is theoretically no need for a named executor to obtain a representation grant from the court. As a practical matter, however, an executor may not be able to accomplish much without a representation grant. If there is no will, all of the property of the deceased vests in the Court (WESA, s 102), and accordingly, no person has authority unless the Court issues a representation grant to that person. Two provisions in WESA are particularly important to understanding the basic effect of obtaining a representation grant. First, section 136 of WESA provides that a representation grant, when issued by the Court, gives exclusive authority to the person named in the grant to administer the estate. Second, section 137 of WESA provides that a person who transfers estate property or releases a document or information to personal representative is not liable for any damage that may result. These two sections give legal assurance to third parties dealing with a personal representative.

D. Jurisdiction

An administration grant is usually applied for in the jurisdiction where the deceased was domiciled at the time of death. Where a person was last residing is a good indicator of domicile, but it is not determinative. If the deceased had assets in multiple jurisdictions, it may be necessary to obtain a representation grant in one jurisdiction, and then to have that grant "resealed" locally in each jurisdiction where assets are located. Furthermore, in such a situation, British Columbia law, including intestacy rules for example, may not apply. These situations are governed by the rules of "conflict of laws".

E. Probate

1. Generally

A grant of probate is a form of representation grant that is issued to the executor appointed by a will. Pursuant to sections 136 and 137 of WESA, a grant of probate gives exclusive authority to the named executor to deal with the estate and grants legal protection to third parties who rely upon the grant.

2. Who May Apply?

An executor appointed under a will may apply for a grant of probate. An alternate executor may apply if the conditions set out for the appointment of that alternate executor are satisfied.

3. Solemn Form versus Common Form

Where the validity of a will is uncontested, the registrar of the Court may issue the grant of probate (WESA, s 129(3)) upon an application being made in the form and manner set out in the Supreme Court Civil Rules. Although obtaining a grant this manner will ordinarily be sufficient, it does not conclusively determine that a will is valid. Where a grant has been obtained this way, the will has been proven only in "common form" or "simple form". If the will is later found to have been invalid, or a later will is found, the grant of probate may be revoked. In this situation, the personal representative may be liable for having distributed the estate assets to the incorrect beneficiaries. Obtaining proof of a will in "solemn form" (also known as "proof in form of law" or "proof per testes") gives a greater degree of protection to an executor. This requires a hearing in open court before a judge, with testimony from witnesses to the will. If a will is proven in solemn form, the grant cannot be revoked unless there a later will shows up, or it was obtained by fraud (for a discussion, see Romans Estate v Tassone, 2009 BCSC 194 for a discussion).

F. Administration

1. Generally

A grant of administration is a form of representation grant issued to an individual other than an executor appointed under a Will. A grant of administration will be required on intestacy, or where there is a will but the appointed executor is unwilling, incapable or dead, or where no executor is appointed. The procedure for administration is similar to probate, except that the Court must appoint an administrator, and bonding may be required. The consent of the Public Guardian and Trustee's office is required where a minor's property is involved. The Public Guardian and Trustee's consent is also needed on probate if any minor is a beneficiary and a trustee is not appointed in the will for such minor beneficiary. An administrator's powers and duties are indistinguishable from an executor's and are set out in WESA.

2. Who May Apply?

Under sections 130 and 131 of WESA, an individual may apply to the Court to be appointed Administrator of an estate. Section 130 enumerates the order of priority for applicants of an intestate estate, favouring the spouse of the deceased, followed by a child of the deceased who obtains the consent of the majority of the children of the deceased. Section 131 enumerates the order of priority for applicants of an estate where the appointed executor is unable or unwilling to act. Priority is given to a beneficiary that applies with the consent of the beneficiaries who, along with the applicant's interest, are entitled to a majority interest of the estate.

G. Probate Fees

Before a grant is issued, probate fees must be paid on the value of the deceased's assets as at the date of death. Only secured debts (i.e. debts secured on property by a mortgage) may be subtracted from the value of assets when determining the amount of fees payable. It should also be noted that probate fees in British Columbia are low. As stated in section 2(3) of the Probate Fee Act, SBC 1999, c 4.

- 2(3) If the value of the estate exceeds $25 000, whether disclosed to the court before or after the issue of the grant or before or after the resealing, as the case may be, the amount of fee payable for an estate over $25,000 up to $50,000 is $6 for each $1,000 or part of $1,000. For estates over $50,000, the fee is $14 for each $1,000 or part of $1,000.

An easy way to calculate probate and application fees for estates over $50,000 is to round the value of the estate to the next $1,000, multiply it by 0.014 and subtract $350 from the result.

H. Assets Passing Outside of Estate

Not all assets of the deceased will form part of the estate. It is not necessary to obtain a representation grant to deal with these assets. There are four primary categories of assets that fall outside of the estate:

1. Pensions and retirement plans, including Registered Retirement Savings Plans, Registered Retirement Income Funds, for which a beneficiary may be designated. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will be an asset of the estate and will vest in the personal representative.
2. Life insurance proceeds, for which a beneficiary or successor may be designated. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will form part of the estate.
3. Assets held in joint tenancy with another will pass to the surviving joint tenant.
4. A tax-free savings account for which a beneficiary has been designated will not form part of the estate. If no designation has been made or the designated beneficiary or contingent beneficiary is not alive to receive the proceeds on the deceased's death, then the asset will pass through the estate.

I. Vehicles

A vehicle registered in the name of a deceased owner can be transferred at an Insurance Corporation of British Columbia Autoplan broker. If the motor vehicle is owned jointly, the surviving owner will need to bring the current vehicle registration and the original death certificate or a certified copy of it. If the estate is valued at less than $25,000, the executor of the estate may transfer the vehicle without obtaining probate of the last will. The executor will need to provide the original death certificate or a certified copy of it, a statutory declaration stating that the estate is not worth more than $25,000 (which can be provided by the Autoplan dealer and which must be sworn before a lawyer or notary

public), and the original last will.

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II. Duties of a Personal Representative

A. General Duties

The basic duties of an Executor/Administrator are to:

- Obtain a death certificate from the Department of Vital Statistics; However, ordinarily, a funeral home will likely order and provide a death certificate.
- Locate the last will if there is one and apply for a search of wills notices;
- Arrange for the disposition of the deceased's body and the funeral;
- Determine the names and addresses of the beneficiaries and intestate heirs and notify them;
- Cancelling subscriptions, redirecting mail and wrapping up personal matters
- Gather papers relating to assets and ascertain the value of the assets (by way of an inventory, taking into account debts and liabilities);
- Safeguard assets until they are sold or distributed, including the transfer of ownership registration and the collection of any debts;
- Selling assets if it is necessary and distributing the estate;
- Prepare and file tax returns;
- Notify appropriate agencies (pensions, subscriptions, charge accounts, etc.);
- Consider advertising for creditors
- Paying all valid debts left to the estate (please note that an executor or administrator may be held personally liable for unsettled debts after the distribution of the estate); and
- Preparing and obtaining approval for the beneficiaries for distribution of estate.

B. CPP Death Benefits

The Canada Pension Plan (CPP) death benefit is a one-time, lump-sum payment to the estate on behalf of a deceased CPP contributor. If an estate exists, the executor named in the will or the administrator named by the Court to administer the estate applies for the death benefit. The executor should apply for the benefit within 60 days of the date of death. If no estate exists or if the executor has not applied for the death benefit, payment may be made to other persons who apply for the benefit in the following order of priority:

1. The person or institution that has paid for or that is responsible for paying for the funeral expenses of the deceased;
2. The surviving spouse or common-law partner of the deceased; or
3. The next-of-kin of the deceased.

To be entitled to a CPP death benefit, the deceased must have made contributions to the lesser of:

- One-third of the calendar years in their CPP contributory period, but no less than 3 calendar years; or
- 10 calendar years

The amount of the death benefit depends on how long and how much has the deceased contributed to his CPP, with the maximum benefit set at $2,500. As of January 1, 2019, the death benefit for all eligible contributors is set at a flat rate of $2,500. To apply, you will need to complete the Application for a Canada Pension Plan Death Benefit (ISP1200), include certified true copies of the required documentation, and mail it to the closest Service Canada Centre to you. Addresses are provided on the form (ISP1200).

C. Search of Wills Notice

If the deceased made a Willwill, he or she may have filed a Wills Notice with the Vital Statistics Registry. Note that the Vital Statistics registry does not keep a copy of the Willwill, but will only have a record of the date the Willwill was made. To obtain a representation grant through the court registry, a personal representative will need to provide two copies of a Wills Notice Search, which can be obtained on application to the Vital Statistics Registry. A Wills Notice Search will provide the date the person signed the will registered in the wills notice, the location of the will at that time, and the date the Vital Statistics Agency received the wills notice. If the will-maker is alive, only the will-maker can request for a search of Wills Notice. However, a person who provides the documentation and payment listed below can apply for a Wills Notice if the will-maker is deceased:

- A photocopy of the death certificate
- A completed VSA 532 form

To apply for a search, a person has to mail the requested documents to: Vital Statistics Agency, PO Box 9657 Stn Prov Govt, Victoria, BC V8W 9P3. Alternatively, they can deliver the requested materials to a Service BC Counter to request for a Search of Wills Notice. Please note that you cannot ask for a search online unlike filing a Wills Notice. The cost to conduct a Wills Notice search is $20 per will search, plus $5 for each additional name the will-maker may have used. The results are usually printed within 20 business days. If you are pressed for time, you can also request Courier Delivery. In the case of Courier Deliveries, there is an additional $33 fee for the courier, but it prints next business day.

D. Other Asset Distribution Instruments

If life insurance policies and RRSPs have pre-existing designated beneficiaries, they will not form part of the Willwill-maker's estate, and will be administered outside of the probate process. For life insurance policies with designated beneficiaries, the proceeds do not form part of the estate. A beneficiary designation in a will is invalidated by a subsequent designation made in an insurance policy or is revoked when the will is revoked (see Insurance Act, s 61(2)). Also, a will cannot revoke an earlier life insurance designation unless it complies with s 60 of the Insurance Act, which requires that the policyholder file a contract or declaration with the insurance company, designating the beneficiary of the policy irrevocably. If this document is filed, the beneficiary must consent to any change to the designation. However, a general revocation clause that does not specifically refer to the insurance policy or contract does not revoke the designation made prior to the will, because it does not meet the definition of "declaration" under the Insurance Act; see Hurzin v Great West Life Assurance Company, (1988),) 23 BCLR (2d) 252 (SC). Those clients with a significant amount of money in RRSPs should consult a tax lawyer or tax accountant for estate tax planning advice, as there are several tax rules that apply solely to the final year of a person's life.

E. Time for Distributing the Estate

As a rule of thumb, an Executor has one year from the date of death (known as the "Executor's year") to distribute the estate. The concept of the executor's year derives from presumption that an executor will be capable of dealing with the Estate's affairs within this period. The concept of the executor's rule has two aspects:

1. A court will ordinarily not compel an executor to make a distribution before the expiry of this period.
2. Except when specifically provided in a will, a legacy will not carry interest until a year after the death of the will-maker.

However, it should also be noted that under section 155 of WESA, a personal representative of a deceased person must not distribute the estate of the deceased in the 210 days following the date of the issue of a representation grant except with the consent of all the beneficiaries and intestate successors entitled to the estate or by an order of the court. This period is to allow any individuals who wish to make a claim against the estate to file a claim. Additionally, the personal representative must not distribute the estate after 210 days without the consent of the court if:

- There is a commenced proceeding to determine if a person is a beneficiary or if a person is an intestate successor,
- If relief is sought under a wills variation claim, or
- Other proceedings have been commenced which may affect the distribution of the estate

F. Payment of Debt

The personal representative is personally liable for payment of creditors if he or she pays the beneficiaries before the debts of the estate. Thus, a personal representative should advertise under s 38 of the Trustee Act, wait 21 days from the last publication, pay any claims that arise, and then pay the beneficiaries. Having advertised, the personal representative will not face personal liability. But the personal representative would still be responsible for the debts, regardless whether he/she has advertised or not, if the personal representative has knowledge of the creditor's claim prior to distribution.

G. Income Tax Clearance Certificate

Section 159(2) of the Income Tax Act, RSC 1985, c 1 (5th Supp) prohibits distribution of the assets until a certificate is obtained from the Minister of Finance certifying payment of all taxes. Without such a certificate, the personal representative may be personally liable for the unpaid amount. However, there have been changes in Canada Revenue Agency (CRA) procedure. It is now possible to review information via online terminals, and usually it is not necessary to obtain the return itself from a taxation centre. The clearance request and necessary documents are not filed with the return, but are forwarded separately to CRA's district office. The personal representative needs to file a terminal tax return, as well as an estate tax return for every year following death. Generally, the terminal tax return is due on or before the following dates:

- If the death occurred between January 1 and October 31 inclusive, the due date for the terminal tax return is April 30 of the following year; or
- If the death occurred between November 1 and December 31 inclusive, the due date for the terminal tax return is six months after the date of death

H. Discharge of Personal Representative

When the estate is large, when litigation is involved, or when the estate is insolvent, the personal representative may wish to protect himself or herself before distributing the estate by obtaining a discharge per section 157 of WESA. This discharge is not generally necessary where a small estate is involved. Generally, a personal administrator can consider their duties at an end once all the residuary or intestate beneficiaries have approved their accounts and signed a release, and when they have obtained clearance from the CRA.

I. Passing of Accounts

Section 99 of the Trustee Act, RSBC 1996, c 464 sets out the procedure for the passing of the trustee's accounts. Absent written and approved consent by all beneficiaries or a court order, an executor, administrator, and trustee under a will and judicial trustee must within two years of the grant of probate or grant of administration or within two years from the date of appointment, pass his or her accounts. This is often the process by which an executor, administrator, and trustee will have their fees approved.

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III. Taxation: RRSP & RRIF & TFSA

A. RRSP: Registered Retirement Savings Plan

In British Columbia, a person may by will gift a property which he or she is entitled at law or in equity at the time of his or her death. This means that the proceeds from a deceased's Registered Retirement Saving Plan ("RRSP") can be distributed to the beneficiary outside of the will if a valid beneficiary designation has been made. However, please note that the deceased's estate will likely need to pay taxes on the value of the RRSP, as at the deceased's date of death. This will be taxed as the deceased's income for that year. A person is "deemed" to have disposed of all assets at the moment before death, and is accordingly taxed in the year of death as such. For example, if the deceased owns a rental property, then that rental property is considered to be sold at the moment of the deceased's death and as a result, the deceased may have earned capital gains from this deemed disposition. Taxes will then be paid on these capital gains. Additionally, the value of any RRSP or RRIF will also be considered to have been earned in the year of death. This is significant because the inclusion of all these capital gains will most likely bump the deceased to the highest tax bracket. In B.C., this bump could mean that an individual is taxed close to 50% of the income. The major exception to this rule is the "spousal rollover" rule in section 73 of the Income Tax Act ("ITA"). This rule effectively defers payment of taxes owing from the deemed disposition if the asset is given to the spouse of the deceased until the death of the spouse. If a beneficiary has been designated to receive the proceeds of a RRSP, those proceeds will pass directly to the beneficiary. However, the deceased will be considered to have earned the entire value of the RRSP during his or her year of death and the estate must declare the value of the RRSP on the T1 Terminal Tax return. Accordingly, unless a roll-over provision, such as the spousal roll-over applies, the Estate will be liable to pay taxes on the value of the RRSP. If the Estate is unable to pay the taxes, the beneficiary receiving the proceeds will be liable to pay the taxes owing (s 160.2(1) of the ITA provides that the the estate and a designated beneficiary are jointly and severally liable for tax on the value of the RRSP at the date of death).

B. RRIF: Registered Retirement Income Fund

The same rules applies to RRIFs as they apply to RRSPs.

C. TFSA: Tax-Free Savings Account

TFSAs receive specialized treatment under the Income Tax Act, however, TFSAs came into effect in 2009, so for deceased taxpayers that died in 2008 or earlier, the proportion of the chapter will not be material to the estate. The fair market value of the TFSA will be received by the estate of the deceased taxpayer or any gains that accumulated in the account will continue to be tax-free until the end of the year following the death of the account holder. The tax-free status of the TFSA is preserved if the deceased taxpayer named his/her spouse or common-law partner as the successor account holder. It is unlikely that tax liability for the income generated by the TFSA from monies contributed to the TFSA during the taxpayer's lifetime. This is different from RRSPs or RRIFs.

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IV. LSLAP File Administration Policy

This section is specific to LSLAP clinicians. It sets out internal LSLAP practice and policy regarding probate and estate administration.

A. LSLAP File Administration Policy – Probate

LSLAP does not advise clients on probate issues. Such clients should be referred to a private lawyer. The potential liability in administering estates is too great to permit greater student involvement; the client should always be referred to a lawyer.

B. LSLAP File Administration Policy – Taxation

Estate taxation is complicated. Clients should be referred to lawyers who specialize in these matters or the CRA, which has agents who specialize in estate taxation.

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Appendix A: Glossary

- Administrator – a person appointed by the court to manage the estate of a person who dies intestate (without a will)
- Attestation – an act of authenticating, affirming to be true, genuine, or correct, in an official capacity of a legal document
- Beneficiary – (a) a person named in a will to receive all or part of an estate, or
- (b) a person having a beneficial interest in a trust created by a will
- Cash legacy – a grant by will of money
- Codicil – an addition to a will that changes, explains, revokes, or adds provisions
- Equitable title – a title to property in which a party has a beneficial interest and will eventually acquire legal title. For example, the beneficiary of a trust has an equitable title in assets held in the trust
- Estate –properties of a deceased person
- Exclusion clause – a provision in a will that leaves something or someone out of the will
- Execution – an act of signing and otherwise completing a testamentary document, such as acknowledging the signature if required to make the document valid
- Executor – a person appointed to manage the estate of a person who has died leaving a will which nominates that person. The executor must insure that the person's desires expressed in the will are carried out. Practical responsibilities include gathering up and protecting the assets of the estate, obtaining information in regard to all beneficiaries named in the will and any other potential heirs, collecting and arranging for payment of debts of the estate, approving or disapproving creditor's claims, making sure estate taxes are calculated, forms filed and tax payments made, and in all ways assisting the lawyer for the estate (which the executor can select)
- Express powers – stated rights, authorities and abilities in a will of the Executor to take some action or accomplish something, including demanding action, executing documents, contracting, taking title, transferring, exercising legal rights and other acts
- Indemnify – to guarantee against any loss that another might suffer
- Intestacy – a situation where a person dies without a legally valid will
- Joint tenancy – an ownership of real property in which each party owns an undivided interest in the entire property, with both having the right to use all of it and the right of survivorship
- Legal title – the ownership of real property, which stands against the right of anyone else to claim the property. In real property, legal title is evidenced by a deed, judgment of distribution from an estate, or other appropriate document recorded in the public records
- Personal representative – the individual that winds up the estate and distributes the assets
- Probate – the process of proving a will is valid and thereafter administering the estate of a dead person according to the terms of the will
- Survivorship – the right to receive full legal title or ownership of a property due to having survived another person in a joint tenancy
- Testamentary capacity – having the mental competency to execute a will at the time the will was signed and witnessed
- Will-maker – a person who has made a will that is in effect at the time of his/her death.
- Trust – an entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding title on behalf of the trust)
- Trustee – a person or entity who holds the assets (corpus) of a trustee for the benefit of the beneficiaries and manages the trust and its assets under the terms of the trust stated in the declaration of trust which created it

- Wind up – to liquidate (sell or dispose of) assets of an entity

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Chapter Seventeen – Citizenship

I. Introduction

This chapter is primarily intended as a short guide of the basic process of obtaining a citizenship grant. For more detailed information refer to the *Citizenship Act*, RSC 1985, c C-29 [1] and *Citizenship Regulations*, SOR/93-246 [2].

This manual may aid individuals seeking assistance to determine whether they or their family members qualify for citizenship as well as individuals facing a removal of their citizenship status. Everyone should be encouraged to apply for citizenship as soon as they become eligible. It is important to be as thorough as possible with the initial citizenship application, as this is the best chance for obtaining citizenship.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on June 18, 2019.

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References

[1] http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-29/latest/rsc-1985-c-c-29.html?resultIndex=1
[2] http://www.canlii.org/en/ca/laws/regu/sor-93-246/latest/sor-93-246.html?resultIndex=1

II. Governing Legislation and Resources

On June 11th 2015, changes to the *Citizenship Act* [1] that had been phased in over the previous year were completed. Applicants may not be fully aware of these changes, but any applications submitted since June 11 2015 are bound by the current legislation. Those whose applications were submitted before this date will have to make careful note of the date, and then review the version of the Act that was in effect at the time the application was submitted.

A. Legislation

The governing legislation is the *Citizenship Act*, RSC 1985, c C-29 [1]. The Act is relevant where a client wishes to obtain, resume, or retain their citizenship, or to determine how it may be forfeited. Under the Act, citizenship is granted after certain requirements are met, thereby making it a right that cannot be arbitrarily withheld as was possible under its predecessor, the *Canadian Citizenship Act*, RSC 1970, c C-19.

For the purposes of this Chapter, some words have specific definitions:

Citizen:	A Canadian citizen
Ceremony Room:	An office of the Department of Immigration, Refugees and Citizenship of Canada or other place where a citizenship judge performs his or her duties under the Act.
Citizenship Judge:	Any citizen appointed by the Governor in Council to be a citizenship judge and to perform duties as the Minister prescribes for carrying into effect the purposes and provisions of the Act under s 26.
Minister:	The Minister of Immigration, Refugees and Citizenship of Canada.
Permanent Resident:	A person conferred with this status under the *Immigration and Refugee Protection Act* [2].
Minor:	A person who has not attained the age of 18 years.
Parent:	The father or mother of a child. This includes an adoptive parent, but does not extend beyond ties of blood or adoption. A mere parent-like relationship is insufficient. See *Valois-D'Orleans v Canada (Minister of Citizenship & Immigration)*, 2005 F.C.J. No. 1258 (F.C.). [3]
Registrar:	The Registrar of Canadian Citizenship.

B. Resources

Citizenship and Immigration Canada

Canadian citizenship law undergoes constant and sometimes unpredictable change. To ensure that you are using the most up to date forms, and the most current policies and procedures, it is important to always check the web site of Immigration, Refugees and Citizenship Canada [4]. Here you can find information, downloadable forms, and links to the IRPA, Regulations, and Policy Manuals. Operational Manuals and Bulletins published by IRCC are available online under the Publications [5] heading. They explain the policies and procedures used by immigration officials to interpret the IRPA.

Online	Website [6] Online Manuals [7]
Address	**Vancouver Office** 200 - 877 Expo Boulevard Vancouver, B.C V6B 8P8 **Surrey Office** 290 – 13450 102nd Avenue Surrey, B.C. V3T 5X3 **Case Processing Centre** P.O. Box 7000 Sydney, Nova Scotia B1P 6V6
Phone	Toll-free in Canada: 1-888-242-2100

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References

[1] http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-29/latest/rsc-1985-c-c-29.html?resultIndex=1
[2] http://www.canlii.org/en/ca/laws/stat/sc-2001-c-27/latest/sc-2001-c-27.html?autocompleteStr=immigration%20and%20refu&autocompletePos=1
[3] http://canlii.ca/t/1l80p
[4] http://www.cic.gc.ca/english/department/
[5] http://www.cic.gc.ca/english/resources/publications/index.asp
[6] http://www.cic.gc.ca
[7] http://www.cic.gc.ca/english/resources/manuals/index.asp

III. Who is a Canadian Citizen?

Section 3 of the Act [1] provides that a person is a citizen if they meet one the enumerated conditions. In general, a person is a Canadian citizen if:

- They were born in Canada.
- They became a citizen through the naturalization process in Canada (i.e., they were a permanent resident before they became a citizen);
- They were born outside Canada and one of their parents was a Canadian citizen at the time of their birth because the parent was either born in Canada or naturalized in Canada. Then this person in this case is the first generation born outside Canada;
- A person may be a Canadian citizen if they were born outside Canada from January 1, 1947, up to and including April 16, 2009, to a Canadian parent who was also born outside Canada to a Canadian parent (in this case, the person is the second or subsequent generation born outside Canada).
- A person may be a Canadian citizen if they were adopted outside Canada by a Canadian parent on or after January 1, 1947.

A. Grant of Citizenship vs. Proof of Citizenship

A person who is a Canadian citizen by virtue of being born in Canada or being born outside of Canada to a Canadian parent may apply for **proof of citizenship**. To receive proof of citizenship, it is not necessary to pass the test or to take the oath of citizenship.

Persons who are living outside Canada should contact the Canadian Embassy in that country.

Permanent Residents of Canada who have fulfilled the necessary requirements can apply for and may be granted citizenship.

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References

[1] http://laws-lois.justice.gc.ca/eng/acts/c-29/page-1.html#h-3

IV. Advantages & Responsibilities

There is no requirement that a permanent resident become a Canadian citizen. However, permanent residents may wish to apply to become citizens because:

• Citizens have the right to vote

• Citizens have the right to apply for a Canadian Passport

• Citizens may receive preference over non-citizens for certain jobs within the government

• Citizens cannot be deported from Canada

• Citizens are able to run in elections

• Citizens are not subject to the same residency requirements as a permanent resident

In all cases, individuals should find out prior to applying for Canadian citizenship whether the countries of which they are citizens permit dual citizenship. As Canada allows dual citizenship, an individual is able to acquire Canadian citizenship regardless of his or her possession of another citizenship. However, if the country of which the individual is presently a citizen does not permit dual citizenship, the individual's citizenship of that country may be extinguished if the individual acquires Canadian citizenship.

NOTE: Non-citizens may be subject to deportation from Canada if they are convicted of an offence in Canada. Non-citizens who have already been subject to the Canadian criminal justice system for minor offences may benefit from applying for citizenship as soon as they become eligible in order to be free from the risk of being deported.

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V. Citizenship Grants

A. Grant of citizenship under s 5

Note: At the time of publication, the Canadian Government has already begun the process of changing the regulations such that the period having been physically present, the age maximum and minimum for demonstrating language ability and knowledge of Canada, and the number of years of tax filings required will be altered. Check the regulations and the IRCC website for the most current information on what is required for a grant of citizenship under section 5.

To be granted citizenship, applicants must meet the required qualifications (as set out in s 5(1) of the Citizenship Act). An applicant must:

a. Make an application for citizenship,

b. Have, since becoming a permanent resident,

i. been physically present in Canada for at least 1095 days in the five(5) years immediately before the date of submission of the application for citizenship,

ii. file income taxes (if required by the Income Tax Act) for any three taxation years that are fully or partially within the five years before you apply.

iii. Applicants may count each day they were physically present in Canada as a temporary resident or protected person before becoming a permanent resident as a half-day toward meeting the physical presence requirement for citizenship up to a maximum credit of 365 days.

iv. with regard to the period of physical presence, please refer to the Citizenship Act ss. 1.01, 1.02, 1.03, 1.2 & 1.3 for detais of exceptions

c. Submit proof that they can speak and listen at Canadian Language Benchmark (CLB) Level 4 or higher.

d. Have an adequate knowledge of Canada and of the responsibilities and privileges of citizenship if the person is between 18 and 54 years of age, and

e. Must not be under a prohibition (see C. Prohibitions).

NOTE: The Residence Calculator on the Immigration, Refugees and Citizenship Canada website is currently accepted by IRCC as a method for calculating presence in Canada. Applicants can print off the results of the calculator and include them with their citizenship application.

NOTE: If the individual is between the ages of 18 and 54, they are required to send proof of their ability to speak and listen in English or French in the citizenship application. Examples of acceptable documents that satisfy this requirement are the results of IRCC-approved third-party tests; transcripts or diploma from a secondary or post-secondary education in English or French, in Canada or abroad; evidence of achieving Canadian Language Benchmark (CLB)/Niveau de compétence linguistique canadien (NCLC) (http://www.language.ca/) level 4 or higher in certain government-funded language training programs. The full list of acceptable documents can be found on the IRCC website.

NOTE: If an applicant studied at a post-secondary program in English or French in or outside Canada, they do not need to write a language test; they can submit their diploma, transcript, or certificate with their citizenship application.

B. Resumption of citizenship, s 11

A person who was a Canadian citizen in the past, but who lost citizenship, may apply for a *grant* of citizenship (resumption) under s 11(1) of the *Citizenship Act* [1]. A former Canadian citizen may resume citizenship if that person:

- makes an application for resumption of citizenship,
- was a citizen and lost citizenship by means other than revocation,
- became a permanent resident after the loss of citizenship,
- lived in Canada as a permanent resident for at least one year immediately before the application,
- is not under a prohibition for certain criminal charges and convictions,
- is not under a removal order (e.g. deportation), and
- does not present a security risk.

Women who lost their citizenship by a law in force before January 1, 1947 because of their marriage or because their husband acquired foreign nationality can resume their citizenship as soon as they notifies the Minister of their intention and produce satisfactory evidence to prove they meet the requirements of s 11(2) [1]. The applicant should provide the reasons she wants another certificate of citizenship and should surrender all previous certificates either at the time of application or when she receives her new certificate. Where the applicant has lost or destroyed her certificate of naturalization or citizenship, she must provide the details of that loss or destruction.

C. Prohibitions (ss 19 & 22 of the Act)

Persons will not be granted citizenship under ss 5(1),(2) or (4) or 11(1) of the Citizenship Act, or take the oath of citizenship, if the person:

a) Is under a probation order,

b) Is a paroled inmate,

c) Is serving a term of imprisonment,

d) Is charged with, on trial for, subject to, or a party to an appeal relating to an offence under the Citizenship Act or any indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act, SC 1992, c 47 [Contraventions Act],

e) Requires but has not obtained the consent of the Minister of Immigration, Refugees and Citizenship, under s 52(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 [Immigration and Refugee Protection Act], to be admitted to and remain in Canada as a permanent resident,

f) Is under investigation by the Minister of Justice, the RCMP, or the Canadian Security Intelligence Service or charged with, on trial for, a party to an appeal, or has been convicted of an act or omission referred to in s 7(3.71) of the Criminal Code, RSC 1985, c. C-46, (war crimes or crimes against humanity),

g) In the three year period immediately preceding the date of the citizenship application, or during the period between the date of the application and the date citizenship would be granted or the oath of citizenship would be recited, the person has been convicted of an offence under s 29(2) or (3) or of an indictable offence under any Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act, or

h) During the five years immediately preceding the citizenship application, ceased to be a citizen pursuant to s 10(1), where the Governor in Council was satisfied that the person has obtained, retained, renounced or resumed citizenship under the Citizenship Act by false representation or fraud or by knowingly concealing material circumstances.

Time spent in a prison, on parole or on probation does not count towards fulfilling the residency requirement.

Additionally, citizenship will not be granted where there are reasonable grounds to believe that an applicant will engage in activity that:

a) Constitutes a threat to the security of Canada, or b) Is part of a pattern of criminal activity planned and organized by a number of persons acting in concert to commit any offence that is punishable by indictment under any Act of Parliament.

Persons not approved for these reasons will have any applications or appeals rejected and this declaration will have effect for three years after the date on which it has been made.

D. Minors

With the 2017 Bill C-6 having received royal assent, minors can now apply for citizenship without a Canadian parent, as the age requirement for citizenship has been removed under subsection 5(1). A person having custody of the minor or empowered to act on their behalf by court order, written agreement or operation of law (s, 5(1.04)), can now apply for citizenship on behalf of the minor, unless that requirement is waived by the Minister (ss. 5(1.05) & 5(3)(b)(v)).

The four-year residency requirement does not apply to children under the age of 18. There is no residency requirement for children applying under s 5(2) [2]. Parents who are citizens may apply for citizenship for their child as soon as the child becomes a permanent resident (s 5(2) [2]). Adoptive parents who are citizens may bypass the permanent residency requirement, and may make an application for citizenship on behalf of their child directly (s 5.1(1) [3]). However, in order to do so the adoption must “create a genuine relationship of parent and child”. Additionally, this direct route to citizenship is not available beyond the first generation of Canadians born or adopted abroad (i.e. the parents must derive their own citizenship by being born in Canada or through naturalization).

Children are not required to write the citizenship test, but children who are 14 and over are required to take the oath. If a child turns 18 before the end of the application process, he or she cannot be granted citizenship as a minor, even though they were under the age of 18 at the time of application. They must submit an adult application of citizenship. Stateless applicants under s 5(5) [2] have until age 23 to complete the application process.

E. Special cases

In some cases, the Minister may, at his or her discretion, waive on compassionate grounds (s 5(3) [2]),

- the requirements of language and knowledge of Canada or of the responsibilities and privileges of citizenship, and
- the requirement to take the oath, in the case of any person who is prevented from understanding the significance of taking the oath of citizenship by reason of mental disability.

Section 5(3.1) requires that for the purpose of section 5, if an applicant for citizenship is a disabled person, the Minister to take into consideration the measures that are reasonable to accommodate the needs of that person.

Section 5(4) [2] allows the Governor in Council, in his or her discretion, to direct the Minister to grant citizenship to any person in order to alleviate cases of unusual hardship or to reward service of exceptional value to Canada, notwithstanding any other requirements under the Act. The relevant policy guideline ofImmigration, Refugees and Citizenship Canada can be found at this website: www.cic.gc.ca/english/resources/manuals/index.asp [4]. Exceptions are granted so it is always worth considering this. The policy guideline is vital in this consideration.

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References

[1] http://www.cic.gc.ca/english/citizenship/language.asp
[2] http://laws-lois.justice.gc.ca/eng/acts/C-29/page-2.html#docCont
[3] http://laws-lois.justice.gc.ca/eng/acts/C-29/page-3.html#docCont
[4] http://www.cic.gc.ca/english/resources/manuals/index.asp

VI. Applying for Citizenship Grant

A. The Process

1. Mail-in Process

A citizenship application has to be mailed in on the proper forms provided by the Department of Citizenship, Refugees and Immigration. The new forms are easy to understand and to complete. To order a citizenship application, phone the Citizenship, Refugees and Immigration Canada Call Centre or consult the website (see Section II.B: Resources). All appropriate application forms and accompanying literature will be mailed directly to the applicant. In-person application assistance is not available from Immigration, Refugees and Citizenship Canada.

The Department of Citizenship and Immigration publishes *Discover Canada: The Rights and Responsibilities of Citizenship*, a book that gives general information regarding the right to vote in elections and run for elected office, voting procedures, and chief characteristics of Canadian physical and political geography. It will help the applicant answer questions in the written test he or she must take to become a citizen. This book is mailed to the applicant after the application for a citizenship grant has been received at the case processing centre.

An application should be completed as fully as possible. Only the full legal names of the person seeking citizenship will appear on the certificate of citizenship. The name on the permanent resident document will appear on the certificate of citizenship unless legal name change documents have been submitted.

2. Materials Required with Application

Individuals should carefully fill in all the forms they receive in the mail or from the website. Those forms will be the most current, and can be found at: http://www.cic.gc.ca/english/citizenship/become.asp

The application will list the documents that are needed, which will vary depending on the applicant's particular situation. Any document that is not in English or French must be accompanied by the English or French translation and by an affidavit from the person who completed the translation. Documents that are usually required with all applications are: a) A birth certificate or other satisfactory proof of the applicant's date and place of birth,

b) Record of Landing or Permanent Resident Card,

c) Satisfactory language evidence, d) Satisfactory proof of entry into Canada and of lawful admission for permanent residence. This could include passport(s) or a Certificate of Identity, e) A Certificate of Marriage or legal name change document if the applicant's name has recently changed, and

f) Photocopies of all valid and expired passports or travel documents you had in the past 5 years. If you don't have these documents or there are gaps in time between travel documents, an explanation will be needed.

g) Photocopies of personal identity documents: e.g. driver's license, health insurance card, senior citizen's card, age of majority card.

In addition to these documents, the applicant must supply two identical photographs that:

a) have been taken within the last six months;

b) The photographs must show the full front view of the head, with the face in the middle of the photograph, and include the top of the shoulders.

c) must be 50 mm (2″) by 70 mm (2 3/4*).*

d) The size of the head, from chin to crown, must be between 31 mm (1 1/4″) and 36 mm (1 7/16″).

e) Crown means the top of the head or (if obscured by hair or a head covering) where the top of the head or skull would be if it could be seen.

Note: These photos are smaller than passport photos and are different than those required for Permanent Resident Cards. Check to make sure that the applicant has signed his or her photographs and the signature matches the applicant's signature on the application.

3. Fees

The fee is $630 for an adult grant. This amount includes a $530 processing fee and a $100 Right of Citizenship fee. The fee for children under 18 is only the $100 processing fee. The processing fee is not refundable unless the applicant withdraws his or her application before processing begins. The Right of Citizenship fee is refundable if the applicant is not approved for citizenship. Fees change regularly. The most recent information about applicable fees may be obtained from the IRCC website (see Section II.B: Resources); see also the Citizenship Regulations, SOR/93-246 in which the fees are proscribed.

If you go to the Immigration, Refugees and Citizenship Canada website, there is a useful fee list, which may be used to determine the applicable fees for all applicants: http://www.cic.gc.ca/english/information/fees/fees.asp

Payment must be made online at www.cic.gc.ca. **Note:** In January 2019, a Federal Court in Ottawa (Tammy Lynn Mayes and Justice for Children and Youth v The Minister of Citizenship and Immigration) ruled that a Minister may exercise discretion and waive the applicable processing fees to alleviate cases of statelessness or of special and unusual hardship or to reward services of an exceptional value to Canada.

4. Filing

After the application form is correctly completed and the client collects all the required materials (documents and photographs), the form, all documents, and fee receipt should be sent to the Case Processing Centre in Sydney, Nova Scotia. If a family wishes to be processed together, all applications should be submitted in the same envelope. Starting from June 3, 2013, all family members who apply together on one citizenship application will no longer be approved at the same time. Applicants who pass the test will now be processed independent of other family members.

See also the Immigration, Refugees and Citizenship Canada website: www.cic.gc.ca/english/citizenship/become-how.asp [1]

5. After Filing the Application

Note: It is anticipated that the minimum and maximum age requirements will change soon. Users of this service are advised to seek current information from the IRCC website [2] on the age requirements.

Once the Registrar receives the application and supporting documents, the Department will begin processing the application and determine whether the applicant meets the requirements of the Act. When it has been determined that an applicant is eligible to apply for citizenship, and they have passed the required clearances, they are scheduled for a citizenship test and an interview with a citizenship official. If the applicant is between the ages of 18 and 54, he or she

must pass a test about Canada's history, geography and the rights and responsibilities of citizenship. The applicant is given at least seven days (usually two - three weeks) written notice prior to the date of the examination. If the applicant is **55 years or older** he or she does not have to write the test, however, they are still required to attend an interview.

Where an applicant has failed to provide all materials relating to the application, the Registrar will give notice to the applicant to provide the appropriate materials. If the applicant fails to comply with this notice, the Registrar will send a second notice. Failure to comply with the second notice will result in the abandonment of the application, and the applicant will have to file a new application.

6. Processing Time

According to the Immigration, Refugees and Citizenship Canada (IRCC) website, the total processing time for a routine application for citizenship varies (Please refer to the IRCC website to see current processing times). An application is considered routine if:

a) All the necessary documents and correct fees are received by Immigration, Refugees and Citizenship Canada,

b) The applicant meets the residence requirement,

c) The applicant is not subject to any immigration, security or criminal prohibitions,

d) The applicant passes the citizenship test, and

e) The applicant does not need a hearing with a citizenship judge.

B. The Citizenship Interview and Test

1. Interview and test

All applicants will be scheduled for a meeting with a citizenship officer, which is generally referred to as an "interview". This interview happens the same day that the citizenship test is scheduled, and is conducted at the test location. The applicant must bring with them their passports, and other documents that they provided as part of their citizenship application. They should be prepared to speak briefly with the citizenship officer conducting the Interview in English or French, and the officer may ask questions about the application (such as requesting clarification on travel dates or other facts that are material to the application).

Where an applicant meets a minimum language requirement (which are assessed at the interview), meets the residency requirements, and has no suspected prohibitions, he or she will be required to take a written examination. The examination consists of multiple-choice questions and tests an applicant's knowledge of Canada and language ability. It is mandatory for citizenship applicants to correctly answer two questions related to s 15(a) of the *Citizenship Regulations* [3] and one question related to s 15(b) [3]. Subsection 15(a) sets out the right to vote and run for elected office and s 15(b) deals with voting procedures. Starting from June 3, 2013, citizenship applicants who fail their first citizenship test, but otherwise met all other criteria, have the opportunity to rewrite the test a few weeks later before being referred to a citizenship judge. If the applicant passes the test, he or she returns later for the citizenship ceremony.

Questions in the citizenship test are based on the information provided in a free booklet called *Discover Canada: The Rights and Responsibilities of Citizenship*. Immigration, Refugees and Citizenship Canada will send this booklet to applicants once their applications for citizenship are filed. A PDF version of the booklet [4] can also be downloaded from the Immigration, Refugees and Citizenship Canada website.

The test takes place in a relatively informal environment where the applicants are required to write the exam on their laps. The majority of people find the time provided to be sufficient to finish the exam. However, people who lack

adequate knowledge of English or French could experience difficulties with passing the test.

> **NOTE:** A local non-profit organization, the B.C. Civil Liberties Association, publishes *The Citizenship Handbook*, a free guide intended to help introduce new Canadians to the country's political process. The handbook is available in English, Chinese, Spanish, Vietnamese and Punjabi. Call (604) 687-2919 for more information.

2. Citizenship Judge

In situations where the person is illiterate, does not meet the residency requirement, is suspected of some prohibition, or fails the written test, he or she will be requested to attend an oral hearing with a Citizenship Judge. The oral interview offers a second chance to those who fail the written examination. It is to be noted that Citizenship Judges are Canadian Federal Government employees and are not appointed through the methods used for other Federal Judge positions.

It should be noted that diversion to a citizenship judge can add significant time to processing and is not always successful, so if the client can avoid this through adequate preparation they should do so.

The purpose of the hearing is to determine whether or not the applicant fulfils the requirements of the *Citizenship Act* to become a citizen. Friends and relatives of the applicant may ask to attend the hearing but it is the judge's discretion whether to allow them to attend. Applicants should bring all relevant documents to the hearing, such as passport(s), IMM1000 (record of landing), confirmation of permanent residence, permanent resident card, separation or divorce papers, and any additional proof of residency in Canada.

During the interview, the judge will ask the applicant simple oral questions based on the instructional materials to decide if the applicant has an adequate knowledge of French or English. The applicant must show that his or her vocabulary in the language is appropriate for conducting day to day activities with the general public and that he or she comprehends simple, spoken sentences in the past, present and future tenses and can express him or herself similarly. The judge will also evaluate whether the applicant has adequate knowledge of Canada and the rights and responsibilities of citizenship, especially the right to vote and participate in the country's political life.

If a client is nervous or needs help preparing for the interview, various school boards, community colleges, and voluntary organizations, such as the Immigration Services Society of B.C., provide training courses for this purpose. This series of learning classes, held once or twice weekly, is conducted in English or bilingually, so a basic understanding of English is essential to benefit from it. Applicants may phone those organizations for more information.

The applicant must inform the citizenship office if he or she is unable to attend the scheduled hearing. If the applicant does not appear, the file will be held for 60 days. If, at the end of 60 days, the applicant has still not contacted the citizenship office and provided a valid reason for failing to show up, a second notice is sent to the applicant by registered mail. If the applicant still fails to show; the file will be considered abandoned. In the event of abandonment, the applicant must make a new application and pay a new fee, as no further action will be taken with respect to the old one.

C. The Oath of Citizenship and the Citizenship Ceremony

If an application is approved, successful applicants are notified in writing to attend a formal ceremony to receive their citizenship certificates. Most ceremonies are held at the citizenship office. Successful applicants must bring their original (or certified) Immigration Record of Landing (not a photocopy or reproduction) or Permanent Resident card and the Records of any minor children who are becoming citizens with them. Immediately before taking the Oath of Citizenship, the Record of Landing will be stamped, updating the applicant's status from permanent resident to Canadian citizen.

If the Record of Landing has been lost or stolen, the applicant must notify police immediately. When successful applicants come to their ceremony, they must bring satisfactory evidence that they have reported the loss or theft to police, and will also be required to complete a statutory declaration.

NOTE: If the applicant forgets to bring the Record of Landing or evidence of a reported loss or theft, local office staff will make arrangements for the applicant to return with the necessary papers to another ceremony or, where applicable, exercise their discretion to allow the applicant to participate in a ceremony with the understanding that he or she will become a citizen, but only receive the commemorative document at that time. In that case, the applicant's file with the citizenship card will be kept in the local office until the applicant brings or sends the Record of Landing to be stamped. Citizenship certificates not picked up within a reasonable time will be destroyed. The client will need to apply for a new certificate.

Citizenship ceremonies are open to the public. Applicants who are 14 years of age or over on the day they are granted citizenship are required to take the oath of citizenship, which is repeated after a judge.

OATH OR AFFIRMATION OF CITIZENSHIP

"I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian Citizen."

D. Judicial Reviews

Where an application has not been approved, the applicant will be notified of the decision, the reasons for the decision, and his or her right to judicial review. All judicial reviews are made to the Federal Court of Canada. If an applicant decides to seek judicial review, a Notice of Application must be filed in the Court Registry within **30 days** of the date the notice of refusal was received. All decisions of the Federal Court are final. However, applicants are free to reapply at any time.

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References

[1] http://www.cic.gc.ca/english/citizenship/become-how.asp
[2] http://www.cic.gc.ca/english/index.asp
[3] http://laws.justice.gc.ca/eng/regulations/SOR-93-246/page-2.html#h-7
[4] http://www.cic.gc.ca/english/resources/publications/discover/

VII. Loss of Citizenship

There are few reasons for losing Canadian citizenship under the current *Citizenship Act*. These are outlined in Part II of the Act [1], and may occur:

- where a person renounced his or her citizenship by application,
- where a person has been admitted to Canada for permanent residence by false representation, fraud, or by knowingly concealing material circumstances,
- where a person became a citizen by false representation, fraud, or by knowingly concealing material circumstances,
- where a person who is born outside of Canada after February 14, 1977 is a citizen for the reason that at the time of his or her birth one of his or her parents was a citizen who was also born outside of Canada to a Canadian parent, that person ceases to be a citizen on attaining the age of 28 years unless that person:
  - applies to retain his or her citizenship; and
  - registers as a citizen and either reside in Canada for a period of at least one year immediately preceding the date of his or her application or establishes a substantial connection with Canada;

Note that the Act now provides that if a person obtained their citizenship through fraud, they cannot re-apply for citizenship for 10 years from the date of their loss of citizenship.

NOTE: Previously, section 10(2) of the Act allowed the Minister to revoke citizenship from dual Canadian citizens convicted of terrorism, treason or espionage, but section 10(2) and its derivative sections are repealed with Bill C-6 2017 and as such they are of no force and effect.

NOTE: Under amendments introduced in Bill C-6 which are not yet in force, the Federal Court will be the decision-maker in all revocation cases, unless the individual requests that the Minister make the decision. The law will also give Citizenship Officers clear authority to seize fraudulent or suspected fraudulent documents in citizenship applications.

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References

[1] http://laws-lois.justice.gc.ca/eng/acts/C-29/page-3.html#h-4

VIII. Proof

If you need to prove your Canadian citizenship, you can apply for a citizenship certificate if you:

- are a Canadian citizen who was born outside Canada
- were born in Canada and need proof besides your Canadian provincial or territorial birth certificate

The government of Canada has stopped issuing citizenship cards. If you apply to update or replace a citizenship card, you will receive a citizenship certificate instead. There are other documents accepted as proof of citizenship, namely, birth certificates, naturalization certificates issued before Jan 1, 1947, registration of birth abroad certificates issued between Jan 1, 1947 and Feb 14, 1977 and certificates of retention issued between Jan 1, 1947 and Feb 14, 1977.

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IX. Search of Citizenship Record

The search of record service verifies the citizenship status of citizens and non-citizens. There are three basic reasons someone would request a “record letter”:

1. The applicant does not have proof of citizenship.
2. The applicant had proof, but needs a letter that outlines when and how he or she became a citizen.
3. A third party asks for citizenship confirmation.

All persons requiring a record letter must make an application for search of citizenship records and pay a $75 fee. All search applications are processed at the centre in Sydney, Nova Scotia. After a search, if no record is found, the applicant will be given a “no record” letter, but if a record of citizenship is found, a numbered record letter is issued, which is valid for a specific purpose and stated length of time. Generally, the letter is valid for one month, but it may be valid for a maximum of three months. If a user of this manual is not sure if he or she was registered as a Canadian citizen in the past, that person should make applications for proof of citizenship and search of citizenship record at the same time and pay only one fee ($75). If the search of citizenship record is positive, the user will already be in line to receive a certificate of citizenship.

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X. Referrals

Immigrant Services Society of B.C

ISS is a non-profit organization committed to identifying the needs of immigrants and refugees and to developing and providing programs which meet those needs.

Online	Website [1] E-mail: immserv@issbc.org
Address	#501 - 333 Terminal Avenue Vancouver, B.C. V6A 2L7
Phone	(604) 684-2561 Fax: (604) 684-2266

Inland Refugee Society of B.C.

The Society facilitates the landing in Canada of people whose refugee claims are in process or who need to file a claim. Their services include assisting in the claim process, providing counseling during the claim period, and providing basics like shelter, food, and clothing.

Online	Website [2] E-mail: contact@inlandrefugeesociety.ca
Address	Suite # 615 – 525 Seymour Street Vancouver, B.C. V6B 3H7
Phone	(778) 328-8888 Fax: (604) 873-6620

MOSAIC

MOSAIC is a multilingual non-profit organization that addresses issues affecting immigrants and refugees in the course of their settlement and integration into Canadian society.

Online	Website [3] E-mail: mosaic@mosaic.bc.com
Address	1720 Grant Street, 2nd Floor Vancouver, B.C. V5L 2Y7
Phone	(604) 254-9626 Fax: (604) 254-3932

S.U.C.C.E.S.S.

S.U.C.C.E.S.S. is a non-profit social service agency that provides assistance to newly-arrived immigrants and refugees. The agency provides instructions in Cantonese and Mandarin on how to fill out citizenship forms and study for the citizenship test.

Online	Website [4] E-mail: info@success.bc.ca
Address	Head office: 28 West Pender Street Vancouver, B.C. V6B 1R6
Phone	(604) 684-1628

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References

[1] http://www.issbc.org
[2] http://www.inlandrefugeesociety.ca
[3] http://www.mosaicbc.com
[4] http://www.success.bc.ca

Chapter Eighteen – Immigration

I. Introduction

This chapter is designed to assist with the following questions pertaining to immigration law in Canada:

- What is my status?
- How do I obtain a Work / Study Permit?
- How do I obtain Permanent Residence?
- How do I appeal an immigration matter?

It is advised that you reference outside sources in addition to this manual if your question is beyond the scope of the questions listed above. It is also important to refer to the main sources of immigration law (listed below) when researching a legal issue as the law may have changed since the printing of this manual. Notes advising users of potential changes to immigration law have been placed throughout the chapter as a warning that further research may be needed.

It is recommended that you contact an immigration lawyer if you require further assistance. Legal advocacy is recommended for appellate proceedings due to the complex nature of this area of law. Furthermore, several programs in British Columbia offer assistance with Temporary and Permanent Residence applications. If you cannot obtain the services of an immigration lawyer, the Law Students' Legal Advice Program [1] and the services listed in Section XII may be able to provide assistance if you meet their qualifications.

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References

[1] http://www.lslap.bc.ca/

II. Main Sources

A. Main Sources of Immigration Law

Immigration law is a very dynamic area, and it has undergone significant change in the recent past. For this reason, it is imperative to refer to the following sources for the most up to date information about immigration law:

- Immigration and Refugee Protection Act, RSC 2001, c 27 ["IRPA"] [1]
- Immigration and Refugee Protections Regulations, SOR/2002-227 ["IRP Regulations"] [2]
- Operational Bulletins and Manuals [3]

There are six general sources of immigration law and policy: the IRPA, the *IRP Regulations*, the Manuals, the Operational Bulletins, the Ministerial Instructions, and case law. The Canadian Charter of Rights and Freedoms [4] is also applicable to immigration matters as the IRPA and *IRP Regulations* must be consistent with the *Charter* provisions.

1. The Immigration and Refugee Protection Act and Regulations

The Immigration and Refugee Protection Act is the primary source and should be referenced first. However, the IRPA is “framework” legislation, i.e. the provisions are general and principled. The IRP Regulations are more detailed than the IRPA and give specific guidance to applicants. Case law in immigration law operates in the same manner as it does in other areas of law. Case law interprets the IRPA and the IRP Regulations. The IRPA is a federal statute, and cases generally go to the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada. The Immigration and Refugee Board has jurisdiction to hear certain immigration matters (consisting of four separate divisions).

The Immigration and Refugee Protection Act, RSC 2001, c 27 (“IRPA”) came into force on June 28, 2002, replacing the former Immigration Act of Canada, 1976. It is important to note which legislation governs a matter. Refer to Part 5 of the IRPA and Part 20 of the Immigration and Refugee Protection Regulations, SOR/2002-227 (“IRP Regulations”) for the transitional provisions if you may be subject to the old Act.

NOTE: The key legislation in this area of law changes frequently. Make sure to check the most recent version of the IRPA and Regulations, and to check the IRCC website for policy changes.

2. Operational Manuals and Bulletins

However, much of the operation of law in the Canadian immigration context takes place through the decision-making apparatus of IRCC, which is a large spatially distributed administrative bureaucracy. IRCC “officers” make decisions on written applications, without significant applicant input, and often without any opportunity to clarify evidence, and so it is vital that applications contain all the evidence required for the status being sought. Much of the law itself is interpreted through the policy of IRCC, which is publicly available through IRCC’s Operational Manuals (http://www.cic.gc.ca/english/resources/manuals/index.asp) and between manuals, Operation Bulletins (a link to these bulletins can be found on the Operational Manuals page).

Operational Manuals are drafted by IRCC and provide details on interpretation of the IRPA and IRP Regulations. Immigration Officers and Visa Officers usually consider themselves bound to the Manuals when determining a case. Operational Bulletins are recent developments by Immigration, Refugees and Citizenship Canada that have not yet been incorporated into the Manuals.

NOTE: The Manuals and Operational Bulletins do not have the force of law and must be consistent with the IRPA and the IRP Regulations. Cases that do not fit the factors listed in the Manuals and Operational Bulletins may therefore still be arguable at law. However, you may never have an opportunity to argue the legal case due to the limited and narrow

appeals and review options, and so it is essential that applicants try to confirm to the policy requirements as much as possible in the circumstances.

3. Ministerial Instructions =

The Ministerial Instructions are provided for in s 87.3 of IRPA, and are created through Order in Council. The Ministerial Instructions drive current immigration policy. The Minister uses Ministerial Instructions to make fast, sweeping changes to the immigration system, and so it is very important to ensure that you are working with the most current information on requirements.

B. Resources

Immigration, Refugees and Citizenship Canada (“IRCC”) Website: www.cic.gc.ca

● Canadian immigration law is changing constantly and sometimes unpredictably. To ensure that you are using the most up to date forms, and the most current policies and procedures, it is important to always check the web site of Immigration, Refugees and Citizenship Canada: Here you can find information, downloadable forms, and links to the IRPA, Regulations, and Policy Manuals. Operational Manuals and Bulletins published by IRCC are available online under the Publications heading (https:/ / www. canada. ca/ en/ immigration-refugees-citizenship/ corporate/ publications-manuals/ operational-bulletins-manuals. html). They explain the policies and procedures used by immigration officials to interpret the IRPA.

Immigration and Refugee Board (“IRB”) Website: http://www.irb-cisr.gc.ca

H.M. Goslett & B.J. Caruso eds., The 2018 Annotated Immigration and Refugee Protection Act of Canada, (Toronto: Carswell, Legal Publications). Available on reserve in the UBC Law Library.

L. Waldman, Canadian Immigration Law and Practice 2018 (LexisNexis).

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References

[1] http://laws.justice.gc.ca/eng/acts/i-2.5/
[2] http://laws-lois.justice.gc.ca/eng/regulations/sor-2002-227/
[3] http://www.cic.gc.ca/English/resources/manuals/index.asp
[4] http://laws-lois.justice.gc.ca/eng/const/page-15.html

III. Players

A. Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA)

Citizenship and Immigration Canada (CIC) (under the Minister of Citizenship and Immigration) is generally responsible for processing permanent resident and temporary visa applications. The Canada Border Services Agency (CBSA) under the Minister of Public Safety and Emergency Preparedness is generally responsible for enforcement, removals, and hearings. The difference between the CBSA and CIC is more complicated than what is outlined here, and roles change.

B. Immigration and Refugee Board (IRB)

The Immigration and Refugee Board is an independent tribunal with four distinct divisions, one of which is expected to come into effect in December 2012. These are outlined in Section VI: The Immigration and Refugee Board.

C. Immigration Representatives, Consultants, and “Shadow” or “Ghost” Consultants

Under section 91 of the IRPA, the only persons permitted to offer immigration advice or to appear before the Immigration and Refugee Board for consideration (i.e. pay) in relation to an application, are lawyers (and articled students) and members of the Immigration Consultants of Canada Regulatory Council ("ICCRC"). The ICCRC is a relatively new organization which replaced the Canadian Society of Immigration Consultants. A person who is not paid may legally provide assistance and advice to an applicant.

Any party appearing as a representative to an applicant must complete an IMM5476E "Use of a Representative" form. This includes both unpaid and paid parties.

For any proceeding in Federal Court, i.e. judicial review of an IRB decision, **only lawyers and the applicants themselves may appear**.

“Shadow” or “ghost” consulting refers to the practice of offering immigration consulting services without the proper accreditation. While these consultants are not authorized players in the immigration process, their presence is nevertheless significant, and often harmful. Whether acting within Canada or outside Canada, ghost consultants will never appear in the official record of an application, and clinicians will hear only of the advice they gave to the client. Since many immigrants are unaware of the regulatory requirement for authorized representation, those immigrants are exposing themselves to censure and even findings of "misrepresentation" if they employ ghost consultants, and CIC and CBSA will aggressively pursue such findings if given the opportunity. If a clinician suspects that a ghost consultant was involved in a file, he or she should seek input from a supervisor before revealing this fact to CIC and prejudicing the client. There are methods for pursuing and censuring ghost consultants provided in the IRPA and IRP Regulations, and clients may also have civil remedies against them in certain situations. LSLAP clinicians can assist persons wishing to file complaints or small claims actions against consultants.

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IV. Categories of Persons

There are three legal categories of persons under IRPA: citizens, permanent residents and foreign nationals. "Status" is the term commonly used to describe the category under which someone falls. Every person physically present in Canada falls into one (and only one) of these categories. "Indians" under the *Indian Act* may enter and remain in Canada in ways that are similar to, but not the same as, a permanent resident, and Indians may also apply for citizenship under certain circumstances. However, Indians may also still be foreign nationals even though they are also Indians, and as such are under the legal requirements of foreign nationals. Clinicians are encouraged to consult with a supervising lawyer when assisting Indians with immigration applications.

A. Citizen

A citizen is a person who was born in Canada, born outside Canada to a Canadian citizen parent, or who has been granted citizenship after filing an application for citizenship under the *Citizenship Act*, RSC 1985, c C-29. Various types of people can apply for citizenship. See Chapter 17: Citizenship.

Dual Canadian citizens (persons with multiple citizenships, including Canadian citizenship) travelling to or through Canada are required to enter Canada on a Canadian passport. Canadian citizens should always try to have a passport that will remain valid well beyond any time they plan to spend outside Canada.

B. Permanent Resident

A permanent resident (historically called a “landed immigrant”) is a person who has been granted permanent admission as an immigrant, but who has not become a Canadian citizen. Under IRPA section 2, “permanent resident” means a person who has acquired permanent resident status and has not subsequently lost that status under section 46.

Permanent residents have the same rights as Canadian citizens, with a few exceptions. One important exception is that permanent residents cannot vote. Another important exception is that a permanent resident can be removed from Canada under certain circumstances, most notably, for having committed a serious criminal offence or for not fulfilling their “residency requirements” (see below).

C. Foreign National

Under IRPA s 2, a foreign national is any person who is not a Canadian citizen or a permanent resident, and includes a stateless person. Foreign nationals with Temporary Resident status have conditions attached that the foreign national must abide by, such as visitor, person with a Study Permit or a Work Permit, Convention refugee claimant and many others. Foreign nationals may also have no status – however, they are still Foreign Nationals even if their status has expired.

a) Restoration

Upon losing their Temporary Resident status for allegedly failing to comply with conditions imposed (a list can be found in *IRP Regulations* 185(a)), a foreign national can apply within 90 days to have this reviewed. If the officer finds that the foreign national has not failed to comply with any conditions and meets the initial requirements for their stay, the officer shall restore their Temporary Resident status.

Some types of foreign nationals and their associated conditions are described below:

1. Visitors

Visitors are foreign nationals who enter Canada lawfully as a visitor. Foreign nationals from certain countries require a Temporary Resident Visa ("TRV") under the Visitor Class (sometimes known as a "visitor's visa") before entering Canada; others do not (see IRP Regulations, s.190). Examples of "visa-exempt" countries are the United States, the United Kingdom, Australia, Japan, and most European countries. Foreign nationals with visitor's status can apply to extend their visitor's status from within Canada. A visitor has the condition that they cannot work or study in Canada, with very few exceptions. Visitors must prove that they will leave Canada at the end of their visit.

Visitors who are exempt from requiring a Temporary Resident Visa will still be required to attain an Electronic Travel Authorization ("ETA"). The sole exception to this requirement is for individuals from the United States and individuals with a valid Canadian visa. Applications to obtain an ETA are made through the IRCC website and applicants will be required to pay a $7.00 surcharge. Electronic Travel Authorizations are not guaranteed and may be denied to travellers with criminal records or existing inadmissibility to Canada. For more information on the ETA process and to apply online visit www.cic.gc.ca/english/visit/eta.asp

Visitors can only stay in Canada for the duration of time granted when they first enter Canada unless they obtain an extension. The default amount of time granted upon entry is six months, although an immigration officer may specify a different period of time (IRP Regulations s 183). This includes foreign nationals from visa exempt countries. It is possible to apply for an extension with Immigration, Refugees and Citizenship Canada from within Canada. However, a person may apply for an extension without having to leave the country if they apply before the temporary resident status expires. If such a person stays in Canada beyond the amount of time granted, the person has "overstayed" his or her visit and is subject to the issuance of a removal order for non-compliance (which would result in a mandatory 1-year exclusion from Canada). A successful applicant must prove that they will leave at the end of the visitation period, and that they will have sufficient funds during their visit. Most foreign nationals can apply for Restoration (IRP Regulations s 182) within 90 days of expiry, but person's status is not actually restored until a decision is made, and so they remain at risk of potential enforcement.

A Super Visa allows parents or grandparents of permanent residents and Canadian citizens to visit Canada for up to two years at a time. IRCC grants multiple-entry visas of up to ten years for qualifying individuals. To be eligible for a super visa: • You must apply for a super visa from outside Canada • You must be the parent or grandparent of a Canadian citizen or a permanent resident of Canada • You must have a signed letter from your child or grandchild who invites you to Canada that includes: o a promise of financial support for the length of your visit o the list and number of people in the household of this person o a copy of this person's Canadian citizenship or permanent resident document • You must take an immigration medical exam. • You must have medical insurance from a Canadian insurance company that is: o valid for at least 1 year from the date of entry o at least $100,000 coverage o have proof that the medical insurance has been paid (quotes aren't accepted)

2. Students

A foreign national who wishes to study in Canada must apply for their initial study permit from outside Canada at a visa office under authorization of the Student Class. There are several exceptions to this general rule: in some circumstances a foreign national can study in Canada without a permit (see IRP Regulations ss. 188 to 189); and in circumstances such as extending an existing study permit a foreign national can apply for a study permit from within Canada (see s. 215).

International students enrolled in courses in Canada for six months or less do not need a study permit, as long as those studies began and will end within six months of their entry to Canada. However, they must still have valid temporary resident status in Canada to perform these studies.

To acquire a study permit, a foreign national must have an acceptance letter from a valid academic institution, sufficient funds, and the intention to leave Canada once their permit expires (see ss. 210 to 222 of the IRP Regulations).

Registered Indians (as defined under the Canada Indian Act) who are also foreign nationals are allowed to study in Canada without a study permit. However, those persons must still have valid temporary resident status in Canada.

An international student who graduates from an eligible designated learning institution may be eligible to obtain a post-graduate work permit. Applicants can only receive one post-graduate work permits in their lifetime. An applicant must submit clear evidence that:

• They have completed a completed an academic, vocational or professional training program that is at least 8 months in duration. • They have maintained full time status in Canada during each academic session of the program except the final academic session. • They have received a final transcript or an official letter from a designated learning institution confirming that they have met the requirements to complete the program.

3. Workers

A foreign national who wishes to work in Canada must apply for authorization under the Worker Class, and a work permit from outside Canada at a visa office. There are several exceptions to this general rule: in some circumstances a foreign national can work in Canada without a permit (see IRP Regulations ss. 186 to 187); and in some circumstances a foreign national can apply for a work permit at a Port of Entry (see IRP Regulations s 198), or from within Canada (see s. 199).

The most common variety of work permit is based on an employer in Canada applying to obtain a Labour Market Impact Assessment (LMIA), or "validation," from Service Canada (Employment and Skills Development Canada). Obtaining an LMIA is often difficult. There are several criteria the employer must meet, including evidence of efforts to hire Canadians or permanent residents; that a government-determined minimum wage (not the same as the provincial minimum wage) will be paid; and that the employer is able to demonstrate it can pay the wages offered. There are additional rules associated with whether the position pays less than or more than the provincial average wage (again, not the same as the provincial minimum wage).

Information on the LMIA process (currently called the "Temporary Foreign Worker Program") can be found at the Employment and Social Development Canada website (http://www.esdc.gc.ca/eng/jobs/foreign_workers/index.shtml).

There are other, less common kinds of work permit such as a professional pursuant to NAFTA; inter-company transfers; and "significant benefit" permits where the foreign national can demonstrate that they will contribute significantly to Canadian culture or the economy. Work permits authorizing self-employment are technically possible, but rarely granted. Please see sections 204 and 205 of the IRP Regulations and the Operational Manuals relating to the International Mobility Program.

Workers who have employer-specific work permits may be eligible for an open work permit that is exempt from an LMIA if they are experiencing abuse, or if they are at risk of abuse. The main objective of this program is to provide migrant workers means to leave their employer if they are facing abuse. It helps migrant workers by reducing the risk and fear of work permit revocation and removal from Canada. Consult the relevant Operational Manual for further details: https:/ / www. canada. ca/ en/ immigration-refugees-citizenship/ corporate/ publications-manuals/ operational-bulletins-manuals/temporary-residents/foreign-workers/vulnerable-workers.html

4. Temporary Resident Permit

When a person is determined by CIC or CBSA to be inadmissible to Canada (see below), a Temporary Resident Permit (TRP) (formerly called a Minister's Permit, and not to be confused with a Temporary Resident Visa) can be issued to a foreign national who is otherwise inadmissible but who has a compelling reason for either entering or remaining in Canada. The TRP can be applied for from either outside or inside Canada (IRPA, s 24). A foreign national is granted a TRP only under **exceptional circumstances**.

5. Convention Refugee Claimants

A Convention refugee claimant is a foreign national who enters Canada and who requests protection but who has not yet had their refugee hearing. Canada is obligated to grant protection to refugees and other persons in need of protection under the IRPA; the obligation originates from various United Nation Conventions and Treaties.

Details of the Convention refugee process are outlined in Section VI.F: Convention Refugees.

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V. PR Application

Immigrant applicants can be broken down into three general categories (these categories are extremely broad): (i.) Economic Class applicants, (ii.) Family Class applicants, and (iii.) humanitarian or refugee applicants. There are several subclasses or subcategories within each of these general headings. All applicants and their dependent family members are subject to medical, criminal, and security checks. These are referred to as “statutory requirements” in the legislation.

Amendments to the Act that came into force June 18th, 2008 give the Minister authority to establish an order of priority for incoming applications (s 87.3), and relieve CIC from the obligation to process all applications to a full decision (s 11). For example, priority processing amongst Family Class applications is given to spouses and dependent children; these are commenced immediately upon receipt. See the Operational Manuals for details.

NOTE: It is important to inform IRCC about any changes in the application, such as a birth or adoption of a child, marriage or divorce, death of an applicant or dependent.

A. Economic Class Applicants

Foreign nationals who apply under one of the economic classes must prove that they will become financially established in Canada. This general requirement is reflected through a series of criteria. There are three general sub-classes within the economic class: the skilled worker class, investor class and the self-employed class. Please note that there are Provincial Nominee Programs in operation throughout Canada, including British Columbia. Under these programs, the province nominates an immigrant for Federal screening (see s. 87 of the IRP Regulations). Nomination by a province provides strong evidence of an applicant’s ability to become economically established in Canada as required by IRPA s. 12(2). A detailed discussion of these programs is beyond the scope of this Manual.

NOTE: IRCC implemented an online screening and selection process for persons who wish to be considered for permanent resident status in Canada under the Economic Classes of Federal Skilled Worker, Canadian Experience Class, and Federal Skilled Trades Class. This process is called Express Entry (“EE”): http:/ / www. cic. gc. ca/ english/ immigrate/express/express-entry.asp

EE is a system whereby applicants create an online profile (there is no paper process for creating an EE profile) that assigns points according to “Human Capital Factors” and “Skill Transferability Factors” under a “Comprehensive Ranking System”. An applicant can obtain a maximum score of 600 points based on these factors in combination, and a possible extra 600 points by obtaining a special EE-related Provincial Nomination (see Provincial Nominee Programs) or an LMIA (see Workers). These factors and selection criteria were established through Ministerial Instructions, and can be reviewed in detail on the IRCC website (http://www.cic.gc.ca/english/department/mi/express-entry.asp).

Once the person has created an active EE profile, they may be selected for an Invitation to Apply (“ITA”) for permanent resident status under one of the three aforementioned Classes of permanent residence. They will be issued an ITA if their profile score equals or exceeds the score chosen by IRCC at a particular selection pass. Consequently, potential immigrants do not know if they are able to apply for permanent resident status until they receive an ITA.

Upon receiving an ITA, the applicant has 60 days to submit the application for permanent resident status. The application is made entirely online, without written forms, and requires scans of all relevant documents. The applicant will not know exactly what documents are required until they actually receive the ITA, and the documents required may change according to other evidence provided as part of the application. The online submission is often referred to as the “e-APR”.

Once the e-APR is submitted, they will be contacted by IRCC with instructions on where to send original documents that may be required (such as original police clearances).

1. Federal Skilled Worker Class (Express Entry Required)

The Federal Skilled Worker Program ("FSW") selects immigrants based on their ability to succeed economically in Canada. After meeting the threshold criteria set out in s. 75 of the IRP Regulations, foreign nationals who apply under the skilled worker class are assessed on a point system designed to evaluate their ability to become successfully established in Canada. Applicants are given points on the following criteria: education, language, experience, age, adaptability, and arranged employment. The point structure is set out in the IRP Regulations in ss. 78 to 83. For information on how points are allocated, refer to www.cic.gc.ca/english/immigrate/skilled/apply-factors.asp.

For complete information of the Federal Skilled Worker Program, please refer to: http://www.cic.gc.ca/english/immigrate/skilled/index.asp

2. Canadian Experience Class (Express Entry Required)

This class is designed to recognize the value of having experience in Canada, and the positive impact this experience is likely to have on a newcomer's prospects of success. Applicants under this class must be able to demonstrate two things:

1) At least one year of full time authorized skilled work experience in Canada. The type of employment must fall under type A, B, or O of the National Occupation Classification system (i.e. managerial, professional, or technical occupations). "Full time" work in this context means 30 or more hours of work per week, and can be made up of work in more than one skilled job, but any hours beyond 30 during that week are surplus and are not counted. 2) Depending upon the dominant type of skilled work they are claiming, the applicant must show a minimum proficiency in either English or French, through providing a test result report from the TEF, IELTS or CELPIP testing systems.

See the IRCC Program Delivery Instructions for the Canadian Experience Class (http://www.cic.gc.ca/english/resources/tools/perm/econ/cec/index-post.asp) and the IRCC website (http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp).

3.Federal Skilled Trades Class (Express Entry Required)

This class is meant to facilitate the permanent residence of skilled tradespersons in Canada. In order to be eligible for the Federal Skilled Trades Program ("FSTP"), an applicant must

a) Plan to live outside the province of Quebec, b) Meet the required levels in English or French for each language ability (CLB 5 for speaking, and listening, and CLB 4 for reading, writing), c) Have at least two years of full-time (30 hours per week) work experience (or an equal amount of part-time work experience) in a skilled trade within the five years before applying, d) Meet the job requirements for their predominant skilled trade as set out in the National Occupational Classification ("NOC"), (except for needing a certificate of qualification), and a. Have an offer of full-time employment for a total period of at least one year (up to 2 employers can commit to offer employment, but all offers of employment must be associated with an LMIA). or b. A certificate of qualification in their predominant skilled trade issued by a Canadian provincial or territorial authority (such as a Red Seal).

Applicants who are applying from outside of Canada must also show that they have sufficient settlement finds for their family upon arrival in Canada. See http://www.cic.gc.ca/english/immigrate/trades/apply-who.asp

4. Provincial Nominee Programs

All provinces, including British Columbia, have their own selection systems and criteria for new immigrants. Applicants who apply under these classes must still comply with the statutory requirements under the federal legislation (see s. 87 of the IRP Regulations). Section 87(3) permits the federal immigration officer to substitute his/her own evaluation of the applicant's ability to become economically established in Canada for that of the nominating province. B.C.'s Provincial Nominee Program ("BCPNP") has its own categories, which can be different from the federal requirements.

After you are nominated for permanent residence by the BC PNP, both you and your employer must tell the BC PNP about any employment changes by emailing PNPPostNom@gov.bc.ca. This includes a promotion, lay-off, termination or a potential new job with a new employer. Please note that failing to inform BC PNP of a change in your employment status could lead to the withdrawal of your nomination. It could also lead to questions from IRCC when they process your application. All post-nomination requests, including requests for work permit support letters, change of employers, and re-nominations, must now be emailed to PNPPostNom@gov.bc.ca.

On 01 February 2017, the BC Provincial Immigration Programs Act and Regulations came into effect. This legislation provides a framework for the operation of the BCPNP, including direction concerning what factors can serve as the basis for a nomination, how fees are set, provides investigatory powers to the Director of the PNP, and allows for an appeal process for refused nominations. Clinicians assisting with PNP applications should familiarize themselves with the "interpretive guidelines" provided on the BCPNP site: https:/ / www. welcomebc. ca/ Immigrate-to-B-C/ B-C-Provincial-Nominee-Program/Documents.

Where a BCPNP applicant is refused their application for a nomination certificate, the ability to appeal the decision is provided within their BCPNP online profile, and so it is important for the applicant to log into their profile as soon as possible upon receiving a refusal. They must pay a fee of $200, and provide submissions and evidence as part of the appeal process.

NOTE: A BCPNP nomination can be cancelled after being issued, and this cancellation does not receive consideration under the appeal process. Instead the nominee is given basic procedural fairness protections in the form of an opportunity to be heard before the nomination is cancelled. There is no appeal to the cancellation decision and so it is important to make the best case possible at that time.

The BCPNP program is currently using an online registration and selection process similar to that of Express Entry (see the NOTE in Section V. A. "Economic Class Applicants"). Enrolment in the program is free. Once an applicant has enrolled in the program they wait to be issued an invitation to apply for a provincial nomination. No time estimate for waiting periods can be provided as they vary and depend on the strength of the application. Consolidated guides with all the details necessary to assist with a BCPNP application can be found under: http:/ / www. welcombc. ca/ Immigrate-to-B-C/ B-C-Provincial-Nominee-Program/ Documents. For more information about BC's programs generally, see: http://www.welcomebc.ca/pnp.

5. Self-Employed Persons Class

This category is designed for individuals who have the intention and ability to be self-employed in Canada in cultural activities, athletics, or in managing a farm. While it is not explicitly stated on the IRCC website, applicants with exceptional skills, such as Olympic athletes, world-renowned artists and/or musicians, etc. are more likely to be successful under this class. It is not necessary that the applicant actually be self-employed before coming to Canada, so long as he or she has participated at a "world-class" level in their field of endeavor for at least 2 years. However, persons not actually participating at a "world-class" level may still be successful if they can demonstrate they were self-employed in Category 5 of the Canadian National Occupational Classification ("NOC") (occupations in art, culture, recreation, and

sport) for at least 2 years before coming to Canada, and that they are likely to become economically established in Canada.

Please refer to IRP Regulations Part 6 Division 2 (ss. 100 and 101), and to the IRCC website (http://www.cic.gc.ca/english/immigrate/business/self-employed/apply-who.asp).

6. Investor Class

The Investor Program and the Federal Entrepreneur Program has been closed since July 1st 2012.

IRCC has a Start-Up Visa Program under the Business Immigration Program, which is geared at attracting experienced business people to Canada who will support the development of a strong and prosperous Canadian economy. Individuals are advised to check the IRCC website for the latest information.

B. Family Class Applicants

Foreign nationals can be "sponsored" under the Family Class by a Canadian citizen or permanent resident. See the *IRP Regulations*, Part 7.

> **NOTE:** Foreign nationals **must** declare any of their non-accompanying family members (i.e. dependent children, spouses, and parents) in their initial application if they wish at some point to sponsor these individuals themselves. Previously, IRCC would not allow a family member to be sponsored if they failed to declare a non-accompanying family member in their application for permanent residence. However, a pilot project has been launched from September 9, 2019 to September 9, 2021 which will allow newcomers who failed to declare their family members to sponsor undeclared immediate family members.

1. Sponsors

a) Eligibility Requirements

The sponsor must meet certain eligibility requirements. For example, the sponsor must be 18 years old, must reside primarily in Canada, must not be bankrupt or receiving provincial welfare benefits, must not be in default of a previous immigration undertaking, etc. (see ss 130 - 137 of the *IRP Regulations* for the requirements).

The requirement to reside in Canada only applies to permanent resident applications. Canadian citizen sponsors may reside outside of Canada when they submit the sponsorship, but must demonstrate their intention to return to Canada when the sponsored person becomes a permanent resident (see *IRP Regulations* 130(2)).

In some circumstances, the sponsor must prove he or she earns a specific amount of money, depending on his or her family size and the city he or she is living in. The definition of "minimum necessary income" can be found in s.2 of the *IRP Regulations*. This is also known as the "low-income cut-off" figure ("LICO"). Generally speaking, the LICO **does not apply** to sponsors who are just sponsoring their spouse or children (s 133(4)).

B. Family Class Applicants

Foreign nationals can be "sponsored" under the Family Class by a Canadian citizen or permanent resident. See the IRP Regulations, Part 7.

NOTE:

Foreign nationals must declare any of their non accompanying family members (i.e. dependent children, spouses, and parents) in their initial application if they wish, at some point to sponsor these individuals themselves. An individual generally cannot sponsor a family member if if they failed to declare that family member in their application for permanent residence. However, a pilot project has been launched from September 9, 2019 to September 9, 2021 which will allow certain newcomers who failed to declare their family members to sponsor undeclared immediate family members. Consult the IRCC website for the latest details on this pilot project, which presently applies only to individuals who became permanent residents under the Convention refugee and Family Classes and who are applying to sponsor undeclared family members.

1. Sponsors

a) Eligibility Requirements

The sponsor must meet certain eligibility requirements. For example, the sponsor must be at least 18 years old, must reside primarily in Canada, must not be bankrupt or receiving provincial welfare benefits, must not be in default of a previous immigration undertaking, etc. (see ss. 130 - 137 of the IRP Regulations for the requirements).

The requirement to reside in Canada only applies to permanent resident applications. Canadian citizen sponsors may reside outside of Canada when they submit the sponsorship, but must demonstrate their intention to return to Canada when the sponsored person becomes a permanent resident (see IRP Regulations 130(2)).

In some circumstances, the sponsor must prove he or she earns a specific amount of money, depending on his or her family size and the city he or she is living in. The definition of "minimum necessary income" can be found in s.2 of the IRP Regulations. This is also known as the "low-income cut-off" figure ("LICO"). Generally speaking, the LICO does not apply to sponsors who are just sponsoring their spouse or children (IRP Regulations s. 133(4)).

2. Members of the Family Class

The family class is the group of family members that can be sponsored to immigrate to Canada. Family members who are not included in IRP Regulation s. 117(1) cannot be sponsored. Below is a list of members of the family class: a) Spouse, common-law partner or conjugal partner, b) Dependent child, c) Parents or grandparents, d) Brother, sister, niece, nephew, or grandchild who is an orphaned child under 22 and is not a spouse or common-law partner, or e) Relative of any age if the sponsor does not have an aunt, uncle, or family member from the list above who he or she could sponsor or who is already a Canadian citizen, registered Indian, or permanent resident. This is known as the "lonely Canadian" provision. A dependent child is defined as a child, both biological and adopted, of the sponsor or sponsor's spouse who is below the age of 22. Exceptions can be made for children who are above the age of 22 but are substantially dependent on their parent due to a mental or physical condition (IRPA s. 1).

NOTE: There is a new requirement that sponsors meet an increased income level for sponsoring parents or grandparents.

NOTE: A major issue that arises in many spousal sponsorship applications is whether the marriage is genuine. Under IRP Regulations, s. 4, a foreign national will not be considered a spouse if the marriage is not genuine or was entered into primarily for the purposes of acquiring any status or privilege under the Act. Applicants must prove that their marriage is valid, both in Canada, and in the country in which it took place (IRP Regulations, s. 2). While an arranged

marriage is not inherently less credible, prior acquaintance to the marriage can pose some evidentiary challenges.

3. Procedure

To sponsor a family class member, a potential sponsor must fill out an application to sponsor, and the relative being sponsored must fill out an application for permanent residence. The sponsor must also provide a signed undertaking with the federal government that he or she will support the prospective immigrant and accompanying dependents, if necessary, for three years if the applicant is a spouse or conjugal/common-law partner, or ten years for most other categories of applicants (see IRP Regulations, Part 7, Division 3). If an application for sponsorship under the Family Class is refused, the sponsor may (in most cases) appeal the refusal to the Immigration Appeal Division.

C. "In Canada" Spouses, Common-law Partners, and their dependents (Spouse or Common-Law Partner in Canada Class)

The statutory "in-Canada" family class sponsorship provisions are outlined under ss. 123 - 125 of the IRP Regulations. The requirements from the sponsor are generally the same, but the Class of persons able to be sponsored through this route is limited to spouses, common-law partners, and the children or grandchildren of those persons. The entire application is processed inside Canada, and the applicants are generally landed at an IRCC office in Canada. It is important to note that, aside from the question of the genuineness of the relationship, in-Canada applications are only successful if the sponsored person resides in Canada with the sponsor.

Out of status spouses in Canada – Public Policy

A Canadian citizen or permanent resident can sponsor a spouse regardless of the spouse's status in Canada under a special public policy directive relating to out-of-status applicants. After the sponsored spouse (applicant) receives first stage approval of their application (that is, approval in principle), they are entitled to an Open Work Permit under IRP Regulations s. 207. This means the applicant is entitled to work in Canada in any capacity; in other words, unlike most temporary foreign workers, this work permit is not tied to a particular form of employment with a particular employer.

NOTE: An applicant will generally be granted a sixty (60) day period in which IRCC should determine whether the relationship is genuine if the applicant is out of status and there is a removal order. If it is determined that the relationship is genuine then the removal order will be stayed.

It is important to understand that foreign nationals without status can apply under this class only if the foreign national:

a) Has overstayed a visa, visitor record, work permit or study permit, b) Has worked or studied in Canada without authorization under the IRPA, c) Has entered Canada without the required visa or other document required under the IRP Regulations and/or, d) Has entered Canada without a valid passport or travel document (provided valid documents are acquired by the time Immigration, Refugees and Citizenship Canada seeks to grant permanent resident status).

Consequently, foreign nationals who are inadmissible to Canada, entered Canada without permission after having been deported, and foreign nationals who have misrepresented themselves are not permitted to apply under this class. Always look to the most recent version of this policy. (See Appendix H of the Operational Manual, "IP 8 — Spouse or Common-law Partner in Canada".)

NOTE: Under "in-Canada" classes, there is no appeal to the Immigration Appeal Division of a failed sponsorship. The only redress is to file a new application, file an overseas family class application, or if possible, to file for judicial review of the refusal.

NOTE: IRCC will issue open work permits to certain spouse or common-law partner in Canada class applicants at the initial stage of processing.

D. Caregiver Program

The federal government has announced two pilot programs that will help caregivers who came to Canada to apply for permanent residency. On June 18, 2019, Caring for Children and Caring for People with High Medical Needs pilot was replaced with a pilot program for Home Child Care Provider and Home Support Worker. There is an Interim Pathway for Caregivers which is available between July 8 and October 8, 2019 to applicants who have at least one year of work experience as a home child care provider or home support worker and meet minimum language and education requirements.

Under the new Home Child Care Provider Pilot and Home Support Worker Pilot, Caregivers will receive a work permit if they have a job offer in Canada and meet standard criteria for economic immigration programs. No LMIA is required. A caregiver can apply for permanent residency after two years of Canadian work experience.

These new pilot programs will also benefit from:

• Occupation specific work permits rather than employer specific permits. This will allow a caregiver to change employers if needed. • The caregivers' immediate family members will be eligible for open work permits and/or study permits.

Please see Chapter 9: Employment Law for further information on caregivers. You may also contact the Migrant Workers Centre for more information:

Migrant Worker's Centre (formerly WCDWA) 302-119 W Pender Street Telephone: (604) 669-4482 Vancouver, B.C. V6B 1S5 Fax: (604) 669-6456 Website: www.wcdwa.ca E-mail: info@wcdwa.ca

E. Humanitarian and Compassionate Applications

Section A25(1) of the Immigration and Refugee Protection Act (IRPA) allows foreign nationals who are inadmissible or who are ineligible to apply in an immigration class, to apply for permanent residence, or for an exemption from a requirement of the Act, based on humanitarian and compassionate (H&C) considerations.

Humanitarian and compassionate ("H&C") applications are generally applied for from within Canada under s 25(1) of the IRPA, but they can also be applied for from abroad.

This is a highly discretionary category, and generally only exceptional circumstances will result in an H&C exception. The Supreme Court of Canada in Kanthasamy v Canada (Citizenship and Immigration) 2015 SCC 61 established a broad and comprehensive assessment of all the applicants' circumstances in an H&C application. The former test, which considers whether the foreign national would face "undue, undeserved, or disproportionate hardship" if they were forced to return to their country of habitual residence or citizenship, should be only treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

Under the previous test the primary concern is "the best interest of any child" affected by the decision, but an immigration officer will also consider: level of establishment in Canada, family ties in Canada, ties to community, and any other relevant considerations. Review the Program Delivery Instructions on H&C applications (http://www.cic.gc.

ca/english/resources/manuals/) for more information.

NOTE: In 2010, s. 25 of the IRPA was amended, such that "... the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national". In other words, officers do not determine whether a well-founded fear of persecution, risk to life, danger of torture and risk of cruel and unusual treatment or punishment has been established, but they may take the underlying facts into account in determining whether the applicant will face hardship if returned to their country of origin. Subsection 25(1.3) applies only to H&C applications made in Canada.Personal risks faced by the claimant that are relevant to a Convention refugee determination can no longer be considered in deciding an H&C application. However, "hardship" must still be considered—see IRPA s. 25(1.3). Thus, discrimination in the foreign national's country of origin that does not constitute persecution may still properly be considered by the Minister in determining whether the foreign national would experience undue, undeserved or disproportionate hardship. Review IP5 for guidance on how officers evaluate discrimination.

Note: Refugee claimants are prohibited from having concurrent H&C applications. Those who have had their claim denied will be subject to a 1-year bar on submission of an H&C application. There are some exceptions to the bar. The bar does not apply if: • you have children under 18 who would be adversely affected if you were removed from Canada, or • you have proof that you or one of your dependents suffers from a life-threatening medical condition that cannot be treated in your home country.

Unlike applications made under a Pre-Removal Risk Assessment, a person who applies under H&C considerations may be removed from Canada before the decision on the application is made.

F. Convention Refugees (the Process)

The Refugee Protection Division ("RPD") assesses foreign nationals who apply for Convention refugee protection or "protected persons" status. The definition of a Convention refugee is found at s 96 of the IRPA. Generally, the person must: a) Have a well-founded fear of persecution, b) The fear must be objective and subjective, c) The fear must be linked to a Convention ground (i.e. race, nationality, religion, political opinion or membership in a particular social group), d) There must be no Internal Flight Alternative, i.e. a place in the country of feared persecution where the person can reasonably live safely, e) There must be no state involvement or state complicity, and f) The state must be unable or unwilling to protect.

If a person has more than one place of citizenship, they must have exhausted options in both of their countries of citizenship (see Canada v Ward [1993] 2 SCR 689). This is not an exhaustive list; refer directly to the IRPA, ss. 95 to 111.

The IRB Chairperson has issued special interpretation guidelines for determining Convention refugee claims of women refugees. Individuals should review these "Gender Guidelines" when assisting women refugee claimants. The Gender Guidelines can be found on the IRB's website, www.irb-cisr.gc.ca, under the heading "Legal and Policy References."

NOTE: A "person in need of protection" has a different definition, outlined under s 97 of the IRPA. Review the Convention Refugee and Protected Persons classes in the IRPA carefully if dealing with such a case. The Refugee Protection Division has the jurisdiction to consider both ss. 96 and 97 of the IRPA.

Significant changes to the refugee determination process have been implemented over the last several years by the Balanced Refugee Reform Act, SC 2010, c 8 (BRRA), and, the Protecting Canada's Immigration System Act, SC 2012, c 17.

Key Changes:

● People who make a refugee claim at an office in Canada must submit their completed Basis of Claim form ("BOC") during their eligibility interview. Those who make a refugee claim at a port of entry must submit their BOC to the IRB no later than 15 days after referral of their claim to the IRB.

● Hearings at the independent Immigration and Refugee Board of Canada ("IRB") will be conducted by public servant decision-makers rather than people appointed by the Governor in Council ("GIC)

In general, refugee claimants have an initial intake interview with an officer, followed by a hearing with a public servant. Due to the increased volume of claims, the RPD has moved to a "first-in, first out" model where claims are heard in the order they are referred. If the claimant fails, they will have 15 days to make an appeal to the Refugee Appeal Division ("RAD"). Claimants whose claims are decided by the IRB to be "manifestly unfounded" or have "no credible basis," designated foreign nationals, and those falling under an exception to the Safe Third Country agreement have no right of appeal to RAD but may be able to file for Judicial Review.

Please note that the timelines for BOC, Hearings, Document Disclosure and Postponement Requests are different for Inland claimants and Port of Entry claimants.

Any person midway through the application process should consult the Immigration, Refugees and Citizenship Canada website for the latest information: www.cic.gc.ca.

1. Entry/Initiation

A foreign national generally requests Convention refugee protection at the Port of Entry upon arrival, i.e. at the airport, land border or sea border. However, if a foreign national wishes to make a Convention refugee claim after being admitted into Canada, the person should go to the Immigration, Refugees and Citizenship Office at 1148 Hornby Street, Vancouver, British Columbia and enter a claim for protection. The first step is the eligibility interview.

2. Eligibility

Once a foreign national makes a claim for protection, an immigration officer will interview him or her and determine if the person is eligible to make a claim. There are several classes of ineligible people listed at s. 101 of the IRPA. For example, if a foreign national has previously made a Convention refugee claim in Canada, and the claim was accepted, refused, withdrawn or abandoned, that person is "ineligible" to make another claim. If a foreign national is determined "ineligible," the process stops.

At the eligibility interview, the interviewing immigration officer will obtain the detailed reasons why the foreign national fears persecution. A foreign national should be prepared to accurately outline the details of his or her account of events leading to the claim for protection.

Important changes to the eligibility rules for refugee claimants were introduced in 2019. Anyone who has made a refugee claim previously in a country with which Canada has an information-sharing agreement (US, UK, Australia, and New Zealand) are now ineligible to make a refugee claim in Canada. Instead, these individuals will receive only a Pre-Removal Risk Assessment ("PRRA"). We recommend that claimants in this situation consult with a lawyer as soon as possible to understand their options.

3. Basis of Claim Form ("BOC")

Once a foreign national is determined to be eligible to submit a Convention refugee claim, the foreign national will be given a Conditional Departure Order. This is a removal order that only comes into effect if the person loses the claim for protection. The foreign national is now a Convention refugee claimant. The claimant will have 15 days to file the BOC. This is the most important obligation on a Convention refugee claimant, apart from attending their hearing.

Claimants will require help in preparing their BOC. In the BOC, a claimant must outline the precise reason(s) for their well-founded fear of persecution. This includes a narrative outlining the dates, incidents of persecution, why they are afraid, etc. The BOC should include facts that support the claimant's fear, and that address the requirements set out in the IRPA. For example, the BOC should address why the claimant has no internal flight alternative, how the state is involved or complicit in the persecution, etc. This account of events will form the basis of the request for protection at the hearing.

4. Refugee Hearing

The Convention refugee claimant will be scheduled for an oral hearing to assess their claim. This hearing is not open to the public. The Presiding Member will question the claimant regarding the BOC. The Minister may also intervene in the hearing and a Hearings Officer may question the claimant if they allege the claimant should be excluded from refugee protection under IRPA s. 98 or if they have concerns about the claimant's credibility.

Note that if the claimant wishes to rely on documents, he or she must file or serve those documents not less than 10 days before the hearing. If the Minister intervenes, they must also be served within the same time frame. If there are documents in other languages, they must be translated (Rule 28).

Claimants may represent themselves at the hearing or be represented by counsel. Representation by counsel is always preferable. Interpreters are provided if required. Claimants may request that a family member or friend be present at the hearing for emotional support.

NOTE: Claimants (and their counsel) must be very familiar with the content of their BOC before the hearing. Claimants must be prepared to elaborate on the details outlined in the BOC. A decision maker may interpret inconsistencies with the facts as stated in the BOC as weakening the claimant's credibility.

5. Refugee Appeal Division

The Refugee Appeal Division ("RAD") considers appeals against decisions of the Refugee Protection Division ("RPD") to allow or reject claims for refugee protection. In most cases there will be no hearing, as the RAD will base its decision on the documents provided by the parties involved and the RPD record. a) Appealing the RPD's decision to the RAD d For appeals of a decision of the RPD to the RAD, the following information may be helpful:

● There are only 15 days to file a Notice of Appeal after receiving the written reasons for the decision from the RPD, ● After a claimant receives the written reasons from the RPD decision, the claimant has 30 days to file an Appellant's Record,

For a detailed compilation of necessary steps and information for a claimant's appeal, please refer to the Appellant's Guide and Kit: http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/RefAppKitTro.aspx b) Responding to the Minister's Appeal of the RPD's Decision

The Minister can appeal the RPD's decision to accept a claimant's refugee claim subject to the following exceptions:

a) The claimant is a designated foreign national, b) c) The claimant made their claim at a land border with the United States and the claim was referred to the RPD as an exception to the Safe Third Country Agreement, and/or d) The claimant's claim was referred to the RPD before the relevant provisions of the new system came into force.

When responding to the Minister's appeal of their RPD decision to the RAD, the following should be considered:

1. A claimant will know the Minister is appealing the RPD decision when the Minister gives the claimant and the RAD a document called a 'notice of appeal'. The Minister has 15 days after they have received the RPD's written decision to take this action. 2. The Minister will then give the claimant any supporting documents that they will be submitting as evidence. The Minister has 30 days after receiving the RPD's written reasons to take this action. 3. After this is done, the claimant will have to submit a "Notice of Intent to Respond" and provide the Minister and the RAD with a copy, no later than 15 days after the claimant receives the supporting document from the Minister.

For a detailed compilation of all necessary components when responding to an appeal, please refer to the Respondent's Guide: http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/ResIntKitTro.aspx

G. Pre-Removal Risk Assessment ("PRRA")

A PRRA is a risk assessment application before removal of a foreign national from Canada. With some exceptions and some restrictions (see ss. 112(2) and 112(3) of the IRPA), every person who is being removed from Canada can submit a paper application describing why they would suffer persecution or danger in the country of destination if returned to that country. The risk(s) are assessed under ss. 96 and 97 of the IRPA. However, very few applications succeed under the PRRA process.

NOTE: Under the IRPA those claimants who have a failed or abandoned refugee claim will generally be ineligible to make a PRRA claim for 12 months after the judicial review decision.

1. Process

Once a claimant has received a removal order and has been given notification, he or she has 15 days to apply for a PRRA and another 15 days to make submissions and include documentary evidence. If the person is a failed Convention refugee claimant, the evidence supporting the PRRA must be new or must have not reasonably been available on the date of the hearing; in other words, only "new evidence" is considered.

Once a person has applied for a PRRA, the person cannot be removed from Canada until a decision is made regarding their case. This is called a "stay of removal".

A person who has been given notice of removal can apply for the PRRA later than the 15-day deadline. However, that person could be removed from Canada before the decision is made (i.e. no stay of removal is issued).

A person who loses the PRRA will be removed. The only redress to a PRRA refusal is to apply for leave and appeal to the Federal Court. The deadline to apply for leave to the Federal Court is 15 days. In such cases, the claimant should contact a lawyer immediately.

2. Status Conferred

If the PRRA is granted, the person will receive the same protection as a Convention refugee. The person will be considered a "protected person" and can apply for permanent resident status from within Canada.

C. "In Canada" Spouses, Common-law Partners, and their dependents (Spouse or Common-Law Partner in Canada Class)

The statutory "in-Canada" family class sponsorship provisions are outlined under ss 123 - 125 of the *IRP Regulations*. The requirements from the sponsor are generally the same, but the Class of persons able to be sponsored through this route is limited to spouses, common-law partners, and the children or grandchildren of those persons. The entire application is processed inside Canada, and the applicants are generally landed at a CIC office in Canada. It is important to note that, aside from the question of the genuineness of the relationship, in-Canada applications are only successful if the sponsored person resides in Canada with the sponsor.

Out of status spouses in Canada – Public Policy

Prior to February 18, 2005, a Canadian citizen or permanent resident could sponsor a spouse (including married couples, common law couples, and conjugal couples) from within Canada only if the foreign national was "in status" from the date of the application until the application wascomplete; i.e. the spouse seeking permanent residence needed to already possess valid temporary immigration status at the time of application (*IRP Regulations* s 124(b)). This prevented, for example, failed Convention refugee claimants from marrying a Canadian and being sponsored from within Canada.

Following the introduction a public policy directive (issued under the Minister's authority to exempt certain applicants from some requirements of the Act on humanitarian or compassionate grounds as per IRPA s 25), as of February 18, 2005, a Canadian citizen or permanent resident can sponsor a spouse regardless of the spouse's status in Canada; i.e. the s 124(b) requirement is effectively suspended in some cases. After the sponsored spouse (applicant) receives first stage approval of their application (that is, approval in principle), they are entitled to an Open Work Permit under *IRP Regulations* s 207. This means the applicant is entitled to work in Canada in any capacity; in other words, unlike most temporary foreign workers, this work permit is not tied to a particular form of employment with a particular employer.

This represents a significant change in policy. **However, it does not mean that every foreign national in Canada married to a permanent resident or Canadian citizen can apply for permanent resident status from within Canada.** Note that this is a policy and not a law, and therefore it is subject to change at any time. Also, foreign nationals without status can apply under this class **only** if the foreign national:

- a) has overstayed a visa, visitor record, work permit or study permit;
- b) has worked or studied in Canada without authorization under the IRPA;
- c) has entered Canada without the required visa or other document required under the *IRP Regulations*; and/or,
- d) has entered Canada without a valid passport or travel document (provided valid documents are acquired by the time Citizenship and Immigration Canada seeks to grant permanent resident status).

Consequently foreign nationals who are inadmissible to Canada, entered Canada without permission after having been deported, and foreign nationals who have misrepresented themselves are not permitted to apply under this class. Always look to the most recent version of this policy. (See Appendix H of the Operational Manual, "IP 8 — Spouse or Common-law Partner in Canada".)

> **NOTE:** Under "in-Canada" classes, there is **no appeal** to the Immigration Appeal Division of a failed sponsorship. The only redress is to file a new application, file an overseas family class application, or if possible, to file for judicial review of the refusal.

NOTE: As of December 22, 2014, IRCC will issue open work permits to certain spouse or common-law partner in Canada class applicants at the initial stage of processing. For more information, see: http://www.cic.gc.ca/english/department/media/notices/2015-12-11.asp

D. Caregiver Program

As of November 30, 2014, the Caregiver Program (formerly the Live-in Caregiver Program) was changed to eliminate the live-in requirement, and to introduce two pathways to permanent residence: the Caring for Children Pathway, and the Caring for People with High Medical Needs Pathway. The government is now reviewing the Caring for Children and Caring for People with High Medical Needs pilot programs to determine how caregivers will apply for permanent residence after the pilots expire on November 29, 2019. To be eligible for under these programs, applicants must meet the requirements and submit an application for permanent residency before that date.

Those who were already working as live-in caregivers or who had submitted applications through the old program may choose to submit a new application under one of the two new pathways, or to remain in the Live-in Caregiver Program and apply for permanent residence under the old requirements.

Caregiver for Children Program: The Applicant must have at least 24 months of full-time work experience in Canada as a home child care provider in the four years (48 months) before they apply.

Caring for People with High Medical Needs class The applicant can apply through the Caring for People with High Medical Needs class if you have been working in Canada for at least two years as a:

- registered or licensed practical nurse
- nurse aid or orderly
- home support worker

Live-in Caregiver Program: The applicant may be eligible to apply for permanent residence in Canada after you have had the following work experience under the Live-in Caregiver Program:

- 24 months of authorized full-time live-in employment, or
- 3,900 hours of authorized full-time employment. the applicant can complete these hours within a minimum of 22 months. When calculating hours, the applicant can also include up to 390 hours of overtime; and
- The work experience must be acquired within four years of your date of arrival.

A foreign national must have first obtained a Service Canada Labour Market Impact Assessment/validation before applying for a Work Permit. Once a foreign national had a Service Canada validation, the foreign national could apply for a Work Permit under the live-in caregiver class. Overseas applications are being processed inside Canada.

Please see Chapter 9: Employment Law for further information on live-in caregivers. You may also refer to the Live-in Caregiver Program, administered by the federal government via Citizenship and Immigration Canada. Information on the Program, including the November 2014 changes, is available on the CIC website [1], and also through the Migrant Workers Centre:

Migrant Worker's Centre (formerly WCDWA)	
302-119 W Pender Street	Telephone: (604) 669-4482
Vancouver, B.C. V6B 1S5	Fax: (604) 669-6456
Website: http://www.wcdwa.ca	E-mail: info@wcdwa.ca

Once a live-in caregiver is admitted into Canada on a Work Permit, she or he must work for two of four years before applying for permanent resident status in Canada (*IRP Regulations*, s 113(1)(d)).

E. Humanitarian and Compassionate Applications

Section A25(1) of the Immigration and Refugee Protection Act (IRPA) allows foreign nationals who are inadmissible or who are ineligible to apply in an immigration class, to apply for permanent residence, or for an exemption from a requirement of the Act, based on humanitarian and compassionate (H&C) considerations.

Humanitarian and compassionate ("H&C") applications are generally applied for from within Canada under s 25(1) of the IRPA, but they can also be applied for from abroad. This is a **highly discretionary category, and generally only exceptional circumstances will result in an H&C exception**. The Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61 established a broad and comprehensive assessment of all the applicants' circumstances in an H&C application. The former test, which considers whether the foreign national would face "undue, undeserved, or disproportionate hardship" if they were forced to return to their country of habitual residence or citizenship, should be only treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to all relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the **equitable** goals of the provision.

Under the previous test the primary concern is "the best interest of any child" affected by the decision, but an immigration officer will also consider: level of establishment in Canada, family ties in Canada, ties to community, and any other relevant considerations. Review the Program Delivery Instructions on H&C applications (http://www.cic.gc.ca/english/resources/manuals/) for more information.

> **NOTE:** In 2010, s 25 of the IRPA was amended, such that "... the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national". In other words, officers do not determine whether a well-founded fear of persecution, risk to life, danger of torture and risk of cruel and unusual treatment or punishment has been established, but they may take the underlying facts into account in determining whether the applicant will face hardship if returned to their country of origin.

Subsection 25(1.3) applies only to H&C applications made in Canada.

As of June 29, 2012, refugee claimants who have had their claim denied **will be subject to a 1-year bar on submission of an H&C application as well as a bar on concurrent applications**. Unlike applications made under a Pre-Removal Risk Assessment, a person who applies under H&C considerations **may be removed from Canada before the decision on the application is made**.

F. Convention Refugees (the Process)

Foreign nationals who apply for Convention refugee protection or "protected persons" status are assessed by the Refugee Protection Division ("RPD").

The definition of a Convention refugee is found at s 96 of the IRPA. Generally, the person must: (a) have a well-founded fear of persecution; (b) the fear must be objective and subjective; (c) the fear must be linked to a Convention ground (i.e. race, nationality, religion, political opinion or membership in a particular social group); (d) there must be no Internal Flight Alternative, i.e. a place in the country of feared persecution where the person can reasonably live safely; (e) there must be no state involvement or state complicity; and (f) the state must be unable or unwilling to protect. If a person has more than one place of citizenship, they must have exhausted options in both of their countries of citizenship (see *Canada v Ward* [1993] 2 SCR 689). This is not an exhaustive list; refer directly to the IRPA, ss 95 to 111.

The IRB Chairperson has issued special interpretation guidelines for determining Convention refugee claims of women refugees. Students should review these "Gender Guidelines" when assisting women refugee claimants. The Gender Guidelines can be found on the IRB's website [2], under the heading "Legal and Policy References."

NOTE: A "person in need of protection" has a different definition, outlined under s 97 of the IRPA. **Review the Convention Refugee and Protected Persons classes in the IRPA carefully if dealing with such a case.** The Refugee Protection Division has the jurisdiction to consider both ss 96 and 97 of the IRPA.

Significant changes to the refugee determination process have been implemented over the last several years by the *Balanced Refugee Reform Act*, SC 2010, c 8 (BRRA), and Bill C-31, the *Protecting Canada's Immigration System Act*, SC 2012, c 17 (Bill C-31). These laws dramatically change the way in which refugee claims are processed. Some of their provisions have come into force already, but **most procedural changes came into effect on December 15th, 2012**.

Key Changes:

- People who make a refugee claim at an office in Canada must submit their completed Basis of Claim form (BOC) during their eligibility interview. Those who make a refugee claim at a port of entry must submit their BOC to the IRB no later than 15 days after referral of their claim to the IRB.
- Hearings at the independent Immigration and Refugee Board of Canada (IRB) will be conducted by public servant decision-makers rather than people appointed by the Governor in Council (GIC)
- Hearings for most claimants will be held no later than 60 days after the refugee claim is referred to the IRB.
- For claimants from Designated Countries of Origin (see below), hearings will be held no later than 45 days after referral to the IRB for those who make a refugee claim at a port of entry, and no later than 30 days after referral for those who make a claim at an inland CIC or Canada Border Services Agency (CBSA) office.

In general, refugee claimants have an initial intake interview with an officer, followed by a hearing with a public servant.Due to the increased volume of claims, the RPD has moved to a "first-in, first out" model where claims are heard in the order they are referred **If the claimant fails, they will have 15 days to make an appeal to the Refugee Appeal Division (RAD). Claimants from DCOs, those whose claims are decided by the IRB to be "manifestly unfounded" or have "no credible basis," designated foreign nationals, and those falling under an exception to the Safe Third Country agreement have no right of appeal to RAD** (though they can ask for judicial review from the Federal Court).

Please note that the timelines for BOC, Hearings, Document Disclosure and Postponement Requests are different for Inland claimants and Port of Entry claimants.

Clients who are midway through the process are advised to consult the Citizenship and Immigration Canada website [3] for the latest information.

1. Entry/Initiation

A foreign national generally requests Convention refugee protection at the Port of Entry upon arrival, i.e. at the airport, land border or sea border. However, if a foreign national wishes to make a Convention refugee claim after being admitted into Canada, the person should go to the Citizenship and Immigration Office at 1148 Hornby Street, Vancouver, British Columbia and enter a claim for protection. The first step is the eligibility interview.

2. Eligibility

Once a foreign national makes a claim for protection, an immigration officer will interview him or her and determine if the person is eligible to make a claim. There are several classes of ineligible people listed at s 101 of the IRPA. For example, if a foreign national has previously made a Convention refugee claim in Canada, and the claim was accepted, refused, withdrawn or abandoned, that person is “ineligible” to make another claim. If a foreign national is determined “ineligible,” the process stops.

At the eligibility interview, the interviewing immigration officer will obtain the detailed reasons why the foreign national fears persecution. A foreign national should be prepared to **accurately outline the details** of his or her account of events leading to the claim for protection.

3. Basis of Claim Form (BOC)

Once a foreign national is determined to be eligible to submit a Convention refugee claim, the foreign national will be given a Conditional Departure Order. This is a removal order that only comes into effect if the person loses the claim for protection. The foreign national is now a Convention refugee claimant. The claimant will have **15 days to file the BOC**. **This is the most important obligation on a Convention refugee claimant, with the exception of attending their hearing.**

Claimants will require help in preparing their BOC. In the BOC, a claimant must outline the precise reason(s) for their well-founded fear of persecution. This includes a narrative outlining the dates, incidents of persecution, why they are afraid, etc. The **BOC should include facts that support the claimant’s fear, and that address the requirements set out in the IRPA**. For example, the BOC should address why the claimant has no internal flight alternative, how the state is involved or complicit in the persecution, etc. This account of events will form the basis of the request for protection at the hearing.

4. Refugee Hearing

The Convention refugee claimant will be scheduled for an oral hearing to assess their claim. This hearing is not open to the public. The Presiding Member and Refugee Protection Officer will question the claimant regarding the BOC. The Minister may also intervene in the hearing and question the claimant if they allege the claimant should be excluded from refugee protection under IRPA s 98.

Note that if the claimant wishes to rely on documents, he or she must file or serve those documents not less than 10 days before the hearing. If the Minister intervenes, they must also be served within the same time frame. If there are documents in other languages, they must be translated (Rule 28).

Claimants may represent themselves at the hearing or be represented by counsel. Representation by counsel is always preferable. Interpreters are provided if required. Claimants may request that a family member or friend be present at the hearing for emotional support.

> **NOTE:** Claimants (and their counsel) must **be very familiar with the content of their BOC before the hearing**. Claimants must be prepared to elaborate on the details outlined in the BOC. Inconsistencies with the facts as stated

in the BOC may be interpreted by a decision-maker as weakening the claimant’s credibility.

5. Refugee Appeal Division

The Refugee Appeal Division (RAD) considers appeals against decisions of the Refugee Protection Division (RPD) to allow or reject claims for refugee protection. In most cases, there will be no hearing as the RAD will base its decision on the documents provided by the parties involved and the RPD record.

a) Client is Appealing the RPD’s decision to the RAD

For a client who is **appealing a decision of the RPD** to the RAD, the following information may be helpful:

- Once a client has received the written reasons for the decision from the RPD, they will have **only 15 days** to file a Notice of Appeal;
- After a claimant receives the written reasons from the RPD decision, the claimant has 30 days to file an Appellant's Record.

For a detailed compilation of necessary steps and information for a claimant’s appeal, please refer to the Appellant’s Guide and Kit [4].

b) Client is Responding to the Minister’s Appeal of the RPD’s Decision

The Minister can appeal the RPD's decision to accept a claimant’s refugee claim subject to the following exceptions:

- i) The claimant is a designated foreign national;
- ii) The claimant is from a country that was a DCO at the time of their RPD decision;
- iii) The claimant made their claim at a land border with the United States and the claim was referred to the RPD as an exception to the Safe Third Country Agreement;
- iv) The claimant’s claim was referred to the RPD before the relevant provisions of the new system came into force.

For a client who is responding to the Minister’s appeal of their RPD decision to the RAD, the following should be considered:

- A claimant will know the Minister is appealing the RPD decision when the Minister gives the claimant and the RAD a document called a ‘notice of appeal’. The Minister has 15 days after they have received the RPD’s written decision to do this.
- The Minister will then give the claimant any supporting documents that they will be submitting as evidence. The Minister has 30 days after receiving the RPD’s written reasons to do this.
- After this is done, the claimant will have to submit a “**Notice of Intent to Respond**” and provide the Minister and the RAD with a copy, **no later than 15 days** after the claimant receives the supporting document from the Minister.

For a detailed compilation of all necessary components when responding to an appeal, please refer to the Respondent’s Guide [5].

G. Pre-Removal Risk Assessment (PRRA)

A PRRA is a risk assessment application before removal of a foreign national from Canada. With some exceptions and some restrictions (see ss 112(2) and 112(3) of the IRPA), every person who is being removed from Canada can submit a paper application describing why they would suffer persecution or danger in the country of destination if returned to that country. The risk(s) are assessed under ss 96 and 97 of the IRPA. However, very few applications succeed under the PRRA process.

LSLAP Clinicians can assist clients with making a PRRA claim.

NOTE: Under the IRPA those claimants who have a failed or abandoned refugee claim will generally be ineligible to make a PRRA claim for **12 months** from the date that their claim is refused, while DCOs will be ineligible for a PRRA for **36 months** after their negative decision.

1. Process

Once a claimant has received a removal order and has been given **notification**, he or she has 15 days to apply for a PRRA and another 15 days to make submissions and include documentary evidence. If the person is a failed Convention refugee claimant, the evidence supporting the PRRA must be new or must have not reasonably been available on the date of the hearing; in other words, only "new evidence" is considered.

Once a person has applied for a PRRA, the person cannot be removed from Canada until a decision is made regarding their case. This is called a "stay of removal".

A person who has been given notice of removal can apply for the PRRA later than the 15-day deadline. However, that person could be removed from Canada before the decision is made (i.e. no stay of removal is issued).

A person who loses the PRRA will be removed. The only redress to a PRRA refusal is to apply for leave and appeal to the Federal Court. The deadline to apply for leave to the Federal Court is 15 days. In such cases, the claimant should contact a lawyer immediately.

2. Status Conferred

If the PRRA is granted, the person will receive the same protection as a Convention refugee. The person will be considered a "protected person" and can apply for permanent resident status from within Canada.

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References

[1] http://www.cic.gc.ca/english/work/caregiver/index.asp
[2] http://www.irb-cisr.gc.ca
[3] http://www.cic.gc.ca
[4] http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/RefAppKitTro.aspxb
[5] http://www.irb-cisr.gc.ca/Eng/RefApp/Pages/ResIntKitTro.aspx

VI. IRB

The Immigration and Refugee Board (the "IRB") is made up of four tribunals with distinct jurisdictions. In Vancouver, the active divisions of the IRB are located at 300 West Georgia Street, Vancouver, British Columbia on the 16th, 17th and 18th floors.

A. Immigration Division

The Immigration Division deals with (i) detention reviews and (ii) admissibility hearings.

1. Detention Reviews

If a foreign national or permanent resident is "detained" under the IRPA, that person is entitled to a detention review before the Immigration Division. The adjudicator is called the "Presiding Member," and a CSBA officer called "Minister's Counsel" (representing the Minister for Public Safety) presents the case to detain the person concerned, unless an alternative to detention exists.

A person arrested under the IRPA provisions is entitled to a detention review within 48 hours after arrest, or as soon as practicable. If the person is ordered detained, he or she receives another detention review in 7 days, then again in 30 days, then again every 30 days thereafter until he or she is either removed or released.

To keep a person in detention, the onus is on the Minister to prove that there are reasonable grounds to believe that the detainee's identity cannot be ascertained, and that the detainee is either a danger, or unlikely to appear for his or her detention review hearing (see IRPA, s 55 and *IRP Regulations* 244 to 250).

2. Admissibility Hearings

If an immigration officer alleges a foreign national or permanent resident of Canada is "inadmissible" under a provision of the IRPA, the Immigration Division conducts admissibility hearings to determine whether or not the allegation is founded.

> **NOTE:** There are exceptions where an immigration officer can determine inadmissibility without redress to the Immigration Division. For inadmissibility provisions, please refer to Division 4 of the IRPA.

The hearings are conducted as adversarial tribunals. Persons subject to such a hearing may represent themselves, or they may choose to retain counsel. It is always preferable for such persons to retain counsel.

If a person is found inadmissible, a removal order will be issued. A determination of inadmissibility can be appealed to the Immigration Appeal Division in certain cases. The Minister can also appeal in some circumstances. Only permanent residents or Convention refugees can appeal, with very few exceptions. Foreign nationals who are not Convention refugees, generally, cannot appeal the removal order to the IAD, but can apply for judicial review or a stay from Federal Court.

B. Immigration Appeal Division

The Immigration Appeal Division ("IAD") hears appeals from the Immigration Division, and some decisions from visa officers and immigration officers. The three most common types of appeals are as follows: (i) permanent residents who have been determined inadmissible by the Immigration Division for serious criminality; (ii) Canadian citizens or permanent residents appealing a negative decision on a sponsorship application under the family class; and (iii) permanent residents determined inadmissible for not having met the "residency requirements".

The IAD is a court of competent jurisdiction. Charter issues can be raised. Also, the IAD, in most circumstances, can deal with issues of equity. For example, if a permanent resident is "lawfully" determined inadmissible by the Immigration Division for having committed criminal acts in Canada and lawfully given a deportation order, the IAD can allow an appeal because there are sufficient "humanitarian and compassionate" grounds warranting relief. See Section IX: Appeals.

C. Refugee Protection Division

The Refugee Protection Division ("RPD") deals exclusively with determining claims for Convention refugee protection. The RPD also deals to a lesser extent with "vacation hearings," i.e. hearings where an allegation is made that Convention refugee protection should be taken away from someone.

D. Refugee Appeal Division

The Refugee Appeal Division ("RAD") is an appeal division for some failed Convention refugee claimants, established by the IRPA. Under s.110, the IRPA provision that actually permits an appeal to be made to the RAD, only some refugee claimants will have access to RAD. All claimants will have 15 days to submit an appeal to RAD. The appeal will largely be paper-based; hearings will be held only in exceptional cases.

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VII. Loss of PR

It is possible for a permanent resident to lose their permanent resident status, and can even be removed from Canada in certain circumstances.

A. Residency Requirement

A permanent resident must meet the residency requirements as outlined in the IRPA. **Generally, a permanent resident must be physically present in Canada for 730 days out of every five years.** The residency requirements can be met in a few different ways. See s 28 of the IRPA for full details.

1. Permanent Resident Cards ("PR Cards")

All permanent residents who intend to travel outside of Canada require a PR card. The PR card is a document that indicates the holder's permanent residence status. A PR card should be renewed before its expiry date. PR cards must be issued within Canada.

The following link may act as a useful reference: http://www.cic.gc.ca/english/helpcentre/answer.asp?q=057&t=10

> **NOTE:** A permanent resident without a PR card is still a permanent resident. If a permanent resident is outside Canada without a PR card, that person can apply for travel documents to re-enter Canada.

B. Inadmissibility

A foreign national or permanent resident can be determined “inadmissible” to Canada for several reasons, including, but not limited to, committing a serious crime or being found to have misrepresented information in their immigration application. Inadmissibility means that a foreign national or permanent resident has contravened the IRPA in some way, and will be issued a removal order.

There are three types of removal orders, which are discussed below.

If a permanent resident is determined inadmissible, he or she may lose their permanent resident status. The inadmissibility provisions relating to foreign nationals and permanent residents overlap for the most part, but there are some differences. For example, permanent residents will be inadmissible for serious criminality if they commit an indictable offence, while foreign nationals will be inadmissible for committing a less serious summary offence. Refer to the IRPA directly for specific grounds of inadmissibility (ss 34 – 43).

> **NOTE:** Convention refugees are not inadmissible on the same health and criminality grounds as most other kinds of applicants, but they may be excluded in cases of serious criminality or crimes against humanity.

> **NOTE: A permanent resident sentenced to 6 months or more of incarceration** (including time in custody awaiting trial) is inadmissible to Canada and **does not have an appeal to the IAD** of their removal. This means that permanent residents who are arrested and charged with crimes, even relatively minor ones, must ensure their criminal counsel are aware of this consequence from the beginning of criminal process. A conditional sentence does not equal imprisonment for the purposes of this provision and sentencing must be considered at the time of conviction (see Tran v Canada (Public Safety and Emergency Preparedness), 2017 SCC 50). Users of this manual should check for developments in this area of the law as it is undergoing continued legal development. See also XI Immigration Issues at Sentencing.

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VIII. Removal Orders

There are three types of removal orders: (i.) departure orders, (ii.) exclusion orders, and (iii.) deportation orders (*IRP Regulations*, Part 13). The IRPA sets out certain types of removal orders that are associated with certain offences created under IRPA. For example, if a foreign national is determined inadmissible for having committed a serious criminal offence, the foreign national will automatically receive a deportation order. Similarly, if a foreign national has worked without a Work Permit and without authorization, the foreign national will be issued an exclusion order. Removal orders vary in seriousness and repercussion. However, officers retain a measure of discretion in deciding whether to issue an exclusion order, restrict entry or allow entry for examination. See Operational Manual ENF 6 and ENF 10 for more details.

Removal orders can also be stayed, either by asking CBSA to defer the removal, or by applying for a stay to the Federal Court pending determination of a judicial review or H&C application. If a client is at the point of the process, students need to refer them to a lawyer.

A. Departure Order

A departure order requires the individual to leave Canada "voluntarily" within 30 days. The person may be required to sign a "certificate of departure" at the Port of Entry (i.e. border or airport) when leaving. If a person under a departure order legitimately leaves Canada, he or she may return to Canada at any time without any specific permission from the Minister, so long as they meet requirements of the IRPA.

> **NOTE: If a person under a departure order does not leave Canada within 30 days of the order coming into effect, the departure order becomes a deportation order. Clinicians should NOT do this time calculation for the client, but should instead direct the client to request the exact date from CBSA.**

B. Exclusion Order

Under an exclusion order, the individual must leave Canada, and cannot re-enter Canada for one year without consent from the Minister in the form of an Authorization to Return to Canada (an "ARC" under s 52 of the IRP Regulations). If the ground of inadmissibility is misrepresentation under s 40(2)(a) of the IRPA, an ARC will be required for **five years** from the date of departure or removal. After the period of inadmissibility has passed, the person can apply to re-enter Canada so long as they meet the requirements of the IRPA.

C. Deportation Order

A deportation order is the most serious type of removal order. A person under a deportation order is generally removed, but in some circumstances, may leave voluntarily. A person removed on a deportation order can never return to Canada unless they obtain authorization from the Minister (See *IRP Regulations*, s 226(1)); this is also known as an "Authorization to Return to Canada", or "ARC").

If a person who has been removed from Canada by CIC wishes to return to Canada, and is permitted to do so, they must pay a fee.

> **NOTE:** If a person, who has been removed from Canada under a deportation order or an exclusion order that is still in effect, returns to Canada without permission from the Minister, that person can be charged with offences under s 124 of the IRPA.

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IX. Appeals

The Immigration Appeal Division ("IAD") may allow an appeal and set aside an original decision:

1. based on the grounds of an error in law or fact;
2. if there are sufficient humanitarian grounds (in some cases); or
3. if a breach of a principle of natural justice has occurred. Principles of equity are generally of greater concern in appeals concerning removal orders.

In certain cases, the IAD may also give special relief on the basis of humanitarian and compassionate grounds (i.e. equitable grounds), considering all the circumstances of the case and especially in taking into account the best interests of a child. The IAD can

1. allow an appeal,
2. dismiss an appeal, or
3. stay the removal and impose terms and conditions (IRPA s 68).

A. Sponsorship Appeals

If a Canadian citizen or permanent resident (PR) tries to sponsor a member of the family class and the application is refused, the citizen or PR can appeal the refusal to the immigration appeal division. Appeals must be made within **30 days** of the day the sponsor is informed of the refusal. A member will hear the appeal following the tribunal process. Section 63 of IRPA specifies that the IAD can consider H&C applications only if the applicant is a confirmed family member.

Some sponsorship appeals follow an Alternative Dispute Resolution (ADR) process, also called Early Resolution. The appellant can always request ADR. The ADR process at the IAD usually involves a one-hour, in-person meeting with a CBSA hearings officer who will review the facts and question the Appellant sponsor. The IAD assigns a member to act as a dispute resolution officer (DRO) for each appeal that is selected for the ADR process. Counsel should also attend, but does not make submissions, and is primarily there to assist the Appellant. Despite this process, many of the cases that go through ADR will have a final result without the parties having to attend a full oral hearing, so clients may wish to request ADR if they believe the Appeal case is strong, is not especially complex, can be resolved without the direct testimony of the principal applicant (sponsored person), and that it can be dealt with about an hour.

IAD's jurisdiction is limited to errors in law, fact, or mixed law and fact. IAD cannot override a negative sponsorship application on grounds of equity. **Sponsorship applications made from within Canada, i.e. . Spouse and Common-law Partner in Canada Class, cannot be appealed to the IAD.**

B. Removal Order Appeals

Permanent residents, Convention refugees, and protected persons who have been ordered removed from Canada may file an appeal with the IAD. These appeals may be based on either legal or equitable grounds.

> **NOTE:** If a person has been convicted and sentenced in Canada to six months imprisonment or more, they will not be able to appeal an order to the IAD. A conditional sentence order (CSO) is included in 'imprisonment'.

Removal orders may **not** be appealed if the permanent resident has been found inadmissible because of:

1. serious criminality with a sentence of 6 months or more;
2. A foreign conviction (or committing an act outside Canada) carrying a maximum sentence of 10 years or more in Canada;
3. organized criminality;
4. security grounds; or
5. violations of human or international rights.

Appeals must be filed within **30 days** of the removal order being issued.

For a comparison of the former inadmissibility regime to the new inadmissibility regime, please refer to: http://www.cic.gc.ca/english/department/media/backgrounders/2013/2013-06-20a.asp

> **NOTE:** Because of the exclusion from appeal for people sentenced to six months or more, advocates in criminal trials where this may become an issue should ensure that the judge is aware of the immigration status of the accused, as it may affect sentencing (e.g. the judge may reduce the sentence to six months less a day, in which case an appeal of the removal order would be possible). For further details see Section XI: Immigration Issues at Sentencing.

C. Residency Obligation Appeals

Permanent residents outside of Canada who are determined by a CIC officer not to have fulfilled their residency obligation have a right of appeal before the IAD.

Appeals must be made within **60 days** of receiving the written decision. Upon application, the IAD can issue an order that the person must physically appear at the hearing. Once the order is given, a travel document will be issued by CIC allowing the person to enter Canada for the hearing. If the appeal is allowed, the person will not lose permanent resident status. If it is dismissed, the person will lose permanent resident status, and the IAD will issue a removal order.

D. Federal Court (Leave and Judicial Review)

Always contact an immigration lawyer in cases where Federal Court is, or might be involved. Decisions by the IAD (or the Refugee Protection Division and the Immigration Division, where no administrative appeal exists) may be challenged by judicial review in the Federal Court of Canada. **There is a 15 day filing deadline to apply for judicial review of matters decided within Canada, and a 60-day deadline for matters decided overseas (IRPA, s 72), so a applicant must act quickly if they seek leave for judicial review.** In the process of judicial review, the court does not try the case *de novo*; the role of the court is not to substitute its own discretion for that of the tribunal, but rather to ensure that the tribunal did not exceed its statutory authority. The court simply reviews the case to verify: that it was procedurally fair; that the decision-maker did not make any errors of law or unreasonable findings of fact; and that the decision itself was reasonable. See Chapter 5: Public Complaints for a more thorough treatment of judicial review.

On a leave application, all arguments and evidence are submitted to the judge in written form without a personal appearance. The judge reviews the material and, if satisfied that the applicant has made an arguable case, grants leave. If

the judge decides there is no arguable case, leave will be denied and there can be no further argument in the Federal Court. A decision made by the Federal Court may be appealed to the Federal Court of Appeal only if the Trial Division judge "certifies" a question as being of serious and general importance (s 74(d)).

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X. Offences

Part 3 of the IRPA outlines various offences and penalties for breaches of the Act. Offences of human smuggling and trafficking in persons have penalties of up to life in prison and fines of up to one million dollars. Other offences created by the Act include:

1. disembarking a person or group of people at sea for the purposes of entering Canada illegally;
2. possession, use, import/export, or dealing in passports, visas and other documents to contravene the Act;
3. entering Canada at any place other than a Port of Entry without reporting to an immigration officer;
4. gaining admission to Canada through the use of a false or improperly obtained passport, visa or other documents;
5. violating the terms or conditions under which admission was granted;
6. knowingly making false or misleading statements at an immigration examination or admissibility hearing;
7. remaining in Canada after ceasing to be a visitor; and
8. working illegally or employing a person who is not authorized to work.

For lesser offences, s 144 of the IRPA provides that offenders may be ticketed. This provides officers with an alternative to using the other procedures set out in the IRPA or the *Criminal Code*, RSC 1985, c C-46. Fines of up to $10,000 may be assessed under such offences.

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XI. Issues at Sentencing

In June 2013, changes to the IRPA came into force that severely altered the **permanent residence** consequences of a term of imprisonment of 6 months or more, including credit for time served. Such permanent residents are will be issued a deportation order with **no appeal** of the deportation order to the IAD. Previously, the period of imprisonment required before there was no appeal to the IAD of a removal was 2 years. This change is retroactive, and any permanent resident who had not already been referred to the IAD for an appeal of the removal order will not have that option even if the sentence was imposed before the law changed.

If a permanent resident has been convicted of an offence in Canada for which a maximum term of imprisonment of more than 10 years could be imposed, he or she becomes inadmissible to Canada and will be issued a deportation order. A permanent resident has the right to appeal a deportation order to the IAD under s 63(3) of the IRPA. As noted above, this right of appeal is lost if the permanent resident actually receives a sentence of 6 months or more, and the calculation of 6 months includes pre-trial custody, so an individual who receives a 2 month sentence in addition to double credit for 2 months pre-trial custody, has received a 6 month sentence. A conditional sentence of imprisonment imposed pursuant to the regime set out in ss. 742 to 742.7 of the *Criminal Code* " is not a term of imprisonment" under s. 36(1)(a) of the *IRPA*. "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refers to the maximum term of imprisonment under the law in force at the time admissibility is determined.

> **NOTE:** Clinicians should advise clients to actively raise these immigration considerations with criminal defence counsel at the earliest opportunity, and make sure that counsel are engaging these issues whenever the client is in custody, or faces a possible custodial sentence.

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XII. Contacts

Immigration, Refugees and Citizenship Canada (IRCC)

Online	Website [1]
Address	18-241148 Hornby Street Vancouver, B.C. V6Z 2C3
Phone	

Immigration and Refugee Board of Canada

Online	Website [2]
Address	Library Square, 1600 - 300 West Georgia Street Vancouver, B.C. V6B 6C9
Phone	(604) 666-5946

Canada Border Services Agency (Enforcement)

Address	Library Square (7th Floor), 300 W. Georgia Street Vancouver, B.C. V6B 6C9
Phone	

Vancouver Association for Survivors of Torture (VAST)

Provides medical and/or psychological assistance to refugee claimants who were victims of torture, as well as services to family members of survivors.
(This organization may have closed / their mandates may be significantly altered due to changes in funding).

Online	Website [3] Email: care@vast-vancouver.ca
Address	2618 East Hastings Street Vancouver, B.C. V5K 1Z6
Phone	(604) 299-3539 Fax: (604)299-3523

MOSAIC Settlement Services

Online	Website [4] Email: immserv@issbc.org
Address	1720 Grant Street (2nd Floor) Vancouver, B.C. V5L 2Y7
Phone	(604) 254-9626 Fax: (604)254-3932

Immigrant Services Society of B.C.

ISS is a non-profit organization committed to identifying the needs of immigrants and refugees and to developing and providing programs which meet those needs.
(This Society can no longer assist people whose claim has not been granted).

Online	Website [5] Email: immserv@issbc.org
Address	#501 – 333 Terminal Avenue Vancouver, B.C. V6A 2L7
Phone	(604) 684-2561 Fax: (604) 684-2266

Inland Refugee Society of B.C.

The Society facilitates the landing in Canada of people whose refugee claims are in process or who need to file a claim. Their services include assisting in the claim process, providing counseling during the claim period, and providing basics like shelter, food, and clothing.

Online	Website [6] Email: contact@inlandrefugeesociety.ca
Address	Suite # 615 – 525 Seymour Street Vancouver, B.C. V6B 3H7
Phone	(778) 328-8888 Fax: (604) 873-6620

S.U.C.C.E.S.S.

S.U.C.C.E.S.S. is a non-profit social service agency that provides assistance to newly-arrived immigrants and refugees. The agency provides instructions in Cantonese and Mandarin on how to fill out citizenship forms and study for the citizenship test.

Online	Website [7] Email: info@success.bc.ca
Address	Head office: 28 West Pender Street Vancouver, B.C. V6B 1R6
Phone	(604) 684-1628

Legal Aid (Legal Services Society) Vancouver Regional Centre

Online	Website [8]
Address	Suite 425 (Intake); Suite 400 (Administration) 510 Burrard Street Vancouver, B.C. V6C 3A8
Phone	(604) 601-6206 (Intake) Fax: (604) 601-6000

BC Provincial Nominee Program

Online	Email: pnpinfo@gov.bc.ca
Address	Suite 450 - 605 Robson Street Vancouver, B.C. V6B 5J3
Phone	(604) 775-2227 Fax: (604) 660-4092

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References

[1] http://www.cic.gc.ca
[2] http://www.irb-cisr.gc.ca
[3] http://vast-vancouver.ca/
[4] http://www.mosaicbc.com/
[5] http://www.issbc.org/
[6] http://www.inlandrefugeesociety.ca
[7] http://www.success.bc.ca
[8] http://www.lss.bc.ca/legal_aid

Chapter Nineteen – Landlord and Tenant Rights

I. Introduction

Landlord-tenant law was written to protect the rights and identify the responsibilities of both landlords and tenants. The law serves to prevent and resolve disputes that may arise within a tenancy, in the clearest and lowest-conflict manner possible. This guide seeks to provide basic legal information, including about the rights and responsibilities of tenants and landlords, and about the processes available for resolving disputes between tenants and landlords.

A. Common Problems

The following points contain most common problems experienced between tenants and landlords:

1. Notices to End Tenancy & Direct Requests by Landlords

- Once the time for a tenant to dispute a notice to end tenancy is passed, orders of possession may be granted to landlords by Residential Tenancy Branch (RTB) Arbitrators (Residential Tenancy Act (RTA), s 55 (2)b and s 55(4)).
- In the case of an eviction due to a tenant not paying rent, a direct request may be made to the Residential Tenancy Branch and an order of possession may be granted without a participatory hearing. This means you may be unable to dispute your eviction. Never ignore a "Notice to End Tenancy", and always pay your rent.
- Under s 55(4), monetary orders for rent in arrears may also be granted without an oral hearing when the tenant's time to dispute the notice has passed.

2. Early Resolution

The Residential Tenancy Branch may provide forms of dispute resolution other than hearings, for example, early resolution by RTB staff. Tenants should request that the Information Officer phone the landlord when the problem is basic and obvious and the law is clear (e.g. a landlord cannot lock out a tenant). The Information Officer will not take on the role of an Arbitrator and will only address situations where the law is very clear. However, if the issue is one where an Information Officer can assist, that can be a faster and lower-conflict solution to a dispute.

3. Administrative Penalties

Under s 87(3) and s 87(4) of the RTA, penalties of up to $5,000 per day may be imposed against landlords for contravening the RTA, the Regulation, or an order. Administrative penalties are rarely, if ever, imposed and according to the RTB guidelines, such penalties are to be used only in response to "serious, repeated non-compliance."

4. Timelines

The Rules of Procedure for dispute resolution are revised occasionally. The latest edition took effect on May 24th, 2019. It is important to be aware of timelines. For example, the respondent and the RTB must receive the applicant's documents that are to be used at a hearing no later than 14 days before the dispute resolution proceeding, while the respondent's documents must be received by both the applicant and the RTB no later than 7 days before the dispute resolution proceeding. This is strictly enforced and while the RTB may forward late documents to the Arbitrator, Arbitrators can choose not to accept them. The current rules and procedures can be found online at https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf

5. Illegal Fees

A potential landlord cannot ask a renter or potential renter for an application fee. If someone has paid an application fee and the landlord will not give it back, one can apply for dispute resolution to have it returned. Applicants will need to know the landlord's proper name and address and have proof that the fee was paid: see RTA, s 15. If a landlord does this as a business practice, the tenant should report this to the director of the RTB, who can launch an investigation.

6. Security Deposits

Landlords can charge security deposits and an additional deposit for pets. Neither may be more than ½ the monthly rent and must not exceed more than one month's rent in total.

A Condition Inspection Report must be completed by all landlords and tenants during move-in, move-out, and before the client starts keeping a new pet. It is extremely important that tenants take part in inspections for their own protection. It is very useful to take dated photographs during both move-out and move-in inspections

If a landlord does not conduct any one of the required condition inspections (either for move-in or move-out), doesn't fill out a Condition Inspection Report as requested, doesn't give a copy of the filled out report to the tenant, or doesn't offer the client at least two opportunities to attend the inspection on a mutually agreed upon day, then the landlord loses their right to claim against the security deposit or pet damage deposit

If the landlord abides by all the regulations concerning the condition inspections but the tenant did not participate in the condition inspection on both opportunities, then the tenant loses their right to claim their deposit back.

A landlord has 15 days from the day the tenancy ends, or the day the landlord receives the tenant's forwarding address in writing, whichever is later, to either return the deposit or apply for dispute resolution to claim against it. If the landlord does neither, the tenant may make a claim for double the security deposit

7. Rent

- The RTA states that a tenant must pay their rent in full and on time, regardless of whether the tenant believes the landlord has fulfilled their obligations.
- A tenant may withhold the last month's rent if the tenant has been given a notice to end tenancy for landlord's use of property (e.g., major renovations, demolition, conversion to condos or co-ops), instead of paying the last month's rent and then waiting for the landlord to repay the required one month's compensation.
- Rents may be increased only once per year and only by the amount permitted by RTR s 22 unless the landlord applies for a greater increase as regulated under RTR s 23 or the tenant agrees in writing to a greater rent increase. Limits on rent increases continue to apply at the end of fixed-term tenancies.

NOTE: Many of the forms referred to in this chapter are available at the RTB web site. Please visit http://bit.ly/1FjmXzc to download them.

B. General

The primary sources of landlord-tenant law in British Columbia are the Residential Tenancy Act [RTA], and the Manufactured Home Park Tenancy Act, SBC 2002, c 77 [MHPTA].

Subject to any applicable limitation period and to RTA s 60, a landlord or tenant may start an action or claim in debt or for damages against the other party in respect of a right or obligation under the RTA or a tenancy agreement (s 58). The limitation period is generally two years. Note that this is two years from the end of the tenancy. The events that form the basis of the claim may have occurred earlier, so long as the tenancy is either on-going or ended in the last two years. Common monetary claims brought to the Residential Tenancy Branch (RTB) for dispute resolution by tenants are:

- for the return of the security and/or pet deposit;
- to dispute a proposed rent increase;
- to cancel a notice to end tenancy;
- for compensation for losses due to breaches of the contract such as loss of quiet enjoyment or lack of repairs; and
- for compensation where the landlord has illegally evicted the tenant and/or seized the tenant's possessions

Landlords commonly bring claims:

- for unpaid rent owed by the tenant;
- to obtain an Order of Possession (to regain possession of a rental unit);
- for the retention of a security and/or pet damage deposit for property damage; or
- for compensation for damage caused by a tenant.

Claims at the RTB can be up to $35,000, per RTA s 58(2)(a) which imposes the same limit as the Small Claims Act. If a claim is over that amount, the amount above the $35,000 figure must be waived in order to file at the RTB. A claim for more than $35,000 must be filed at the British Columbia Supreme Court.

C. Definitions

The following are interpretations of the definitions that are set out in Section 1 of the RTA. For the exact wording of the definitions, refer to the RTA itself.

1. Tenancy Agreement

An agreement between a landlord and tenant respecting possession of residential premises. It may be written or oral, express or implied, and may or may not have a predetermined expiry date. An agreement can be deemed to be in effect even before a tenant assumes occupancy.

2. Landlord

Includes a lessor, sublessor, owner, or other person permitting the occupation of residential premises, including his or her heirs, assignees, personal representatives and successors in title and a person, (other than a tenant occupying the rental unit) who is entitled to possession.

3. Tenant

A tenant is a person who enters into a tenancy agreement with a landlord. Tenants include the estate of a deceased tenant, and in some contexts, a former or prospective tenant. Otherwise “tenant”, “persons in possession”, and “occupants” are not defined in the RTA. Presumably, a tenant is a person entitled to exclusive possession, and the definition of a tenant includes a tenant whose primary residence is in a hotel. Common law licensees are also tenants under the RTA, but not under the Manufactured Home Park Tenancy Act. See RTB Policy Guideline 9: Tenancy Agreement and Licenses to Occupy.

4. Residential Property

A building, or related group of buildings, in which one or more rental units or common areas are located, the parcel or parcels on which the building, related group of buildings or common areas are located, and any other structure located on the parcel or parcels.

5. Standard Terms

The standard terms of a tenancy agreement are prescribed in the Schedule attached to the Regulations.

6. Assisted and Supported Living Tenancies

Assisted and supported living tenancies are rental accommodations where hospitality or personal care services are provided by or through the landlord. Registered assisted living facilities are generally exempt from the RTA. However, supported housing facilities may be covered by the RTA depending on the nature of the services provided. Only an Arbitrator, through the dispute resolution process, can determine whether a housing situation is exempt from the RTA.

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II. RTA Coverage

A. Premises and Persons Subject to the RTA

1. Effective Date

The RTA applies to all residential tenancy agreements entered into or renewed after the date the RTA first came into force (1984). The RTA was modernized in 2004.

2. No Contracting Out

An agreement or a term in an agreement, which purports to exclude the application of the RTA is of no effect. Where a term in an agreement conflicts with the RTA or the Residential Tenancy Regulations, the term is void. This means that neither landlords nor tenants can contract away rights legislated under the RTA when the RTA would have otherwise applied to the situation

3. Crown

Generally, the RTA applies to the Crown.

4. Infants

Tenancy agreements entered into by persons under the age of 19 are enforceable under s 3 of the RTA.

5. Hotel Tenants and Landlords

Hotel tenants are fully covered by the RTA if the hotel is the tenants' primary residence. There are a few rules that apply only to hotel tenants and landlords, namely:

- s 29(1)(c) permits entry into a hotel tenant's room without notice for the purposes of providing maid service, as long as it is at reasonable times;
- s 59(6) permits an individual occupying a room in a residential hotel to apply to an Arbitrator, without notice to any other party, for an interim order stating that the RTA applies to that living accommodation.

See **Policy Guideline 9: Tenancy Agreements and Licences to Occupy**.

6. Subsidized Housing

Persons living in publicly subsidized housing paying rent on a scale geared to their income are excluded from the rent increase provisions. They are also excluded from s 34 of the RTA, which deals with assignment and subletting. Not all subsidized housing is directly operated by the B.C. Housing Corporation. For a list of subsidized housing options and to apply for subsidized housing, visit https:/ / www. bchousing. org/ housing-assistance/ rental-housing/ subsidized-housing".

B. Excluded Premises and Agreements

1. Tenancies, Co-tenancies, and Licenses to Occupy

The RTA sets out the rights and obligations of landlords and tenants. When a tenancy starts, there should be a tenancy agreement in place. A tenancy agreement means an agreement, whether written or oral, express or implied, between a landlord and a tenant, respecting possession of a rental unit, use of common areas and services and facilities. It also includes a licence to occupy a rental unit. Each landlord must prepare a written tenancy agreement that complies with the RTA. However, even if the landlord does not prepare such a written tenancy agreement, the tenant is still protected by all the standard terms contained in the Residential Tenancy Regulations. Rights and obligations specified by the RTA cannot be waived or contracted out by the landlord or tenant.

The question may arise as to whether or not a person living in a rental unit is a tenant, a co-tenant, a tenant in common or an occupant. **Residential Tenancy Policy Guideline 19: Assignment and Sublet**, **Guideline 27: Jurisdiction**, and **Guideline 13: Rights and Responsibilities of Co-tenants** may provide helpful guidance.

Section 4 of the Residential Tenancy Act sets out living accommodations where the Act does not apply. These include but are not limited to:

- where the tenant shares bathroom or kitchen facilities with the owner of the accommodation;
- where the accommodation is rented by a housing cooperative to a member of that cooperative;
- where the accommodation is owned or operated by an educational institution (e.g. a college or university) and provided by that institution to its students or employees;
- where the accommodation is included with premises that are primarily occupied for business purposes and are rented under a single agreement; and
- where the accommodation is a correctional institution.

In situations where a tenant, named in the tenancy agreement, shares accommodations with a roommate who does not have an agreement with the landlord, only the tenant is protected by the RTA. Any roommates who do not have a tenancy agreement with the landlord are not covered by the RTA and do not have any recourse against the landlord. Disputes between a tenant and a roommate cannot be brought to the RTB but may be brought to the Civil Resolution Tribunal if the disputed monetary amount is under $5000. Otherwise, the dispute can be brought to Small Claims Court. For more information, see **Policy Guideline 19: Assignment and Sublet**.

The determination of whether there is a tenancy depends on the circumstances of each case and can only be made by an RTB Arbitrator at a dispute resolution hearing.

A person who is not a tenant (i.e. someone whose housing is excluded from the RTA or who is an occupant, such as a roommate) may have a licence to occupy. Licensees’ rights and obligations are governed by common law. A licensee can be asked to leave (i.e. be evicted) without a specific reason, but the licensor must give reasonable notice (written or verbal). This can be as short as a few days. Over two weeks or a month is almost always reasonable. A person who has

had his or her personal property seized should consider taking the position that he or she is a tenant and apply to the Residential Tenancy Branch for dispute resolution seeking an order for the return of personal property. If the Arbitrator finds that the RTA does not apply, the application will be dismissed.

Seizing a licensee's personal property is not lawful unless the licensor already has a court order. If the licensee has been locked out or has had goods seized without notice, he or she could ask a police officer for assistance or sue in Small Claims Court for an order for the return of goods and/or monetary compensation. A licensee not covered by the RTA may have a remedy under the common law, the Hotel Keeper Act, RSBC 1996, c 206, the Commercial Tenancy Act, RSBC 1996, c 57 (under which "tenant" is defined as including "occupant"), or the regulations authorized by these statutes.

2. Non-Profit Housing Cooperatives

Residential premises where a non-profit housing cooperative is the "landlord" and a member is the "tenant" are excluded from the application of the RTA; instead, the co-op relationship is governed by the Cooperative Association Act, SBC 1999, c 28 (see RTA, s 4(a), and Burquitlam Cooperative Housing Assoc. v Romund (1976), 1 BCLR 229 (Co Ct)). Where the person paying rent is not a member of the cooperative, and the cooperative or a cooperative member is the landlord, those rental units may be subject to the RTA if the arrangement appears to fit the definition of a tenancy.

More information can be found at the website of the Co-operative Housing Federation of BC at *www.chf.bc.ca* [1].

3. Strata Lots

A tenant in possession of a strata title lot (i.e. a condominium), whose landlord is the owner of the title and a member of the strata, is subject to both the RTA and the Strata Property Act. This is a frequent source of problems for tenants. See **RTB Policy Guideline 21: Repair Orders Respecting Strata Properties**.

4. Twenty-Year Term

Section 4(i) of the RTA provides that the RTA does not apply to a tenancy agreement for a term of over 20 years.

5. Holiday Premises

Section 4(e) of the RTA provides that the RTA does not apply to living accommodation occupied primarily as vacation or travel accommodation

6. Manufactured Home Owners

The RTA does not apply to tenancy agreements to which the Manufactured Home Park Tenancy Act applies, i.e. owners of manufactured homes who rent the site on which their homes sit (RTA, s 4(j)). If a person rents both a manufactured home and the pad it sits on, he or she is covered by the RTA.

7. Assisted and Supported Living Tenancies

Assisted and many supported living tenancies may not be covered by the RTA. In addition to a tenancy agreement as required for regular tenancies, residents must negotiate and sign a separate agreement specifying services, costs, and other terms. Section 4(g) of the RTA excludes community care facilities governed by the Community Care and Assisted Living Act, the Continuing Care Act, hospitals governed by the Hospital Act, some health facilities designated under the Mental Health Act, and others.

8. Emergency Shelter and Transitional Housing

Section 4 (f) of the RTA states that the RTA does not apply to accommodation "provided for emergency shelter or transitional housing." The Residential Tenancy Regulations were updated on December 2016 to include a three-part definition of transitional housing. According to s.1 of the Regulations, "transitional housing" means living accommodation that is provided:

- On a temporary basis;
- By a person or organization that receives funding from a local government or the government of British Columbia or of Canada for the purpose of providing that accommodation; and
- Together with programs intended to assist tenants to become better able to live independently.

Any accommodation must satisfy all three of these criteria to be excluded from the Act, even if a transitional housing agreement has been signed.

Policy Guideline 46: Emergency Shelters, Transitional Housing, Supportive Housing defines "emergency shelter" as "a facility that provides temporary overnight shelter to homeless individuals". Residents of these shelters "may have an immediate need for support services" such as nutrition, hygiene, and health services, and "may be required to abide by house rules as a condition of their stay".

9. Residential Tenancy Branch Information Line & Additional Information

Call the Residential Tenancy Branch information line (604-660-1020 or 1-800-665-8779) if you are unsure whether the rental unit comes under the RTA. If your issue does not fall under the RTA, please see **Section XX** of this Chapter for additional resources.

C. Discrimination Against Tenants

Although poverty is not a protected ground, a landlord must not discriminate against a (prospective) tenant based on a lawful source of income, such as Income Assistance or similar benefits. The prospective tenant may file a human rights complaint under the B.C. Human Rights Code, RSBC 1996, c. 210 [HRC]. Section 10(1) of the HRC also prohibits a person from denying tenancy or from discriminating with respect to a term of the tenancy against a person or class of persons because of their race, sexual orientation, colour, ancestry, place of origin, religion, marital status, physical or mental disability, or sex. Note also, that pets are not covered under discrimination rules. See **Chapter 6: Human Rights** for more information.

There are two exceptions:

1. Shared Accommodations

The law does not always apply when kitchen and bathroom facilities are shared with the owner of that accommodation.

2. Adults Only

A landlord cannot refuse to rent to adults because they have children unless the building or manufactured home park is reserved for people over 55 years old.

D. Foreign Students

Foreign students should consider how long they plan on studying before signing a fixed-term lease. Students should not sign a fixed-term tenancy that exceeds the time they plan to study. Signing a fixed-term tenancy that extends beyond one's intended study period can put a tenant into breach and may result in having to pay liquidated damages and/or any loss of rent incurred by the landlord.

Many foreign students have problems getting back their security deposits, as some landlords take advantage of the fact the students will be returning overseas after their tenancy ends. As a result, students should make arrangements to appoint someone as their agent if they have to head overseas and have not received their deposits from their ex-landlords.

Some foreign students take furnished rooms by paying "take-over fees" to purchase the furniture and continue the rental agreement. The initial tenancy agreement may have been "taken over" by a dozen students in a row, leading to confusion about who is entitled to the security deposit or the furniture.

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References

[1] http://www.chf.bc.ca

III. Tenancy Agreements

A. Protecting the Tenant

A third party should accompany a potential tenant during a rental unit showing, so there is a witness as to the landlord's representations made during the showing. Important: Get the landlord's promises in writing if possible but note that landlords are not obligated to provide them in writing.

After establishing the tenancy and before the tenant moves their personal possessions into the rental unit, the RTA requires the landlord and tenant to jointly conduct a condition inspection and fill out and sign the RTB's Condition Inspection Report. This report notes the condition of various elements of the rental unit. It is a good idea to take photographs at the initial move-in inspection, as well as the move-out inspection. The landlord must provide the tenant with a copy of the Condition Inspection Report within 15 days.

Fees for cable and internet should be negotiated before the tenancy commences and included in the Tenancy Agreement.

The Residential Tenancy Branch provides a fillable and printable Tenancy Agreement at www.rto.gov.bc.ca/documents/RTB-1.pdf.

B. General

The “leasehold” or tenancy interest is an estate (a bundle of property rights) of limited duration, which is created and acquired by the “tenant” when a person capable of granting that interest does so. Such a person (usually called the owner or landlord) conveys to the tenant the right of “exclusive possession”. The interest that the landlord retains is called the “reversion” because full possession reverts back to the landlord on the termination of the tenancy.

The landlord can sell his or her reversion to someone else, who becomes the new landlord and property owner. The tenancy follows the property, not the initial owner, so a tenancy agreement is still binding on a new owner, who is responsible for repaying the initial security and/or pet damage deposit when the tenancy ends (RTA, s 93).

1. Two Methods of Creating a Tenancy Relationship

a) By Formal Contract

A tenancy interest is granted by a contract known as a tenancy agreement or lease. Often the parties will enter into an express agreement The executed tenancy agreement governing the tenant’s possession may be written, or oral, or both (see the s 1 definition of “tenancy agreement”). To be enforceable, the elements of a complete contract (offer, acceptance, and consideration) must be present (see Chapter 9: Consumer Protection).

b) By Implied Contract

Every tenancy agreement entered into on or after January 1, 2004 must be prepared in writing by the landlord (RTA, s 13(1)).

Notwithstanding this obligation to prepare the agreement in writing, where a tenant is already in possession of the unit, or where rent has been paid, the law may imply the existence of a valid tenancy agreement This type of rental agreement is quite common because many tenancies are entered into on the basis of an application form, or verbal consensus, without the existence of any written contract. A “tenancy agreement” may be found to exist, even when:

a) there is no written tenancy agreement;

b) a previously existing agreement has expired or terminated; or

c) there was no previous agreement of any kind.

If the person in possession pays rent or a deposit and the landlord accept the payment with the intention of creating a tenancy, an agreement is created.

2. Where Something Other than a Tenancy is Created

A person who enters into an agreement with a landlord to rent accommodation does not always create a tenancy. Depending on specific circumstances and context, such a person may not be a tenant, but instead may be a mere occupant.

An occupant or person in possession who is not a tenant has no agreement with the landlord concerning that possession or occupation. In the case of a licensee or occupant living in a home by permission of the main tenant (when the landlord/owner lives off-site), the main tenant is responsible for all obligations, including paying rent (and utilities if required). If the licensee or occupant is sharing a kitchen or bathroom with the landlord, the parties can seek remedies in Small Claims Court.

3. Formal Requirements of the Agreement

A landlord must prepare in writing every tenancy agreement entered into on or after January 1, 2004 (RTA, s 13(1)). A tenancy agreement must comply with any requirements prescribed in the regulations and must set out all the requirements in RTA s 13(2).

Where these elements are absent, vague, or unclear, the agreement may be void (as a result, no interest would be created). However, if the tenant is in possession and has paid money (i.e. rent) then there is a tenancy agreement. If a tenancy has been created (i.e. the tenant has possession and is paying rent), vague terms of the tenancy agreement may be framed in the tenant's favour using the principle of contra proferentem (i.e. the agreement will be strictly construed against the party seeking to rely on the contract), and principles of statutory interpretation. The law seeks to recognize and validate the relationship where possible, even where the requirement to have a written tenancy agreement has not been met.

4. Agreements for Lease (Also Known as Agreements to Lease, or Agreements for Tenancy)

Landlords may occasionally attempt to have potential tenants enter into "agreements to lease", whereby they agree, by paying some amount now, to enter into a lease at a later date. In accordance with the provisions of s.15 of the RTA: application, holding, consideration, administration or other fees are not permitted. If a tenant gives a landlord a sum of money after negotiating in relation to a rental unit, the most likely legal outcome is that the parties have created a tenancy, and the amount paid is considered either a security deposit and/or rent.

C. Contractual Nature of the Tenancy Agreement

1. Freedom of Contract and the Agreement

Throughout the establishment and duration of the agreement, the parties are generally free to add and alter the terms, covenants and conditions as they see fit – subject to restrictions imposed by common law and statute (e.g. prohibition of contracts for an illegal purpose, unconscionable terms, or contracts in restraint of trade). The RTA and MHPTA both restrict parties from contracting out of requirements of those Acts and from adopting terms that are contrary to the Acts. The changes in the tenancy agreement must be in writing and be signed and dated by both parties. Some requirements, such as locks on doors, are automatically included in every tenancy agreement even if the tenancy agreement does not specifically mention them. A unilaterally altered or newly included term may be unenforceable where there is nothing offered or given in return for it.

The parties may enter into additional or subsequent oral or written contracts, separate from the tenancy agreement, that change the way the terms of the tenancy agreement are carried out (e.g. agreement by the tenant to do repairs in return for paying a reduced amount of rent). The terms of the tenancy agreement still exist; they must be performed as stipulated when the collateral contract is fully performed or is otherwise terminated (e.g. one party dies or goes away). If an Arbitrator determines the terms are reasonable and not unconscionable, as defined within s 3 of the RTR, new landlords or tenants that take over or enter into the same tenancy agreement would be bound by the collateral contract. A remedy for the new landlord would be found in an action against the seller. Generally speaking, oral collateral contracts are hard to prove. If something is important, it should be recorded in writing.

2. Terms, Covenants, and Conditions

a) Covenants and Conditions

A covenant in a tenancy agreement consists of a promise by a person that a certain thing must or must not be done (the RTA eliminates the word “covenant” and uses the more modern word “term”). A “Material Term”, as used in the RTA, is a term going to the root of the relationship and the tenancy agreement. Landlords and tenants may agree to any term they wish, as long as it is not unconscionable or contrary to the RTA. Terms contrary to the RTA may not be identified in some cases until dispute resolution, and a tenant is free to argue that a term violates the RTA and should, therefore, be void. The Arbitrator will take this into consideration when determining reasonableness. For more information, see **RTB Policy Guidelines 8: Unconscionable and Material Terms**.

b) Express, Implied and Statutory Terms

Valid express terms or conditions override any implied terms or “usual terms” that might otherwise apply at common law. For residential tenancies, the RTA deems some express terms to be unenforceable The RTA also establishes statutory terms, deemed to be terms in every agreement, that override any express or implied term to the contrary. For tenancies not governed by the RTA, a court will find implied obligations and insert the usual terms if the parties have failed to expressly agree to certain matters.

c) Express Terms and Obligations

Parties may write their own tenancy agreement with their own terms or may use a standard form tenancy agreement to which they can add their own extra terms. Parties may also adopt a lease in conformity with the Land Transfer Form Act, RSBC 1996, c 252, p 2.

The RTA requires that all tenancy agreements include standard terms outlining key statutory rights and responsibilities of the tenant and landlord (see RTA s 12, and the Schedule to the Regulation). The standard terms cover repairs, payment of rent, rent increases, security deposits, assignment or sub-let, occupants and invited guests, entry of the residential premises by the landlord, locks, ending the tenancy, and the application of the RTA. To assist landlords and tenants, the Ministry created a standard Residential Tenancy Agreement, available online (http://bit.ly/1eiaQNL).This Agreement incorporates suggestions put forward by landlord and tenant stakeholders and includes the prescribed terms found in the Schedule of the Regulation.

For residential tenancies, the following express terms are void and unenforceable:

- a term purporting to hold that the RTA does not apply to the agreement or attempts to avoid the RTA (s 5(1) and (2));
- that the rent remaining for the term of the agreement becomes due and payable if a tenant fails to comply with a term of the tenancy agreement (s 22) (i.e. “accelerated rent terms” are not permitted); or
- that the landlord can seize the tenant’s personal property for rent owing (s 26(3)(a)).
- for a fixed term tenancy, any vacate clauses that require the tenant to move out at the end of the tenancy unless:
- The tenancy agreement is a sublease agreement; OR
- The fixed term tenancy was created in circumstances where the landlord or landlord’s close family plans in good faith to occupy the unit after the tenancy ends, pursuant to RTR s 13.1.

Some included requirements of the RTA state that the tenant:

- must maintain reasonable health, cleanliness, and sanitary standards throughout the rental unit and other areas of the property to which the tenant has access;
- shall not assign or sublet without the landlord’s written consent, where the agreement is for a period of six months or more; and

- shall not pay more than one-half of one month's rent for each of the security deposit and/or pet damage deposit.

Similarly, terms in a short form lease that are inconsistent with the RTA are unenforceable. The parties may, however, enter into a separate collateral agreement, under which a clause requiring the tenant to perform repairs is binding on the tenant, so long as there is some value given in return (i.e. lower rates of rent).

d) Reasonable Terms

Changes in the RTA allow more ability to agree to any term landlords and tenants wish than the repealed Act did.

However, a term of the tenancy is unenforceable if (RTA, s 6):

(1) the term is inconsistent with this RTA or the regulations;

(2) the term is unconscionable; or

(3) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

See **Policy Guideline 8: Unconscionable and Material Terms**.

NOTE: The RTR defines "unconscionable" for the purposes of s 6(3)(b) of the RTA as follows: a term of a tenancy agreement is "unconscionable if the term is oppressive or grossly unfair to one party".

e) Pets

In B.C., there is no law that allows tenants to have a pet. RTA, s 18 allows a tenancy agreement to include terms that prohibit pets or restrict the size, kind or number of pets a tenant may keep on the residential property. If the agreement is silent about pets, then the tenant should be able to obtain one. If a tenancy agreement doesn't allow pets and a tenant gets one anyway, the landlord can tell the tenant to remove it. If the tenant refuses, the landlord may be able to give an effective eviction notice. RTA, s 18 is subject to the rights and restrictions under the Guide Animal Act RSBC 1996, c 177, s 4, which states that landlords must not deny tenancy or impose discriminatory terms on a person with a disability who intends to keep a guide animal in the rental unit.

When a landlord permits a tenant to keep a pet after the tenancy has already started, the landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day (RTA, s 23(2)). Failure of the tenant or landlord to participate in the inspection may extinguish the right of the failing party to the rights relating to the pet deposit (s 24). The landlord can request pet damage deposit of not greater than ½ of a month's rent, regardless of the number of pets.

f) Prescribing Terms

Terms and conditions that must or must not be included in every written tenancy agreement or an application for an agreement may be prescribed by an order-in-council and may prescribe different terms for different classes of tenancy agreements. As discussed above, the RTR sets out in its schedule those terms that must be included in every tenancy agreement.

g) Implied Obligations and Usual Terms

(1) Landlord's Obligations

A landlord must ensure that:

- the tenant is given vacant possession on the starting date of the tenancy;
- the tenant has quiet enjoyment;
- the rental units are reasonably fit for occupation; and
- the rental units are maintained in a state of decoration and repair that complies with housing health and safety standards required by law.

(2) Tenant's Obligations

A tenant must ensure that:

- he or she pays the rent or other fees on;
- he or she delivers up the rental unit in a reasonably clean condition and in a reasonable state of repair, with exceptions for reasonable wear and tear; and
- he or she gives one full month's notice in writing when terminating the agreement.

h) Statutory Terms in the RTA: Duties and Prohibitions

For residential tenancies subject to the RTA, the common law implied obligations apply unless their subject matter is superseded by one of the RTA's obligations.

i) Rent Increases for Additional Occupants

A rental increase for a new occupant can only be imposed if the contract specifically allows for it. Disputes most often arise upon the birth of a baby, so renters should consider whether they might have children before signing a contract with a new occupant increase clause.

3. Cannabis Legalization

With the legalization of cannabis in BC, changes to the RTA were implemented around growing and smoking cannabis.

(1) If a tenancy agreement included a "no smoking" clause and did not explicitly allow for smoking cannabis, then the "no smoking" clause is deemed to apply to smoking cannabis. This also applies to any clauses that restrict or regulates smoking. (RTA s 21.1 (2))

- For the purpose of RTA s 21.1 (2), vaporizing a substance containing cannabis is not "smoking cannabis."

(2) All existing tenancy agreements would be implied to have terms prohibiting growing cannabis unless:

- the tenant is growing in or on the residential property one or more cannabis plants that are medical cannabis,
- growing the plants is not contrary to a term of the tenancy agreement, AND
- the tenant is authorized under applicable federal law to grow the plants in or on the residential property and the tenant is in compliance with the requirements under that law with respect to the medical cannabis.

NOTE: The RTA allows for landlords and tenants to agree upon terms in new tenancy agreements as long as they do not violate the RTA.

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IV. Moving in

A. Condition Inspection: Move In and Move Out

The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day (RTA, s 23 (1)), and once more on a mutually agreed day when the tenant moves out. Both the landlord and the tenant must sign the Condition Inspection Report and the landlord must give the tenant a copy of that report. The RTA requires that certain standard information be included on a condition inspection report. Generally, the landlord should use RTB official forms, which contain all of the information required by law. Landlords can use their own forms so long as the forms used contain all the information required in s 20 of the RTR. Landlords must give tenants a copy of the signed condition inspection report within seven days after the condition inspection is completed.

NOTE: RTA s 23, Condition Inspection Report: Start of Tenancy, and RTA s 24: consequences if report requirements are not met, do not apply to a landlord or tenant in respect of a tenancy that started before January 1, 2004.

1. Landlord

The landlord must conduct the inspection and complete and sign the report even if the tenant refuses to participate. The right of a landlord to claim against a security or pet damage deposit for damage to the residential property is extinguished if the landlord does any of the following acts or omissions contained in RTA ss. 23 and 24(2):

- fails to offer the tenant at least two opportunities for the inspection;
- does not participate in the inspection; or
- does not complete the condition inspection report and give the tenant a copy of it in accordance with the regulations.

2. Tenant

The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if the landlord has complied with s 23(3), given two opportunities for inspection, and the tenant has not participated on either occasion.

B. Condition: Moving Out

The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit on or after the day the tenant ceases to occupy the rental unit, or on another mutually agreed day (RTA, s 35(1)). The landlord must offer the tenant at least two opportunities for the inspection and must complete the inspection report in accordance with the RTR. Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the RTR – within 15 days of the date the condition inspection is completed or the date the landlord receives the tenant’s forwarding address in writing, whichever is later.

1. Landlord

Unless the tenant abandons a rental unit, the right of the landlord to claim against a security or a pet damage deposit, or both, for damage to residential property is extinguished if the landlord does not offer the tenant at least two opportunities for the inspection or does not participate on either occasion, or having made an inspection with the tenant does not complete the condition inspection report and give the tenant a copy of it in accordance with the RTR.

2. Tenant

The right of a tenant to the return of a security deposit or a pet damage deposit, or both is extinguished if the landlord complies with RTA s 35 (provides two opportunities for inspections), and the tenant has not participated on either occasion (s 36(1)).

C. Re-keying Locks for New Tenants

At the request of a tenant at the start of a new tenancy, the landlord must re-key the locks or other means of access given to the previous tenant, and pay all costs associated with the changes. If the landlord at the end of the previous tenancy altered the locking system, the landlord need not do so again (RTA, s 25).

D. Duty to Provide a Copy of the Agreement

Section 13(3) of the RTA provides that within 21 days after a landlord and tenant enter into a tenancy agreement, the landlord must give the tenant a copy of the agreement.

E. Obligations on Move Out

1. Tenant Obligations

- Give proper notice;
- participate in move-out condition inspection;
- leave the unit clean;
- repair damage caused (above normal wear and tear), including damage caused by guests or pets above normal wear and tear levels; and
- remove all possessions from the rental unit and the residential property.

2. Landlord Obligations

- Give proper notice;
- schedule and participate in the move-out condition inspection and provide the tenant with a copy of the condition inspection report; and
- return security deposit and pet damage deposit or file to retain them in accordance with the RTA

F. Breaking a Fixed Term Tenancy

If a tenant moves out before their fixed term ends without finding another tenant approved by the landlord to take over the fixed term tenancy, the tenant may be responsible for the landlord's advertising and administrative costs incurred in finding a new tenant, as well as rent (at the tenancy agreement rate) until the unit is rented or the fixed term expires.

NOTE: Refer to the tenancy agreement, as some agreements will have move-out clauses that will express what a tenant's obligations will be upon breaking their fixed term tenancy.

NOTE: A landlord cannot evict a tenant except for cause during the term of a fixed-term tenancy. A landlord may not give notice before the end of the fixed term even if the property is sold or the landlord's family wishes to move into the rental unit.

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V. Security Deposits

A. General

A requirement that a tenant pay a security deposit is an express term of the standard agreement. Security deposit is defined in s 1 of the RTA very broadly. It can include money or property or almost any other item of value to be held by a landlord for the purpose of securing the performance of a tenant's obligations under the agreement and the RTA (e.g. the payment of rent and the obligation to leave the rental unit in the same condition they were received). A security deposit is a deposit which may cover a variety of costs to the landlord: see *Balfour v. Thomson*, Vancouver Registry F771652 (BC Co Ct). A security deposit does not include a post-dated cheque for rent, a pet damage deposit, or a fee prescribed under RTR ss. 6 and 7. See **Policy Guideline 29: Security Deposits**.

A landlord can only request a security deposit from a tenant as a condition of entering into a tenancy agreement, not after the agreement has been formed. However, pursuant to s 20, if a landlord permits a tenant to keep a pet on the residential property the landlord may require the tenant to pay a pet damage deposit in accordance with s 19 at the time the tenant moves in with a pet, or at the time a tenant acquires a pet.

B. Requirements Under the RTA

1. Amount

A security deposit demanded or received must not exceed one half of the monthly rent (RTA, s 19(2)). Only one security deposit can be required for each rental unit (s 20(b)). A landlord can also ask for an additional ½ month rent as a pet damage deposit (s 19(1)). The tenant may, with the landlord's written permission, set off all or part of a security deposit against the rent that is due from him or her (s 21). Any excess security deposit paid (more than ½ of the amount payable as rent at the beginning of the tenancy) to the landlord may be set off by the tenant without the landlord's permission (s 19(2)). Failure to pay a lawful security deposit is a ground for ending the tenancy (s 47(1)(a)). The landlord may give a one-month end of tenancy notice if the tenant fails to pay the security deposit within 30 days.

2. Inspection Reports

The RTA requires landlords and tenants to do move-in (ss 23 and 24) and move-out (ss 35 and 36) condition inspection reports. The rights to the security deposit of a landlord or tenant who does not participate in the condition inspection process may be extinguished.

C. Return of Security Deposit and Pet Damage Deposit

When a tenant moves out, he or she must provide his or her landlords with a forwarding address in writing. The security deposit must be returned to the tenant, with interest, or the landlord must file for dispute resolution to retain the deposit, within 15 days of the later of the following two: the date at which the tenancy ends, or the date the landlord receives the tenant's forwarding address, which must be in writing.

If a landlord does not comply with s 38(1) of the RTA (fails to return deposits within 15 days and fails to file for dispute resolution) and the tenant still has a valid right to the deposit, the tenant may apply for dispute resolution. After this, the landlord may not make a claim against the security deposit or any pet damage deposit and must pay the tenant double the amount of the security deposit, pet damage deposit, or both (s 38(6)). Leases may not include a term providing that the landlord automatically keeps all or part of the deposit at the end of a tenancy (s 20 (e)).

According to RTA s 38(8), the landlord can repay security deposits by cheque, personal service

Interest on Security Deposit

Interest on a security deposit is calculated from the date the tenant pays the deposit to the day before the security deposit is paid back to the tenant. If the deposit is disputed at dispute resolution, the interest is calculated from the date the tenant paid the deposit up until the date the Arbitrator orders its return (usually the date of the hearing).

Interest on a security deposit is calculated as follows. For each one-year period beginning on January 1, the rate will be 4.5% below the prime lending rate of the principal banker to the province on January 1st of that year, compounded annually. There is an online deposit interest calculator at http:/ / www. housing. gov. bc. ca/ rtb/ WebTools/ InterestOnDepositCalculator.html

NOTE: A tenant has only one year from the time the tenancy ends to supply the landlord with his or her forwarding address. If the tenant fails to forward the address within the one year limit the landlord may retain the security or pet damage deposit or both.

NOTE: A landlord does not have to return a deposit within 15 days if the tenant's right to the return of the deposit (pet or security) has been extinguished for failing to participate in the condition inspection procedures.

NOTE: A pet damage deposit may be used only for damage caused by a pet to the residential property unless the tenant agrees otherwise.

D. Extra Deposits and Non-Refundable Fees

The RTA allows landlords to charge a deposit for additional access devices (a device so long as it is not a tenant's only means of entry to one's building).

Administration fees for returned cheques ($25) or moving between rental units on a single property can only be charged if the tenancy agreement specifically allows for it (RTR, s 7(1)(d)).

Allowable non-refundable fees include:

- Direct costs of replacement keys;
- Direct costs of any additional keys that a tenant request;
- Bank service fees for NSF cheques plus a maximum late fee of $25; and
- Parking fees.

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VI. Repair and Service

A. Duty to Provide and Maintain Rental Unit in Repair

1. Landlord

Sections 32(1)(a) and (b) of the RTA provide that a landlord must provide and maintain residential property in a state of decoration and repair that complies with the health, housing and safety standards required by law, and having regard to the age, character and location of the rental unit. It must be suitable for tenant occupation. With respect to a landlord's obligation to repair, the RTR Schedule states that the landlord must provide and maintain the residential property in a reasonable state of decoration and repair, suitable for occupation by a tenant.

A landlord is responsible for repairing:

- the rental structure, and roof;
- heating, plumbing, electricity;
- locks, walls, floors, ceilings;
- fire doors, and fire escapes;
- intercoms, elevators; and
- anything else included in a tenant's rent if identified in the tenancy agreement.

If a landlord is required to make a repair to comply with the above obligations, the tenant should be advised to notify the landlord of the need for repair (preferably in writing). If the landlord refuses to make the repair, the tenant may seek an Arbitrator's order. If the tenant fails to notify the landlord and substantial damage results from the lack of repair, the tenant may have breached his or her duty.

When a tenant goes to the RTB to request a repair order, they may also request a rent reduction until the repair is complete.

In the case of an infestation of bedbugs or other pests, under s 32(1) of the RTA, landlords must maintain the property in a state of repair that complies with health standards and is suitable for human occupation. Some municipalities, such as Vancouver, have Standards of Maintenance bylaws that require landlords to get rid of pest infestations. If a landlord is refusing to treat the infestation, a tenant can call their municipality for an inspection and for an order that the building is treated. Each municipality's bylaws will vary, so it is best to call city hall.

Landlords are obligated to bear the cost for treatment of an infestation, provided the tenant cooperates with treatment (see Tenant Obligations below). In Vancouver, the Health Bylaw mandates that only a trained and certified person can spray pesticides in a multiple-unit dwelling. The landlord should not, and legally cannot, do it themselves. There are also other requirements in the Health Bylaw, such as notification in writing 72 hours prior to spraying. The pesticide technician should also adhere to the label on the pesticide bottles.

2. Tenant

Tenants must maintain "ordinary health, cleanliness and sanitary standards" in their rental unit. Tenants must also repair damage caused to the rental unit and property (this includes common areas) by their or their pet's willful or negligent acts or omissions, or those of a person permitted by him or her on the rental unit or property (RTA, s 32(3)). There is no duty to repair reasonable wear and tear (s 32(4)).

Tenants are also obligated to maintain the property in a sanitary condition. This includes notifying the landlord of any suspected pest infestation. Upon discovery of a pest infestation, the tenant is obligated to cooperate with the landlord in treating the infestation. If tenants do not cooperate, they could be found liable for the cost of treatment or be evicted. The landlord is obligated to get rid of the infestation unless it can be proven the tenant brought the pests with them when they moved in.

If a landlord refuses to have the suite or building treated, the tenant can apply to the RTB for an order compelling the landlord to do so, or as noted above can get an order from a city inspector. Vancouver Coastal Health no longer does inspections but is available to answer questions over the phone at 604-675-3800.

B. Withholding Rent

A tenant cannot withhold rent because of repairs needed unless an Arbitrator gives an order permitting it. Another way to seek repairs can be through the local municipality's Standards of Maintenance bylaw however this is only the case in some municipalities, for example, Vancouver, the City of North Vancouver, and New Westminster. Tenants should check with the municipality to see if there is a Standards of Maintenance bylaw in place. A tenant can call a local municipality and ask for a free inspection if the repair problem relates to structural defects (requiring a building inspector), health problem (e.g. mould or pests), or fire problem (e.g. fire inspection for fire exits, smoke alarms). The inspection may result in a formal report and may require the landlord to conduct repairs. The inspection report can also be important evidence to present at an RTB dispute resolution when seeking a Repair Order or an Order for a reduction in rent.

NOTE: There is a risk attached to calling a City Inspector. The inspection could result in the municipality ordering the suite vacated, resulting in eviction for the tenants.

C. Emergency Repairs

Before advising any tenant on this course of action, an advocate should be aware that this is a rather complicated area. To qualify, the repairs must fall into the categories below and must be urgent and necessary for the health and safety of persons or the preservation and use of the property and rental units. Pursuant to s 33, a tenant may conduct emergency repairs without going to dispute resolution if the landlord fails to make repairs within a reasonable time after a tenant has made a reasonable effort on two or more occasions to contact the landlord. Sometimes there is a discrepancy between what a tenant, landlord, and RTB might consider 'emergency' repairs. Before a tenant conducts any repairs, he or she should call the Residential Tenancy Branch, speak to an Information Officer, and make note of the Officer's name and what the Officer tells them. The specific types of repairs that may qualify as emergency repairs are urgent, necessary for the health, safety or preservation of property AND concern:

- major leaks in the pipes or roof;
- damaged or blocked water or sewer pipes or plumbing fixtures;
- malfunction of the central or primary heating system;
- defective locks that give access to the residential premises;
- electrical system repair.

Emergency repair is a complicated area. Tenants must follow the exact procedure under s 33(3) of the RTA or the landlord can make a claim against the tenant. All steps taken should be documented fully. Emergency repairs usually constitute a large repair bill and should only be undertaken by the tenant in the clearest of circumstances. When in doubt, apply first to an Arbitrator for a Repair Order, refer to a Property Use Inspector, or investigate local Standards of Maintenance bylaws.

D. Terminating or Restricting Services or Facilities

A service or facility, as defined in s 1 of the RTA, includes: furniture, appliances and furnishings; parking and related facilities; cable television facilities; utilities and related services; cleaning or maintenance services; maid services; laundry facilities; storage facilities; elevator facilities; common recreational facilities; intercom systems; garbage facilities and related services; and heating facilities or services.

Sections 27(1)(a) and (b) of the RTA provides that a landlord must not terminate or restrict a service or facility if it is essential to the tenant's use of the rental unit as living accommodation, or providing the service or facility is a material term of the tenancy agreement.

Section 27(2) of the RTA provides that a landlord may terminate or restrict a service or facility other than one referred to in ss 27(1)(a) or (b) if the landlord gives 30 days written notice, in the approved form, of the termination or restriction, and reduces the rent in an amount that is equivalent to the reduction in the value of the tenancy agreement resulting from the termination or restriction of the service or facility. The tenant may dispute the restriction or termination on the basis that the service being restricted or terminated constitutes an essential service.

See **RTB Policy Guideline 22: Termination or Restriction of a Service or Facility**.

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VII. Rent Increase

A. Rent Increases and Notice

Landlords can raise rents by a set amount each year and can apply for rent increases above that amount (RTA, s 43(1)). A tenant may also agree to pay a greater increase than the percentage permitted; this agreement must be in writing. If the tenant does not agree then the landlord is required to go through the dispute resolution process (RTA s 43 (3)). The percentage for allowable rent increases is the inflation rate (Consumer Price Index, or “CPI”) plus 2 percent. The maximum allowable increase changes each January 1st Check the webpage titled Rent Increases (http:/ / bit. ly/ 1cWKrDB) on the RTB website to find the maximum rent increase allowed for the current year. The increase can occur every 12 months of the tenancy with the time period running from the date of the last rent increase for that tenant or the date the rental agreement was entered into (s 42(1)). A tenant may not apply for dispute resolution to dispute a rent increase that complies with s 43(1) (permitted increase or an Arbitrator ordered increase). If a landlord collects a rent increase that does not comply with the RTA, the tenant may deduct the entire increase from the rent. The tenant should communicate the reason for the deduction to the landlord before taking this form of action.

The landlord must give written notice of a rent increase at least three full months before the increase becomes effective (s 42(2)). If the notice of rent increase is not in writing in the approved form, it is invalid and of no effect. If the landlord gives notice of less than three months, or if the increase is to take effect less than 12 months from when the tenant moved in, or from when the tenant’s rent was last increased, the original notice will self-correct and will take effect on the earliest lawful date, provided it is otherwise correct. The tenant should notify the landlord about any self-correcting dates.

A landlord may apply under s 43(3) of the RTA (additional rent increase) by making an application for a dispute resolution if one or more of the following conditions are met:

- the landlord has completed significant repairs or renovations that could not have been reasonably foreseen and will not recur within a reasonable period (s 23(1)(b) of the RTR);
- the landlord has incurred a financial loss from an extraordinary increase in the operating expenses of the residential property;
- the landlord, acting reasonably, has incurred a financial loss for the financing costs of purchasing the residential property if the financing costs could not have been foreseen under reasonable circumstances; or
- the landlord, as a tenant, has received an additional rent increase under this section for the same rental unit.

The rent increase formula for Manufactured Home Parks is 2% plus inflation plus the proportionate amount of the increases to regulated utilities and local government levies.

B. New Lease with Same Tenant and Location

In the case where a tenant is remaining in the same rental location, but circumstances require a new lease is signed, any change in rent is still controlled by RTA s 43 as if the new lease is an extension of the original lease.

This means that if there was a rent increase in the last 12 months, the landlord is prohibited from increasing the rent for the new lease. If there wasn’t a rent increase in the last 12 months, the landlord can only increase the rent to the maximum annual allowable amount and is prohibited from increasing it again in the next 12 months unless they obtain the director’s approval pursuant to RTA s 43 (3).

C. Hidden Rent Increases

The tenant can apply to an Arbitrator under s 27 of the RTA, if the landlord starts to charge the tenant for a service or facility previously included in the rent (e.g. for cable television or laundry that was previously free), or takes away a service or facility previously enjoyed by a tenant (e.g. stops providing cable television or laundry that was previously included in the rent, without decreasing the rent proportionately).

If the Arbitrator considers that the failure or reduction has resulted in a substantial reduction of the use and enjoyment of residential premises or of the service or facility, the Arbitrator can provide relief (e.g. allowing the tenant to pay less rent, or ordering the service or facility restored). See also RTB Policy Guideline 22: Termination or Restriction of a Service or Facility.

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VIII. Tenant's Rights

A. Right of Entry

Section 29 of the RTA provides that a landlord may not enter a rental unit except where:

- an emergency exists and the entry is necessary to protect life or property;
- the tenant gives either written or verbal consent to enter for a specific purpose one month or less prior to entry, including when the tenant consents at the time of entry
- the landlord provides housekeeping or related services as part of the written tenancy agreement and the entry is for this purpose in accordance with the terms
- the tenant abandons the rental unit;
- the landlord gives written notice of entry for a specified “reasonable purpose” between 30 days and at least 24 hours before the time of entry (s 29(1)(b)).
- the landlord has an Arbitrator’s order authorizing the entry;

The landlord must arrange a specific time between 8 a.m. and 9 p.m. to enter unless otherwise agreed by the tenant.

Note that the clock starts ticking when the tenant receives the notice to enter, not the time when the landlord gives it. The 24 hours starts right away when a landlord hand-delivers the notice; 3 days later when it is delivered by fax or by posting on the tenant’s door, or five days later when sent by regular or registered mail, unless earlier received;

B. Quiet Enjoyment

Section 28 of the RTA provides protection of tenant's right to quiet enjoyment. A tenant's right includes but is not limited to:

1. reasonable privacy;

2. freedom from unreasonable disturbance;

3. exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with s 29; and

4. use of the common area for reasonable and lawful purposes, free from significant interference.

Arbitrators may not be particularly generous in assessing noise complaints. While tenants have a right to quiet enjoyment, they also have a duty not to disturb other tenants. There is no reciprocal right.

However, a landlord may end a tenancy for Cause with one month's notice if a tenant unreasonably disturbs other occupants or the landlord of the building. This is separate from the right of quiet enjoyment, and is a cause for landlord to evict (RTA s 47 (d)(i)).

C. Duty to Provide Access

Under RTA s 30 (1)once a tenant has taken possession of a rental unit, a landlord is not allowed to unreasonably restrict the tenant's access to the residential property. Under s 31 of the RTA, the landlord cannot change the locks or alter the means of access to the rental unit without the tenant's permission, and a landlord is obligated to provide all tenants with new keys or other means of access to the rental unit. On the request of a tenant at the beginning of a new tenancy agreement, the landlord must re-key or change the locks to the rental unit: see Section IV: Moving In and Moving Out. A landlord cannot restrict access if a tenant has failed to pay rent.

Tenant: Changing the Locks

If the landlord changes the locks in contravention of s 31 of the RTA, the Arbitrator may grant an order authorizing the tenant to change the locks. Also, if a tenant applies for dispute resolution, an Arbitrator can grant permission to allow the tenant to change the locks, and give the tenant the right to withhold a copy of a key from the landlord if the Arbitrator is satisfied that the landlord may contravene s 31. It should be noted that a tenant changing a lock without landlord permission or an order can be grounds for eviction. To change the lock legally, the tenant must follow the procedure set out in RTA, s 31(2).

D. Cash Payment Rules

Section 26(2) provides that a landlord must provide a tenant with a receipt for rent paid in cash. If a tenant makes a cash payment and receives no receipt, the tenant should send a letter to the landlord confirming the payment or pay with a witness present.

E. Personal Property: Non-Payment of Rent

Whether or not a tenant pays rent in accordance with the tenancy agreement, a landlord must not seize any personal property of the tenant or prevent or interfere with the tenant's access to the tenant's personal property (RTA, s 26(3)). The only exceptions are if the landlord has a court order authorizing the action, or if the tenant has abandoned the rental unit and the landlord complies with the regulations: see RTA s 26 (4)(a) and (b).

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IX. Subletting and Assignment

A. Right to Assign or Sublet and Duty to Obtain Consent

According to s 34 of the RTA, a tenant may assign or sublet his or her interest in a tenancy agreement with the written consent of the landlord (s.34(1)); in other words, the landlord's written consent is always required for an assignment or subletting of the agreement. However, the landlord must not be arbitrary or unreasonable in withholding consent if the tenant has a fixed term tenancy with six months or more remaining (s 34(2)). A tenant may apply for an Arbitrator's order where a landlord has unreasonably withheld consent: see RTA s 65(1)(g). Section 34(3) stipulates that a landlord must not charge a tenant anything for considering, investigating or consenting to an assignment or sublease.

Public housing tenants or tenants receiving a rent subsidy (those renting premises owned by the Crown, or by a non-profit organization receiving rental subsidy by agreement with the Crown, or whose landlord is the B.C. Housing Management Commission) are exempt from these assignment and sublet provisions. Generally, this means a subsidized housing tenant cannot assign or sublet a rental unit.

People with licences to occupy, such as roommates or other occupants, may not be sub-tenants or assignees.

B. Creating a Sublet

Generally, sub-tenants have many of the same rights against the tenant they rent from as do tenants against the original landlord, with the exception that they cannot themselves dispute the actions of the "main" landlord, as this can only be done by the original tenant. This only applies, however, if a sublet is actually created. Where an individual takes on a roommate, and that roommate does not either hold a sublet approved by the landlord or is subletting a clearly defined, separate portion of the property, that roommate will not be considered a sub-tenant. As a result, individuals moving in as roommates may wish to ensure either that they are named on a written lease as a co-tenant or tenant in common. If they are not named on such a written lease, they will have no recourse against the landlord at the RTB unless they can prove that a tenancy agreement has been created between the two in some other way.

Tenants wanting to create sublets must retain an interest in the tenancy. This is done by making sure that the sublease ends before the first tenant's lease with the original landlord does. For example, if a tenant has a fixed term tenancy agreement that lasts for six more months and wants to sublet to a sub-tenant, that sublease must, at maximum, be for six months less a day so that the tenant still retains an interest in the tenancy. In a periodic tenancy, there must be an understanding that the sublet continues on a month-to-month basis, less one day, in order to preserve the original tenant's interest in the tenancy. Where a sublet continues for the full period of the tenancy, it likely amounts in law to an assignment instead. See **Policy Guideline 19: Assignment and Sublet**.

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X. Termination/Eviction

A. Tenant Gives Notice (RTA, ss. 45, 45.1)

A tenant can end the tenancy by giving notice:

(1) Where there is a periodic tenancy, notice will be effective in terminating the tenancy no earlier than one clear month after it is received by the landlord.

(a) Additionally, it must take effect no earlier than the day before the day of the month (or another period on which the tenancy is based) that rent is payable under the tenancy agreement.

(b) E.g. If rent is payable on the first of the month, notice to end the tenancy given on January 1st will be effective in terminating the tenancy agreement no earlier than February 28th, and rent must be paid throughout the notice period; notice given on May 31st would be effective to end the tenancy on June 30th. Note that the time is calculated from the time the landlord receives the notice, not when the notice was sent.

(2) Where there is a fixed term tenancy, notice will be effective no earlier than one clear month after it is received by the landlord.

(a) Additionally, it must be no earlier than the date specified in the tenancy agreement as the end date of the tenancy.

(b) It must be the day before the day in the month (or in the other period on which the tenancy is based) that rent is payable under the agreement.

(3) If a landlord breaches a material term, the tenant must first give written warning that a term has been breached and requests that the breach be corrected. If after a reasonable time, the landlord has not corrected the breach, the tenant can end the tenancy after the landlord receives notice in writing.

(4) Under s 45.1 of the RTA, a tenant is eligible to end a fixed term tenancy early if they are at risk of or fleeing family violence, or if they have a need for or have been accepted into long term care.

(a) Tenants must fill out form #RTB-49 and submit it to the landlord with one month written notice. Note that the early termination form requires a qualified third-party to verify the risk of family violence or the need for long term care.

(b) Section 39 of the Residential Tenancy Regulations lists persons qualified to confirm a risk of family violence

(c) Section 40 of the RTR lists persons qualified to confirm the need for long term care.

(d) Ending a tenancy this way means that all individuals subject to the same tenancy agreement must vacate the rental unit when the tenancy ends.

A landlord cannot apply for dispute resolution with respect to a tenant's eligibility to end their tenancy, but they can apply for dispute resolution if the basis of the claim is that the confirmation statement was made by a person who was not authorized under the regulations to do so, or if the tenant's notice is not provided in accordance with the RTA, or if there are other claims unrelated to the tenant's notice to end tenancy.

B. Landlord Gives Notice

1. Non-Payment of Rent (RTA, s 46)

A landlord may give a ten-day notice to end a tenancy if rent is unpaid on any day after the day it is due. If the tenant pays the overdue rent within five days after receiving a notice under s 46 the notice has no effect. If the tenant does not pay within those five days or dispute the notice to end tenancy, the landlord can go to the RTB and make a direct request for an order of possession without a hearing.

If the tenant decides to pay the overdue rent after the five day period is over, the landlord is not obligated to accept the late payment.

2. Cause to End Tenancy (RTA, s 47)

A variety of circumstances can qualify as cause to end a tenancy:

1) the tenant does not pay security deposit or pet damages deposit within 30 days when the deposits are due

2) the tenant is repeatedly late in paying rent

3) there are an unreasonable number of occupants in the rental unit

4) the tenant or their permitted guests has done something that:

a. significantly interfered with or disturbed another occupant or landlord of the property, OR

b. seriously jeopardized the health or safety or a lawful right of the landlord or another occupant of the property, OR

c. placed the landlord's property at significant risk

5) the tenant or a person permitted on the residential property by the tenant has engaged in illegal activity that

a. has caused or is likely to cause damage to the landlord's property,

b. has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

c. has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;

6) the tenant or their permitted guests have caused extraordinary damage to a rental unit of residential property

7) the tenant does not repair damage to the rental unit that is within their obligations (RTA s 32(3)) within a reasonable time

8) the tenant has failed to comply with a material term of the tenancy agreement and has not corrected the situation in a reasonable time after the landlord gave them written notice

9) the tenant purports to assign the tenancy or sublet without the landlord's permission

10) the tenant knowingly gives false information about the residential property to a prospective buyer or tenant of the residential property who is viewing the property

11) there is an order to vacate the property by the government

12) the tenant has ignored an Arbitrator order for 30 days after receiving the order or when the order should take effect, whichever comes later.

3. Landlord's Notice: End of Employment with Landlord (RTA, s 48)

A landlord may end the tenancy of a person employed as a caretaker, manager or superintendent of the residential property of which the rental unit is a part by giving notice to end the tenancy if:

- the rental unit was provided to the tenant for the term of the caretaker's (tenant's) employment,
- the tenant's employment as a caretaker is ended,
- and the landlord intends in good faith to rent or provide the rental unit to a new caretaker, or manager.

An employer may also end the tenancy of an employee in respect of a rental unit rented or provided by the employer to the employee to occupy during the term of employment by giving notice to end the tenancy if the employment is ended.

4. Landlord's Use of Property (RTA, s 49)

Notice to end tenancy may be given by the landlord where:

- the landlord sells the property and the purchaser asks the landlord, in writing, to give the tenant notice because he or she intends to occupy the property (RTA, s 49(5)(c));
- the landlord or a member of his or her immediate family (consists only of spouse, child or parent of the landlord or spouse) intends to occupy the property (s 49(3)); or
- the landlord has all the necessary permits and approvals required by law, and intends in good faith to demolish the property, convert it into a strata lot or co-op, convert it into non-residential property or a caretaker's premises for more than six months, or renovate the rental unit in a manner that requires it to be vacant (s 49(6)).

NOTE: One of the rulings of Aarti Investments Ltd. v. Baumann, (2019 BCCA 165) states that in a dispute over an eviction on s 49 (6), the onus is on the landlord to establish "good faith." The tenant is not required to prove the landlord's bad faith.

Right of first refusal:

Additionally, if the rental unit is one in a residential property containing 5 or more rental units where the landlord ended the tenancy pursuant to s. 49(6)(b) (renovation or repair), the tenant has a right of first refusal under s. 51.2. This means that the tenant is entitled to enter a new tenancy upon completion of renovation or repair if they give notice that the tenant intends to enter into a new tenancy prior to the end of tenancy.

If the tenant gave notice pursuant to s. 51.2, the landlord must give tenant notice at least 45 days before the date of completion informing the tenant the availability date of the rental unit and a tenancy agreement to sign that commences on that availability date.

If the tenant does not enter into a tenancy agreement on or before the availability date, the tenant has no further right.

By s. 51.3, if the tenant gave notice under s. 51.2 and the landlord does not comply with s. 51.2, the landlord must pay the tenant 12 times the monthly rent as compensation. Note that the landlord may be exempted due to hardship as determined by an Arbitrator (s. 51.3(2)).

A landlord who gives notice to end a tenancy under s 49 must pay the tenant, on or before the effective date of the notice an amount that is equivalent to one month's rent as compensation (s 51(1)).

NOTE: If the landlord does not take steps within a reasonable time to use the property for the reason stated on the eviction notice, the landlord must pay the tenant 12 times the monthly rent payable under the tenancy agreement (s 51(2)). The landlord's use must be for at least six months beginning within a reasonable period of the effective date of the notice, to prevent landlords from simply moving a relative in for a month. The landlord may be exempted due to hardship.

NOTE: Some municipalities have additional protection in place for tenants that are being subject to “renovictions” in addition to the protection offered by the RTA. One such example is the City of Vancouver’s Tenant Relocation and Protection Policy. Check if your municipality has similar policies in place.

C. Landlord and Tenant Agree in Writing

According to RTA, s 44(1)(c), the landlord and tenant can consent in writing to end a tenancy.

D. Required Notice

1. Form and Basic Requirements

For a notice to end a residential tenancy to be effective, it must be in writing, signed and dated by the landlord or tenant giving notice, include the address of the rental unit, and state the effective date of the notice. When the landlord gives notice, it must state how to challenge the eviction (RTA, s 52). A landlord must state the grounds for ending the tenancy; tenants giving notice are not required to provide any such grounds (RTA, s 45(1) or (2)). An official form is available from the Residential Tenancy Branch. A landlord must use RTB approved forms (s 52(e)) when giving notice to end a tenancy in order for it to be effective. A mailed notice is presumed to be received in five days, while a posted notice is deemed received three days after being posted. Generally, before a landlord issues a notice to end tenancy for cause, the landlord should give the tenant some written warnings in relation to the conduct at issue and a reasonable opportunity to adjust his or her conduct.

A tenant’s notice to end tenancy must be in writing and must include:

- the tenant’s signature;
- the date the tenant signed it;
- the address of the rental unit; and
- the date the tenant is moving out.

If a notice to end tenancy does not comply with the RTA, s 52 requirements, an Arbitrator may set aside a notice, amend a notice, or order that the tenancy end on a date other than the effective date shown. A notice to end tenancy can be amended if the Arbitrator is satisfied that the person receiving the notice knew or should have known the information that was omitted from the notice, and in the circumstances it is reasonable to amend the notice (s (68)(2)). Dates are self-corrective, so notice is not void simply because a landlord proposes to have the tenancy end on a date sooner than the RTA allows. Tenants should never ignore a notice, even if they believe it is drafted incorrectly.

In order to properly give notice, landlords must use one of the Notice to End a Residential Tenancy forms put out by the RTB. Failing to do so may constitute a failure to provide notice. Tenants and landlords can agree to use the Mutual Agreement to End Tenancy form, but tenants should add a clause barring the landlord from claiming damages.

2. Length of Notice and Limitation Periods

The RTA sets out when a landlord may issue a notice to end tenancy and the length of the notice period. Time limits to apply to the Residential Tenancy Branch for dispute resolution are also set out. Certain time limits may be extended in exceptional circumstances. See **Residential Tenancy Policy Guideline 36: Extending a Time Period**, which sets out information regarding the meaning of exceptional circumstances.

a) Non-Payment of Rent

If the rent goes unpaid, a landlord can give a 10 day Notice to End Tenancy for Unpaid Rent or Utilities following the day the rent was due (RTA, s 46). The tenant may pay all the rent due within five days of receiving the notice to render the notice void or dispute the notice by applying for dispute resolution within five days of receiving the notice. If they do nothing then the landlord can go to the Residential Tenancy Branch and make a Direct Request for an order of possession without a hearing. Tenants should request a receipt for the rent payment if they are concerned that the landlord will try to evict them anyway. If the tenant does not pay the overdue rent in 5 days, the landlord is not legally obligated to accept the payment.

If a tenant fails to pay the utilities, the landlord can give written notice demanding payment, and then, 30 days after the tenant receives the demand for payment, treat any unpaid amount as unpaid rent (RTA, s 46(6)).

NOTE: A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under the RTA to deduct from rent. However, tenants need to file for dispute resolution in this situation, and not simply ignore the notice.

b) Cause

The minimum notice given by a landlord where there is cause is one month, effective on the last day of the ensuing rental period (RTA, s 47(2)). Practically speaking, the full month requirement means the notice must be received the day before rent is due, so notice given on May 31 is effective to end the tenancy on June 30, but notice given June 1 would be effective to end the tenancy only on July 31. A tenant may dispute a notice under this section by applying for dispute resolution within 10 days after the date the tenant receives the notice. The minimum notice of one month does not apply if the tenant is engaging in illegal activity.

c) Landlord’s Personal Use of Property

Section 49 of the RTA requires that a landlord give at least two months notice if he or she wishes to take back the property for personal use: see s 49(2)(a). A tenant has 15 days to apply for dispute resolution to challenge the notice.

d) Renovations

If the landlord is giving notice for RTA s 49(6), which would include most forms of building renovations, the landlord must give at least 4 months’ notice. If the tenancy is a fixed term tenancy, the landlord cannot terminate the tenancy before the fixed term is over. A tenant would have 30 days after receiving the notice to file a dispute.

e) End of Employment

Where the ground for eviction is the end of employment (RTA, s 48), the tenant must file for dispute resolution to dispute the Notice to End Tenancy within 10 days of receiving it (s 48(5)). The notice period must be at least one month after the date the tenant receives notice, not earlier than the last day the tenant is employed by the landlord, and the day before the day in the month, or in the period on which the tenancy is based, that rent, if any, is payable under the tenancy agreement.

f) Early End to Tenancy

Under the RTA, s 50, if the landlord gives a tenant a notice to end a periodic tenancy under s 49, a tenant may end a tenancy early by giving 10 day notice for a date earlier than that specified by the landlord at any time during the period of notice and pay rent up to the end of that 10 days. This does not apply to tenants in a fixed-term tenancy.

A tenant may end a tenancy early if they believe the landlord has not complied with a material term of the tenancy agreement, regardless of whether they have a fixed-term tenancy agreement or a month-to-month tenancy agreement. The tenant must first write the landlord describing the problem, stating they believe it is a breach of a material term of the tenancy agreement, asking the landlord to fix the problem and stating that if the problem is not fixed by a reasonable deadline [stated in the letter] they will end the tenancy early. The tenant must give the landlord a chance to fix the problem. If the landlord does not fix the problem by the deadline, the tenant may end the tenancy by writing the landlord a second letter stating they are ending the tenancy. The tenant may not end the tenancy until the landlord has received the second letter.

A landlord may end a tenancy early by applying to the Residential Tenancy Branch for dispute resolution, seeking an order ending the tenancy early and an Order of Possession. The usual rules about service and notice to the tenant apply. The landlord must prove the tenant has:

- significantly interfered with or unreasonably disturbed another occupant or the landlord;
- seriously jeopardized the safety, rights or interests of the landlord or another occupant;
- engaged in illegal activity that has caused or could cause damage to the property, disturb or threaten the security, safety or physical well-being of another occupant, or jeopardize a lawful right or interest of another occupant or the landlord; or
- caused major damage to the property or put the landlord's property at significant risk.

At the dispute resolution hearing, the landlord must provide convincing evidence that justifies not giving full notice and demonstrate it would be unreasonable or unfair to wait for a notice to take effect.

3. Disputing a Notice to End Tenancy

a) By a Landlord

If the tenant wants to end a month-to-month tenancy, he or she can always give one month's written notice "on or before the last day of a rental payment period to be effective on the last day of an ensuing rental payment period" (e.g. give notice no later than May 31 to move out on June 30). The landlord cannot dispute the tenant's notice. But, if the tenant's notice does not comply with the rules under the RTA (ss 45(1) and 45(2)), the tenant may have to pay an extra month's rent.

b) By a Tenant

Under s 59 of the RTA, a tenant may dispute a Notice to End a Residential Tenancy from the landlord by applying to the RTB and filing an application for dispute resolution to set aside the notice within the following time limits:

- under s 46 (unpaid rent): five days;
- under s 47 (for cause): 10 days;
- under s 49 (landlord use of property): 15 days;
- under s 49 (6) (renovations): 30 days.

An Arbitrator may extend a time limit established by the RTA only in exceptional circumstances. In respect to a notice given by a landlord for non-payment of rent (s 46(4)(a)), time limits can only be extended if: the landlord has provided written permission for an extension, or the tenant has deducted the unpaid amount because the tenant believed that the deduction was allowed for emergency repairs or under an Arbitrator's order (s 66(2)). Personal hardship is not a reason for more time when disputing a notice to end tenancy for non-payment.

NOTE: An Arbitrator must not extend the time to apply for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.

NOTE: A tenant can apply for a delayed order of possession in the alternative that the eviction is upheld. To do so, the tenant should explain why a short order would cause them hardship and why an extended order would not prejudice the landlord. Particular attention should be paid to the landlord's financial interests. - ie if the tenant has paid rent and intends to continue to pay rent, the tenant should indicate that

NOTE: A tenant should never ignore a notice to end tenancy. If the tenant does not dispute a notice within the time limit, the landlord may apply for an Order of Possession.

E. Failure of a Tenant to Deliver Up the Rental Unit; Regaining Possession

A tenant must deliver up possession at the end of the tenancy. After tenancy ends, there is no "agreement" and the over holding tenant is usually found to be a licensee or mere occupant. A new tenancy agreement could be created (e.g. by the landlord accepting and providing a receipt for payment of rent), but otherwise the occupant of residential premises is liable to a landlord's claim for compensation for "use and occupation" (RTA, s 57(3)). if a prospective tenant is suing the landlord for failure to give vacant possession, the landlord can add the overholding tenant as a party to the case (s 57(4)). The landlord must not take actual possession of a rental unit that is occupied by an over holding tenant unless the landlord has a writ of possession issued under the B.C. Supreme Court Rules.

A tenant, occupant, or landlord may obtain an order from the RTB respecting his or her right to possess or occupy the rental unit. A landlord may apply for an Order of Possession whether or not a tenant has disputed the Notice to End Tenancy he or she was given. A landlord may not regain possession after a tenancy agreement has ended unless the tenant vacates, or has abandoned the unit, or (where the tenant remains in possession) unless the landlord obtains an

Order of Possession through a Dispute Resolution hearing. If a tenant is served with an Order of Possession but fails to comply, a landlord may then seek a writ of possession from the B.C. Supreme Court (or Registry)What this means is that a landlord may not change the locks, or lock out a tenant, without judicial backing. The landlord must receive an Order of Possession, a writ of possession and take back possession of the rental unit by employing an authorized court bailiff to change the locks and remove the tenant.

If the landlord gives the notice to end, he or she can apply for the Order of Possession only after the tenant's limitation period to file for dispute has expired (s 55(2)(b)). This may be 5, 10, 15, or 30 days depending on the reasons for ending the tenancy. A list of reasons can be found on the Notice to End Residential Tenancy form.

Landlords can, in some circumstances, obtain an Order of Possession without attending a hearing. An Arbitrator may issue the order directly where the tenant has failed to dispute a Notice to end Tenancy for unpaid rent within the time limits (s 55(4)).

F. Abandonment and End of Tenancy

Abandonment of the rental unit by the tenant is one of the automatic grounds for ending a residential tenancy agreement (RTA, s 44(1)(d)). Where a tenant abandons the rental unit before the end of a fixed term tenancy, or without giving proper notice during a periodic tenancy, a landlord may have a claim against the tenant for outstanding rent. Disputes may arise when the landlord claims the rental unit has been abandoned and the tenant disputes the end of the tenancy and the landlord's finding of abandonment. The landlord's duty to mitigate and re-rent and the landlord's right to remove the tenant's goods both depend on a finding that the rental unit was abandoned. In other words, if a tenant does not clearly communicate to the landlord that they will be abandoning the rental unit, the landlord may not be subject to a duty to mitigate their losses by re-renting the suite until they are sure the rental unit has been abandoned.

The landlord's covenant to ensure quiet enjoyment, and to comply with s 29 entry procedures, continues while the agreement exists, but ends with abandonment. The landlord can enter where the tenant abandons the rental unit. However, the landlord may not be able to determine if there is abandonment without re-entering the rental unit; if there is no abandonment and the landlord has improperly entered, he or she has breached s 29. The landlord could enter under the emergency provision, or if he or she is certain that substantially all the tenant's chattels have been removed; otherwise, the landlord should give written notice of entry for a reasonable purpose. Alternatively, the landlord could apply for an Order of Possession if he or she believes the rental unit has been abandoned but wants clear legal grounds to establish the right to enter the suite. This may also require that a Notice to End a Residential Tenancy be formally served.

Part 5 of the Residential Tenancy Regulations sets out guidelines to assist the landlord of abandoned personal property, and/or assist the tenant to recover such property. Abandonment of Personal Property

Section 24 of the RTR deals with the situation where the tenant has vacated the residential premises at the end of the tenancy but leaves personal property behind. The main issue is whether the tenant has "given up possession" of the property. A landlord may consider that a tenant has abandoned personal property if the tenant leaves the personal property in residential premises that:

a) he or she has given up possession of, or that he or she has vacated after the tenancy agreement has ended or after the term of the tenancy agreement has expired; or

b) for a continuous period of one month, the tenant has not ordinarily occupied and remained in possession of, and in respect of which he or she has not paid rent, or from which the tenant has removed substantially all of his or her personal property, and either gives the landlord an express oral or written notice of the tenant's intention not to return to the residential premises, or by reason of the facts and circumstances surrounding the giving up of the residential premises, could not reasonably be expected to return to the residential premises.

Section 24(3) of the RTR permits the landlord to remove personal property from residential premises that have been abandoned. This includes removing personal property from storage lockers, etc. If the landlord decides property has been abandoned, the landlord is required by s 25(1)(b) of the RTR to make and keep an inventory of such property as soon as the property has been removed from the rental unit, and to keep the particulars of the disposition and inventory for two years. In addition, the personal property, once removed from the rental unit, must be kept in a safe place for a period of not less than 60 days if the property is considered to be worth five hundred dollars or more). Under s 25(2) of the RTR, the landlord may sell or dispose of the property stored in compliance with s 25(1) of the RTR. The purchaser of such property obtains marketable title, free of all encumbrances, but landlords should be very cautious before selling a tenant’s property and should follow the regulations carefully. For example, problems will arise if a landlord sells a tenant’s “abandoned” furniture if it turns out that the furniture was only leased.

Some tenants may have little of value in their residences and should be aware that the RTR allows landlords to dispose of property with a value of less than $500 (s 25(2)(a)).

The landlord must exercise reasonable care and caution to ensure the personal property does not deteriorate and is not damaged, lost, or stolen (RTR, s 25(1)). A tenant may file a claim for his or her personal property at any time before it is disposed of under ss 25 or 29 of the RTA. Practically speaking, any claim for return of abandoned property, or for compensation for lost, damaged, or abandoned property must be brought as soon as possible if there is to be any likelihood of success.

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XI. Dispute Resolution

A. General

The formal dispute resolution process may be avoided in cases where the application of the law is clear if an Information Officer is willing to phone one of the parties in order to explain the law. For example, an Information Officer might call a landlord and tell him or her that landlords are required by law to provide rent receipts if the tenant pays rent in cash. The Information Officer will not take on the role of an Arbitrator and will only explain the Legislation.

Dispute resolution is the formal method of resolving disputes between landlords and tenants. Any party going to dispute resolution may be represented by an agent, advocate, or lawyer. The Arbitrator may require a representative to provide proof of their appointment to represent a party and may adjourn a dispute resolution hearing for this purpose. To understand the procedure, advocates should read the dispute resolution Rules of Procedure that are available on the Residential Tenancy Branch website (https:/ / www2. gov. bc. ca/ assets/ gov/ housing-and-tenancy/ residential-tenancies/rop.pdf).

1. Disputes Covered by Dispute Resolution

Virtually all claims that may arise between tenants and landlords are eligible for dispute resolution (see RTA, s 58). A court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to dispute resolution under the RTA. The exceptions are as follows:

• the dispute is linked substantially to a matter that is before the Supreme Court; or

• the monetary claim exceeds the monetary limit prescribed in the Small Claims Act, RSBC 1996, c. 430, s 3. (Currently the monetary limit is $35,000.)

As well, the RTB is specifically excluded, pursuant to section 5.1 of the RTA, from considering the following:

• Questions of constitutional law, and

• Issues arising out of the BC Human Rights Code.

2. Arbitrators

Arbitrators are like judges and base their decisions on evidence and arguments presented by the parties at the dispute resolution hearing. The Arbitrator is not bound by decisions of other Arbitrators but is bound by legal precedent established by the court. The Arbitrator makes the decision based on the merits of the case. An Arbitrator has authority to arbitrate disputes referred by the director to the Arbitrator, and any matters related to disputes that arise under the RTA or a tenancy agreement. Arbitrators may assist the parties or offer the parties an opportunity to settle their dispute. They can record agreements reached by the parties, sign off on the agreement, and record the settlement order. Except as otherwise provided by the RTA, a decision of the director is final and binding (s 77(3)).

B. Dispute Resolution Procedure

1. Applying for Dispute Resolution

A landlord or tenant who wants a government-appointed Arbitrator to settle a dispute must complete an Application for Dispute Resolution. Most applications for dispute resolution are filed online through the RTB website. Applicants can also apply in person by submitting a paper application for dispute resolution form in person at the RTB office or any Service BC office. The form is available at an RTB office or a Service BC office or online at the RTB website. Note that there are separate forms for the landlord and the tenant.

NOTE: Rule 3 of the RTB Rules of Procedure (available at http://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf) sets out how to serve the Application for Dispute Resolution, how to submit and exchange documents, and the time limits within which the parties and the Arbitrator must receive the documents to be used as evidence at the hearing. For applicants, the easiest way to comply with this rule is to attach all relevant documents to the initial application form. Evidence can be faxed to the RTB at 1-866-341-1269. (Applications cannot be submitted via fax), or online with the online application or at https://tenancydispute.gov.bc.ca/DisputeAccess/#access

Rule 3.14 governs evidence not submitted with the Application and sets out that such evidence must be received by the all other parties and the Branch not less than 14 days before the hearing. In calculating the 14 days, the first and last day must be excluded. If the due date for service to the Branch falls on a day the office is closed, the limit is extended to the next day the office is open. If the date for service to the other party falls on a holiday, the limit is extended to the next non-holiday day. If evidence is not available within the deadline for service, under Rule 3.17 the Arbitrator has the discretion to determine whether or not to accept it.

You should also take special notice of the rules regarding how days of service are calculated. Documents sent by mail are deemed “received” five days later, while documents dropped through a mail slot or taped to a door are deemed “received” three days later. Please note that the RTB does not copy evidence for parties. See the Rules for further information.

An Information Officer at the RTB must check the form. This is best done in person. Clients who cannot go to an RTB office can file applications at a local Service BC office. Online applications may be paid for over the Internet with a credit card or an online debit card, but if you wish to apply for a fee waiver you must also upload proof of income through the Online Portal, or submit it in person. The Downtown Eastside office only accepts applications where a fee waiver applies. Those offices do not handle money payments. The application will not be accepted until the applicant has paid $100 (by cash, or money order or certified cheque payable to the Minister of Finance) or submitted the documents required for a fee waiver. Any corrections or clarifications will need to be completed as well. People on income assistance or whose incomes fall below the low-income guidelines can apply to have the fee waived if they provide proof of their income status. The applicant is usually informed of the date of the hearing within a few days. The RTB created a Monetary Order Worksheet which should be completed when applying for a monetary order. The worksheet number is available online at http://bit.ly/1ToyRm9.

For more information about how to apply for dispute resolution and request a fee waiver, see https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/solving-problems/dispute-resolution

The limitation period for designation of an Arbitrator (i.e. for filing the claim at the RTB) is two years from the end of the tenancy to which the dispute relates (RTA, s 60).

a) Naming Parties on an Application

The RTB has specific rules for naming parties. These rules are of particular importance in relation to landlords who conduct their operations under a business or other name. If a tenant has a written lease, it may specify the name of the landlord, in addition to their address for service.

Individuals should be named by their full legal names. Businesses should be named using the full legal name of the business, which may include an indication of the type of legal structure the business operates under and may be a numbered corporation. Where a business carries on business under a name other than the legal name of the business, you may indicate that the party is "doing business as" the other name.

b) Amending an Application for Dispute Resolution

In certain circumstances, applications for dispute resolution that have already been submitted can be amended. Amended applications must be related to existing issues raised in the original application.

To amend an application for dispute resolution, the applicant completes the RTB-42 "Amendment to an Application for Dispute Resolution" form and submits that form along with any accompanying evidence to the RTB. Once the RTB approves the application, the applicant serves the other party with a copy of the application and supporting evidence, not less than 14 days before the hearing. Note that, as the application must be served on each party 14 days before the hearing, and it takes time to have the application approved, it is advisable to submit an application to amend as soon as possible so as to meet these deadlines.

To learn more about amending an application, see: https:/ / www2. gov. bc. ca/ gov/ content/ housing-tenancy/ residential-tenancies/apply-online/amend-or-update-an-application

2. Direct Request

A landlord may make a Direct Request for an order of possession and/or monetary order for unpaid rent or utilities when he or she has issued a 10-day notice to end tenancy for non-payment of rent or utilities, and the tenant has neither paid the rent nor contested the notice. An order can then be granted without the need for a participatory hearing, with only the landlord's written submissions being considered by the Arbitrator. No evidence from any other party would be considered. The landlord can also recover the $100 application filing fee through Direct Request. Because of the Direct Request process, it is very important that tenants never ignore a notice to end tenancy.

NOTE: It is possible that a tenant will receive a Notice of Direct Request in circumstances where they should receive a hearing (e.g. all arrears paid in 5 days, application for dispute resolution filed, legitimate dispute on merits). In such a case, it is imperative that the tenant immediately write to the RTB and request a dispute resolution hearing. The tenant should explain why their case is not appropriately addressed through the direct request process.

Once an Order of Possession has been given to the landlord and served to the tenant after a wrongful Direct Request, the tenant should tell the landlord that they are reviewing it, so the landlord can't get writ from BC Supreme Court; The tenant should file a Review Application to the RTB on the basis of landlord fraud and/or inability to attend original hearing (See **Section XI. E: Review of Arbitrator's Decision**).

3. The Dispute Resolution Hearing

Hearings are a formal process, though less formal than court. The RTB uses the dispute resolution Rules of Procedure (online at http://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf).The Information Officer may assist landlords and tenants by providing information about the procedure for resolving disputes but will not help complete forms. An Arbitrator may make any finding of fact or law that is necessary or incidental to making a decision or an order under the RTA. The Arbitrator makes decisions based on the merits of the case and is not bound by previous Arbitrator decisions but is bound by court decisions. The Arbitrator considers all of the evidence and makes a decision based on the RTA, the common law, and the facts.

The dispute resolution policy guidelines are also available online (https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators-and-resources/policy-guidelines).These are useful for preparing for a hearing, but Arbitrators have the discretion to decide when and how to apply Policy Guidelines. Most RTB hearings are now conducted via telephone. However, there are still some in-person or written hearings.

a) Telephone Hearings

Parties should join the conference call in a quiet place where they will not be interrupted. Parties should not try to call more than 5 minutes before the start of the hearing, as they will most likely not get through. The same is true if a party tries to call in more than 5 minutes after a hearing has started. The hearing will proceed even if one party gets disconnected during the call. It is important that parties check they have the correct telephone code. If a hearing has been adjourned or continued from an earlier hearing, the code will be different than the previous one.

Telephone hearings are scheduled for one hour exactly. If the hearing is not finished at this time, the Arbitrator may extend the hearing or schedule another conference call to continue the hearing. This may be several weeks or months after the first hearing. It is important that parties be focused on the outcome they wish to achieve and that their documents are carefully numbered so that time is not wasted searching for documents and other evidence.

b) In-Person and Written Hearings

In-person or written hearings are rare and will generally only occur at the request of one or both parties, to account for unusual circumstances or particular needs of one or both parties. For more information on alternative hearing formats, see **RTB Policy Guideline no. 44: "Format of Hearings"** (online at http://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/policy-guidelines/gl44.pdf)

c) Evidence

If possible, it is best to include all evidence with the initial application. However, if this is not possible, the RTB must receive a copy of all of the applicant's evidence no less than 14 days prior to the hearing; the respondent's evidence must be received no less than 7 days prior to the hearing. Evidence can be faxed to the RTB at 1-866-341-1269, delivered in person to any ServiceBC office, or RTB office in Burnaby, or uploaded online at https://tenancydispute.gov.bc.ca/DisputeAccess/#access

Digital evidence must be provided to the RTB on a USB memory stick, CD or DVD for their permanent files and must also be accompanied by a printed description, or they can be uploaded online with the online application or at the Dispute Access Site. Evidence does not need to be presented in print form but should be organized in a way so that the Arbitrator and other parties can easily refer to it during the hearing.

Each party must also deliver a copy of all evidence to the RTB and the other party 14 days before the hearing for the applicant and 7 days before the hearing for the respondent. The Arbitrator will usually refuse to look at anything not exchanged in advance of the hearing, but might accept the evidence subject to the following rules:

a) the party must show that the evidence is relevant and that it was not available at the time they filed or when they served their other evidence;

b) the Arbitrator has the discretion to determine whether to accept the evidence if it does not unreasonably prejudice the other party, and both parties must have the opportunity to be heard as to whether the evidence ought to be accepted;

c) if the evidence is accepted, the other party will have an opportunity to review it, therefore the Arbitrator must rule whether to adjourn, in accordance with Rule 6.3 and 6.4 which establish the criteria for adjourning a hearing.

The practical result of these rules is that Arbitrators will often refuse to look at any evidence that was not exchanged before the hearing as required.

The RTB's definition of "days" is as follows, taken from page 4 of the Dispute Resolution Rules of Procedure, located on the RTB's website at https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf

a) If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday

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

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

d) In the calculation of time not referred to in subsection (c), the first day must be excluded and the last day included

Evidence should be clearly marked and numbered so that all parties involved in a telephone conference can easily locate the relevant documents when necessary.

For a face-to-face hearing, it is still a good idea to bring extra copies of important documents to the hearing itself, in case the Arbitrator or the other party does not have copies handy. Original photos and documents that are presented to the Arbitrator cannot be returned later to the party. If a party has filed and served a petition for judicial review in B.C. Supreme Court, the RTB will usually file an affidavit attaching the record of proceeding for the hearing, which will include copies of original photos and documents. Copies of documents can be given to the Arbitrator, but they may demand the originals. If a witness cannot attend, the Arbitrator may accept affidavits (however, written statements may suffice) and may take testimony over the phone. If a party thinks a witness has something to contribute to his or her case but the witness refuses to cooperate, the party can then request in advance or at the hearing that the Arbitrator summon that witness (RTB Rules of Procedure s. 5.3 - 5.5).

The Arbitrator may then decide to adjourn the hearing and summon the witness for the hearing when it reconvenes. The party requesting the summon is required to serve it on the person being summoned. The Arbitrator also has the power to compel witnesses to give evidence under oath and/or to produce records that may be of importance to the hearing. Where a witness fails to comply with these procedures, he or she may be subject to a finding of contempt on application to the Supreme Court by the Arbitrator (RTA, s 76(3)).

The applicant should always bring proof of service (i.e. proof that the other side received the Notice of Hearing package) to the hearing or, for a telephone hearing, include it in the evidence the applicant submits to the RTB. The proof of service will have to be presented if the respondent does not attend – to prove that the applicant served the Notice of Hearing on the respondent. The person who served the documents should be at the hearing or should have provided an affidavit of service to the applicant.

4. The Arbitrator's Decisions

The Arbitrator may render a decision at the end of the hearing and will make a written decision following the hearing. Pursuant to s 77(1) of the RTA, the written decision and reasons must be provided within 30 days. If a party, pursuant to s 78 of the RTA completes a form requesting correction of a technical error, omission, or clarification within 15 days of the decision being given, such amended decision or clarification must be provided within 30 days.

The Arbitrator's order is final and binding but may be reviewed in limited circumstances (s 79).

5. Amendments to Decisions/Orders

On an Arbitrator's initiative, or at the request of a party, the Arbitrator may correct technical errors, or within 15 days, clarify a decision, reason, or inadvertent omissions in a decision or order the Arbitrator may also require that notice of a request be given to the other party. The Arbitrator shall not exercise this power unless the Arbitrator considers it just and reasonable in the circumstances (RTA, s 78(3)). The forms to be completed are the Request for Correction or a Request for Clarification

The RTB continues to amend its Policy Guidelines on key issues under the RTA. There are now over 40 detailed RTB Policy Guidelines available that ensure more consistency in dispute resolution decisions, and which should be reviewed in preparation for any hearing. They can found online at https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators-and-resources/policy-guidelines

However, Arbitrators will not be required to consult the Guidelines.

C. Enforcing the Arbitrator's Order

NOTE: If a successful party has any concerns about the ability to serve an order, he or she should request an order under RTA, s 71(1) and (2) permitting alternate means of service. An example of such an order would be one that permits serving a document at a tenant's workplace rather than at their new home.

1. Enforcing a Monetary Order

The Arbitrator may order the tenant or landlord to pay a monetary amount or to bear all or part of the costs of dispute resolution (RTA, s 67). Enforcement of the order is the sole responsibility of the applicant. If the monetary order is in favour of a tenant still living in the rental unit owned by the landlord that the order is against, the Arbitrator may direct the tenant to deduct the award from the rent (RTA, s 65(1)(b)). Rent should not be withheld unless the decision explicitly states this is allowed. If the monetary order is in favour of a landlord still holding part or all of the security deposit paid by the tenant, it may be deducted from the tenant's security deposit. If neither of these situations applies, one should give the other party a written request for payment stating the amount owing and requesting payment by the date on the order or within a reasonable time.

If the other party still does not pay, the order can be filed in the Small Claims Court.

2. Enforcing a Repair Order

If a landlord fails to make repairs as ordered by an Arbitrator, the tenant can apply for an order requiring compliance. The order to comply may include an order that the landlord reduces the rent until the repairs are complete.

3. Enforcing an Order of Possession

The purpose of an Order of Possession is to gain vacant possession of the rental premises. The landlord should first give a copy of the Order of Possession to each person named in the order. The best way to do this is to hand the copy to the other parties personally or by registered mail. The RTA also permits for the Order of Possession to be posted on the tenant's door. The tenant should be asked to move out of the rental unit within the time period given in the order. If a tenant does not comply with the order, the landlord must not attempt to physically remove the tenant by his or her own means (RTA, s 57(2)), as this is unlawful. Bailiff services, described below, can be used to lawfully remove the tenant.

a) Use of Bailiff Services

If the tenant does not comply with the order and does not vacate the rental unit on the date specified on the order, the Order of Possession can be filed in the Supreme Court of B.C. Registry. The landlord must fill out a Writ of Possession and an Affidavit (re: service) and take these completed forms with the Order of Possession to the Supreme Court. Once the documents are filed and stamped in the Supreme Court, the landlord may contact a court bailiff service. The Writ of Possession is then ready to be executed by the court bailiff.

Under s 9 of the Sheriff Act, RSBC 1996, c. 425, the landlord is required to give a deposit to the court bailiff against the costs of the execution of the writ. This deposit varies depending on the size of the rental unit. For example, $1,100 for a one-bedroom and $3,000 for a five-bedroom house will be required as a deposit for executing a seizure.

b) Bailiff's Procedure for Executing a Writ of Possession

The bailiff consults with the landlord to discuss attempting a "soft" eviction, which gives the tenant a chance to vacate on their own; this is generally what occurs. Tenants are generally allowed three to four days to vacate under a "soft" eviction.

If the bailiff executes a "hard" eviction, the bailiff enters the rental unit and removes the belongings, as well as the tenant if necessary. It is the responsibility of the bailiff to ensure that all of the tenant's belongings are safe and secure in storage. The bailiff may seize the tenant's possessions to sell in order to compensate the bailiff for the cost of the eviction.

NOTE: Sometimes third parties who are not named in the order (i.e. roommates) have their goods seized together with the tenant's. It is important to inform the Bailiff as soon as possible what goods do not belong to the tenant. These goods can usually be returned to the third party if he or she is not named in the order.

c) Role of the Police

Neither the police nor the RCMP has the authority to evict tenants. However, a court bailiff can forcibly evict a tenant on behalf of the landlord. The police may attend the occasion to prevent the breach of peace but they cannot play any role in evicting the tenant; however, the police will attend and remove the tenant if required to do so by the court bailiff.

D. Serving Documents: Giving and Receiving Notice under the RTA

The rules for serving the other party with documents depend on what is being served, and who is being served. This section sets out the basics of service, but for more detail or to check the requirements for your specific situation, you may need to check the Residential Tenancy Branch’s Residential Tenancy Policy Guideline #12.

1. Service Methods

Generally, items can be served in any of the ways listed below. Some items must be served in particular ways. For details on items that must be served only in certain ways, see the relevant section below.

Different service methods are “deemed” or considered served at certain times after the date on which they are served. Note that, if there is proof that the document was actually received earlier than the date it is deemed to be received, the document may be considered received on the day it was actually received.

a) Personal Service

For tenants serving a landlord, the tenant must serve by leaving a document by leaving a copy with the landlord or landlord’s agent. For a landlord serving a tenant, the landlord must leave a copy with the tenant, and in a case with multiple tenants, with each co-tenant separately.

Personal service requires physically handing a copy of the document to the person being served, and, if the person declines the document, leaving a copy of the document near the person, and informing the person being served of the nature of the document.

Persons can be served anywhere the person serving has legal access to, including in public streets and other publicly- or privately-owned areas open to the public.

b) Registered Mail

You may serve these items by sending them by registered mail (any Canada Post service with delivery confirmation to a named person) to the address for service of the other party. For landlords, this is where the landlord lives or carries on business as a landlord. This address may be listed on the lease or other document related to the tenancy. For tenants, this is the address where the tenant resides at the time of mailing or the forwarding address provided by the tenant.

Records indicating that a person refused to accept a piece of registered mail are considered proof of service. Registered mail is deemed received on the fifth day after mailing.

c) Ordinary Mail

This method is the same as service by registered mail, except that it is sent by ordinary postal service. Ordinary mail is deemed received on the fifth day after mailing.

d) Leaving a Copy of the Document at the Person's Residence with an Adult Person who Apparently Resides with the Person to be Served

This method involves leaving the document with a person 19 years or older who, from what can be seen, observed, and is evident from all the circumstances, resides with the person to be served. Such documents are considered personally served, and so considered served on the day they are delivered.

e) Leaving a Copy of the Document in a Mailbox or Mail Slot

This method involves leaving the document in a mailbox or mail slot. For serving tenants, this would be the place where the person to be served resides at the time of service. For landlords, this would be at the address for service identified in the tenancy agreement or on the Notice to End Tenancy the tenant is contesting, or the place where the person to be served carries on business as a landlord. You must make sure that the mailbox or mail slot actually belongs to the person being served, particularly where there are multiple boxes or slots for one building.

Documents left in a mailbox or mail slot are considered served on the third day after they are left

f) Posting

This method involves attaching a copy of the document to a door or other conspicuous place (a place that is clearly visible and likely to attract notice or attention). Placing a copy of the item under a door is not sufficient for service by "posting". For serving tenants, this would be where the person resides at the time of service, and for serving landlords, this would be at the address for service identified in the tenancy agreement or on the Notice to End Tenancy the tenant is contesting, or the place where they carry on business as a landlord.

Documents served by posting are considered served on the third day after they are attached.

g) Fax

You can serve a party by fax if they have provided a fax number as their address for service.

Documents served by fax are considered served on the third day after faxing them.

h) Substituted Service

If none of the above options are feasible, the Residential Tenancy Branch may order another type of service. In applying for substituted service, you must show that the party being served cannot be served by any of the methods listed and that there is a reasonable expectation that they will receive the documents if served in the manner being proposed.

2. Requirements for Specific Documents

a) Application for dispute resolution or Residential Tenancy Branch decision to proceed with a review of a decision

These items, with the exception of applications by landlords for an order of possession or an order ending a tenancy early, may only be served by personal service, registered mail, or by another service method authorized by an order for substituted service.

b) Application by a landlord for an order of possession or an order ending tenancy early

These items can only be served by personal service, registered mail, posting, or by another service method authorized by an order for substituted service.

3. Address at Which the Landlord Carries on Business as a Landlord

To quote from **RTB policy guideline #12**: "A landlord may operate a business as a landlord from one location and operate another business from a different location. The Legislation does not permit a tenant to serve a landlord in one of the ways set out above at the address where the landlord carries on that other business unless the landlord also carries on his or her business as a landlord at that same address.

If the landlord disputes that he or she has been served in one of the permitted ways at the address where he or she carries on business as a landlord, or if the landlord does not attend the hearing, the tenant will have to provide sufficient evidence to the Arbitrator to prove that the address used is, in fact, the address at which the landlord carries on business as a landlord."

The address at which the landlord carries on business as a landlord may be:

- Set out in the tenancy agreement
- The landlord's office or resident manager's suite in an apartment building
- The address where the landlord resides
- A separate business address in an office or storefront location.

4. Proof of Service

Where service has been affected and a party fails to appear at a hearing, the other party should be prepared to prove that service was affected. For personal service, this can be done by having the person who actually served the other party appear as a witness at the hearing or provide a signed statement with details about service. For personal service on another adult apparently residing with the other party, details should be included about the date and time of service, identity of the person served, and description of how it was confirmed that the person apparently resides with the party being served. For registered mail, a Canada Post tracking printout providing information about the delivery of the registered mail item and the signature of the recipient will suffice. Proof of service by other methods should include details about the date, time, identity of persons served, address where notice was posted, fax number or mailbox information, and any other relevant information. Photographs of service can be valuable in proving that service occurred.

E. Review of Arbitrator's Decision

1. Application for Review of Arbitrator's Decision

Under the RTA, s 79(2), an application may be made for Review of the Decision or Order, only if:

a) the party was not able to attend the original hearing due to circumstances that could not be anticipated and were beyond his or her control;

b) there is new and relevant evidence that was not available at the time of the original hearing; or

c) a party has evidence that the Arbitrator's decision or order was obtained by fraud.

The Application for Review does not include an oral hearing. The written application for review must, therefore, be complete and exact, with all necessary documents attached. Note that an Application for Review is not an opportunity to re-argue the facts of the case.

NOTE: There is a filing fee, which cannot be recovered, but which can be waived under the same circumstances for which the original application fee can be waived.

NOTE: Applicants who seek a review of an RTB decision should be aware of the BC Court of Appeal's decision in *Sereda v Ni* 2014 BCCA 248. That decision provides that, where an internal review decision is judicially reviewed, only that decision, and not the initial dispute resolution decision, can be reviewed by the court. This position has been softened somewhat by the same court's decision in *Yee v Montie*, 2016 BCCA 256, and by the BC Supreme Court's decision in *Martin v Barnett*, 2015 BCSC 426, which provides a clear overview of the issue. Individuals dissatisfied with the result of a first RTB proceeding should still, however, consider, if the timelines in their situation allow, seeking legal advice on what their best course of action is in seeking to have the decision reviewed.

2. Time Limits for Launching a Review

There are strict time limits in the RTA for launching a review. For orders of possession (s 54, 55, 56, 56.1), unreasonable withholding of consent (s 34 (2)) and notice to end tenancy for non-payment of rent (s 46) the time limit is two days. For a notice to end a tenancy agreement other than under s 46, repairs or maintenance under s 32, and services or facilities under s 27, the time limit is five days. For other orders, the time limit is 15 days (RTA s 80).

A review application is not a stay of proceedings but can act as one since court enforcement of an Arbitrator decision requires the landlord/tenant applying for the enforcement to swear to court that they have confirmed with RTB that there is no review application consideration pending. A stay of proceedings can also be requested separately through the Supreme Court.

3. Successful Application for Review

If a party is successful in his or her Application for Review, that person will receive a written decision from the Arbitrator permitting the review to proceed. The original decision would be set aside, and a new hearing date would be scheduled.

The Arbitrator's decision permitting review must be served on the other side within three days of receiving the decision. The same method of service must be used as outlined above for a Notice of Hearing package.

4. Review by the Supreme Court of B.C.

An Arbitrator's decision can also be reviewed by the Supreme Court of B.C. under the Judicial Review Procedure Act, RSBC 1996, c 241. The RTA contains a privative clause (s 84.1) which narrows the scope of the review. It is not a new trial. The Supreme Court of B.C. generally would conduct a review if there were:

• Patently unreasonable error of fact or law

• Patently unreasonable breach of procedural fairness

When a decision is overturned by the court, the case is usually returned to an Arbitrator to be reheard. Due to the complexity of operating in the B.C. Supreme Court, a lawyer should be involved for a judicial review in B.C. Supreme Court. It is important to get legal advice and act quickly. The Community Legal Assistance Society (CLAS) (604-685-3425) is available to assist with judicial reviews of Arbitrators' decisions and is especially interested in helping with potential test cases.

NOTE: Losing a judicial review may result in an award of costs, meaning that the losing party must pay the legal costs of the other party.

5. Filing Complaints to the RTB

Complaints about information officers, dispute resolution hearings, or general services of the RTB must be put into writing and mailed to the Executive Director of the RTB:

P.O. Box 9844 Stn Prov Govt Victoria, B.C. V8W 9T2

Complaints can also be made to the BC Ombudsperson. More information can be found at www.ombudsman.bc.ca. Note that the BC Ombudsperson does not review decisions; they can only investigate complaints where a person feels that RTB staff has treated them unfairly.

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July 29, 2019.

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XII. Common Law

Since a tenancy agreement has elements of both contract and interest in land, privity of contract and privity of estate exists between the parties to the agreement. Covenants relating to either the estate or the agreement are enforceable between such parties. Where either the reversionary (landlord) or the tenant assigns his or her interest, privity of estate only exists between the assignee and the remaining original party. Terms and covenants that run with (touch and concern) the land are enforceable between these parties. One of the more common situations involving a covenant running with the land is where a security deposit is paid to a landlord, and the property is then subsequently sold. After the building is sold to the second landlord, the security deposit obligations carry over to that second person. So a tenant who had lived in the building all along would be able to claim the return of his or her security deposit from a new landlord, even though the tenant had originally paid the security deposit to a different person. See s 90 of the RTA regarding covenants that run with the land.

A sub-lessee has privity of estate and contract with the head landlord and is bound by all the covenants in the original lease.

Covenants in leases are independent at common law, which means that one party's breach does not relieve the other party of performance obligations unless the lease is forfeited. The innocent party in a tenancy breach situation is under no duty to mitigate damages under the common law of property. However, s 7(2) of the RTA invokes a clear-cut duty to do so in a residential tenancy (see also RTB Policy Guideline 5: Duty to Mitigate). For commercial tenancies or other residential leases to which the RTA does not apply, the courts have begun to view them as contracts with all attendant rights and obligations, including the duty to mitigate where the plaintiff is seeking damages under contract (as opposed to property) law; see *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.* (1971), 17 DLR (3d) 710 (SCC). However, there appears to be no duty to mitigate where the landlord does not accept the tenant's repudiation of the lease, and simply sues for rent as it comes due under the principles of property law. Should this situation arise, clients are strongly advised to consult an experienced lawyer.

A. Common Law and Residential Tenancies

Subject to the RTA, the common law respecting landlord and tenant applies (RTA, s 91).

1. General Effects of Breach of the Agreement

The common law rules of contract respecting the effect of one party's breach of a material term on the other party's performance obligations apply to a residential tenancy agreement (RTA, s 91; see also **Chapter 10: Consumer Protection**). Thus, material terms are dependent, and the innocent party is entitled to withhold performance. However, withholding rent because a landlord has breached a material term is barred by the RTA. A tenant may withhold rent only as permitted by the RTA.

Under the law of contract, a party may not be able to repudiate a contract due to another's breach of a non-material term, but a right of "forfeit" can arise under tenancy common law. Under s 45(3) of the RTA, where the landlord breaches a material term, the tenant may elect to treat the agreement as ended (an Arbitrator may have to decide whether a term is "material"). The landlord may end the tenancy only in accordance with the RTA, because of abandonment, or due to an agreement. The RTA does not abolish the doctrines of privity of estate and contract, but it enables a person having a reversionary interest (i.e. a landlord) and a tenant under the RTA to enforce against each other all conditions and terms, whether material or not, contained in the tenancy agreement for the possessed rental unit (s 49(1)).

See also **RTB Policy Guideline 8: Unconscionable and Material Terms**.

2. Status of Other Statutes and Legal Doctrines

a) Tenant Rights before Possession

At common law, where an agreement for lease is entered into, or a tenancy agreement executed, and a tenant has not entered and taken possession, that tenant has only contractual rights. The tenant may not exercise rights incidental to the possession of the property by suing a person in possession of or upon the rental unit for trespass, assigning, or subletting the rental unit. However, s 16 of the RTA provides that property and contractual rights under a residential tenancy agreement take effect at law from the date the agreement is entered into. The tenant may obtain an order respecting his or her right to possess or occupy the rental unit. Problems will arise when another tenant has come into possession; the tenant with the earlier commencement date may prevail over the later tenant, but the tenant in possession will probably be allowed to remain in possession.

b) Implied Surrender: Abandonment

At common law, a lease may be ended by "surrender" due to conduct of the parties, consistent only with a "merging" of the tenancy interest back into the landlord's (owner's) estate. Surrender occurs, for example, where the tenant abandons the rental unit and the landlord repossesses and re-rents. Generally, no further rent or compensation for the unexpired portion of the tenancy may be claimed on surrender. However, following Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd. (above), claims for lost rentals are allowed.

Abandonment is cause for ending a tenancy, but regardless of the wording of the tenant's notice, or the wording of the acceptance of surrender, or the absence of a notice, abandonment gives rise to the landlord's duty to mitigate.

c) Frustration

The doctrine of frustration applies to residential tenancy agreements (RTA, s 92) and commercial leases (Commercial Tenancy Act, s 30). If some unforeseen event occurs that prevents the agreement from being performed, it will be considered to have been frustrated and is thereby terminated at the time of the event. Frustration will rarely be found where the event appears to be largely self-induced (and the result of acts or omissions which might themselves constitute a breach of covenant, e.g. a municipal closure order made pursuant to a fire bylaw where the landlord failed to install sprinklers). If the event is totally self-induced, the perpetrator will not be able to establish frustration. Two factors to consider beyond the normal contract law concerns are: 1) the length of the unexpired term at the time of frustration, and 2) the possibility of alternative use of the rental unit. If the lease is one to which the RTA doesn't apply, by common law the doctrine of frustration would not apply.

d) The Right to Distrain the Tenant's Personal Goods

Under the RTA, a landlord has no right to distrain (i.e. seize) a residential tenant's personal goods for default in rental payment, nor may the landlord seize a tenant's personal goods to satisfy another claim or demand, unless the seizure is made by a person authorized by a court order or an enactment (s 26(3) and (4)). If a landlord seizes goods contrary to s 26(3), the tenant may apply to the court for an order to return the property, or for a monetary claim for damages. A landlord may, where personal property has been abandoned by the tenant, remove it from the residential property, and must deal with it in accordance with the Residential Tenancy Regulations, which impose specific obligations on landlords in these circumstances. See Sections 24 and 25 of the RTR for specific obligations of landlords.

B. Damages, Debts, Compensation, and Specific Performance

Where an enforceable term or condition has been breached, a number of remedies are available. The availability of remedies is restricted, however, by the type of breach (i.e. material term, or not) and conduct involved.

1. Termination (Ending the Tenancy)

A term's breach may entitle the innocent party to put an end to the agreement, and either regain possession (landlord) or vacate the rental unit (tenant). Compensation or damages, in addition to termination, may also be available. However, it is risky to assume a breach is fundamental enough to put an end to an agreement, for if the party who makes that assumption is wrong, they may be held to be in breach and liable for damages. It is better to have such matters adjudicated.

2. Damages

A person suffering loss due to the breach of an express, implied, or statutory term may apply for damages through dispute resolution under s 58(1) of the RTA, or, if not precluded by the RTA, by civil action in Small Claims or Supreme Court. Damages may be available where the tenant harms or destroys property. See **RTB Policy Guideline 16: Claims in Damages**.

3. Debt

Under s 6 of the RTA, action for debt may be taken for rent arrears, e.g. a tenant does not pay their rent in full.

4. Duty to Mitigate

Under s 7(2) of the RTA, any time a monetary claim arises between landlord and tenant, both have a duty to mitigate damages (i.e. minimize losses). For example, if a tenant breaks a lease that was for a fixed term of one year, the landlord could sue the tenant for the balance of the rent payments. Nonetheless, the landlord has a duty under s 7(2) to try to minimize his or her loss by re-renting the rental unit as soon as possible, rather than just suing the tenant for the whole year's rent. A landlord who makes such a claim must prove that they took reasonable steps to re-rent the unit and was not able to do so. See **RTB Policy Guideline 5: Duty to Mitigate Loss**.

5. Compensation

An Arbitrator may award compensation to a party (a tenant or landlord) who has suffered a direct loss due to a contravention of the RTA by the other party.

Only persons who are party to the tenancy agreement have the right to enforce said agreement.

Section 95 is a penalty section, which states that breaches of the listed sections (mostly landlord breaches) are punishable by fine. Recently, the RTB has established a Compliance and Enforcement Unit to conduct investigations of repeated or serious non-compliance with tenancy laws or orders of the Residential Tenancy Branch, issue warnings to ensure compliance and if necessary, administer monetary penalties.

The Compliance and Enforcement Unit only handles cases in which all attempts to resolve the issue through the RTB has been made, yet there is still no compliance. Usually, the first step that the unit takes would be simply informing the parties of their responsibilities. For continued non-compliance, fines of up to $5000 per day may be levied.

Example of matters that the unit investigates:

- Renters repeatedly not paying rent

• Landlords repeatedly attempting to evict renters illegally

• Refusal to complete health and safety repairs; and

• Illegal rent increases

C. Joint Hearing

RTA cannot make orders for landlords and tenants not participating in a hearing, so class action lawsuits do not exist for RTB hearings. However, tenants can seek a joint hearing where they can join their claims into a single hearing. If several tenants seek a joint hearing, under the RTA, they must apply separately for Dispute Resolution and then submit an application to join their claims together. The scheduled hearing date may then be a preliminary hearing to allow the parties a chance to argue why the matters should or should not be joined, or an Arbitrator may decide to immediately hear the cases jointly without the consent of the landlord

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XIII. Strata Law

The *Strata Property Act* (SPA)and the *Strata Property Regulation* (SPR) govern strata properties. Persons renting a residential condominium are tenants under the RTA. Such tenants are also subject to Parts 7 and 8 of the SPA. Below is a brief description of the SPA as it relates to landlords and tenants.

A. The Law Under the Strata Property Act

The definition section refers to both “landlord” and “tenant”. A tenant is a person who rents all or part of a strata lot, and includes a sub-tenant, while a landlord can include a tenant who rents to a sub-tenant.

Part 7 of the SPA covers bylaws, rules, fines, and eviction (ss 119 - 138):

• s 120 provides for standard form bylaws, which can be amended;

• s 123 states that a bylaw prohibiting pets does not apply to a pet already living with a tenant when the bylaw is passed. This section also deals with age bylaws. Tenants can be well-served by reviewing the Human Rights Code to see if the bylaw is enforceable (see s 121(1)(a) of the SPA as it relates to age). Specifically, see section 10 of the Human Rights Code;

• s 124 states that bylaws can provide for a voluntary dispute resolution process to settle disputes between owners, tenants, and the strata corporation. It also states that statements or documents made only for the purpose of such voluntary dispute resolution cannot be reused at other legal proceedings;

• s 125 gives the strata corporation the power to make rules governing use, safety and condition of the common property and assets;

• s 130 permits fines to be levied if a tenant or his or her guest contravenes a bylaw or rule; Section 7.1 of the SPR gives the maximum amount and frequency by which a fine can be levied.

• s 131 provides that the strata corporation may collect fines levied against a tenant both from the tenant and from a landlord/owner. If the landlord/owner pays a fine levied against the tenant, the tenant owes the landlord/owner the

amount paid; section 7 of the RTA, sets out "fees" that landlords can charge provided they do not contradict s 131 of the SPA, subject to a duty to mitigate by both sides;

• s 133 allows for the strata corporation to also recover reasonable costs of remedying a contravention of the bylaws from the person whom they fined pursuant to s 130;

• s 134 states that the strata corporation may, for a reasonable length of time, deny a tenant the use of a recreational facility that is common property in the strata if the tenant (or guest of the tenant) has contravened a bylaw or rule relating to the recreational facility;

• s 135 states that the strata corporation must not impose fines or deny the use of recreational facilities unless the particulars of a complaint have been given in writing and reasonable opportunity is given to answer the complaint, including a hearing if requested by the tenant. The strata corporation must also give prompt notice in writing of any decision it reaches concerning a fine or denial of recreational facility.

NOTE: This is a highly technical section. Often strata corporations do not comply with it very well and technical defences are available on a close reading of the section and the correspondence on the file;

• s 137 permits a landlord to issue a one-month Notice To End Tenancy under RTA s 47 for "a repeated or continuing contravention of a reasonable and significant bylaw or rule by a tenant"; and

• s 138 permits the strata corporation to issue a one month Notice To End Tenancy under RTA s 47 for "a repeated or continuing contravention of a reasonable and significant bylaw or rule… that seriously interferes with another person's use and enjoyment of a strata lot, the common property or the common assets".

• NOTE: As a practical matter, it may be difficult for a Strata Corporation to evict a tenant, despite ss. 137-138 because the Residential Tenancy Branch has been unwilling to recognize a Strata as a "Landlord" as defined in the RTA.

Part 8 of the SPA governs "rentals" (ss. 139-148):

• s 141 permits a strata corporation to pass a bylaw restricting rentals by prohibiting rentals entirely, limiting the number or percentage of units that may be rented, or limiting the period of time for which units may be rented (i.e. requiring fixed term tenancies).

• Other than the above points, a strata corporation is not permitted to regulate, restrict, or otherwise interfere with the rental of strata property in any way.

• s 142 provides that "restrictions" do not apply to prevent rental of a unit to a member of the owner's family, "family" is defined in the Regulations, s 8.1.

• s 143 (1) states that any bylaw that restricts or prohibits strata rentals would not take effect on existing tenants. The bylaw would not apply on that particular lot until either a year after the tenancy has ended or a year after the bylaw takes effect, whichever is later.

• s 144 permits an owner to apply for exemption from a rent restriction bylaw in cases causing hardship to the owner. "Hardship" is not defined and will depend on the facts of the case. Mere financial difficulty is often not enough.

• s 145 provides that if a tenant is renting without knowledge of a rental restriction bylaw, the tenant has not contravened the bylaw and may end the tenancy agreement without penalty by giving notice to the landlord within 90 days of finding out about the bylaw. Also, the tenant can claim reasonable moving expenses in such a situation to a maximum value of one month's rent. However, there is no corresponding section in the RTA, and the right to tenancy MUST come from the RTA. Tenants cannot solely rely on SPA s 145 to end a tenancy.

• s 146 puts the responsibility on the landlord to provide a copy of a Form K to a tenant to sign, and to provide a copy of the Form, once signed, to the strata corporation. Tenants are bound by the bylaws and rules of the strata whether or not they are provided with one. A landlord must provide a Form K to the tenant, and they can also force the tenant to sign it.

It is important the tenant reads the bylaws before signing, as the tenants are bound by the rules and bylaws, and can be held liable for any contraventions

• s 146(3)(b) and (4) purport to allow a tenant to end a tenancy and claim reasonable moving expenses if the landlord does not provide a Form K, but there is no corresponding section in the RTA, so tenants likely cannot rely upon this as a means for ending a tenancy.

• s 147 allows an owner to assign to a tenant some or all the powers and duties of a landlord under the Strata Property Act, with the exception of the landlord's responsibility for fines and costs of remedying a contravention of the bylaw (as per SPA s 131).

• This must be done in writing and copied to the strata corporation;

• s 148 defines a "long term lease" as a lease for a set term of three years or more. Such a lease confers the powers and duties of the landlord onto the tenant for the term of the lease, with the exception of the landlord's responsibility to pay fines as per SPA s 131. The landlord must not deal with his or her interest in the strata lot during a long-term lease in a way that would unreasonably interfere with the rights of the tenant.

NOTE: All legislation related to strata property can be found on a single web page on https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/legislation-and-changes/strata-legislation#sources

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XIV. Assisted Living

The RTA does not cover Assisted Living nor most Supported Living Tenancies. These would fall under the *Community Care and Assisted Living Act*.

NOTE: In September 2013, the B.C. Law Institute published a report after a three-year review regarding drafting legislation on Assisted Living and Residential Care tenancies. The Report on Assisted Living in British Columbia is available online at www.bcli.org/publication/report-on-assisted-living-in-british-columbia.

Hospitality service may include meal services, laundry services, social and recreational opportunities or a 24-hour emergency response system. Personal care services would include assistance with eating, grooming, bathing, etc.; storage and distribution of medications; supervision of cash and property; nutrition monitoring; behavior management; or psychosocial rehabilitation. Tenants and landlords entering into assisted/supported living arrangements need to sign tenancy agreements and need to sign separate service agreements specifying which services are included and on what terms. A service agreement should cover:

• the hospitality services and personal care services provided to each occupant of the rental unit;

• the amount payable for these services and when it is due;

• the landlord's entry into the rental unit to provide services; and

• whether there is a requirement for other occupants and guests to pay for services that are not needed.

More information on assisted living services can be found at the website of the Assisted Living Registry at www.health.gov.bc.ca/assisted/residents/.

Fees for these services should not be part of a lump-sum monthly bill but should be set out separately from the rental fee. A landlord can increase the rent if the tenant agrees, or once a year by a percentage permitted by law. The landlord must give the tenant three whole rental months' written notice before the effective date of the rent increase. A landlord will not be permitted to withdraw or restrict rental services if they are essential, or if they constitute material terms of the rental agreement.

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XV. Commercial Tenancies

Generally speaking, the RTA does not cover tenancies that are made for a commercial purpose (i.e. Renting a space to open a store). These tenancies would be covered by the Commercial Tenancy Act, RSBC 1996, c 57. Commercial tenancy law is much more complex than residential tenancy law, and individuals who believe they may have a legal issue related to a commercial tenancy are strongly encouraged to seek legal advice relevant to their individual situation.

1. Commercial or Residential Tenancy?

If you are unsure as to whether your tenancy is commercial or residential, and so whether or not it falls within the Residential Tenancy Act, you should seek legal advice. For assistance in determining whether your tenancy is commercial or residential, it may be helpful to refer to Residential Tenancy Branch Policy Guideline no. 14: Type of Tenancy: Commercial or Residential.

2. Commercial Tenancy Resources

If you encounter an issue related to a commercial tenancy, resources that may be of assistance are listed in the "Resources" section at the end of this chapter. in the "Resources" section at the beginning of this chapter.

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XVI. Mobile Homes

A. General

In 2004, the Manufactured Home Park Tenancy Act, (MHPTA)was given effect in order to meet the unique needs of landlords of manufactured home parks and owners of manufactured homes who rent the site on which their homes sit. If one rent both the manufactured home and the pad it sits on, the tenant is covered by the RTA, and therefore has the same legal rights as other tenants in British Columbia.

A landlord may authorize assignment or sublease of a manufactured home park site in a tenancy agreement. The agreement should also include information about the proportionate amount of increases to regulated utilities and local government levies. The inflation rate for each calendar year is available on the RTB website. See the Manufactured Home Park Tenancy Regulations.

B. Definitions

1. Common Area

A Common Area is defined as any part of a manufactured home park the use of which is shared by tenants or by a landlord and one or more tenants.

2. Landlord

Includes the owner of the manufactured home site; the owner's agent or another person who permits occupation of the manufactured home site under a tenancy agreement on the landlord's behalf; the owner's heirs, assignees, personal representatives and successors in title; a person, other than a tenant whose manufactured home occupies the manufactured home site, who is entitled to possession of the manufactured home site and exercises any of a landlord's rights under a tenancy agreement or the MHPTA in relation to the manufactured home site.

3. Manufactured Home

Means a structure, whether or not ordinarily equipped with wheels, that is designed, constructed or manufactured to be moved from one place to another by being towed or carried, and used or intended to be used as living accommodation.

4. Manufactured Home Site

This is a site in a manufactured home park, rented or intended to be rented to a tenant for the purpose of being occupied by a manufactured home.

5. Cannabis

With the legalization of cannabis in BC, changes to the MHPTA were implemented around growing and smoking cannabis.

• If a tenancy agreement included a "no smoking" clause and did not explicitly allow for smoking cannabis, then the "no smoking" clause is deemed to apply to smoking cannabis. This also applies to any clauses that restrict or regulate smoking. (MHPTA s 18.1 (2))

NOTE: For the purpose of MHPTA s 18.1 (2), vaporizing a substance containing cannabis is not "smoking cannabis."

• All existing tenancy agreements would be implied to have terms prohibiting growing cannabis on the outdoor areas or common areas of the home park or home site unless:

1. the tenant is growing, in an outdoor area of the manufactured home park, one or more cannabis plants that are medical cannabis,
2. growing the plants is not contrary to a term of the tenancy agreement, and
3. the tenant is authorized under applicable federal law to grow the plants at the manufactured home park and the tenant is in compliance with the requirements under that law with respect to the medical cannabis.

C. Moving In and Moving Out

Landlords may require a tenant to provide proof of third party liability insurance held by the mover as security against damages caused by the move of a home into a park or out of a park (MHPTA, s 29).

Prior to a person's entering into a tenancy agreement with a landlord, the landlord must disclose in writing to that person all rules in effect at the time of his or her entering into the tenancy agreement.

According to MHPTA s 30, when moving out the tenant must leave the manufactured home site reasonably clean and give the landlord all the keys or other means of access to or within the manufactured home park that are in the tenant's possession.

NOTE: "To and within the manufactured home park" means that keys or other such items that unlock, for example, a bathroom within the home park are also included in the category controlled by MHPTA s 30.

D. Deposits

1. Security Deposits

A landlord cannot require or accept a security deposit in respect of a manufactured home site tenancy. If a landlord accepts a security deposit from a tenant, the tenant may deduct the amount of the security deposit from rent or otherwise recover the amount (MHPTA, s 17). Security deposits held by landlords before the effective date of the MHPTA may be retained until the end of the tenancy. As the MHPTA was assented to in Nov. 2002, this would only apply in long-standing tenancies as of the time of writing (2019). A landlord who does not return or file a claim against the deposit at the end of tenancy could be required to pay the tenant double the amount of the deposit.

2. Pets

Landlords may not charge pet damage deposits but may include terms in the tenancy agreement that prohibits pets or restricting the size, kind, and number of pets. Landlords may also add terms that govern the tenant's obligation regarding keeping their pets on the manufactured home site.

3. Fees

a) Prohibited Fees (MHPTA, s 89(2)(k); MHPTR, s 3)

A landlord must not charge:

• a guest fee, whether or not the guest stays overnight; or

• a fee for replacement keys or other access devices if the replacement is required because the landlord changed the locks or other means of access.

b) Refundable Fees

So long as an access device is not a tenant's sole means of access to the manufactured home park, a landlord may charge a refundable fee for that device. The fee cannot be greater than the direct cost of replacing the access device.

Some non-refundable fees are permissible (e.g. a $25 charge for late payment of rent or NSF cheques) as long as the fees are identified in the tenancy agreement. A list of permissible non-refundable fees are listed in the Manufactured Home Park Tenancy Regulations (MHPTR) s 5.

E. During the Tenancy

1. Rent Increases

a) Amount

Landlords are able to increase rent annually by a percentage equal to the Consumer Price Index (CPI) plus the proportionate increase in local government levies and regulated utilities (MHPTA, s 36(1)(a) and see MHPTR Part 5). A landlord may apply to an Arbitrator for approval of a rent increase in an amount that is greater than the amount calculated under the regulations.

NOTE: A landlord may apply under s 36 of the MHPTA for an additional rent increase above the rent increase formula but can only do so under certain circumstances: see MHPTR, s 33(1) for a list of requirements for when the landlord is allowed to do so.

b) Notice

A landlord must give a tenant notice of a rent increase at least three months before the effective date of the increase, the notice of increase must also be in the approved form. If the increase does not meet these two requirements, the notice takes effect on the earliest date that it does comply (MHPTA, s 35(2)).

c) Timing

A rent increase cannot be imposed for at least 12 months after whichever of the following applies (MHPTA, s 35(1)):

• if the tenant's rent increase has not previously been increased, the date on which the tenant's rent was first established; or

• if the tenant's rent has previously been increased, the effective date of the last rent increase made in accordance with this MHPTA.

F. Manufactured Home Park Rules and Committee

In accordance with s 31 - 33 of the MHPTA and the associated regulations, the landlord and tenants of a manufactured home park may establish and select the members of a park committee. A park committee must make all of its decisions by unanimous agreement of all members of the committee (MHPTR s 22), except resolutions regarding secret ballots made under MHPTR, s 23(8), which must be decided by majority vote.

A park committee, or if none exist, the landlord, may establish, change or repeal a rule if it is reasonable in the circumstances and if the rule has one of the following effects (MHPTR, s 30):

• it promotes the convenience or safety of the tenants;

• it protects and preserves the condition of the manufactured home park or the landlord's property;

• it regulates access to or fairly distributes a service or facility; or

• it regulates pets in common areas.

The rule must not be inconsistent with the MHPTA or the regulations. A rule established, or changed is enforceable against a tenant only if (MHPTR s 30(3)):

• the rule applies to all tenants in a fair manner;

• the rule is clear enough that a reasonable tenant can understand how to comply with the rule;

• notice of the rule is given to the tenant in accordance with s 29 (disclosure); and

• the rule does not change a material term of the tenancy.

G. Tenancy Agreements

Landlords and tenants may agree to any term so long as the term is not an attempt to avoid or contract out of the MHPTA or the regulations. Any attempt to avoid or contract out of the MHPTA or regulations is of no effect (MHPTA, s 5). Furthermore, a term will not be enforced if it is found to be unconscionable, or the term is not expressed in a manner that clearly communicates the rights and obligations under it. The rights and obligations established by or under the MHPTA are enforceable between a landlord and tenant under a tenancy agreement.

1. Liability for Non-compliance

If a landlord or tenant does not comply with the MHPTA, the regulations, or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results (s 7(1)).

NOTE: The innocent party always has a duty to mitigate their losses.

2. Tenant's Right to Quiet Enjoyment

A tenant is entitled to quiet enjoyment including but not limited to the following (MHPTA, s 22):

• reasonable privacy;

• freedom from unreasonable disturbance;

• exclusive possession of the manufactured home site subject only to the landlord's right to enter the manufactured home site in accordance with MHPTA section 23; and

• use of common areas for reasonable and lawful purposes, free from significant interference.

H. Ending a Tenancy

A tenancy ends only if one or more of the following applies (MHPTA, s 37(1)):

• the tenant or landlord gives notice to end the tenancy in accordance with one of the following:

- s 38 (tenant's notice);
- s 39 (landlord's notice: non-payment of rent);
- s 40 (landlord's notice: cause); s 41 (landlord's notice: end of employment);
- s 42 (landlord's notice: landlord's use of property); or,
- s 43 (tenant may end tenancy early).

NOTE: Each of these sections sets out notice requirements. It is important that any notice given meets the form and content requirements set out in MHPTA, s 45.

• the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the manufactured home site on the date specified as the end of the tenancy;

• the landlord and tenant agree in writing to end the tenancy;

• the tenancy agreement is frustrated; or

• an Arbitrator orders that the tenancy is ended.

• the tenancy agreement is a sublease agreement.

1. Tenant's Notice

a) Periodic

A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that is:

• not earlier than one month after the date the landlord receives the notice; and

• is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

b) Fixed Term

A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is:

• not earlier than one month after the date the landlord receives the notice,

• is not earlier than the date specified in the tenancy agreement as the end of the tenancy; and

• is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(1) Exception for Family Violence or Long-Term Care

Section 45.1 of the RTA allows tenants who have been assessed as requiring long-term care, have moved into a long-term care facility, or have been confirmed as being at risk of family violence if they remain in the rental unit, may end a fixed-term tenancy by giving one month's notice to the landlord. See Section Forced End of Tenancy (Termination/Eviction), above.

c) Material Term Breach

If the landlord breaches a material term, the tenant may end the tenancy by giving the landlord notice to end the tenancy effective on a date that is after the date the landlord receives the notice.

2. Failure to Pay Rent

A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives notice (MHPTA, s 39(1)). Notice given under this section must comply with the form and content requirements found in s 45. A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under the MHPTA to deduct from rent, or if rent is paid within five days of receiving the notice to end tenancy, or if the tenant disputes the notice by applying for dispute resolution. However, if the tenant does not dispute the notice and does not pay the amount owed the landlord can go to the Residential Tenancy Branch and apply for an Order of Possession without a hearing.

NOTE: After the allocated 5 days to pay overdue rent, the landlord is no longer legally obligated to accept any late rent to continue to tenancy.

3. Landlord's Use

A landlord may end a tenancy agreement by giving notice to end the tenancy agreement if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to convert all or a significant part of the manufactured home park to a non-residential use or a residential use other than a manufactured home park (MHPTA, s 42(1)). A notice to end a tenancy under this section must end the tenancy effective on a date that is:

• not earlier than 12 months after the date the notice is received; and

• is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Once a tenant receives a 12-month notice, the tenancy will end 12 months after the notice is received, regardless if it is a periodic tenancy or a fixed term tenancy with a remaining term longer than 12 months, and the tenant must vacate the manufactured home park before that date.

A tenant who is given a 12-month notice may end their tenancy early if they give the landlord 10 days' written notice in accordance to MHPTA s 43.

A landlord that makes a 12-month notice must compensate the tenant $20000 on or before the effective date of the notice. The tenant can apply for dispute resolution for additional compensation between the assessed value of the home and $20000 if:

• They are not able to obtain the necessary permits, licenses, approvals or certificates required by law to move the manufactured home OR they are not able to move the manufactured home to another manufactured home site within a reasonable distance of the current manufactured home site; AND

• The tenant does not owe any tax in relation to the manufactured home. If the above situation happens and the home cannot be moved out of the park, the landlord cannot claim reimbursement from the tenant for any cost incurred for removing, storing, advertising, or disposing of the manufactured home.

• If the landlord closes a manufactured home park to be converted for residential or non-residential use (s. 42(1)) but have not taken any steps to accomplish the stated purpose in a reasonable time after the effective date of the notice, the landlord would have to compensate the tenant $5000- or 12-months' rent, whichever is higher. However, if an Arbitrator determines there are extenuating circumstances, this compensation can be excused.

4. Landlord's Notice: Cause

Refer to s 40(1) of the MHPTA; it is similar to the RTA section regarding Landlord's Cause.

NOTE: Notice to end tenancy must take effect on a date that is:

• not earlier than one month after the date the notice is received, and

• the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

5. Disputing Notice

Notices of termination or eviction can be disputed by applying for dispute resolution, but must be done so within the following set time limits that start running after the date the tenant receives the notice:

• non-payment of rent: five days;

• landlord's cause: 10 days; and

• landlord's use of property: 15 days.

6. Required Form

In order to be effective, a notice to end tenancy must be in writing and must be signed and dated by the landlord or tenant giving the notice, give the address of the manufactured home site, state the effective date of the notice, except for a notice under s 38(1) or (2) (tenant's notice), state the grounds for ending the tenancy, and when given by a landlord be in the approved form (RTB Form) (MHPTA, s 45).

I. Dispute Resolution

Disputes between landlords and tenants may be resolved by applying to dispute resolution at the Residential Tenancy Branch in the same manner as for an ordinary residential tenancy. The following are typical examples of issues that may lead to a need for dispute resolution:

• rights and prohibitions under the MHPTA;

• rights and obligations under the terms of a tenancy agreement that are required or prohibited under this MHPTA;

• tenant's use, occupation or maintenance of the manufactured home site; and

• the use of the common areas or services.

A dispute between landlord and tenant generally has to be dealt with in dispute resolution unless the claim is for more than the monetary limit under the Small Claims Act ($35000 as of June 2019), the application was not filed within the application period before the Supreme Court, or the dispute is linked substantially to a matter that is before the Supreme Court.

See MHPTA s 52(1) on starting dispute resolution proceedings. Proceedings can be started by either the landlord or the tenant filing an application for dispute resolution with the director. The application must be in the approved form and include full particulars of the dispute and be accompanied by the fee; it is possible for this fee to be waived.

NOTE: If the MHPTA does not state a time by which an application for dispute resolution must be filed, it must be filed within two years of the date that the tenancy to which the matters relates ends or is assigned (MHPTA, s 53(1)).

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XVII. Income Assistance

A. Shelter Aid for Elderly Renters (SAFER)

The SAFER program is a rental assistance program administered by BC Housing. It is intended to help senior citizens (i.e. people over 60). Applicants must be Canadian citizens, authorized to take up permanent residence in Canada, or Convention refugees. Applicants must have lived in B.C. for at least one year prior to applying. An applicant must also be paying over 30 percent of his or her income towards rent. There is a gross monthly income requirement that varies depending on the location of residence and is subject to being updated.

Residents of subsidized housing, cooperative housing, and manufactured homes (unless they are renting both the trailer home and the pad) do not qualify for the SAFER program.

More information and application forms are available from B.C. Housing. Application forms are available in English and Chinese. Application forms may be obtained from the SAFER's webpage at:

https://www.bchousing.org/housing-assistance/rental-assistance/SAFER.or contact:

B.C. Housing Suite 101 - 4555 Kingsway Burnaby, B.C. V5H 4V8 Toll-free: 1-800-257-7756 Lower Mainland: 604-433-2218

B. BC Housing Corporation's Family Rental Assistance Program (RAP)

The Rental Assistance Program provides eligible low-income, working families with at least one dependent child with assistance to help pay their rent. The maximum gross annual household income level is $ 40,000. A child up to age 25 qualifies as dependant as long as the child is attending school. A child of any age with mental or physical infirmity is accepted as a dependant.

A rental assistance calculator is available on the RAP website as well as other information and application forms see www.bchousing.org/Options/Rental_market/RAP or contact B.C. Housing (above).

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XVIII. Illegal Suites

Municipalities all over the Lower Mainland are attempting to regulate secondary suites. In most Lower Mainland municipalities, secondary suites are legal and regulated (though some landlords may be operating the secondary suite without approval). The bylaws and policy guidelines are municipality-specific, so clients should be directed to their municipal offices to find out what the specific enforcement policies are for their municipality. For a website with links to various municipalities' polices on secondary suites, see http://www.homeswithsuites.ca/MunicipalSuitePolicies.ubr

The City of Surrey approved secondary suites in December of 2010. See http://www.surrey.ca/city-government/7617.aspx for information.

Vancouver's Zoning and Development By-law makes it possible to have a secondary suite in every detached single family home in the City of Vancouver. Council also approved the relaxation of various building code standards to facilitate the secondary suite process.

The City of Vancouver will continue to respond to complaints received from neighbours or tenants regarding illegal suites. Where legitimate complaints are received, homeowners will have to apply to make the suite legal. In the case of houses with multiple suites, Council policy limits the house to a principal dwelling and one secondary suite. The application process is described online, and can be accessed at: http://vancouver.ca/home-property-development/creating-a-secondary-suite.aspx.

If a city inspector determines that a suite should be closed down, the landlord will be given 30 days' notice to evict the tenant. That notice will begin to run from the day on which rent is next due. **Regardless of the legality of the suite however, the RTA may still apply.** A tenant may be entitled to more than the 30 days' notice given by the municipality, and may therefore have a claim against the landlord if proper notice is not given.

For more information on the issue of tenancy agreements relating to illegal or unapproved suites, see RTB Policy Guideline 20: Illegal Contracts.

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XIX. Forms

Check the RTB web site: http://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/forms for current forms and fees. Ensure clients are using the most recent forms. Be aware that some applications require fees (e.g. a standard Application for dispute resolution costs $100). Waivers are available for low-income applicants.

The dispute resolution policy guidelines are also available online, as are decisions by Arbitrators. These are useful for preparing for a hearing, but they are **NOT** binding on Arbitrators.

A. Entering Into a Tenancy

1. **Residential Tenancy Agreement - RTB 1**

   The RTB is of the opinion that this Residential Tenancy Agreement accurately reflects the RTA and accompanying regulations. The RTB makes no representations or warranties regarding the use of this Agreement. A landlord and tenant may wish to obtain independent advice regarding whether this agreement satisfies their own personal or business needs.

2. **Manufactured Home Site Tenancy Agreement - RTB 5**

   The Residential Tenancy Branch is of the opinion that this Manufactured Home Site Tenancy Agreement accurately reflects the MHPTA and accompanying regulations. The RTB makes no representations or warranties regarding the use of this agreement. A landlord and tenant may wish to obtain independent advice regarding whether this agreement satisfies their own personal or business needs.

3. **Condition Inspection Report - RTB 27**

   Landlords and tenants or their representatives can use this form to record the condition of a rental unit at the time of move-in and at the time of move-out by the tenant.

4. **Schedule of Parties - RTB 26**

   Use this Schedule of Parties to continue if the form you are completing does not have enough room for additional applicants or respondents. It is to be filed with your completed application.

B. Rent Increases

1. **Notice of Rent Increase - Residential Rental Units - RTB 7**

   Landlords must use this notice to notify tenants of rent increases.

2. **Notice of Rent Increase - Manufactured Home Site - RTB 11**

   Park owners must use this notice to notify tenants of site rent increases. This notice is not used where a tenant rents a manufactured home, as well as the site, under a single tenancy agreement.

3. **Application for Additional Rent Increase - RTB 16**

   A landlord must use this form to apply for an Arbitrator's approval for a rent increase in an amount greater than the amount specified in the RTA, the MHPTA and associated regulations.

4. **Schedule of Parties - RTB 26**

   Use this Schedule of Parties to continue if the form you are completing does not have enough room for additional applicants or respondents. It is to be filed with your completed application.

C. Dispute Resolution

1. **Tenant's Application for Dispute Resolution - RTB 12**

   Tenants must complete and file this form to request a hearing before an Arbitrator to resolve a residential tenancy dispute. To submit the Application form over the web, fill out the Online Application for Dispute Resolution form.

2. **Landlord's Application for Dispute Resolution - RTB 12**

   Landlords must complete and file this form to request a hearing before an Arbitrator to resolve a residential tenancy dispute. To submit the Application form over the web, fill out the Online Application for Dispute Resolution form.

3. **Application to Waive Filing Fee - RTB 17**

   A person bringing a dispute to dispute resolution may use this form to request that the Residential Tenancy Branch waive the fee for filing an Application for dispute resolution.

4. **Application for Substituted Service - RTB 13**

   Landlords and tenants must use this form to request an Arbitrator order documents be served in a method other than those required by the RTA.

5. **Tenant's Request to Join Applications for Dispute Resolution - RTB 19**

   Tenants may use this application to request that the Director of the Residential Tenancy Branch order that two or more dispute resolutions be heard together. Dispute resolutions may be joined when the matters to be determined are related and it makes sense that the matters be joined.

6. **Landlord's Request to Join Applications for Dispute Resolution - RTB 18**

   Landlords may use this application to request that the Director of the Residential Tenancy Branch order that two or more dispute resolutions be heard together. Dispute resolutions may be joined when the matters to be determined are related and it is sensible that the matters be joined.

7. **Schedule of Parties - RTB 26**

   Use this Schedule of Parties to continue if the form you are completing does not have enough room for additional applicants or respondents. It is to be filed with your completed application.

D. Dispute Resolution Decisions and Orders

1. **Application to Review Arbitrator's Decision or Order - RTB 2**

   Landlords and tenants may use this form to apply to the Director or the Residential Tenancy Branch for review of an Arbitrator's order or decision.

2. **Request for Correction - RTB 6**

   Tenants and landlords may use this form to request that the Residential Tenancy Branch correct any obvious error or inadvertent omission.

3. **Request for Clarification – RTB 38**

   Tenants and landlords may use this form to request the Residential Tenancy Branch clarify a decision.

4. **Request/Approval for Release of Originals - RTB 9**

   Use this form to request the return of original evidence used in a residential tenancy dispute resolution hearing. Please note that original copies must be given to the Residential Tenancy Branch and the other party of the dispute. The applicant or respondent should always keep original copies of each document submitted in a dispute resolution proceeding.

5. **Application for Substituted Service - RTB 13**

Landlords and tenants must use this form to request an Arbitrator order documents be served in a method other than those required by the RTA.

6. **Schedule of Parties - RTB 26**

   Use this Schedule of Parties to continue if the form you are completing does not have enough room for additional applicants or respondents. It is to be filed with your completed application.

E. End of Tenancy

1. **Notice to End Tenancy - Residential Unit - RTB 3**

   A landlord **must** use this notice to end a tenancy agreement, unless the tenancy is a fixed-term agreement that contains a predetermined expiry date and the tenant has agreed to vacate, or the landlord and tenant have agreed in writing to end the tenancy.

2. **12 Month Notice to End Tenancy for Conversion of Manufactured Home Park - RTB 31**

   Landlords **must** use this form to end a Manufactured Home Site Tenancy.

3. **Mutual Agreement to End a Tenancy - RTB 8**

   Tenants and landlords may use this form to voluntarily end residential tenancies.

4. **Notice of Final Opportunity to Schedule a Condition Inspection - RTB 22**

   A landlord **must** use this form where a tenant was not available at the date(s) and time(s) first offered by the landlord for a condition inspection, and where the landlord was not available at an alternate time proposed by the tenant.

5. **Schedule of Parties - RTB 26**

   Use this Schedule of Parties to continue if the form you are completing does not have enough room for additional applicants or respondents. It is to be filed with your completed application.

F. Condition Inspection

1. **Condition Inspection Report - RTB 27**

   Landlords and tenants or their representatives can use this form to record the condition of a rental unit at the time of move-in and move-out by the tenant. Both parties must participate in these inspections, in order to reclaim (tenants) or withhold (landlords) the damage deposit. It is therefore in the interests of both parties to complete these inspections carefully, and it is advisable to take photographs confirming the condition on both move-in and move-out.

2. **Notice of Final Opportunity to Schedule a Condition Inspection - RTB 22**

   A landlord **must** use this form where a tenant was not available at the date(s) and time(s) first offered by the landlord for a condition inspection, and where the landlord was not available at an alternate time proposed by the tenant.

3. **Schedule of Parties - RTB 26**

   Use this Schedule of Parties to continue if the form you are completing does not have enough room for additional applicants or respondents. It is to be filed with your completed application.

G. Other Forms

1. **Terminating or Restricting a Service or Facility - RTB 24**

   A landlord must use this form to terminate or restrict a service or facility to a rental unit or manufactured home site.

2. **Request for Consent to Assign a Manufactured Home Site Tenancy Agreement - RTB 10**

   Use this form if you are a manufactured home owner and you are requesting the park owner's consent to assign your site tenancy agreement to the purchaser of your manufactured home.

3. **Request for Consent to Sublet a Manufactured Home Site Tenancy Agreement - RTB 25**

   A manufactured home owner may use this form to request a park owner's consent to sublet a site tenancy agreement to the renter of the manufactured home.

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XX. Governing Legislation and Resources

A. Legislation and Regulations

Residential Tenancy Act, SBC 2002, c 78 [RTA].

Website: www.bclaws.ca/civix/document/id/complete/statreg/02078_01

Residential Tenancy Regulation, BC Reg 477/2003, [RTR].

Website: http://www.bclaws.ca/civix/document/id/complete/statreg/477_2003

• The RTA and RTR set out the law of residential tenancies in BC. They will often hold the ultimate answer to questions relating to disputes between landlords and tenants.

• For the current status of the RTA and RTR, refer to CCH British Columbia Real Estate Law Guide, Robert J. Maguire, Rose H. McConnell, loose-leaf (Toronto, ON: CCH, undated).

Manufactured Home Park Tenancy Act, SBC 2002, c 77 [MHPTA].

Website: www.bclaws.ca/civix/document/id/complete/statreg/02077_01

Manufactured Home Park Tenancy Regulation BC Reg 481/2003

Website: www.bclaws.ca/civix/document/id/complete/statreg/481_2003

The Residential Tenancy Act, SBC 2002, c 78 [RTA] and Residential Tenancy Regulation [RTR], BC Reg 477/2003 as well as the rules of procedure are amended occasionally; check the Residential Tenancy Branch (RTB) website (www.gov.bc.ca/landlordtenant) to get the most up to date information.

B. Resources and Policy Guidelines

TRAC Tenant Resource & Advisory Centre Website: www.tenants.bc.ca

Provides a variety of publications relating to tenant law, including the Tenant Survival Guide (also available online as a wikibook, via the Clicklaw website: wiki.clicklaw.bc.ca/index.php/Tenant_Survival_Guide)

Residential Tenancy Branch

Main Office

400 - 5021 Kingsway Burnaby, B.C. V5H 4A5

Website: www.rto.gov.bc.ca

Office Hours: M-F 9:00 am - 4:00 pm

Information line:

Metro Vancouver 604-660-1020

Victoria 250-387-1602

Elsewhere in BC 1-800-665-8779

Fax: 604-660-2363

E-mail: HSRTO@gov.bc.ca

Downtown Eastside Satellite Office

Four Corners 390 Main Street (Entrance on Hastings) Vancouver, B.C. V6A 2T1

Office Hours: M-F 12:30 pm - 4:00pm

NOTE: The main office in Burnaby is a full-service office. The Downtown Eastside office is a satellite office and does not handle money. Dispute applications can only be filed there by low-income applicants who are eligible for a fee waiver. Those offices are staffed with information officers.

The RTB website (www.gov.bc.ca/landlordtenant) contains forms, legislation and RTB interpretation guidelines, and includes the following useful publications:

Residential Tenancy Branch Dispute Resolution Rules of Procedure

Website: https://www2.gov.bc.ca/assets/gov/housing-and-tenancy/residential-tenancies/rop.pdf

Residential Tenancy Information Sheets

Website: http://bit.ly/1KTmo6l

RTB Policy Guidelines: detailed information on common problem areas; drafted by RTB Arbitrators. Website: http://bit.ly/1ei1NfH

RTB Calculators: Help in calculating rent increases, dates, deposits and more. Website: https://www2.gov.bc.ca/gov/content/housing-tenancy/residential-tenancies/calculators-and-resources/calculators

B.C. Housing

Suite 101 - 4555 Kingsway Burnaby, B.C. V5H 4V8 Website: www.bchousing.org Toll-free: 1-800-257-7756

Information for tenants living in public, subsidized housing.

Landlord BC

Website: www.landlordbc.ca E-mail: info@landlordbc.ca Direct: 1-888-330-6707

Vancouver Office:

1210-1095 West Pender Street

Vancouver, British Columbia

V6E 2M6

Telephone: 604-733-9420 Fax: 604-733-9420

Victoria Office:

830B Pembroke Street

Victoria, British Columbia

V8T 1J9

Telephone: 250-382-6324 Fax Local: 250-382-6006 Fax Toll-Free: 1-877-382-6006

C. Books

Margaret Carter-Pyne, Residential Tenancy Law in British Columbia: Everything you need to know to prevent a disaster (Victoria, BC: Sunnymead Publishing, 2009).

• A useful resource for tenants in preparing for a hearing.

Allan Wotherspoon, Annotated British Columbia Residential Tenancy Act (Aurora, ON: Canada Law Book, 2005).

• This is a loose-leaf volume updated once or twice annually.

CCH British Columbia Real Estate Law Guide, Robert J. Maguire, Rose H. McConnell, loose-leaf (Toronto, ON: CCH, undated).

• A summary of the state of the RTA and RTR.

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Chapter Twenty – Small Claims

I. Introduction

Most people with legal claims under $35,000 are not lawyers and do not have the benefit of legal representation. It can be challenging to choose how to resolve a dispute and how much to claim. While this guide primarily focuses on the Small Claims Court, it briefly reviews other options for resolving disputes, including the new Civil Resolution Tribunal for Small Claims up to $5,000 in British Columbia.

If you are a party to a small claims action, take the time to read this guide in its entirety. If you fail to comply with the rules, the process may be delayed, your claim or defence may be weakened, and you may be liable to pay costs and penalties to the other party. Reading this guide will help you be more prepared and minimise confusion.

This guide is meant to explain the general Small Claims Court process; it is not legal advice. Read the guide along with the Small Claims Court rules and obtain legal advice where necessary.

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II. Governing Legislation and Resources

1. Legislation

Corporations

Business Corporations Act, SBC 2002, c 57. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/02057_00

Canada Business Corporations Act, RSC 1985, c C-44. Website: http://laws-lois.justice.gc.ca/eng/acts/c-44/

Consumer Protection

Business Practices and Consumer Protection Act, SBC 2004, c 2. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/04002_00

Judgments

Court Order Enforcement Act, RSBC 1996, c 78. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96078_01

Court Order Interest Act, RSBC 1996, c 79. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96079_01

The Enforcement of Canadian Judgments and Decrees Act, SBC 2003, c 29. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03029_01

Court Rules

Bill 19, Civil Resolution Tribunal Amendment Act, 2015, 4th Sess, 40th Parl, British Columbia, 2015 (assented to May 14th, 2015). Website: http://www.bclaws.ca/civix/document/id/lc/billsprevious/4th40th:gov19-1

Court of Appeal Act, RSBC 1996, c 77. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96077_01

Court of Appeal Rules, BC Reg 297/2001. Website: http://www.bclaws.ca/Recon/document/ID/freeside/297_2001a

Court Rules Act, RSBC 1996, c 80. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96080_01

Judicial Review Procedure Act, RSBC 1996, c 241. Website: http://www.bclaws.ca/civix/document/id/roc/roc/96241_01

Small Claims Act, RSBC 1996, c 430. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96430_01

Small Claims Rules, BC Reg 261/93. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/261_93_00b

Supreme Court Act, RSBC 1996, c 443. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96443_01

Supreme Court Civil Rules, BC Reg 168/2009. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_00

Other Important Statutes

Crown Proceeding Act, RSBC 1996, c 89. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96089_01

Employment Standards Act, RSBC 1996, c 113. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96113_01

Evidence Act, RSBC l996, c 124. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96124_01

Insurance (Vehicle) Act, RSBC 1996, c 231. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96231_01

(Old) Limitation Act, RSBC 1996 c 266. Website: http://www.ag.gov.bc.ca/legislation/limitation-act/pdf/LimitationAct_REPEALED.pdf

(New) Limitation Act, SBC 2012, c 13. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_12013_01

Local Government Act, RSBC 1996, c 323. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96323_00

Motor Vehicle Act, RSBC 1996, c 318. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96318_00

Personal Property Security Act, RSBC 1996, c 359. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96359_01

Residential Tenancy Act, SBC 2002, c 78. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02078_01

Sale of Goods Act, RSBC 1996, c 410. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96410_01

Strata Property Act, SBC 1998, c 43. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/98043_01

Law and Equity Act, RSBC 1996, c 253. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96253_01

Wills, Estates and Succession Act, SBC 2009, c 13. Website: http://www.bclaws.ca/civix/document/id/complete/statreg/09013_01

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28. Website: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03028_01

2. Books

Bullen, Leake, Jacob, and Goldrein. *Bullen and Leake and Jacob's Precedents of Pleadings*, 15th ed. (London: Sweet and Maxwell, 2004).

Burdett, E. (Ed.). *Small Claims Act and Rules—Annotated*. (Vancouver, B.C.: The Continuing Legal Education Society of British Columbia, Dec 2014).

Celap, M. and Larmondin, P.J. *Small Claims Court for the Everyday Canadian*. (North Vancouver, B.C.: Self-Counsel Press, 2000).

Fraser, Horn and Griffen. *The Conduct of Civil Litigation in British Columbia*. 2nd ed. (Markham: Butterworths, 2007).

Keating, M. *Small Claims Court Guide for British Columbia*. (North Vancouver, B.C.: Self-Counsel Press, 1992).

Martinson, D.J. (Manual Coordinator). *Small Claims Court—1994*. (Vancouver, B.C.: The Continuing Society of British Columbia, April 1994).

Mauet, Casswell, and MacDonald. *Fundamentals of Trial Techniques* 2d Canadian ed. (Toronto: Little Brown, 1995).

McLachlin and Taylor, *British Columbia Court Forms*. (Markham, Ont.: LexisNexis Canada, 2005).

Moore Publishing. (Ed.) *Small Claims Practice Manual*, 3rd Ed. (Richmond, B.C.: Moore Publishing Ltd, 1999).

UBC Law Review Society. (Eds.) *Table of Statutory Limitations for the Province of British Columbia, Revised and Consolidated*. (Vancouver, B.C.: University of British Columbia Law Review Publication, 2006).

Vogt, J. (Ed.). *Provincial Court Small Claims Handbook*. (Vancouver, B.C.: The Continuing Legal Education Society of British Columbia, January 1997).

3. Websites

Provincial Court Judgment Database [1]

- Contains selected decisions from 1999 to the present.

Provincial Courthouses Directory [2]

- Contains Small Claims Court locations

British Columbia Court of Appeal and Supreme Court Judgment Database [3]

Small Claims Court [4]

- Provides information on court procedure and the full text of the Small Claims Rules.

Small Claims Fees [5]

Small Claims Forms [6]

Small Claims Pilot Project [7]

CanLII [8]

- Caselaw and legislation database.

4. Other Resources

UBC Law Library

- Most of the books listed above are available in the Law Library. The Small Claims Acts and Rules Annotated and the Provincial Court Small Claims Handbook, published by the Continuing Legal Education Society (CLE), are recent publications written by Small Claims Court judges. They include the Act, Rules, and copies of all of the forms. Students can access an online edition of the Provincial Court Small Claims Handbook on the UBC Law Library website [9].

Court Registry

- The Small Claims Court registry staff does not give legal advice, but they are experienced with the rules and procedures and are helpful. See Appendix A: Small Claims Registries.

DIAL-A-LAW

- DIAL-A-LAW ((604) 687-4680) is a library of pre-recorded messages on a variety of legal topics available by telephone 24 hours a day, seven days a week. Lawyers under the supervision of the Canadian Bar Association, BC Branch, prepare the tapes. Several tapes deal with Small Claims Court. The content of the tapes is also available online: http://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts

BC Supreme Court Self-Help Information Centre

Online	Website [10]
Address	290– 800 Hornby Street, Vancouver, BC V6Z 2C5
Phone	

Company Search

To search for a **provincially** regulated company, the client may request a company or society search in person:

Surrey Board of Trade

Address	101 – 14439 104th Ave Surrey, BC V3R 1M1
Phone	(604) 581-7130 Toll-free: 1-866-848-7130

Small Business B.C.

Address	54 - 601 West Cordova St Vancouver, BC V6B 1G1
Phone	(604) 775-5525 Toll-free in B.C.: 1-800-667-2272

Registrar of Companies

Address	940 Blanshard Street Victoria, BC V8W 2H3
Phone	(250) 387-7848 Vancouver: (604) 660-2421 Toll-free in B.C.: 1-877-526-1526

The client may also write to:

Registrar of Companies
P.O. Box 9431 Station Provincial Government Victoria, BC V8W 9V3

For more information about searching for provincial companies, refer to:

- http://smallbusinessbc.ca/services/
- http://www.bcregistryservices.gov.bc.ca/
- http://www.bconline.gov.bc.ca (the online search feature is not currently available to individuals however).

Partnerships and non-profit societies are also registered in the company directory and would show up in a search. In cases that involve franchises, it is important to do a company search to see how the other party is registered; it may be possible to sue the parent company and the individual who owns the franchise rights. The search costs $10 and cheques should be made payable to the Minister of Finance.

If Unincorporated:

Online	Website [11]
Address	City of Vancouver Licence Office 515 West 10th Ave Vancouver, BC V5Z 4A8
Phone	(604) 873-7611

To search for a **federally** regulated company, refer to:

Online	Website [12]
Address	Industry Canada C.D. Howe Building 235 Queen Street Ottawa, Ontario K1A 0H5
Phone	

A collection of useful company directories can be found on the Industry Canada website under the “Programs and Services” heading. Federal corporations can be searched free of charge online.

NOTE: If the defendant is a business, it may be worth checking if that defendant has declared bankruptcy. To do so contact Industry Canada’s Head Office of the Superintendent of Bankruptcy at (613) 941-2863 for free.

Translation and Support Services

To find support services and resources, including agencies and people that can provide translation services, please visit:

MOSAIC

Online	Website [13]
Address	1720 Grant St, 2nd Floor Vancouver, BCV5L 2Y7
Phone	(604) 254-9626 Fax: (604) 254-3932

Society of Translators and Interpreters of B.C.

Online	Website [14]
Phone	(604) 684-2940 Fax: (604) 684-2947

MultiLingoLegal.ca

DIVERSEcity

Online	Website [15]
Phone	(604) 597-0205 Fax: (604) 597-4299

WelcomeBC

Online	Website [16]
Phone	(604) 660-2421 Toll Free: 1-800-663-7867

OPTIONS

Online	Website [17]
Phone	(604) 584-5811 Fax: (604) 584-7628

S.U.C.C.E.S.S.

Online	Website [18]
Phone	(604) 684-1628 Fax: (604) 408-7326

Westcoast Association of Visual Language Interpreters

Online	Website [19]

Citizenship and Immigration Canada

Online	Website [20]
Phone	1-888-242-2100

Affiliation of Multicultural Societies and Service Agencies of B.C.

Online	Website [21]
Phone	(604) 718-2780 1-888-355-5560 Fax: (604) 298-0747

Safe Harbour

Online	Website [22]

Immigrant Services Society of B.C.

Online	Website [23]
Phone	(604) 684-2561 Fax: (604) 684-2266

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[20] http://www.cic.gc.ca/english/index-can.asp
[21] http://www.amssa.org/
[22] http://www.amssa.org/programs/diversity/safe-harbour/
[23] http://www.issbc.org

III. Do You Have a Claim?

In order to have a legal claim, it must be recognised by the law. A frivolous claim is one that does not disclose a legal cause of action, is incapable of proof, or is otherwise bound to fail. A vexatious claim is one that is brought in order to annoy, frustrate, or antagonise the defendant. A claim may be both frivolous and vexatious.

If a claim is frivolous or vexatious, the claimant will lose and may be penalised up to 10% of the amount of the claim (*Small Claims Rule* 20(5)). The penalty could be up to $8,750 on a $35,000 claim; it pays to research your cause of action and limit your claim to the proper amount.

A. Types of Claims & Remedies

It is helpful to research each of the following types of claims to ensure that a claim falls within at least one of them. See Appendix G: Causes of Action for a partial list of specific causes of action. If you are unable to fit your claim into one of the listed categories, you should consult a lawyer to see if you have a cause of action.

1. Tort

Torts are offences committed by one person against another. Examples include assault, battery, and negligence. Each tort has its own test and defences. Tort law continues to evolve and a person planning to bring a claim in tort should research what must be proven to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practising lawyer.

2. Contract

Contract law governs voluntary relationships between parties. It is a complicated and nuanced area of the law and a person planning to bring a claim in contract should research what must be proven to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practising lawyer.

NOTE: Courts will generally not enforce illegal contracts or dishonest transactions (see *Faraguna v Storoz*, [1993] BCJ No. 2114). However, *Transport North American Express Inc. v New Solutions Financial Corp.,* 2004 SCC 7 states that a court may enforce legal portions of a contract, thus effectively severing the illegal portion. A common example involves contracts purporting to charge interest rates prohibited under s 347 of the *Criminal Code*. The court will not enforce a term in a contract purporting to charge such a rate. (However, section 347.1 exempts payday loans from criminal sanctions, if certain conditions are met; see Section V.G: Regulation of Payday Lenders and Criminal Rate of Interest in Chapter 9: Consumer Protection).

3. Equity

The usual remedy for torts and breaches of contract is monetary damages. In circumstances where monetary damages are inadequate or where a legal remedy is improper in the circumstances, the court may grant other relief such as an injunction. The Small Claims Court, pursuant to s 2 of the *Small Claims Act* [SCA] (*Small Claims Act*, RSBC 1996, c 430 [SCA]), has a limited inherent jurisdiction to grant equitable remedies. A party seeking an equitable remedy such as an injunction should consult with a lawyer and will likely need to apply to the Supreme Court for relief.

4. Restitution

The law of restitution (See *Garland v Consumers' Gas Co.*, 2004 SCC 25; *Kerr v Baranow*, 2011 SCC 10; *Skibinski v Community Living British Columbia*, 2012 BCCA 17) applies to circumstances where a party has benefited, the other party has suffered a loss as a result, and there is no legal basis for the party to have benefited. The type of claim commonly pursued for a restitution remedy is referred to as “unjust enrichment” and is a complicated and evolving area of the law. A party planning to attain a restitution remedy should consult a lawyer, research what must be proved to be successful and which defences may be available to the defendant. Resources include CanLII.org, the courthouse library, and a practising lawyer.

5. Statute

Certain statutes create a right of action that does not exist in the common law. The statute will set out what must be proved, the defences that apply, the types of damages that can be awarded, and how the claim must be brought. A person planning to bring a claim under a statutory cause of action should research the statute as well as how the courts have interpreted it by noting up the applicable provisions. Resources include CanLII.org, the courthouse library, and a practising lawyer.

B. Types of Damages

Although the Small Claims Court has the jurisdiction to award $35,000 (*BC Reg* 179/2005), the monetary awards in most cases are significantly less. There must be a principled basis for an award of damages and it is helpful to separate a claim into the following types of damages. Ensuring that there is a legal basis for a claim is a critical step as there are penalties for proceeding through a trial in Small Claims Court on a claim that has no reasonable basis for success (*Rule* 20(5)).

1. General Damages

General damages are those that are not easy to quantify and for which a judge must assess the amount of money that, in the circumstances, will compensate for the loss. A common example of general damages is "pain and suffering". The purpose of general damages is to compensate and not to punish; a party should not expect to profit or realise a windfall through an award of general damages. A person planning to claim general damages should provide evidence of the loss and research the case law to determine how the courts have assessed damages in cases with similar losses and circumstances. Resources include CanLII.org, the courthouse library, and a practising lawyer.

2. Special Damages

Special damages are those that are not presumed as a direct consequence of the act (See *Stroms Bruks Aktie Bolag v Hutchison*, [1905] AC 515, at p 525). In other words, special damages are generally quantifiable out-of-pocket expenses. For example, if a person has been put to expense and has receipts showing the amounts spent, these expenses would be classified as special damages. In a personal injury action, this could be medical bills, or in an action involving faulty equipment, repair bills could be classified as special damages. Each and every expense must be strictly proved with documents or other satisfactory evidence.

3. Nominal Damages

Nominal damages are those where a wrong has been committed but there has been no, or insignificant, damages suffered as a result of the wrong. Certain torts, such as trespass, allow claims for nominal damages however there is little reward and much to be lost. A person who has suffered no damages yet still brings a claim may not recover the costs for bringing a claim that wastes the court's and the parties' time and money. Note that cost awards are limited in small claims cases (*Rule* 20(2)).

4. Debt

Debt is a remedy for breach of contract. See: *Busnex Business Exchange Ltd. v Canadian Medical Legacy Corp*, 1999 BCCA 78. At paragraph 8, the court addresses the requirements for establishing a debt or liquidated demand:

"A liquidated demand in the nature of a debt, i.e., a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation, beyond mere calculation, then the sum is not a 'debt or liquidated demand,' but constitutes 'damages.'"

5. Liquidated Damages

Some contracts provide for a genuine pre-estimate of damages in the event of a breach and allow the non-breaching party to claim for that estimate without having to prove the amount they have actually lost. This amount can be recovered as a debt. If the amount of liquidated damages is not a genuine pre-estimate of damages or is manifestly inappropriate in the circumstances, a court may decline to award them.

6. Statutory Damages

Statutory damages are those that arise from a breach by the defendant of an obligation found in a statute. The statute and relevant case law should be examined carefully to determine what damages may be claimed and the principles for assessing damages.

7. Aggravated Damages

Aggravated damages provide additional compensation where the wrongdoer's actions have caused mental distress, injury to dignity or injury to pride . Awards of aggravated damages are rare and depend heavily on the actions of the wrongdoer and the circumstances. Aggravated damages have previously been awarded in cases of aggravated assault and sexual assault . The claimant must provide actual evidence of mental distress that results from the wrongdoing of the defendant.

A claimant who seeks aggravated damages must ask for aggravated damages in the Notice of Claim. Aggravated damages cannot be awarded in addition to the $35,000 monetary limit.

8. Punitive Damages

Punitive damages, also called "exemplary damages", are reserved for conduct that is so abhorrent that the court must impose an additional penalty to punish the wrongdoer and discourage others from engaging in similar conduct. Punitive damages are rarely awarded. Punitive damages are not compensatory and the amount, if any, is in the complete discretion of the judge.

A claimant who seeks punitive damages must ask for punitive damages in the Notice of Claim. Punitive damages cannot be awarded in addition to the $35,000 monetary limit.

9. Treble Damages

Treble damages are a form of punitive damages that, in certain circumstances, automatically triple an award of compensatory damages. Treble damages do not exist in Canada.

C. Limitation Periods

After a certain amount of time has passed, a person loses the right to commence a claim. The amount of time that must pass before the limitation period expires depends on which act applies to the claim.

The new *Limitation Act*, SBC 2012, c 13 [*Limitation Act*] came into effect on June 1, 2013. A claim is governed by this Act if the claim was discovered after this date, unless the facts underlying the claim arose before the effective date and the limitation period under the old *Limitation Act*, RSBC 1996, c 266 [*Old Limitation Act*] has expired (*Limitation Act*, SBC 2012, c 13, s 30(3-4) [*Limitation Act*]). Under the new *Limitation Act*, the basic limitation period that applies to most claims is 2 years after the day on which the claim is discovered (*Limitation Act* s 6(1)).

Discovery occurs the day on which the claimant knew or reasonably ought to have known all of the following:

- a) That injury, loss or damage had occurred;
- b) That the injury, loss or damage was caused by or contributed to by an act or omission;
- c) That the act or omission was that of the person against whom the claim is or may be made;
- d) That, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage (*Limitation Act*, s 8).

Special rules for discovery apply in various circumstances. For example, when a person signs a document acknowledging liability for a claim, discovery is deemed to occur on the date the acknowledgement is made unless the limitation period has already expired (*Limitation Act*, s 24(1)). Generally, there is an ultimate limitation period of 15 years from the date the basis of the claim occurred, regardless of when discovery happens (*Limitation Act*, s 21(1)). If it has been close to 2 years since the events giving rise to your claim occurred, act quickly and refer to Appendix F: Limitation Periods or consult a lawyer.

Under this act, the limitation period depends on the type of claim and who the other party is. A claim may consist of several causes of action and each cause of action may have a separate limitation period. For example, if a claimant waits three years, they may be unable to bring a claim in negligence but may still be able to claim for breach of contract. Litigants should review the *Old Limitation Act* to determine which limitation period applies.

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IV. Choosing the Proper Forum

There are several options for resolving most civil disputes in British Columbia: Alternative Dispute Resolution, specialised tribunals, Small Claims Court, the Civil Resolution Tribunal, and the Supreme Court of British Columbia.

Certain claims must be made through administrative tribunals instead of the courts. See, for example, Section IV.C: Civil Resolution Tribunal for small claims matters under $5000 and strata matters, Chapter 9: Employment Law, Chapter 7: Workers' Compensation, Chapter 8: Employment Insurance, Chapter 19: Landlord and Tenant Law, and Chapter 6: Human Rights.

In order to bring a claim in British Columbia, the court or tribunal must have territorial jurisdiction. If either the subject matter of the claim (e.g., the contract or wrongful act) occurred in British Columbia or the Defendant resides or does business in British Columbia, this may be a sufficient connection for a court or tribunal to assert jurisdiction. It is sometimes unclear whether British Columbia has a sufficient connection to the claim and is the most appropriate forum. If the court's jurisdiction is not clear, a claimant should obtain legal advice and review applicable case law (See *DreamBank Online Gifting v BeneFACT Consulting*, 2011 BCPC 459 (CanLII) [DreamBank]; *Teck Cominco Metals v Lloyds Underwriters*, [2009] 1 SCR 321; *Purple Echo Productions, Inc. v KCTS Television*, 2008 BCCA 85; *Jordan v Schatz*, 2000 BCCA 409; *Tolofson v Jensen*, [1994] 3 SCR 1022).

Where the dispute is contractual, the existence of a "forum selection clause" may provide further jurisdictional difficulties. Forum selection clauses require the adjudication of claims in the named jurisdiction. Such clauses will generally be upheld absent a finding of "strong cause" to hear the matter in the jurisdiction of another court (*Borgstrom v Korean Air Lines Co. Ltd.*, 2007 BCCA 263; *Procon Mining & Tunnelling Ltd. v McNeil*, 2007 BCCA 438).

A. Small Claims Court

The Small Claims Court is the civil division of the British Columbia Provincial Court and is designed to accommodate unrepresented parties who do not have legal training. The overriding purpose of the Small Claims Court is to resolve disputes in a "just, speedy, inexpensive, and simple manner." (*SCA*, s 2). The Court uses simplified forms, procedures, and rules and encourages settlement.

Small Claims Court is a formal court that applies the law. Although the procedures and rules of evidence are slightly relaxed in order to make it more accessible to the public, it is significantly more formal and principled than the courts portrayed in television programmes.

There are three primary considerations when choosing Small Claims Court: the amount claimed, the court's jurisdiction, and costs.

1. Amount Claimed

As of June 1, 2017, Small Claims Court can award a judgment of up to $35,000. A person whose claim exceeds $35,000 may still choose Small Claims Court but must expressly state in the notice of claim or counterclaim that they will abandon the amount necessary to bring their claim or counterclaim within the court's jurisdiction (*Rules* 1(4) and 1(5)). Interest and costs are not included in calculating the $35,000 limit.

A claimant must sue all responsible parties for damages arising from a single event in **one** claim; the claimant cannot split claims for damages arising out of a single event into multiple claims in an attempt to circumvent the $35,000 limit. If, however, there are multiple events giving rise to a claim, even if closely related, they may be brought in separate actions (*Wah Loong Ltd v Fortune Garden Restaurant Ltd.*, 2000 BCPC 163 (CanLII)). For example, if a contractor issues an invoice for $20,000 at the end of January for work done in January and issues another invoice for $20,000 at the end of February for work done in February and both invoices go unpaid, the contractor may sue on each invoice in a separate claim. Rule 7.1(4) permits certain related claims to be heard together.

Where a defendant has pleaded a set-off (the plaintiff owes the defendant money that should be deducted from their award), contributory negligence (the plaintiff's negligence also contributed to their loss), or shared liability (there is another party who is also liable for the same action), the court may consider these defences against the full amount of the claimant's claim provided that the net judgment does not exceed $35,000. This also applies when a set-off forms the basis for a standalone counterclaim. For example, if the claimant proves a $50,000 claim and the defendant establishes a $35,000 set-off, the claimant will have a net judgment of $15,000. *SCA*, s 21(2) permits the monetary limit to be set by regulation at any amount up to $50,000. Claimants should confirm the current monetary limit prior to filing a claim.

2. Jurisdiction

The Small Claims Court derives its authority from the SCA, the *Small Claims Rules*, BC Reg 261/93 [SCR], and other acts that expressly confer jurisdiction upon the Provincial Court.

The court has express jurisdiction in claims for:

- debt or damages;
- recovery of personal property;
- specific performance of an agreement relating to personal property or services; or
- relief from opposing claims to personal property.

The court does not have jurisdiction in claims for libel, slander, or malicious prosecution unless such authority is expressly granted in limited circumstances by another statute (e.g., s-s 171(3) of the *Business Practices and Consumer Protection Act* allows for contraventions of this act to be heard in Provincial Court even if they involve claims for libel or slander (*Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 171(3))).

The court cannot resolve disputes involving residential tenancy agreements nor can it grant remedies created by statute if there is another dispute resolution mechanism prescribed in the statute. For example, claims for overtime must be claimed through the Employment Standards Branch and not in Small Claims Court. The court has very limited jurisdiction in residential tenancy (*Residential Tenancy Act*, SBC 2002, c 78), employment (*Employment Standards Act*, RSBC 1996, c 113; *Macaraeg v E. Care Contact Centers Ltd.*, [2008] BCCA 182; *UBC v Moore*, 2009, BCPC 186), human rights (*Human Rights Code*, RSBC 1996, c 210), and strata property matters (See *Strata Property Act*, SBC 1998, c 43; *Frechette and Meagher v Crosby Property et al*, 2007 BCPC 174 (CanLII); *Stettner v The Owners*, Strata Plan PG 56, 2011 BCPC 82 (CanLII); *Valana v Law et al*, 2005 BCPC 587 (CanLII); *Heliker et al v Strata Plan VR 1395*, 2005 BCPC 500 (CanLII); *David v Vancouver Condominium Services Ltd.*, [1999] BCJ No 1869; *McNeill v Strata Plan – KAS1099*, [1996] BCJ No. 2553; *Strata Plan LMS2064 v Biamonte*, [1999] BCJ No. 1267; *Seller v Singla Bros.*

Holdings Ltd, [1995] BCJ No. 2826; *Beck v Andrews Realty Ltd. (cob RE/Max Real Estate Services)*, [1994] BCJ No 2796).

Other noteworthy areas of law often falling outside the jurisdiction of the Small Claims Division are divorce, trusts, wills (i.e., probate), prerogative writs, and bankruptcy. However, the court may have jurisdiction over cases where these areas of law are involved only circumstantially – where the pith and substance of the case does fall within the court's jurisdiction (See *AMEX Bank of Canada v Golovatcheva*, 2007 BCPC 369, at para 12). In *AMEX Bank of Canada v Golovatcheva*, the claimant alleged that the defendant had committed fraud by running up a debt that she knew she would escape by declaring bankruptcy. The Small Claims court exerted jurisdiction over the issue of fraud.

The Small Claims Court has limited inherent jurisdiction. It cannot grant injunctions nor can it grant declaratory relief; however, subject to the SCA and SCR, the court may make any order or give any direction necessary to achieve the purpose of the SCA and SCR. One should review the SCA and the SCR thoroughly. [See *LLC v PG*, sub nom. *Craig v Gidyk*, [1994] BCJ No. 1591 (Prov. Ct.); *RK v McBride*, [1994] BCJ No. 2791; and *Joey Beenz Coffee Bar Ltd. v Di Stasio (cob Neon Sign Writers)*, 2011 BCPC 375 (CanLII).

3. Costs

The cost to file a claim depends on the amount being claimed. The filing fee is $100 for claims of $3,000 or less and $156 for claims over $3,000. All Small Claims Court fees are listed in Schedule A of the SCR.

If a person is unable to afford the court's fees, they can file an Application to the Registrar (Form 16) together with a Statement of Finances. If accepted, the party will be exempted under Rule 20(1) from paying fees with respect to that court file.

An unsuccessful litigant must, unless a judge or registrar orders otherwise, pay to the successful party:

- any fees the successful party paid for filing any documents;
- reasonable amounts the party paid for serving any documents; and
- any other reasonable charges or expenses that the judge or registrar considers directly relate to the conduct of the proceeding (See *Bagry v. Aoujla* [1], [1994] B.C.J. No. 1212 (QL) (Prov. Ct.); *Gaudet v. Mair* [2], [1996] B.C.J. No. 2547 (QL) (Prov. Ct.); *Faulkner v. Sellars* [3] (1998), 9 C.C.L.I. (3d) 247 (B.C. Prov. Ct.); *Johnston v. Morris* [4], 2004 BCPC 511).

Under no circumstances can any party recover any fees paid to a lawyer with respect to the proceeding: s. 19(4) of the SCA; however, reasonable disbursements charged by a lawyer with respect to the proceeding may be awarded to the successful party.

B. Supreme Court of British Columbia

The Supreme Court has a broad jurisdiction. It is not bound by any monetary limits and there are few restrictions on the types of claims that it can hear. The Supreme Court can grant injunctions, conduct judicial reviews, and make new law. The Supreme Court is not designed for lay litigants. Parties without legal training or legal advice may find it much more difficult to navigate than Small Claims Court. There are, however, a number of resources (II.4. Other Resources) to help lay litigants bring and defend claims in Supreme Court. The court fees in Supreme Court are higher than in Small Claims Court; they can be waived, however, for those who cannot afford them. In Supreme Court, the losing party will often be ordered to pay to the successful party a portion of that party's reasonable legal costs. Costs are awarded using a tariff system and generally on a party and party basis that usually amounts to about twenty percent of the successful party's costs. While it is possible for the successful party to be fully indemnified through an award of special costs, also known as solicitor-client costs, this is rare and should not be expected.

C. Civil Resolution Tribunal

The Civil Resolution Tribunal (CRT) is designed to be an alternative to Small Claims Court. The role of the Civil Resolution Tribunal is to encourage the resolution of disputes by agreement between the parties, and if resolution by agreement is not reached, then to resolve the dispute by deciding the claims brought to the tribunal by the parties. The Civil Resolution Tribunal Act [CRTA] and Civil Resolution Tribunal Amendment Act [CRTAA] set out the general process and jurisdiction.

For up to date information on the Civil Resolution Tribunal, associated legislative changes, and the official rules, please visit their website at https://www.civilresolutionbc.ca/.

1. Jurisdiction

The CRT classifies claims as “Small Claims Matters” or, “Strata Property Matters”. The tribunal will not determine if they have jurisdiction over disputes until an application for dispute resolution is submitted and the required fee paid. Applicants who want to know if their claim is within the tribunal’s jurisdiction before filing a dispute, may try using the CRT’s Solution Explorer or may need to seek legal advice.

There are some claims that may be considered hybrid claims, in that they include both strata and small claims elements. Applicants must file two separate applications if they have a partly strata and partly small claims matter.

a) Small Claims Matters

The tribunal’s jurisdiction is similar to that of the Small Claims Court, however while the Small Claims Court can resolve claims of up to $35,000, the CRT is limited in jurisdiction to resolving small claims disputes of $5000 or under. If a claim is over $5,000 in total value, it may be reduced to $5,000 or less in order to make an application for dispute resolution at the CRT but this requires abandoning the amount that is over $5,000. This means that part of the claim is gone and can no longer be claimed at the CRT or anywhere else.

The Small Claims tribunal has jurisdiction over the following types of matters:

- Loans and Debt (ex. a claim for money loaned to someone and not repaid);
- Contract (ex. A claim for damages caused by the respondent’s failure to properly complete a contract);
- Personal Injury;
- Personal property (ex. a claim for damages caused to the applicant’s property or return of personal property);
- Consumer transactions (ex. a claim for damages for faulty merchandise);
- Insurance Disputes;
- Some employment (ex. a claim that the respondent complete work required under a contract or that they pay the applicant for work done for them)

However, it does not have jurisdiction over claims:,

- that involve slander, defamation or malicious prosecution (CRTA s. 3.1(2));
- that are deemed sufficiently complex that they would benefit from being adjudicated by the Provincial Court (CRTA s.12.1(3));
- that are in a class of claims prescribed by regulation as being excluded from the jurisdiction of the tribunal;
- that have already been filed or resolved through another legally binding process or other dispute resolution process;
- that fall within the jurisdiction of other tribunals (e.g.,x. the Residential Tenancy Board);
- that are frivolous, vexatious or an abuse of process;
- that are against the government, or which the government is a party to the dispute (CRTA s.3.1(2));
- that involve the application of the Canadian Charter of Rights and Freedoms (CRTA s. 3.8).

b) Strata Property Matters

The CRT can resolve a wide variety of disputes between owners and tenants of strata properties and strata corporations, but can only help with disputes where the event triggering the dispute happened in BC. Unlike the Small Claims jurisdiction of the CRT, the Strata Property jurisdiction of the CRT has no monetary limit. A person may make a request for tribunal resolution of a claim that concerns:

- the interpretation or application of the *Strata Property Act* or a regulation, bylaw, or rule under that Act;
- the common property or common assets of the strata corporation;
- the use or enjoyment of a strata lot;
- unfair, arbitrary or non-enforcement of strata bylaws, such as noise, pets, parking, rentals;
- money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act
- financial responsibility for repairs;
- an action or threatened action by the strata corporation, including the council, in relation to an owner or tenant;
- a decision of the strata corporation, including the council, in relation to an owner or tenant; or
- the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.

The foregoing list contains a number of limitations. A person considering tribunal resolution of a claim listed above should review s 3.6 (2) of the CRTAA to ensure that a limitation does not deny jurisdiction to the tribunal.

2. Process

Using the tribunal to resolve a dispute will be mandatory. The tribunal is designed to be more informal, faster, and less expensive than Small Claims Court, and will be conducted primarily using the internet. Unlike Small Claims Court, the tribunal generally requires the parties to be self-represented; lawyers are generally not permitted (CRTA, s 20). There are exceptions to this, including where a party is a minor or has impaired capacity, where the rules permit the party to be represented or where the tribunal permits representation because it is in the interests of justice and fairness. If a party is wanting to request a representative they can request one in the online intake system or by filling out a Representation Request Form, which can be found at the following link: https://civilresolutionbc.ca/wp-content/uploads/2017/06/FORM-Request-Representative-May-2017.pdf..

There is no guarantee that tribunal adjudicators will be legally trained. For a tribunal small claim, if a party is unhappy with the tribunal decision, they will be able to file a notice of objection and bring the small claim as a claim in the Provincial Court (*Bill 19, Civil Resolution Tribunal Amendment Act*, 2015, 4th Sess, 40th Parl, British Columbia, 2015 (assented to May 14th, 2015) s 27). A party who is dissatisfied with the ruling on a strata property matter can only seek limited judicial review in the Supreme Court of British Columbia. The standard of review is correctness unless the decision relates to:

- findings of fact for which the finding must either be unreasonable or made without any evidence to support it;
- discretionary decisions for which the decision must be arbitrary, made in bad faith, be based entirely or predominantly on irrelevant factors, or fail to comply with a statute; or
- natural justice and procedural fairness which are considered with the tribunal's mandate in mind.

Resolving a dispute through the tribunal has up to three phases. See Appendix H for more details on the Tribunal's procedures.

3. General

Once the tribunal has accepted the request for tribunal resolution, the limitation period is postponed until:

- the tribunal notifies the parties of its refusal to facilitate the settlement of, resolve, or adjudicate the claim;
- the date the tribunal certifies that case management is completed, unless the claim has been referred to a hearing under section 30;
- the date a party files a notice of objection; or
- the date the time for filing a notice of objection expires.

Tribunal orders relating to strata property matters are enforceable as an order of the court.

D. Alternative Dispute Resolution

Alternative dispute resolution is useful because it is efficient, inexpensive, **confidential**, informal, and flexible; the parties have control over the outcome. A trial, on the other hand, is formal, less flexible, and can be more expensive. With few exceptions, everything that is said in a courtroom or written in a filed document can be accessed by any member of the public.

Parties who wish to preserve their relationship, avoid the stress of trial, keep the details of their dispute private, or resolve their dispute in months instead of more than a year should seriously consider alternative dispute resolution.

1. Negotiations

Negotiation is cost and risk free. Any contact between the parties should be used to attempt to negotiate a settlement. Parties can negotiate a settlement at any point before a judgment is pronounced. Negotiations are without prejudice, which means they are confidential between the parties and cannot be used against a party in court. Any documentation related to negotiation should have the words “WITHOUT PREJUDICE” written across the top.

Ask the other party if he or she is represented by a lawyer. If so, all communication should be with the lawyer. If the other party is not represented, ask the other party if he or she is willing to discuss the claim.

Telephone technique should be **firm** but **not argumentative**. Try to negotiate the best offer possible.

Make a written plan and keep detailed notes of each conversation as it occurs. Plan how best to find out the other side’s position and how best to put forward your position.

If a settlement is reached, a letter should be sent to the other party to confirm the agreement. Enclose a duplicate copy for the appropriate party to sign and return to you. Any settlement should include a mutual release agreement in which both parties agree to not bring any further claims against each other and to withdraw any other proceedings that may have been commenced.

NOTE – If there are multiple defendants, a claimant should obtain legal advice to ensure that an agreement with one defendant does not inadvertently release the other defendants from liability.

2. Mediation

Mediation is a voluntary process in which an independent, neutral party listens to each party's position, focuses the issues in dispute, and assists the parties to come to a settlement agreement. While the mediator plays an active role in ensuring discussion remains productive, the ultimate responsibility for resolving the dispute rests with the parties. The purpose of mediation is not to determine who wins and loses, but to find solutions that meet the needs of the people involved.

Mediation as an alternative to litigation is often a more expedient, less expensive, and more satisfactory route than litigation. In order to mediate outside of the Small Claims Court process, all parties must agree. The parties typically share the cost of mediation.

The Small Claims Court requires that parties participate in either a settlement conference or mediation. Both processes are highly successful in resolving disputes and there is no additional cost to either party. For information on these processes, see the Small Claims Procedural Guides [5].

Parties who choose to mediate outside of the Small Claims Court process can choose their mediator [6], resolve the dispute sooner and on a more convenient timeline, and spend more time resolving the dispute than the approximately 2.5 hours allocated by the court. Also, since both parties would have agreed to mediate, settlement is more likely than if mediation is compulsory.

a) Conflict Resolution Clinic (CoRe Clinic [7])

The CoRe Clinic provides mediation services on a flexible payment scale. Sessions are run by a professional mentor mediator paired with a trained student mediator. The mentors are often the same mediators available through the BC Mediator Roster Society but are available at greatly reduced rates while volunteering with CoRe. All mentors have extensive Small Claims mediation experience, and significant expertise in other areas of the law as well. Students working with CoRe have undergone training through the UBC Faculty of Law Mediation Clinic and Practicum courses. Consider using the CoRe clinic for mediations under Rule 7.3. CoRe may also be particularly useful where parties have not yet filed a court action. Mediations with CoRe are voluntary, and both parties must agree to mediate in order for CoRe to assist. CoRe offers a flexible process that can be designed to accommodate the individual needs of parties to a dispute. Where requested, mediation sessions can be held in a range of locations, or by teleconference. In some cases the process will run more smoothly if parties to a dispute are kept separate. Mediation in general and CoRe in particular can provide a faster, less expensive alternative to court. For more information, refer to CoRe's website [8].

3. Arbitration

Arbitration is a voluntary process in which an independent, neutral party will listen to each party's position and resolve the conflict by choosing one of the party's positions. If the arbitrator's decision is binding, the dispute is settled. If the arbitrator's decision is non-binding, the parties may accept it or proceed to litigation. Arbitration can offer a very quick resolution to disputes and encourages both parties to present reasonable offers in order to increase the likelihood that their proposal will be selected. In order to arbitrate, all parties must agree. The parties typically share the cost of arbitration. The Small Claims Court does not require or provide arbitration; parties who wish to arbitrate must do so on their own. (See British Columbia Arbitration and Mediation Institute [9]).

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References

[1] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=11138
[2] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=11209
[3] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=24429
[4] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=11234
[5] http://www.ag.gov.bc.ca/courts/small_claims/info/guides.htm
[6] http://www.mediatebc.com/Find-a-Mediator.asp
[7] http://faculty.law.ubc.ca/coreclinic/index.htm
[8] http://faculty.law.ubc.ca/coreclinic
[9] http://www.bcami.com

V. Starting a Claim

A. Civil Resolution Tribunal

The Civil Resolution Tribunal is designed to facilitate dispute resolution in a way that is accessible, speedy, economical and flexible. It relies heavily on electronic communication tools. It focuses on resolution by agreement of the parties first, and by the Tribunal's binding decisions if no agreement is reached. Thus, there are several steps to the CRT process before actually applying for dispute resolution with the tribunal.

1. Self Help

A claimant must first attempt to resolve the dispute using the tribunal's online dispute resolution services. The claimant may use the website's resources to gather information and diagnose their claim.

a) Solution Explorer

The Solution Explorer, available on the CRT website, includes free legal information and self-help tools, such as guided pathways, interactive questions and answers, tools, templates and other resources. Applicants can apply to the CRT for dispute resolution right from the Solution Explorer.

Small Claims Solution Explorer website: https:/ / civilresolutionbc. ca/ how-the-crt-works/ getting-started/ small-claims-solution-explorer/

Strata Solution Explorer website: https:/ / civilresolutionbc. ca/ how-the-crt-works/ getting-started/ strata-solution-explorer/

b) Online Negotiations

The parties may then engage in an online negotiation that is monitored but not mediated or adjudicated. Online negotiations connect parties in order to encourage negotiated settlement. This tool will guide the parties through a structured, low cost negotiation phase.

2. Dispute Resolution – Case Management

If a claimant's attempt at online dispute resolution has been unsuccessful, the claimant must formally request resolution of the claim through the tribunal and pay all required fees. A claimant cannot request tribunal resolution if there is a court proceeding or other legally binding process to resolve the claim and a hearing or trial in that court or other legally binding process has been scheduled or has occurred to decide that claim.

If the other party does not agree to tribunal resolution or does not reply to the request for tribunal resolution, the tribunal will not resolve the claim unless the defendant is required to participate by either a statute or a court order. Despite the consent of both parties, the tribunal retains authority to refuse to resolve a claim or dispute and may exercise this authority at any point before making a final decision resolving the dispute. The general authority for refusing to resolve a claim or dispute is set out in s. 11 of the CRTA.

a) Applying for Dispute Resolution

To request dispute resolution by the tribunal an applicant must provide to the tribunal a completed Dispute Application Form, and pay the required fee.

(1) Application Costs and Where to Apply

Applications may be made online or a paper application form can be requested by calling 1-844-322-2292. Fees vary slightly by method of application. The cost to apply for dispute resolution online is $75-125, while the cost by paper application is $100-150.

If you are using a paper application, it may be sent to the CRT by:

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            PO Box 9239 Stn Prov Govt
            Victoria, BC  V8W 9J1
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(2) After an Application is Received

After an initial review of the Dispute Application Form, the tribunal will provide to the applicant one of the following:

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     a) a request for more information about the application;
     b) a Dispute Notice to provide to each respondent; or
     c) an explanation as to why the Dispute Notice will not be issued
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Once a Dispute Notice is issued by the tribunal the applicant must:

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     a) provide a Dispute Notice and a blank Dispute Response Form to
every respondent named in the dispute within 90 days from the day the
Dispute Notice is issued by
     the tribunal;
     b) complete the Proof of Notice Form;
     c) provide the completed Proof of Notice Form to the tribunal
within 10 days of providing notice; and
     d) provide any other information or evidence about the Dispute
Notice or notice process requested by the tribunal.
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(3) Providing Notice to Respondents

A Dispute Notice can be provided to a respondent by e-mail, fax, registered mail, courier delivery requiring a signature, or by delivering it in person. Notice by e-mail is acceptable proof that the notice requirements are met only if the respondent confirms receipt by sending a reply by e-mail to the applicant by the date shown on the Dispute Notice. Additional rules regarding notice delivery and when notice is considered accepted can be found on the CRT website found at:

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https://civilresolutionbc.ca/wp-content/uploads/2017/05/CRT-rules-effective-June-1-2017.pdf (Rules 50-71).
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Despite the rules, the tribunal may determine that the applicant has provided notice to a respondent using another method than permitted by the tribunal. The proof of notice form may be found at this link: https://civilresolutionbc.ca/wp-content/uploads/2017/05/CRT-ProofOfNotice-Person.pdf.

A Dispute Notice is invalid if it not provided to a respondent by the deadline on the Dispute Notice, unless the tribunal extends the deadline for providing notice. An applicant can ask the tribunal for more time to provide notice to a respondent by completing the applicable section of the Request for Directions on How to Provide Notice Form and providing it to the tribunal before the deadline for providing notice has passed.

If you have unsuccessfully tried to deliver a Dispute Notice to a respondent and would like to request an alternative method to deliver the notice or an extension of time see: http://civilresolutionbc.ca/wp-content/uploads/2017/02/CRT-Alternative-Service-Extension-Form.pdf.

b) Permitted Methods of Service

(1) Individual Under 19 Years Old

The applicant must provide the Dispute Notice (by any above method) to that respondent's parent or guardian unless the tribunal orders otherwise.

(2) Individuals Over 19 Years Old with Impaired Mental Capacity

If an applicant knows that a respondent has a committee of estate, a representative appointed in a representation agreement, or an attorney appointed in an enduring power of attorney, the applicant must provide the Dispute Notice to that person An applicant must also provide the Dispute Notice to the respondent or the person with whom the respondent normally resides, and the Public Guardian and Trustee.

(3) Companies defined by the Business Corporations Act

An applicant can serve these parties by the following methods: by registered mail, courier delivery requiring a signature or delivery in person to the address shown for the registered office with the Registrar of Companies; by delivery in person at the place of business of the company, to a receptionist or a person who appears to manage or control the company's business there; or, by delivery in person to a director, officer, liquidator, trustee in bankruptcy or receiver manager of the company.

(4) Extraprovincial Corporation defined by the Business Corporations Act

An applicant can serve these parties by the following methods: by registered mail, courier delivery requiring a signature or delivery in person to the address shown for the head office in the office of the Registrar of Companies if that head office is in British Columbia; by registered mail, courier delivery requiring a signature or delivery in person to the address shown in the office of the Registrar of Companies for any attorney appointed for the extraprovincial company; by delivery in person to the place of business of the extraprovincial company, to a receptionist or a person who appears

to manage or control the company's business there; or, by delivery in person to a director, officer, liquidator, trustee in bankruptcy or receiver manager of the extraprovincial company.

(5) Society incorporated under the Societies Act

An applicant can serve these parties by the following methods: by registered mail, courier delivery requiring a signature or delivery in person to the address for service with the Registrar of Companies; or by delivery in person to a director, officer, receiver manager or liquidator of the society.

(6) Partnerships

An applicant can serve these parties by the following methods: by registered mail, courier delivery requiring a signature or delivery in person to a partner; or, by delivery in person to the partnership's place of business, to a receptionist or to a person who appears to manage or control the partnership's business there.

(7) A trade union, municipality, extraprovincial society, unincorporated association, or a party outside Canada

An applicant must complete the Request for Directions on How to Provide Notice Form and provide it to the tribunal, and complete the steps and follow the directions provided by the tribunal.

(8) ICBC (motor vehicle accident related claims)

An applicant must also provide the Dispute Notice to the Insurance Corporation of British Columbia (ICBC) by: sending a copy of the Dispute Notice by registered mail or courier to 800 – 808 Nelson Street, Vancouver, BC V6Z 2H1; or, delivering a copy of the Dispute Notice in person to an employee at any ICBC claim centre.

c) Facilitated Dispute Resolution (FDR)

The purpose of the case management phase is to facilitate an agreement between the parties and to prepare for the tribunal hearing should it be required. The Preparation for Tribunal Hearing phase may be conducted at the same time as the Facilitated Dispute Resolution phase.

A case manager will determine which FDR processes are appropriate for a particular dispute and has the authority to require the parties to participate. They can make adjustments or modifications to the facilitation directions at any time during facilitation. FDR may be conducted in person, in writing, by telephone, via videoconferencing, via email, via other electronic communication tools, or a combination of these methods. These negotiations will be mediated by the case manager.

The case manager can direct any party in a dispute to provide to the tribunal and to every other party any information and evidence, including explanations of that information or evidence, information about a party's ability to pay an amount reached by agreement or ordered by the tribunal, responses to another party's information and communications, and that party's position on any proposed resolution of a claim in the dispute. During facilitation, the facilitator can refer any matter requiring a decision or order to a tribunal member, including a party's non-compliance with directions.

At any time during facilitation, the case manager can provide a non-binding neutral evaluation of the claims including any representations, demands, offers, information or evidence relating to a claim, or views on how the tribunal would likely resolve the dispute if it were to be resolved by the tribunal decision process. A case manager's non-binding neutral evaluation is covered by the confidentiality and non-disclosure rules. If the parties reach a resolution by agreement on any or all of the claims in their dispute, they can ask the tribunal to make a consent resolution order to make the terms of their agreement an order of the tribunal, and pay the required fee. If the parties agree to resolve some, but not all, claims by agreement, the case manager can record their draft agreement based on the terms agreed upon by the parties, and

provide a draft consent resolution order to a tribunal member immediately, or along with the Tribunal Decision Plan.

If the case manager decides the parties cannot resolve their dispute by agreement, they will inform the parties that activities aimed at finding a resolution by agreement are over, and ask the applicant to pay the tribunal decision fee. If the applicant does not pay the tribunal decision fee, a respondent can pay it. If no party pays the tribunal decision fee within the time period set by the case manager the tribunal may refuse to resolve or dismiss the dispute. If a party pays the tribunal decision fee, the process to prepare the dispute for a tribunal decision will begin.

d) Preparation for Tribunal Hearing

If the FDR process does not result in a settlement, the case manager will assist the parties in preparing for adjudication by ensuring the parties understand each other's positions and by directing the exchange of evidence. Most of this exchange and communication will occur online. To prepare the dispute for a tribunal decision, the case manager can support the parties in identifying and narrowing the claims or issues that will be decided in the tribunal decision process, identifying the facts relevant to resolving the claims or issues in the tribunal decision process, and taking any other steps to prepare for the tribunal decision process.

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As well, the case manager will give the parties a Tribunal Decision
Plan, which sets out required information, steps, and timelines to
prepare the dispute for the tribunal decision process. Once the case
manager has given the Tribunal Decision Plan to the parties, they
cannot add any other party or claim without permission from the
tribunal. The tribunal may at any time order that a party be added to
the dispute and make directions as to the process to be followed.
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If a party does not comply with the Tribunal Decision Plan the tribunal may do any of the following:

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    a) the tribunal can decide the dispute relying only on the
information and evidence that was provided in compliance with the
Tribunal Decision Plan;
    b) the tribunal can dismiss the claims brought by a party that did
not comply with the Tribunal Decision Plan; and
    c) the tribunal can require the non-complying party to pay to
another party any fees and other reasonable expenses that arose as a
result of a party's non-
    compliance with the Tribunal Decision Plan.
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Facilitation ends when the case manager determines that the Tribunal Decision Plan is complete.

B. Settlement Letter

The fastest and least expensive way to resolve a dispute is to tell the other person what you are claiming from them and why you are claiming it. If the other person agrees with the amount or responds in a manner that leads to a settlement, both parties will save the time, effort, expense, and uncertainty of a lawsuit.

Bona fide attempts to settle may involve concessions and admissions of liability. For example, a claimant may offer to settle for less than the claim to account for the cost, time investment, and risk of going to trial. A defendant, for example, may admit liability but dispute the amount owed. Whenever parties can agree on certain points, the likelihood of settlement increases.

Because of the strong public interest in settlement, these *bona fide* settlement attempts are protected by settlement privilege. This means that, if the matter is not settled, any reductions in the claim or admissions made disappear and cannot be used against the party who made them (See *Schetky v Cochrane*, [1918] 1 WWR 821 (BCCA); *Greenwood v Fitts* (1961), 29 DLR (2d) 260 (BCCA)). It is prudent to include the words "WITHOUT PREJUDICE" in correspondence involving *bona fide* attempts to settle to indicate that the party sending the document wishes to rely on settlement privilege; settlement privilege will still apply, however, even if "WITHOUT PREJUDICE" is not included.

Settlement letters should be brief, factual, and clearly state the amount claimed even if that amount exceeds $25,000. Settlement letters should have a courteous tone as a letter that invokes a hostile reaction from the recipient will be counter-productive. A party writing a settlement letter should never threaten criminal or regulatory penalties; **extortion is a criminal offence**.

C. Identifying the Defendant(s)

If a settlement letter is unsuccessful, parties will be required to file a Notice of Claim through Small Claims Court; see Section V.D.: Drafting the Notice of Claim.

When drafting a Notice of Claim and throughout the litigation process, it is important to stick to the **relevant** facts. Court is not a forum for airing grievances that do not give rise to a claim. For example, in a claim for breach of contract, the fact that the defendant acted rudely is generally not relevant to the claim. Including irrelevant facts confuses the issues, wastes time, raises tensions, and makes it more difficult to successfully prove the claim. A good rule to follow for each type of claim is to include **only the facts necessary** to satisfy the legal test for that type of claim; brief is better.

It is important to make your cause of action (e.g., negligence, breach of contract, etc.), type of damages, and amount of damages very clear. Do not let the judge guess what you want.

1. Suing a Business

a) Corporation

A corporation is a legal entity that is separate from its shareholders and employees. It is identified by a corporate designation such as Incorporated, Limited, Corporation, their abbreviations Inc., Ltd., or Corp., or their French equivalent following the business name.

A corporation may register a sole proprietorship or partnership and operate under that name. To sue such a company, a claimant should include both the corporate name and the name of the proprietorship or partnership: e.g., 0123456 BC Ltd. dba Joe's Bakery. The letters dba stand for "doing business as". Variations such as "coba" meaning "carrying on business as" are also acceptable.

A corporation can enter into contracts and can sue or be sued. Generally speaking, a corporation's shareholders, officers, directors, and employees are not liable for the actions or liabilities of the corporation or their own actions while acting

within the scope of their office or employment. A person who feels that a shareholder, director, officer, or employee of a corporation might be liable should obtain legal advice.

Corporations may be either provincially or federally incorporated. A federal company is incorporated under the *Canada Business Corporations Act*, RSC 1985, c. C-44 [CBCA]. A BC corporation is incorporated under the *Business Corporations Act*, SBC 2002, c 57 [BCBCA]. Corporations may also be registered under the laws of the other provinces and territories.

Because a corporation can have multiple locations, every corporation, including non-BCBCA corporations, doing business in BC must provide an address where it can be served with notices of claim and other important documents. A claimant must perform a company search to obtain the current registered address for the defendant corporation. (*Rule* 1(2.1); *Rule* 5(2.1). See Small_Claims_Legislation_and_Resources_(20:App_E) Appendix E for instructions on conducting a company search.) This address must be listed as the corporation's address on the notice of claim form.

b) Partnership

A partnership can exist between one or more persons and is governed by the *Partnership Act*, RSBC 1996, c 348 [PA]. A person includes a corporation.

The rules for determining whether a partnership exists are set out in s 4 of the PA. Generally speaking, all partners are personally liable for the debts of the business: s 7 of the PA. As it is impossible to tell whether a business is a partnership or a sole proprietorship from the name alone, a claimant should perform a company search to learn the true structure of the business as well as the name and address of each partner.

The proper way to list each partner on the notice of claim is:

Jane Doe d.b.a. XYZ Partnership

John Doe d.b.a. XYZ Partnership

ABC Company Ltd. d.b.a. XYZ Partnership

NOTE: "d.b.a." stands for "doing business as"

NOTE: One should be careful to not confuse partnerships with limited partnerships (LP) or limited liability partnerships (LLP).

c) Sole Proprietorship

A sole proprietorship allows a single person or corporation to do business under a business name. Sole proprietorships are registered under Part 4 of the PA. A sole proprietor is personally responsible for the debts of the business.

As it is impossible to tell whether a business is a partnership or a sole proprietorship from the name alone, a claimant should perform a company search to learn the true structure of the business as well as the name and address of the proprietor.

The proper way to list a sole proprietor on the notice of claim is:

Jane Doe d.b.a. XYZ Company

John Doe d.b.a. XYZ Company

ABC Company Ltd. d.b.a. XYZ Company

NOTE: "d.b.a." stands for "doing business as"

d) Other

For other forms of businesses such as limited partnerships (LP), limited liability partnerships (LLP), and unlimited liability corporations (ULC), legal advice is recommended.

2. Suing a Person over 19 Years Old

Do not use titles such as Mr., Mrs. or Ms. Use full names, not initials (i.e., "Dr. D. Smith" should be "Doris Smith"). Claimants may sue more than one defendant if the claim against each defendant is related. Divide the "To" space in half and use one half for the name and address of each defendant; alternatively, the notice of claim filing assistant [1] makes it convenient to add multiple defendants.

3. Suing a Society

A society is a type of not-for-profit corporation registered pursuant to the *Society Act*, RSBC 1996, c 433. The procedure and principles for suing a society are the same as for corporations. A company search is required to ascertain the society's registered address (*Rule* 1(2.2); *Rule* 5(2.2)).

4. Suing I.C.B.C.

A claimant who is suing for the deductible portion of an insurance policy must name both the driver and the registered owner of the vehicle as defendants rather than ICBC. A claimant who only has the number plate of the vehicle can obtain the owner's name by writing a letter to ICBC's Vehicle Records Office.

ICBC Insurance Enquiries

151 West Esplanade

North Vancouver, BC V7M 3H9

Telephone: (604) 661-2233 or 1(800) 464-5050

Note: If a motor vehicle has caused personal injury or property damage or a claimant has been denied coverage by ICBC, refer to the entire Law Students' Legal Advice Program's "Automobile Insurance (ICBC)" guide. Claims involving motor vehicles and motor vehicle insurance can be complicated; it is not possible to cover all possibilities in this Small Claims guide.

A claimant should be alert to the following:

- a claim involving motor vehicle insurance may have a shorter limitation period;
- parties other than the driver (e.g., the owner of the vehicle) may also be liable;
- a lawsuit for Part 7 (No Fault) benefits should be filed if appropriate;
- ICBC may be liable if damage is caused by an unidentified (i.e., hit and run) (See *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 24), under, or uninsured motorist (*Insurance (Vehicle) Act*, RSBC 1996, c 231, s 20); and
- personal injury claims are very difficult to value and it may be appropriate to consider bringing the claim in Supreme Court if the injuries are more than trivial.

Many personal injury lawyers work on a contingency basis. A claimant may wish to consult a personal injury lawyer prior to filing the claim to ensure that the amount claimed is reasonable and all parties are properly listed on the Notice of Claim.

Whether or not ICBC is named as a defendant, in a claim for damages caused by a vehicle in British Columbia, a claimant **must** serve ICBC with a copy of the Notice of Claim and a blank Reply form in the same manner as serving a corporate defendant (*Insurance (Vehicle) Act*, RSBC 1996, c 231, s 22).

Where ICBC is properly named as a defendant, its correct legal name is the **Insurance Corporation of British Columbia**. It is a special type of corporation and the usual corporate designation such as Inc. is not required.

5. Suing the Government

a) Federal Government

The federal government should be named as either "Attorney General of Canada" or "Her Majesty in right of Canada". If an agency of the Crown is to be sued and **if a federal Act permits**, the agency may be sued in the name of that agency. (See s 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50; *Goodhead v The Law Society Of BC*, 1997 CanLII 4299 (BC SC)).

b) Provincial

The provincial government should be named as "Her Majesty the Queen in right of the Province of British Columbia". (See s 7 of the *Crown Proceeding Act*, RSBC 1996, c 89).

It should be noted that the CRT cannot resolve disputes where the claim is against the government or the government is a party to the dispute. See Section IV. C.: Civil Resolution Tribunal for more information on the jurisdiction of the CRT.

6. Suing the Police

The "Royal Canadian Mounted Police" is not a legal entity that can sue or be sued. (See *Dixon v Deacon Morgan McEwen Easson*, 1989 CanLII 2786 (BC SC)). A claimant who wishes to sue for damages arising from the conduct of a police officer should sue the individual police officers and the Minister of Justice and Attorney General. (See *Amezcua v Taylor*, 2010 BCCA 128 (CanLII); *Roy v British Columbia (Attorney General)*, 2005 BCCA 88 (CanLII)). A claimant who is suing a municipal police force should sue the individual police officers as well as the municipality employing the police officers. It is critical that a claimant provide written notice to the city within **two months** of the event giving rise to the cause of action. (See *Local Government Act*, RSBC 1996, c 323, s 286(1)).

7. Suing a Municipality

Municipalities are special corporations incorporated by letters patent. Depending on its size, a municipality is referred to as a village, town, city, or a district municipality. (See *Local Government Act*, RSBC 1996, c 323, s 17(1)). When letters patent are issued, the name of the incorporated municipality is published in the BC Gazette. (See *Local Government Act*, RSBC 1996, c 323, s 15(1)(a)). A claimant should search the BC Gazette [2] to obtain the legal name of the municipality.

8. Suing a Young or Mentally Incompetent Person

A minor, also called an infant, is a person who is under 19 years of age at the time the claim is filed. Mentally incompetent persons as well as minors are persons with a legal disability. When suing such persons, Rule 20-2 of the *Supreme Court Civil Rules* applies, with the exception of Rule 20-2(4) (which does not apply in Small Claims cases). (See *Small Claims Rule* 17(18)). Persons with a legal disability must be represented by a litigation guardian. With some limitations, a litigation guardian can be any person ordinarily resident in British Columbia.

If the claim involves personal injury, Rule 20-2(4) of the *Supreme Court Civil Rules* applies and requires that the litigation guardian act by a lawyer unless the litigation guardian is the Public Guardian and Trustee.

A party cannot take a step in default against a person with a legal disability without the court's permission. A settlement with a party under a legal disability is not binding unless the court approves it.

These rules also apply to a party who becomes mentally incompetent at any point in the proceeding.

9. Suing an Insurance Company other than ICBC

Claims against insurers for coverage can be complicated. A claimant should research the law surrounding *uberrimae fidei*, an insurer's duty to defend, and an insurer's duty to indemnify. A claimant should be aware that claims against insurers may have a shorter limitation period.

10. Suing an Unknown Person

If a claimant does not know the identity of one or more parties, the claimant can still file a claim using a misnomer. For example, the claimant would list the unidentified defendant as either John Doe or Jane Doe as the case may be. If there are multiple unknown parties, the claimant could add a number to each misnomer (e.g., John Doe 1; John Doe 2). Misnomer also applies to unknown companies.

A claimant should research the law surrounding misnomer and ensure that both the unidentified party and its actions are described in as much detail as possible.

If the party is unknown because of a motor vehicle hit and run, the claimant may sue ICBC as a nominal defendant.

C. Can the Defendant(s) Pay?

One cannot squeeze blood from a stone. If a defendant has insignificant assets or income, the defendant may have no means to pay a judgment; such a person is "judgment-proof" and a claimant with an uncollectible judgment is said to be holding an "empty judgment". A claimant should consider whether it is worth the time, expense, and stress of suing a judgment-proof defendant.

A judgment is enforceable for ten years after it is issued (See *Limitation Act*, RSBC 1996, c 266; *Limitation Act*, SBC 2012, c 13, s 7); after this time, unless it is renewed, the judgment expires and becomes uncollectible. On some occasions, a previously judgment-proof defendant will "come into money" by receiving an inheritance or winning the lottery. This is a rare occurrence and a claimant must invest time and effort to monitor the defendant's circumstances over the ten years that the judgment is enforceable. A more common change in a judgment-proof defendant's circumstances is the defendant securing a higher-paying job.

A claimant should also consider the likelihood of the defendant going bankrupt. If the defendant goes bankrupt, the claimant may recover little or none of the amount of the judgment. For more detail on bankruptcy, see "Enforcement of a Judgment".

A claimant must decide whether or not to sue before the limitation period expires. If the limitation period expires, a claimant cannot later sue on that cause of action if the defendant's circumstances change.

D. Drafting the Notice of Claim

The Notice of Claim is the document that starts an action in Small Claims Court. The Notice of Claim form is comprised of several sections and each section must be completed. The form can be either typed or handwritten. Hard copies are available from the court registry (see Appendix A) and an electronic copy is available online [3]. Where possible, a claimant should type the Notice of Claim form.

A sample Notice of Claim is attached (see Appendix C) and may be a helpful guideline when drafting a Notice of Claim.

1. “From”

This section must contain the claimant’s full legal name, address, and telephone number. The claimant has an on-going duty to notify the court registry of any changes to the information in this section. Failure to provide the registry with current and accurate contact informationmay result in the claimant’s claim being dismissed and/or the claimant being liable for costs or penalties.

2. “To”

The claimant must list the full legal name, address for service, and, if available, the telephone number for each defendant. If additional space is required, the claimant may attach a piece of paper listing this information for each defendant. Alternatively, the Notice of Claim filing assistant [1] can neatly add multiple defendants onto one Notice of Claim form.

Failure to list the proper legal name of a defendant may result in the claimant’s claim against that defendant being dismissed or the judgment against that defendant being unenforceable. If the limitation period (see Appendix F) has already expired, the claimant may not be able to correct the error.

3. “What Happened?”

In this section, the claimant must list the facts that support the claimant’s cause(s) of action and the damages that the claimant has suffered. The claimant should adhere to the following general rules:

1. Don’t plead evidence – state what you will prove, not how you will prove it
2. Don’t plead law – unless you have a statutory cause of action
3. Use paragraphs – use one paragraph to state each fact that you will prove -- Number each paragraph beginning at 1
4. Claimant must prove every fact – therefore, stick to material facts

In this section, one must set out the facts that give rise to the cause of action, and the loss or damage that resulted. This description should be brief, but must inform the opposing party of the case to be met and give the judge an outline of what will be argued. The Notice of Claim (Form 1) has little space for the facts, but the facts can continue onto another piece of paper. The additional facts must be attached to each copy of the Notice of Claim. In general, the pleadings should be brief, complete, and as accurate as possible.

The facts as alleged must give rise to a legal cause of action. After the facts, state the legal cause of action(s) that entitle you to the relief you are seeking. If there is more than one cause of action, plead the strongest one and plead the other ones in the alternative. For example, in a claim for a bad car repair, a claimant can sue for breach of contract and negligence. A pleading might read: “In addition, or in the alternative, the claimant claims damages as a result of the defendant’s negligent repair of the automobile”.

The pleadings should describe:

- a) the relationship of the parties (e.g., buyer and seller); and
- b) the dates, places, and details of amounts, services, or practices involved.

Claimants will usually be bound by the facts in the pleadings. If the facts or legal basis need to be changed, the claimant may be able to amend the Notice of Claim (Rule 8).

When there is more than one defendant, the claimant should make it clear whether their liability is joint, several, or joint and several. This distinction affects enforcement of a judgment and any subsequent actions arising out of the same cause. Liability stated as joint and several is more inclusive.

If liability is joint, the defendants must be sued as a group however the claimant can recover the full amount from any or all of the defendants.

Where liability is several, the claimant can sue any or all of the defendants however each defendant is obligated to repay only his own portion of the debt.

Where liability is joint and several, the claimant may sue any or all of the defendants and may recover the full amount from any or all of the defendants. The debtors can then litigate among themselves to apportion the debt between them.

4. "Where?"

The claimant should enter the name of the municipality as well as the province where the cause of action arose. If the cause of action arose outside of British Columbia, the claimant must state in the "What Happened?" section how the court has jurisdiction over the claim. (See *Dreambank, supra*.)

5. "When?"

List the date or dates when the cause(s) of action arose. Unless the date is very clear or the limitation period is about to expire, stating the month and year is sufficient. It is prudent to state the date as follows:

- when the date is known: "On or about August 15, 2012";
- if only the month is known: "In or about August 2012"; or
- if the cause(s) of action arose over time: "From about May 2012 to August 2012".

6. "How Much?"

This is where the claimant describes the remedy. In most cases, this will be an amount of money. However a claimant may request an alternative remedy. For example, the claimant could request the return of an item or, in the alternative, the value of it, as well as damages. A claimant who wants items returned should consider what condition they will be in, and whether he or she really wants them back.

a) Interest

If there is no mention of interest in a contract between the parties, the court will award interest to the successful claimant from the date the cause of action arose until the date of judgment. (See *Court Order Interest Act*, supra, s. 1(1); *Red Back Mining Inc v Geyser Ltd*, 2006 BCSC 1880 (CanLII)). This is called "pre-judgment interest". Interest in a claim for debt is calculated from the date the debt became due and, in a claim for damages, from the date the damages arose.

The court sets the interest rate every six months and publishes a table listing the rates applicable to each six-month period. The Notice of Claim should indicate a claim for "Interest pursuant to the *Court Order Interest Act*" but leave the amount area blank; the registry will calculate the amount according to the table.

Note: While a claimant may be paying a higher interest rate on a credit card or loan as a result of the defendant's actions, the claimant is limited to the pre-judgment interest rate set by the court unless the parties have expressly agreed that interest will be paid.

If the parties have agreed on a rate of interest, the Notice of Claim should indicate a claim for contract interest, the applicable interest rate, and the date from which the interest began to accrue. The amount of interest that has accrued up to the date of filing should be included on the Notice of Claim as well as the amount of interest that accrues each day. It is important to note that a claim for contract interest is, in substance, a claim for contractual damages. Accordingly, the claim for contract interest together with the principal amount must be within the Small Claims Court's monetary jurisdiction. If a claim for contract interest has or could cause the total claim to exceed the court's monetary jurisdiction, it would be prudent to state on the Notice of Claim that the claimant abandons the amount necessary to bring the claim within the Small Claims Court's monetary jurisdiction.

If the parties have agreed that interest will be paid but have not agreed on a rate of interest, the rate of interest is five per cent per annum. (See *Interest Act*, RSC 1985, c I-15, s 3).

Generally, even if the parties agree to a rate of interest expressed with reference to a period other than one year (e.g., 2% per month), a claimant can only recover a maximum of five per cent per annum unless the contract expressly states a yearly rate or percentage of interest that is equivalent to the other rate (e.g., 24% per annum). (See *Interest Act*, RSC 1985, c I-15, s 4).

It is a criminal offence to receive, or enter into an agreement to pay or receive, interest at a rate that exceeds 60% per annum. (See *Criminal Code*, RSC 1985, c C-46, s 347(1)). Interest has a broad definition and includes fees, fines, penalties, commissions, and other similar charges including costs relating to advancing credit.

If the judgment is not paid immediately, post-judgment interest may be awarded. The court has the discretion to vary the rate of interest or to set a different date from which the interest commences. (See *Court Order Interest Act*, supra, s 8).

b) Claims between $5000-$35,000

In order to sue in Small Claims Court for a claim exceeding $35,000, the claimant must state, "The Claimant abandons the portion of any net judgment that exceeds $35,000" (Rules 1(4) and (5)). At any time prior to trial, the claimant can decide to sue for the full amount and apply to transfer the claim to the Supreme Court of British Columbia (see *Der v Giles*, 2003 BCSC 623). Once the trial has been heard, however, the abandonment is likely permanent.

There is an exception to the $35,000 limit. If more than one claimant has filed a Notice of Claim against the same defendant(s) concerning the same event, or, if one claimant has filed Notices of Claim against more than one defendant concerning the same event, the judge may decide each claim separately, even though the total of all the claims (not including interest and expenses) exceeds $35,000 (Rule 7.1(4)). Such claims often have a trial at the same time although the claimant(s) must request this.

c) Filing Fees

Filing fees are those fees paid to file the Notice of Claim and are either $100 or $156 unless the fees have been waived. The registry staff will enter this amount. Filing fees are recoverable if the claimant is successful.

Please note that fees for the CRT are different. (See Appendix I: Civil Resolution Tribunal Fees)

d) Service Fees

Service fees are an estimate of the cost of serving the defendant(s). The amount varies based on the method of service and the number of defendants. The registry staff will enter this amount. Service fees are recoverable if the claimant is successful; however, as the claimed amount is only an estimate, a judge has discretion to either increase or decrease the allowed service fees.

e) Other Expenses

Unless a judge or the Registrar orders otherwise, an unsuccessful party **must** pay to the successful party (Rule 20(2)):

- any fees the successful party paid for filing any documents;
- reasonable amounts the successful party paid for serving any documents; and
- any other reasonable charges or expenses directly related to the proceedings. (See Rule 20(2); *Bagry v. Aoujla* [4], [1994] B.C.J. No. 1212 (QL) (Prov. Ct.); *Gaudet v. Mair* [5], [1996] B.C.J. No. 2547 (QL) (Prov. Ct.); *Johnston v. Morris* [6], 2004 BCPC 511).

An example of a reasonable expense related to the proceedings is a company search. Another example is costs to purchase cases used in argument. (See *Faulkner v. Sellars* [7] (1998), 9 C.C.L.I. (3d) 247 (B.C. Prov. Ct.)). For additional case examples, please see Rule 20(2); *Bagry v. Aoujla* [4], [1994] B.C.J. No. 1212 (QL) (Prov. Ct.); *Gaudet v. Mair* [5], [1996] B.C.J. No. 2547 (QL) (Prov. Ct.); *Johnston v. Morris* [6], 2004 BCPC 511. If such expenses are known at the time of filing, they should be stated on the Notice of Claim. If they occur afterwards, the successful party may request them at the conclusion of the trial.

Although legal fees **cannot** be recovered, legal disbursements may be recoverable if they fit one of the criteria above.

Parties are not compensated for the time they spend preparing for or attending court.

E. Filing a Notice of Claim

1. Cost

The cost to file a notice of claim is $100 if the claim is for $3,000 or less. The cost increases to $156 for claims above $3,000 and up to $25,000. A person who is unable to afford the filing or other fees may apply to the registrar for a fee waiver (Rule 20(1)) by filing an Application to the Registrar and a Statement of Finances.

2. Where to File (Rule 1(2))

A claimant must file the notice of claim at the Small Claims registry nearest to where:

- the defendant lives or carries on business (see *DreamBank.*; or
- the transaction or event that resulted in the claim took place.

This can sometime be unclear in the case of contracts that are executed by fax or email or in other claims, such as negligence, where the conduct complained of took place in a number of locations. (See *DreamBank*; *Rudder v Microsoft Corp.*, 1999 CanLII 14923 (ON SC); *Simpson-Sears Ltd. v. Marshall* [8] (1979), 12 B.C.L.R. 244 (S.C.)). A claimant may wish to obtain legal advice if there is any uncertainty regarding where to file.

If two different Small Claims registries have jurisdiction, the claimant should choose the one that is most convenient. If the defendant disputes the claimant’s choice, the defendant can file an application for change of venue and a judge will decide the most appropriate location.

A company can live in multiple locations including where it is registered, where it carries on business, and where its records are kept. (See *DreamBank*; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28).

3. How to File

The claimant must file at least four complete and identical copies of the notice of claim. One copy is for the court, one is for the claimant, one is a service copy, and one is required for **each** defendant.

Once the notice of claim has been filed and stamped by the registry and the fee, unless waived, has been paid, the claimant must, within one year, serve a copy on the defendant.

F. Serving a Notice of Claim

A copy of the filed Notice of Claim **together with a blank Reply form** (available from the registry) must be served on each defendant (Rule 2(1)). A claimant has 12 months from the date of filing to serve the defendants (Rule 2(7)). If more time is required, the claimant can apply to the registrar for an extension (Rules 2(7), 16(2)(a), and 16(3)).

The permissible methods for serving a defendant depend on who the defendant is. The table below sets out how each category of defendant can be served. If a defendant is evading service or, after a diligent search, cannot be found, a claimant may apply to a judge for an order for substitutional service.

Defendant	**Permitted Methods of Service**
Individual Over 19 Years Old (Rule 2(2))	• Personal service • Registered mail to residence
Individual Under 19 Years Old (Rules 2(6) and 18(2))	• Personal service on the minor's mother, father, or guardian • Personal service on another person as directed by a judge upon application
Individual outside BC	• See "Individual Over 19 Years Old" or "Individual Under 19 Years Old" • Defendant has 30 days to respond (Rule 3(4))
BC Corporation (Rule 2(3))	• Leaving a copy at the **delivery address** for the registered office • Registered mail to the **mailing address** for the registered office • Personal service on a receptionist or manager at the company's place of business • Personal service on a director, officer, liquidator, trustee in bankruptcy, or receiver manager • If the company's registered office has been eliminated, as directed by a judge on application
Extraprovincial Corporation	See Rule 2(4)
Unincorporated Company (Proprietorship) (Rule 2(2))	• Personal service on proprietor • Registered mail to proprietor's residence
Unincorporated Company (Rule 2(5)) (Partnership)	• Personal service on a partner • Personal service on a receptionist or manager at the place of business • Registered mail to a partner's residence
Company outside BC	See Rule 18(6.1)
Strata Corporation (See *Strata Property Act*, SBC 1998, c 43, s 64)	• Personal service on a council member • Registered mail to its most recent mailing address on file in the Land Title Office
Society (See *Society Act*, RSBC 1996, c 433, s 12; Rule 18(3))	• Personal service on anyone at the address for service • Personal service on a director, officer, receiver manager, or liquidator • Registered mail to the address for service

Unincorporated Association (Rule 18(5))	• Personal service on an officer • Registered mail to the registered office
Incorporated Association (See *Cooperative Association Act*, SBC 1999, c 28, s 28) Housing Cooperative Community Service Cooperative	• Personal service on a director or officer • Registered mail to the registered office • Personal service on anyone at the registered office
Trade Union (Rule 18(5))	• Leaving with the business agent
Municipality (Rule 18(1))	• Personal service on the Clerk, Deputy Clerk, or similar official
ICBC	• Personal service on a receptionist at 800 – 808 Nelson Street, Vancouver, BC V6Z 2L5
Estate (See *Wills Estate and Succession Act*, SBC 2009, c13, s 61(1))	• Personal service on the administrator, executor, or executrix • Registered mail to the residence of the administrator, executor, or executrix

If a defendant is served incorrectly, a claimant cannot obtain a default order until after the defendant has been properly served. If the defendant has been served incorrectly but files a Reply, the claimant does not have to serve the defendant again.

If the claim involves a motor vehicle accident, the other driver and ICBC must be served, even though ICBC may not be named as a defendant. (See *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 22).

1. Personal Service

Personal service is effected when the claimant gives the notice of claim and blank reply form to the defendant in a manner that ensures that the nature of the document is brought to the defendant's attention. For example, a notice of claim inside an unmarked and sealed envelope or rolled inside of a newspaper is not properly served.

If a defendant knows the nature of the document and has touched it, service has likely been effected. If the defendant knows of the nature of the document and refuses to touch it, the claimant may place it at the defendant's feet.

Personal service can be effected by any adult who is not under a legal disability. A claimant may wish to have a friend or a process server serve the Notice of Claim.

NOTE: Personal service should not be used as a means of intimidating or exacting revenge on a defendant. While it may seem satisfying to personally serve the defendant, alternative methods should be employed if there is a risk of a heated exchange. Such an exchange may lead to physical violence and, in any event, negative encounters in the course of the litigation will be counterproductive to settlement discussions.

2. Registered Mail

Registered mail is a service offered by Canada Post. In order to prove that a document was served by registered mail, a party must either obtain a copy of the signature obtained by Canada Post at the time of delivery or obtain a printout of the delivery confirmation from http://www.canadapost.ca.

3. Substitutional (Alternate) Service

When, after a diligent search, a claimant is unable to locate the defendant or the defendant is evading service, the claimant can apply to the registrar (Rule 16(3)) for permission to serve the defendant in another manner (Rules 16(2)(e) and 18(8)). An affidavit and a hearing are not required.

The alternate method of service that is ordered should be sufficient to bring the claim to the defendant's attention. Suggested methods of alternate service include a Facebook message, email, facsimile, regular mail, and text message to all known addresses and phone numbers for the defendant. Other methods include posting the Notice of Claim on the defendant's door. The claimant should seek an order requiring service in as many methods as will be reasonably necessary to make the defendant aware of the claim.

G. Proof of Service

Once the defendant has been served, the claimant should complete a Certificate of Service (Form 4) and file it along with the service copy of the Notice of Claim. If there are multiple defendants, the claimant should file a Certificate of Service and service copy of the Notice of Claim for each defendant. Other methods of written proof of service are available (Rule 18(14)). Rarely, a judge may allow sworn oral evidence of personal service (Rule 18(15)).

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References

[1] https://justice.gov.bc.ca/FilingAssistant/
[2] https://www.crownpub.bc.ca/Home/Gazette
[3] http://bit.ly/UO7v9l
[4] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=11138
[5] http://pm.cle.bc.ca/clebc-pm-web/manual/42757/reference/casePopup.do?id=11209
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VI. Responding to a Claim

If a party is responding to a claim over $5,000, proceed to Section VI.B.: Possible Strategies.

A. Civil Resolution Tribunal

A respondent who receives a Dispute Notice must within 14 days of receiving it (or if notice was provided outside British Columbia within 30 days) complete a Dispute Response Form, provide the Dispute Response Form to the tribunal and pay the required fee (See Appendix I: Civil Resolution Tribunal Fees). A Dispute Response Form can be found at the following link: https://civilresolutionbc.ca/wp-content/uploads/2017/06/FORM-Response-Individual-May-2017.pdf.

A party named as a respondent to a dispute who fails to respond to a properly delivered Dispute Notice by the date shown on the notice is in default. If every respondent is in default, an applicant may request a default decision and order from the tribunal. See Section VII. Default Order for more information

For more information on Counterclaims or adding Third Parties through the CRT see Section VI. B.: Possible Strategies.

B. Possible Strategies

1. Notify Insurance Company

Many insurance policies cover more liabilities than their description would suggest. For example, many homeowner and tenant policies cover claims for damages or injuries arising from acts or omissions by the insured anywhere in the world. An example would be accidentally tripping a person who falls and breaks their hip. These policies also tend to include most people in the household including young children and foster children.

There are many exclusions and limitations but it is always best to let the insurer know about a claim against you. If the insurer will defend you, the insurer will bear the costs of your defence and possibly pay any damages that are awarded.

Note: It is important to contact the insurer as soon as possible and to not make any admissions that might jeopardise a defence. Failing to promptly notify the insurer, admitting liability, or taking steps in the claim may permit the insurer to deny coverage.

2. Apologising

Many lawsuits arise or continue because a wrongdoer has not apologised to the party who was wronged. The *Apology Act*, SBC 2006, c 19 allows a person to apologise for a wrongful act or failure to act without the apology becoming an admission of liability. A sincere apology can often avert litigation or form an important foundation for a settlement.

3. Option to Pay all or Part

If a defendant pays the entire amount of the claim directly to the claimant (Rule 3(1)(a)), the defendant need not file a Reply. The defendant should retain a receipt as proof of payment and request that the claimant withdraw the claim. Only the claimant may withdraw a claim and, if a withdrawal is filed, all parties who were served with the Notice of Claim must be served with a copy of the withdrawal.

When considering this option, a defendant should be aware of other possible problems aside from the lawsuit. For example, if the claimant has placed derogatory information on the defendant’s credit file, the defendant should ask the claimant to remove this negative information as part of the settlement. If the claimant is unwilling to remove the

information, the defendant may still settle the claim but may find it difficult or impossible to remove the information from the credit file. The process for removing incorrect information from a person's credit file is outside the scope of this guide.

If the entire claim is admitted but the defendant requires time to pay or only part of a claim is admitted (Rule 3(1)(b) or (c)), the defendant must file a reply form but may also propose a payment schedule for what is admitted. The payment schedule must detail how the amount will be paid back. The Registrar can order the proposed payment schedule if the claimant consents to it (Rule 11(10)(b)). If the claimant does not consent to the proposal or no payment schedule is proposed, the claimant may summon the defendant to a payment hearing (See Section XVI: Enforcing a Judgment).

4. Option to Oppose all or Part

A defendant who opposes all or part of the claim (Rule 3(1)(d)) must file a Reply form detailing what is admitted, what is opposed, or what is outside the defendant's knowledge. The reply should list reasons for any parts that are opposed. A defendant should avoid a general denial of the entire claim; a detailed examination of each element of the claim and why the defendant thinks it is wrong is much more persuasive.

Before deciding to oppose a claim, a defendant should ensure that there is a legal defence to the claim. A penalty can apply if a defendant proceeds through trial with a Reply that is bound to fail (Rule 20(5)).

5. Counterclaim

Whether or not a defendant agrees or disagrees with all or a part of the claim, the defendant can counterclaim (Rule 4(1)). A defendant who wishes to counterclaim should review Section III: Do You Have a Claim? and Section IV: Choosing the Proper Forum. A counterclaim is essentially a notice of claim but on a different form. A counterclaim must have a legal basis; there are penalties for proceeding to trial if there is no reasonable basis for success (Rule 20(5)).

Although a defendant can start a separate claim either in Small Claims Court or another forum instead of counterclaiming, if the parties and witnesses are the same and the claim falls within the Small Claims Court jurisdiction, it is preferable that the defendant file a counterclaim so that both matters are heard together. If the defendant has commenced an action in a different forum, this should be mentioned in the Reply.

A counterclaim is made on the Reply form by following the instructions and paying the required fee. The fee for a counterclaim is the same as the fee for a notice of claim and is eligible for a fee waiver.

The relationship between a counterclaim and a set-off should be noted. (See *Johnny Walker Bulldozing Co Ltd v Foundation Co of Canada Ltd*, 1997 CanLII 3726 (BCSC); *Gwil Industries Inc v Sovereign Yachts (Canada) Inc*, 2002 BCSC 713 (CanLII); *Lui v West Granville Manor Ltd*, 1985 CanLII 155 (BC CA)). A counterclaim is a standalone claim and it is possible for a defendant to succeed on a counterclaim when the claimant has been unsuccessful. A set-off is a defence. If the claimant is successful, a set-off will reduce the amount payable to the claimant. If the claimant is unsuccessful, the set-off defence does not apply; the defendant is not awarded the amount of the set-off.

a) Filing and Service

As the counterclaim is on the reply form, it must be filed at the same time as the Reply (Rule 4(1) and (2)), within the time allowed for filing a Reply (Rule 3(4)), and at the registry where the notice of claim was filed (Rule 3(3)).

The registry will serve the claimant with the reply and counterclaim within 21 days of it being filed (Rules 3(5) and 4(2)).

b) Replying to a Counterclaim

Once served, the claimant (now a defendant by counterclaim) must follow the same rules as replying to a Notice of Claim (Rule 5(7)). The claimant should review this section of the guide in its entirety.

6. Counterclaims through the Civil Resolution Tribunal

Once served, the claimant (now a defendant by counterclaim) must follow the same rules as replying to a Notice of Claim . The claimant should review this section of the guide in its entirety. Unless a facilitator directs otherwise, within 30 days of providing the Dispute Response Form to the tribunal, a respondent can request a “counterclaim” by:

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(a) indicating in a completed Dispute Response Form that the respondent will add at least one claim in the dispute;

(b) completing an Additional Claim Form;

(c) providing the Additional Claim Form to the tribunal; and

(d) paying the required fee to add a claim (see Appendix I: Civil Resolution Tribunal Fees).
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7. Third Party

If the defendant who has filed a Reply believes that a person or legal entity other than the claimant should pay all or part of the claim, he or she may make a claim against that other party by completing a Third Party Notice (Form 3). If a settlement conference, mediation session, or a trial conference has not been held, leave of the court is not required (Rule 5(1)(a)). If any of these have been held, the defendant must apply to the court for an order permitting the counterclaim to be filed against the third party (Rule 5(1)(b)).

A third party claim is different from a claim against the incorrect defendant. A third party claim is made when a defendant believes that a third party should reimburse them if they are found to be liable to the claimant. For example, if a defendant is sued for a credit card debt, the defendant may third party the cardholder who actually spent the money giving rise to the debt.

A defendant who wishes to issue a third party notice should review Section III. Do You Have A Claim? and Section IV. Choosing The Proper Forum. “ A third party claim is essentially a notice of claim but on a different form. A third party claim must have a legal basis and there are penalties for proceeding to trial if there is no reasonable basis for success.

a) Filing and Service

To start a third party claim, the defendant must complete Form 3 and file it in the same registry where the Notice of Claim was filed (Rule 5(2)). The defendant must serve the third party with a copy of the filed Form 3, a blank Reply form, a copy of the Notice of Claim, a copy of the Reply to the Notice of Claim, and all of the documents and notices the other party would have received (Rule 5(3)); all of these documents are to be served in the same manner as serving a Notice of Claim (Rule 5(4)). A defendant has only **30 days** after filing to serve the third party and file a certificate of service (Form 4; Rule 5(5)) at the registry. If the third party is not served and the certificate of service is not filed within 30 days, the third party notice expires but can be renewed (Rule 5(5.1)).

The registry will serve the claimant with the third party notice within 21 days of its being filed (Rule 5(6)).

b) Replying to a Third Party Notice

Once served, a third party must follow the same rules as replying to a Notice of Claim (Rule 5(7)). The third party should review this section of the guide in its entirety.

c) Adding a Third Party through the Civil Resolution Tribunal

Unless a facilitator directs otherwise, a respondent who believes another person is responsible for a claim can request resolution of the claim against that other person, often referred to as a "third party claim" by:

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(a) indicating in a completed Dispute Response Form that the respondent will apply for dispute resolution against the other person,

(b) completing an Additional Claim Form identifying the other person and describing any claims against that person,

(c) providing the Additional Claim Form to the tribunal, and

(d) paying the required fee to add a claim (see Appendix I: Civil Resolution Tribunal Fees).
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A respondent who adds an additional party to a claim must complete the steps for applying for CRT Dispute Resolution, except the time frame for providing notice to the other person is 30 days instead of 90 days and the original Dispute Notice and any responses must be provided along with the Dispute Notice for the additional claims.

B. Time Limits

Unless a defendant pays the amount of the claim directly to the claimant and asks the claimant to withdraw the claim (Rule 3(1)(a)), the defendant must file a Reply within the required time limit. **Failure to file a Reply may result in the claimant obtaining a Default Order.**

The time limits for filing a Reply are generally the same whether the defendant is:

- a defendant served with a Notice of Claim (Rule 3(4));
- the claimant served with a counterclaim (Rule 4(3.1)(b)); or
- a third party served with a third party notice (Rule 5(7)).

If the defendant was served inside British Columbia, a Reply must be filed within **14 days after service** (Rule 3(4)). If the defendant was served outside British Columbia, a Reply must be filed within **30 days after service** (Rule 3(4)). The one exception is where the claimant is served with a counterclaim. The claimant is required to file a Reply within 14 days after service even if the claimant is served outside British Columbia.

C. Defences

For every cause of action, there is usually at least one possible defence. Some of the more common defences are listed here however a defendant should research the claimant's cause of action or obtain legal advice to determine which defences might be applicable.

1. Common Defences

a) Contributory Negligence

Where a claimant was careless **and** this carelessness contributed to the damages suffered, a defendant might plead the defence of contributory negligence. An example is where a claimant tripped over a bag that was carelessly left in a walkway. The defendant may be liable but the claimant may have been contributorily negligent for failing to keep watch for obstacles.

A defendant who believes that the claimant was partially at fault should state in the reply: "The defendant pleads and relies upon the *Negligence Act*". (See *Negligence Act*, RSBC 1996, c 333). Each party is liable to the degree that they are at fault; where degrees of fault cannot be determined, liability is apportioned equally. (See *Negligence Act, supra*, s 1(2))

b) Consent

Where, by express or implied agreement, a claimant knew of and understood the risk he was incurring and voluntarily assumed that risk, the defendant will not be liable. Because voluntary assumption of risk is a complete defence, it is very difficult to prove.

c) Criminality or Immorality

Where a claimant stands to profit from criminal behaviour or compensation would amount to an avoidance of a criminal sanction, the claimant cannot recover damages. (See *Hall v Hebert*, [1993] 2 SCR 159). This is narrowly construed and a claimant should read Hall before relying upon it.

d) Inevitable Accident

If the defendant can show that the accident could not have been prevented even if the defendant had exercised reasonable care, the defendant cannot be liable. (See *Rintoul v X-Ray and Radium Industries Ltd*, [1956] SCR 674). For this defence to apply, the defendant must have had no control over whatever occurred and its effect could not have been avoided even with the best effort and skill.

e) Illegality

If the claimant is suing on a contract that is illegal (e.g., it calls for a criminal interest rate), the defendant may ask the court to decline to enforce the illegal provision or possibly the entire contract. Depending on the circumstances, the court may consider modifying the contract to remove the illegality.

f) Self Defence

If the defendant honestly and reasonably believed that an assault or battery was imminent and used reasonable force to repel or prevent the assault or battery, the defendant may not be liable for any injuries or damage suffered by the claimant as a result. (See *R. v Lavallee*, [1990] 1 SCR 852; *Wackett v Calder*, [1965] BCJ No 129; *Brown v Wilson*, [1975] BCJ No. 1177; and *R v Beckford*, [1987] All ER 425).

g) Defence of Third Parties

The same general rules apply as for self-defence provided that the use of force is reasonable. (See *Gambriell v Caparelli*, [1974] OJ No. 2243).

2. Statutory Defences

Certain statutes such as the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 provide a party with a cause of action that would not otherwise exist. A defendant should carefully read the statutes that the claimant is relying upon to see if the statute creates or prescribes certain defences.

Where the claim is for remuneration in relation to real estate or property management services, the claimant must have either been licensed when the services were rendered or have been exempt from the requirement to be licensed. (See *Real Estate Services Act*, SBC 2004, c 42, s.4). If the claimant was required to be licensed but was not licensed, the claimant cannot legally charge a fee.

The first step in replying to a claim by an entity such as a real estate management company is to establish whether the claimant was licensed with the Real Estate Board.

D. Filing a Reply

The Reply must be filed in the same registry where the Notice of Claim was filed (Rule 3(3)). There is a filing fee except where the defendant admits and agrees to pay the entire claim or obtains a fee waiver.

Generally, a Reply cannot be filed late however, in practice, the registry may allow a Reply to be filed late as long as the registrar has not made a default order or set a date for a hearing (Rule 3(4)(b)).

E. Serving a Reply

The registry will serve the Reply and Counterclaim, if any, on each of the other parties (Rules 3(5) and 5(6)).

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VII. Default Order

A. Civil Resolution Tribunal

A party named as a respondent to a dispute who fails to respond to a properly delivered Dispute Notice by the date shown on the notice is in default. If every respondent is in default, an applicant may request a default decision and order from the tribunal by:

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     a) providing a completed Request for Default Decision and Order
form together with supporting evidence of dispute-related expenses and
the value of non-debt
     claims,
     b) providing a completed Proof of Notice Form, and
     c) paying the required fee to request a default decision and
order.
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However, an applicant must request a default decision within 21 days of being requested to do so, or the tribunal may dismiss or refuse to resolve the application. The Request for Default and Order form can be found at the following link: https://civilresolutionbc.ca/wp-content/uploads/2017/05/CRT-Request-For-Default-Order.pdf.

B. Small Claims Court

If a defendant chooses not to defend a claim, the claimant wins by default. Evidence of the defendant’s choice not to defend the claim can include the defendant’s failure to file a Reply.

A claimant should not rush to the registry to file an Application for Default Order. Sometimes, a defendant may have a good reason for not filing a Reply on time and may have a defence to the claim that the court wishes to explore. In these circumstances, the court will set aside the default order and the claim will proceed in the ordinary course. A default order should only be used where the defendant has truly elected not to defend against the claim.

Where a defendant has not filed a Reply on time, it is a good idea to contact the defendant to determine why the Reply was not filed and to advise the defendant that a default order will be obtained if a Reply is not filed.

A default order can also be obtained if a defendant does not attend a mediation session (Rules 7.2(25), 7.3(40), and 7.4(34). If the defendant does not attend a settlement conference (Rule 7(17)), trial conference (Rule 7.5(17)), or trial (Rules 9.1(26), 9.2(11), and 10(9)), the judge or justice of the peace may grant a payment order instead of the claimant having to apply for a default order.

1. Requesting a Default Order

Unless the defendant was served outside of British Columbia or the court has otherwise ordered, a defendant has fourteen full days to file a Reply. This does not include the date the Notice of Claim was served and the date that the Application for Default Order is filed (Rule 17(10)).

To apply for a default order, the claimant must file Form 5 and pay a $25.00 fee. A certificate of service (Form 4) confirming service of the Notice of Claim and blank Reply form must also be in the file (Rule 6(3)). The claimant can ask the court to add the $25.00 fee plus reasonable expenses to the amount of the default judgment.

If the claim is for a specific amount of debt, the registrar will grant a default order for the amount claimed plus expenses and interest (Rule 6(4)). If the claim is for anything other than a specific amount of debt, the registrar will schedule a hearing before a judge (Rule 6(5)). Once a hearing has been set, the defendant cannot file a Reply without a judge's permission (Rule 6(8)). If another defendant to the claim has filed a Reply and a date has been set for either a settlement conference, trial conference, or trial, the hearing will be held on that date (Rule 6(6)). A defendant is not entitled to notice of the hearing date (Rule 6(7)).

At a hearing, a default order is not automatic. The claimant must give evidence and produce documents to prove the amount owing as well as convince the court that the default order should be granted (Rule 6(9)).

2. Setting Aside Default Orders and Reinstating Claims

If a party obtains a default order or a hearing for assessment of damages is scheduled, the party in default can apply to a judge to set aside the default order (Rules 16(6)(j) and 17(2)) and file a Reply (Rule 16(6)(d)). The party in default must file the application as soon as possible upon learning of the default order and attach to the application an affidavit containing (See Rule 17(2)(b); *Miracle Feeds v D. & H. Enterprises Ltd.* (1979), 10 BCLR 58 (Co. Ct.) [*Miracle Feeds*]):

- a reasonable explanation for not filing a Reply (or failing to attend a mediation session, trial conference, or trial);
- a reasonable explanation of any delay in filing the application;
- the facts supporting the claim, counterclaim, or defence; and
- why permitting the order would be in the interests of justice.

The party in default must show that:

- the failure to file a Reply (or failure to attend a mediation session) was not wilful, deliberate or blameworthy;
- the application to set aside the default order was made as soon as reasonably possible after obtaining knowledge of the default order (see *Camnex Marketing Inc. v Aberdeen Financial Group*, 2009 BCSC 763 (CanLII));
- if there has been a delay in applying to set aside the default order, an explanation for the delay; and
- if the party in default is the defendant, there is a defence that is not bound to fail.

(See *Miracle Feeds*; *Hubbard v Acheson*, 2008 BCSC 970 (CanLII); *McEvoy v McEachnie*, 2008 BCSC 1273 (CanLII); *Anderson v T.D. Bank*, 1986 CanLII 897 (BC CA); *Doyle v Lunny Design and Production Group Inc.*, 2009 BCSC 925 (CanLII); and *Innovest Development Corp. (Receiver of) v Lim*, 1999 CanLII 5356 (BCSC))

Where the party in default is a defendant who has not filed a Reply, the defendant should also bring copies of the Reply and be prepared to file them immediately if the judge grants permission.

If the default order is cancelled, the party who obtained it may ask the court to award reasonable expenses that relate to the cancellation. These expenses may include the cost of filing the application for default order, significant travelling expenses, and lost wages that were incurred only as a result of the cancellation.

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VIII. How a Claim Proceeds

A number of pilot projects have been implemented at some of the busier court registries. To anticipate how your claim will proceed and which rules will apply, find the court location where your claim will be heard and the heading that best describes your claim.

The length of time it will take to resolve a claim depends on:

1. how busy the court is (to find out how far ahead dates are being set at your location, ask at the court registry or the Judicial Case Manager);
2. how much time the trial is expected to take (a matter requiring a full day trial will often be scheduled later than a simpler matter);
3. whether the documents can be served without delay;
4. whether the claim is disputed; and
5. the number of applications filed.

Complying with all of the court's rules and orders will ensure that the claim is heard as soon as possible.

A. Vancouver (Robson Square)

1. Claims of $5,001-$10,000

Where the claim and counterclaim, if any, are each $5,001 - $10,000 (not including interest or expenses) and are not for either personal injury or financial debt, a simplified trial will be scheduled pursuant to Rule 9.1; except for the trial, no other court appearances are typically required. The trial will be held in the evening for one hour before a Justice of the Peace.

2. Claims for Financial Debt

If the claimant or counterclaimant **is in the business** of lending money or extending credit and is suing for a debt that arises from a loan or the extension of credit, a summary trial will be scheduled pursuant to Rule 9.2; except for the trial, no other court appearances are typically required. The trial will be held before a judge and usually takes fewer than 30 minutes to complete.

3. Claims Exceeding $10,000 or Personal Injury Claims (Any Amount)

If the claim exceeds $10,000 or is for personal injury in any amount, the parties must attend mediation pursuant to Rule 7.4. Following mediation, a trial conference will be scheduled pursuant to Rule 7.5. Trial conferences are described in greater detail in section XI. The final step is a trial pursuant to Rule 10. For an explanation of trials and how to prepare for a trial, see section XII.

B. Richmond

1. Claims of $5,001 - $10,000

Where the claim and counterclaim, if any, are each $5,001 - $10,000 (not including interest or expenses) and are not for personal injury, a simplified trial will be scheduled pursuant to Rule 9.1; except for the trial, no other court appearances are typically required. The trial will be held during the day for one hour before a Justice of the Peace.

2. Claims Exceeding $5,000 or Personal Injury Claims (Any Amount)

If the claim exceeds $5,000 or is for personal injury in any amount, a Settlement Conference will be scheduled pursuant to Rule 7.4.

For claims greater than $10,000, either party may also initiate mediation pursuant to Rule 7.3. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

C. Surrey, North Vancouver, Victoria, or Nanaimo

1. Claims of $1 0,000 or Less

Rule 7.2 mediation applies automatically to some construction-related claims and can otherwise be commenced by a party. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

2. Claims Exceeding $10,000

Any party to a proceeding where the amount of a claim, counterclaim, or third party notice exceeds $10,000 **may** initiate Rule 7.3 mediation. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

D. Other Registries

1. Claims of $1 0,000 or Less

A settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

2. Claims Exceeding $10,000

Any party to a proceeding where the amount of a claim, counterclaim, or third party notice exceeds $10,000 **may** initiate Rule 7.3 mediation. Following mediation or if mediation is not initiated, a settlement conference will be scheduled unless the claim relates to a motor vehicle accident where only liability for property damage is disputed. The final step is a trial pursuant to Rule 10.

E. Civil Resolution Tribunal ($5000 or less)

The Civil Resolution Tribunal is designed to facilitate dispute resolution in a way that is accessible, speedy, economical and flexible. It relies heavily on electronic communication tools. It focuses on resolution by agreement of the parties first, and by the Tribunal's binding decisions if no agreement is reached.

Adjudicators will decide most cases by reviewing the evidence and arguments submitted through the tribunal's online tools. The adjudicator may order a telephone, video or face-to-face hearing if warranted by the circumstances. The tribunal can determine all matters relating to the tribunal decision process and if, at any time before or during the tribunal decision process, the tribunal decides that a dispute requires further facilitation, it can refer the dispute back to facilitation, and suspend the tribunal decision process until a facilitator refers the dispute back to the tribunal decision process.

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IX. Pre-Trial

A. Offers to Settle

If a party rejects a formal offer to settle, the trial judge may order a party who rejected an offer to settle to pay a penalty of up to 20 per cent of the offer (Rule 10.1(7)). This can happen in one of two ways. If the defendant makes an offer that the claimant rejects and, at trial, the claimant is awarded an amount including interest and expenses that is equal to or less than the offer, the penalty is deducted (Rule 10.1(5)). If the claimant makes an offer the defendant rejects, and the claimant is awarded a sum including interest and expenses that equals or exceeds the claimant's offer, the penalty is added onto the award (Rule 10.1(6)).

A formal offer to settle must be made using Form 18 and served on the party to whom the offer is made as if it were a Notice of Claim (Rule 10.1(1)). The party offering to settle may also fill out a certificate of service. Neither the Form 18 nor the certificate of service are filed at the registry; if the party making the offer wishes the penalties to apply, these forms should be presented to a judge for the first time **after** a decision is given at trial.

A formal offer must be made within 30 days of the conclusion of a:

- settlement conference;
- mediation under either Rule 7.2 or 7.4; or
- trial conference.

Once the first of any of these hearings has concluded and 30 days have elapsed, formal offers cannot be made without the permission of a judge (Rule 10.1(2)).

B. Withdrawing a Claim, Counterclaim, Reply, or Third Party Notice

A party may withdraw a claim, counterclaim, reply, or third party notice at any time (Rule 8(4)). To do so, a party must file a notice of withdrawal (Rule 8(4)(a), Form scl019) at the registry and then promptly serve the notice of withdrawal on all parties who had been previously served with the claim, counterclaim, reply, or third party notice (Rule 8(4)(b)). A Notice of Withdrawal may be served by ordinary mail or personal service (Rule 18(12)).

Once a pleading is withdrawn, it cannot be reinstated, used, or relied upon without the permission of a judge (Rules 8(6) and 16(7)).

Withdrawing a claim does **not** result in the dismissal of a counterclaim. The counterclaim may still proceed, unless it is also withdrawn. (See *Ishikawa v Aoki and Japanese Auto Centre Ltd.*, 2002 BCPC 683 (CanLII)).

C. Adjournments and Cancellations

Once a date for a hearing, settlement conference, or trial has been set, any party can apply for an adjournment or to cancel the hearing (Rule 17(5)).

If seeking an adjournment, try to first obtain the consent of the opposing party prior to applying to a judge. If consent is given, Form 17 must be filed in the registry as soon as possible.

A trial will only be adjourned if a judge is satisfied that it is unavoidable and if an injustice will result to one of the parties if the trial proceeds (Rule 17(5.1)). There is a $100 fee (*Small Claims Rules*, BC Reg 261/39, Schedule A, Line 14) for adjournments where the application is made less than 30 days before a trial and notice of the trial was sent 45 days before the trial's date (Rule 17(5.2)). The fee must be paid within 14 days of the granting of the adjournment (Rule 17(5.3)) or else a judge may dismiss the claim, strike out the reply, or make any order he or she deems fair (Rule

17(5.4)).

D. Pre-Judgment Garnishment

If the claim is for debt, a "garnishing order before judgment" may be issued at the same time a Notice of Claim is filed. Except for wages and interest, almost any debt can be garnished before a judgment. Since injustice can sometimes occur from the procedure, few garnishing orders are issued before judgment. Practically, the court will grant a garnishing order before judgment in only certain circumstances, for instance where the claimants will be unable to collect if they succeed. (See *Webster v Webster*, [1979] BCJ No 918; *Affinity International Inc. v Alliance International Inc.*, [1994] MJ No 471; *Intrawest Corp. v Gottschalk*, 2004 BCSC 1317 (CanLII); and *Silver Standard Resources Inc. v Joint Stock Co. Geolog*, [1998] BCJ No. 2887).

To obtain a pre-judgment garnishing order, the claimant must file an affidavit stating that a Notice of Claim has been filed, the date of its filing, the nature of the cause of action, the amount of the debt, claim, or demand, and the true amount owing after discounts and deductions. (See *Court Order Enforcement Act*, RSBC 1996, c 78: s 3(2)).

If the registry grants the order, the claimant must serve both the garnishee and the defendant (http://thelawcentre.ca/self_help/small_claims_factsheets/fact_19). If the garnishee is a bank, the garnishing order must be served on the branch where the account is located. (See *Bank Act*, SC 1991, c 46, s 462(1)). If the garnishee is a credit union, the order must be served on its head office. A separate order must be obtained for each garnishee. The Garnishee must pay the greater of the amount owed to a Defendant and the amount shown on the garnishing order to the Court Registry. It is extremely important to find out the correct legal name of the Garnishee. This is because if you use the wrong name on the Garnishment documents, the Garnishee can refuse to pay to the Court money owed to the Defendant. If the Garnishee is a company, a search at the BC Corporate Registry Office would be useful.

In some cases of fraud, the Supreme Court can issue a Mareva Injunction freezing the defendant's worldwide assets; this prevents the defendant from dealing with **any** of their assets in any way. (See *Aetna Financial Services v Feigelman*, [1985] 1 SCR 2; and *Silver Standard Resources Inc. v Joint Stock Co. Geolog*, [1998] BCJ No. 2887).

It is also possible to apply for a "garnishing order before action". This is a separate form from a pre-judgement garnishment. This form is used before a Notice of Claim has been registered at a Small Claims Court Registry. (See http://thelawcentre.ca/self_help/small_claims_factsheets/fact_19).

E. Transfer to Supreme Court

A judge at the settlement/trial conference, at trial, or after application by a party at any time, **must** transfer a claim to Supreme Court if he or she is satisfied that the monetary outcome of a claim (not including interest and expenses) may exceed $25,000 (Rule 7.1(1)). However, the claimant may expressly choose to abandon the amount over $25,000 to keep the action in the Small Claims Court (Rule 7.1(2)). For personal injury claims, a judge must consider medical or other reports filed or brought to the settlement conference by the parties before transferring the claim to Supreme Court (Rule 7.1(3)).

If a counterclaim for more than $25,000 is transferred under this rule, the original claim can still be heard in Small Claims Court if the claim is $25,000 or less. (See *Shaugnessy v Roth*, 2006 BCCA 54).

F. Amendments

A party who wants to amend, change, add, or remove anything in a filed document, such as the amount, the name of a party (see *Royal Bank of Canada v Olson*, 1990 CarswellBC 54 (BCSC)), or a fact, must follow Rule 8.

1. Permission to Amend

Anything in any filed document can be changed by the party who filed it. Permission is not required unless any of the following have begun (Rule 8(1)):

- a settlement conference;
- a mediation under Rule 7.4;
- a trial conference under Rule 7.5;
- a trial under Rule 9.1; or
- a trial under Rule 9.2.

If any of these steps have commenced, the party must apply to a judge for permission to amend the document (Rules 8(1)(b) and 16(7)).

2. Amendment Procedure

Changes on the document must then be underlined, initialled and dated (Rule 8(2)). If a judge has allowed the amendment, the document should reference the order. For example, the document might state, "Amended Pursuant to Rule 8(1)(b) by Order of the Honourable Judge Law on September 1, 2012."

3. Serving Amendments

Before taking any other step in the claim, the party must serve a copy of the amended document on each party to the claim (Rule 8(3)). If the amended document is a Notice of Claim, Counterclaim, or Third Party Notice, it must be served as if it was an original.

If the amended document is a Reply or some other document, it can be sent by regular mail to the address of each party to the action Rule 18(12)(b)). Documents served by ordinary mail are presumed served 14 days after being mailed unless there is evidence to the contrary (Rule 18(13)). While proof of service is not required, it is recommended.

4. Responding to Amendments

Generally, there is no obligation to respond to an amendment (Rule 8(3.1)). For example, a defendant's current Reply may satisfactorily respond to a minor change to a Notice of Claim. If the defendant chooses not to file an amended Reply, the claimant cannot apply for a default order (Rule 8(3.2)).

A party who wishes to respond to an amendment should follow the same procedures outlined in this section.

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X. Mediation

There are three types of mediation under the Small Claims court rules. Parties are free to mediate on their own. See Section III. D.: Alternative Dispute Resolution.

A. Claims of $1 0,000 or less - Rule 7.2

There is no cost to mediate under this rule unless a party requires an interpreter. Rule 7.2 mediations operate in four of the registries, namely: Surrey, Victoria, Nanaimo, and North Vancouver.

Rule 7.2(2) applies to all claims of $10,000 or less:

- that involve a claim relating to the construction, renovation, or improvement of a building;
- that are one of the first 10 to 16 cases in which replies are filed in the month (number varies by registry—see 'Small Claims Rules', BC Reg 261/93, Schedule D for specific information on each registry);
- where the parties consent and a judge refers to mediation; and
- where, prior to the notice of settlement conference being mailed, a party completes and files Form 21.

Rule 7.2 does not apply to claims arising from a motor vehicle accident where only **liability** for property damage is disputed or where there is a claim for personal injury (Rules - Schedule E: ss 1-5). This rule also does not apply where a party is a person under disability.

Parties must attend the mediation session in person unless an application is filed for an adjournment (Rules 7.2(11), (11.1), and (12)), a teleconference (Rule 7.2(14)), or an exemption (Rule 7.2(9)). Any party served with a notice of mediation session may be accompanied by a lawyer or articled student (Rule 7.2(17)(c)). If a party fails to attend the mediation session, the party in attendance will receive a verification of non-attendance (Form 22) that can be filed with the Registrar (Rule 7.2(22)). After filing Form 22, the party in attendance can file a request for judgment or dismissal (Form 23), which dismisses the claim if the party not attending is the claimant or gives a default order if the party not attending is the defendant (Rules 7.2(23)-(26)).

B. Claims Exceeding $10,000 – Rule 7.3

This rule applies to all registries except the Vancouver (Robson Square) court registry. See Section III. D.: Alternative Dispute Resolution.

Any party to a proceeding where the amount of a claim, counterclaim, or third party notice exceeds $10,000 **may** initiate mediation by filing a Notice to Mediate (Form 29) and serving it on every other party to the proceeding (Rules 7.3(2), (3), and (5)). If mediation has been scheduled all parties must select a mediator, attend the mediation, and agree on the amount that each party will pay towards the costs of mediation (Rules 7.3(9)-(10), (17)-(23), and (33)-(36)); by default, the parties will split the cost (Rule 7.3(35)(b)(i)). If the parties cannot agree on a mediator, the BC Mediator Roster Society may be requested to appoint one (Rule 7.3(10)).

Parties must attend the mediation session in person unless an application is filed for adjournment (Rule 7.3(30)), for a teleconference (Rule 7.3(25)), or for an exemption (Rule 7.3(28)). If a party fails to attend as required, the mediator will fill out a verification of default (Form 31) and provide it to the party in attendance (Rule 7.3(37)). After filing Form 31, the party in attendance can file a request for judgment or dismissal (Form 23) which dismisses the claim if the party not attending is the claimant or gives a default order if the party not attending is the defendant (Rules 7.3(38)-(41)).

C. Mediation in Vancouver (Robson Square) – Rule 7.4

Claims exceeding $5,000 or personal injury claims in any amount are subject to mandatory mediation (Rule 7.4(2)). There are a few exceptions (Rule 7.4(3)) including where the claim is for a financial debt and Rule 9.2 applies. The Registrar will serve the parties with a Notice of Mediation (Form 27) informing them of the date, time, and place of the mediation session (Rule 7.4(17)).

If the claim is for damages for personal injuries, the claimant must file and serve the other parties with a certificate of readiness (Form 7) and required documents (Rules 7.4(12)-(16)). The claimant should review the applicable rules for the proper timeline and how to obtain extensions.

Each party must attend the mediation session in person unless an application is filed for adjournment (Rules 7.4(18), (19), and (20)), for a teleconference (Rule 7.4(23)), or unless an exemption is granted (Rules 7.4(5) and (6)). If a party fails to attend the mediation session, the party in attendance will receive a verification of non-attendance (Form 22) that can be filed with the Registrar (Rule 7.4(31)). After filing Form 22, the party in attendance can file a request for judgment or dismissal (Form 23), which dismisses the claim if the party not attending is the claimant or gives a default order if the party not attending is the defendant (Rules 7.4(32)-(35)).

D. Preparing for Mediation

Preparation is essential in order to achieve the most from mediation. Each party should provide copies of relevant documents to the other party. Parties have the ability to create their own resolution and should consider creative settlement options. Mediation is not a forum to assess blame or resolve legal questions; it is designed to end the dispute in a manner that satisfactorily addresses the interests, legal and otherwise, of each party. It is important to listen to the other party expressing his or her interests and allow the mediator to help the parties resolve the dispute.

E. Procedure

Mediation is a flexible process that allows the mediator to help the parties achieve a settlement. A mediator is not necessarily a lawyer, but is a skilled, experienced professional. Although mediation sessions can vary with respect to process, there are generally some standard steps that are followed.

All parties and representatives will be seated at a table with one to three mediators. The mediators will describe the mediation process, and ask each person attending to sign an Agreement to Mediate. This must be signed in order for the mediation process to proceed. The Agreement to Mediate form includes a confidentiality clause (any information disclosed in the session that is not otherwise discoverable is inadmissible and mediators cannot be called to testify in later proceedings), and ensures that the parties present have full authority to settle the case.

After signing the Agreement to Mediate, both parties will have a short time to tell their story. The mediator will summarize the key points in dispute. Once the main issues are identified, the mediator will look for common interests in an attempt to assist parties to resolve the dispute. The mediator will assist the parties to negotiate and reach an amicable resolution. During the process, it is not uncommon for a mediator to have a private conference with each party.

If the parties agree to a resolution, the mediator will draft an Agreement setting out the terms of the resolution. It may include monetary and non-monetary terms, and may have a non-compliance clause setting out consequences for failing to fulfil the obligations set out in the Agreement. If there is no non-compliance clause, the default amount will be the original amount claimed in the action. The mediator will file the agreement in the Small Claims Court registry after each party signs the agreement.

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XI. Settlement Conferences

Settlement conferences are held in all court registries except for Vancouver (Robson Square). Settlement conferences are mandatory for all cases except motor vehicle accident cases where only liability for property damage is disputed, or if rule 7.4, 7.5, 9.1 or 9.2 applies to the claim (Rule 7(2)).

A. Who Must Attend

The registry will serve the parties by mail with a Notice of Settlement Conference (Form 6) at least 14 days in advance (Rule 7(3)).

All parties, with or without legal representation, must attend the settlement conference, although there is a limited exception for certain motor vehicle claims (Rule 7(4)). If a party is not an individual (e.g., a company), someone who has authority to settle the claim for the company must attend. (See *Kamloops Dental Centre v Mcmillan*, 1996 CanLII 377 (BCSC)). If a party sends a lawyer or articled student and does not attend personally or send a company representative, that party will be deemed to have not attended the settlement conference. A party may appear by telephone if an application is made to and approved by the Registrar prior to the date set for the conference (Rule 16(2)(c.1)). If a party does not attend or does not have full authority to settle, the judge can dismiss a claim, grant a payment order, or make any other appropriate order (Rules 7(17)). If a party attends but is unprepared, a judge may order the unprepared party to pay the other party's reasonable costs (Rules 7(6) and 20(6)).

Witnesses cannot attend except in unusual and exceptional cases. A witness who does attend the settlement conference will usually be asked to wait outside.

B. What to Bring

Each party must bring to a settlement conference **all relevant documents and reports** whether the party intends to use them at trial or not (Rule 7(5)). Documents include any contracts, invoices, bills of sale, business records, photographs, and summaries of what each witness will say in court ("will-say" statements).

Each party should prepare a brief chronological summary of its case and support it with evidence. Claimants should bring more than one written estimate or quote, if there is a large sum of money involved.

If the claim is for personal injury, the claimant must file and serve a Form 7 certificate of readiness and required records (Rules 7(9)-(13)) before a settlement conference will be scheduled. There can be consequences for failing to file the certificate of readiness on time. (See *Yewchak v Cleland*, 2002 BCPC 200 (CanLII); *Irving v Irving*, 1982 CanLII 475 (BC CA); *Busse v Robinson Morelli Chertkow*, 1999 BCCA 313).

C. What May Happen

A settlement conference is scheduled for 30 to 60 minutes before a judge in a conference room at the courthouse. The judge at the settlement/trial conference will not be the judge at trial, if a trial is necessary. The parties will sit at a table with the judge. The judge will say a few words and ask each party to give a brief summary of their case. The judge may then lead both the claimant and defendant into a discussion on what, if anything, the parties can agree on. If the parties agree on the final result, the judge will make the order. However, the parties may agree on some issues and leave issues in dispute to be resolved at trial. The judge will assess how much time is required for trial.

A judge at a settlement conference may make any order for the just, speedy, and inexpensive resolution of the claim (Rule 7(14)). This includes mediating and making orders regarding admissibility of evidence, inspections of evidence, or

production of evidence to the other party. The judge may also dismiss a claim that discloses no triable issue, is without reasonable grounds, is frivolous, or is an abuse of the court's process. (See Rule 7(14)((i); *Belanger v AT&T Canada Inc.*, [1994] BCJ No. 2792; *Cohen v Kirkpatrick*, 1993 CanLII 2059 (BCSC); and *Artisan FloorCo. v Lam*, 1993 CanLII 2138 (BCSC)). Examples include claims that are outside the court's jurisdiction, where the claimant presents no evidence, or where the limitation period at the date of filing the Notice of Claim had expired. A judge cannot dismiss a case at the settlement conference on the basis of issues relating to the credibility of witnesses or evidence.

A judge may also order that multiple claims be heard at the same time, or consolidated into one claim. (See *Schab v Active Bailiff Service Ltd.*, [1993] BCJ No. 2936). The distinction is important. Claims heard at the same time may each individually be awarded up to $35,000, while claims which are consolidated into one claim may only be awarded $35,000 combined.

Any agreement valid under contract law can result in a binding settlement. Agreements entered into by lawyers with their client's knowledge and consent are binding but can be set aside in some circumstances. (See *Harvey v British Columbia Corps of Commissionaires*, 2002 BCPC 69 (CanLII)). If all claims are not settled, the parties should acquire a record of the settlement conference, which may outline all of the issues in the case, all admissions, the number of witnesses, the anticipated length of trial, and anything that must be disclosed.

NOTE: If the settlement pertains to an action against a lawyer for which a complaint has been filed with the Law Society, a party cannot use complaint withdrawal as a bargaining technique; it is improper during settlement negotiations to offer to withdraw a complaint against a lawyer as a part of the settlement. (See *Gord Hill Log Homes Ltd. v Cancedar Log Homes*, 2006 BCPC 480 (CanLII)).

D. Disclosure

Trial by ambush is not permitted. Each party is entitled to know the evidence for and against its position. If the parties cannot reach a settlement, the focus will turn to trial preparation. The judge at a settlement conference has the power to order production of documents and evidence. Each party should attend the settlement conference with a list of documents and evidence that is believed to be in the possession of the other party.

A judge will order the parties to exchange copies of all documents or allow for their inspection before trial. Disclosure must be timely. (See *Golden Capital Securities Ltd. v Holmes*, 2002 BCSC 516 (CanLII)). These documents should be compiled in a tabbed binder for easy reference at trial.

Each party must be prepared to disclose the name of each witness that party intends to call, indicate what evidence each witness will give, and provide a time estimate. If expert evidence will be used, it is helpful if a written report (or at least a draft copy) is available for the settlement conference. If an expert report is not available, parties will be ordered to exchange those reports prior to trial. There is a minimum deadline of 30 days before trial (Rules 10(3) and (4)) however the judge at the settlement conference can be asked to change the time limits.

If a party does not comply with a disclosure order, a judge may adjourn the trial, the settlement conference, or both, order that party to pay expenses, order the trial to proceed without allowing that evidence to be used, or dismiss the action.

NOTE: For case law relating to the disclosure of medical documents and ethical obligations of physicians to their patients see *Halliday v McCulloch*, [1986] BCJ No 223 (BC CA), *Hope v Brown*, [1990] BCJ No. 2586, *Davies v Milne*, 1999 CanLII 6654 (BC SC), and *Cunningham v Slubowski*,2003 BCSC 1854.

NOTE: For case law on obtaining disclosure from the Crown (e.g., from a related criminal case) in a civil case see *Huang (litigation guardian of) v Sadler*, [2006] BCJ No. 758 (BCSC) and *Wong v Antunes*, 2008 BCSC 1739. For case law pertaining to the admissibility of evidence obtained through electronic surveillance (e.g., recording telephone conversations and videotaping) and whether it will be considered a violation of the *Privacy Act*, RSBC 1996, c 373 see

Watts v Klaemt, 2007 BCSC 662 and *Cam v Hood*, 2006 BCSC 842. For case law on obtaining evidence from third parties see *Lewis v Frye*, 2007 BCSC 89.

A judge may also order the exchange of all case law prior to the trial date.

Parties should consider writing to the other side after the settlement conference to confirm the deadline, the documents required, and remedies that will be pursued if there is no disclosure. When sending documents, it is important to include a list or outline of what material is enclosed.

E. Enforcing a Settlement Agreement (Rule 7(20))

If an agreement reached at a settlement conference includes payment, and if a party does not comply, the agreement can be cancelled. After filing an affidavit describing the on-compliance, the person entitled to payment may file a payment order for either the amount agreed to by he parties as the default amount and noted on the record as the default amount endorsed by the judge at the settlement conference or the full amount of the original claim if there was no default amount endorsed by the judge.

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XII. Trial/Pre-Trial Conferences

A. Trial Conference

A trial conference only applies to claims at the Vancouver (Robson Square) registry. Parties should see Section XI: Settlement Conference for information regarding the purpose of, preparation for, and conduct of a trial conference. A trial conference is similar to a settlement conference with a few notable exceptions, such as:

- The focus will be on trial preparation rather than on settlement.
- a party does not have to attend if a lawyer, articling student, or other representative attends on that party's behalf (Rule 7.5(12));
- a Trial Statement (Form 33) must be filed at least 14 days before the trial conference and served on all other parties at least 7 days before the trial conference (Rules 7.5(9) and (10));
- a certificate of readiness is not required as it will have been provided prior to Rule 7.4 mediation;
- the judge may require the parties to jointly retain an expert (Rule 7.5(14)(e)(ii)); and
- the judge may give a non-binding opinion regarding the probable outcome of the trial (Rule 7.5(14)(j)).

There may be consequences for failing to file and serve the Trial Statement on time. (See Rule 20(6); *Yewchak v Cleland*, 2002 BCPC 200 (CanLII); *Irving v Irving*, 1982 CanLII 475 (BCCA); and *Busse v Robinson Morelli Chertkow*, [1999] BCJ No. 1101 (BCCA)

The Registrar must serve a Notice of Trial Conference (Form 32) at least 30 days prior to the date set for the conference. A judge may make any order for the just, speedy, and inexpensive resolution of the claim including those enumerated in Rule 7.5(14).

B. Pre-Trial Conference

At most registries, a pre-trial conference will be scheduled for claims with trials that are scheduled to be longer than one half-day. In many ways this is similar to a settlement conference. There are basically no rules for pre-trial conferences. The general purpose is to ensure that the parties are prepared for trial, that all orders have been complied with, that all disclosure has been made, and that all witnesses will attend the trial. The judge will try to narrow the number of witnesses to reduce court time. In addition, the judge will review the admissibility of documentary evidence, particularly that of written evidence. The judge will also ensure that the matter falls within the jurisdictional limits of the Small Claims Court and that the claim is not beyond its limitation period. Finally, even at this late date, the judge will encourage the claimants and defendants to settle the matter. The parties may receive an order allowing another 30 days after the pre-trial conference to serve a formal settlement offer to the opposing party. The offer to settle must be made according to Rule 10.1 and penalties may apply to parties who refuse the formal offer to settle. For example, if the court after trial grants the claimant a sum that is equal to or less than the defendant's formal settlement offer, the claimant can be ordered topay the defendant a penalty of up to 20 per cent of the settlement offer.

It is not uncommon for Judges at a pre-trial conference to decide the case based on the law without hearing any evidence. Some consider this to be an improper use of pre-trial conferences. However, as stated above, there are no rules governing pre-trial conferences so you should be aware of this going into a pre-trial conference.

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XIII. Trial Preparation

Many, if not most, litigants find trials to be extremely unnerving. While a small claims trial is not predictable, preparing well in advance can help a party to avoid surprises, present a more compelling case, and alleviate fears about the process.

It is important to consider the merits of a claim before proceeding to trial. If there is no reasonable or admissible evidence, the claim is bound to fail (e.g., a statute prohibits recovery), or a limitation period has passed, the judge may impose a penalty. A penalty of up to 10 per cent of the amount of the claim may be imposed if a party proceeds to trial without any reasonable basis for success (Rule 20(5)).

A. Trial Binder

A tabbed trial binder helps a party to effectively present its case at trial. A suggested format is:

Tab l:	Opening Statement: a brief summary of the issues in the case.
Tab 2:	Pleadings: all filed documents in chronological order with a list or index.
Tab 3:	Orders: all court orders that have been made.
Tab 4:	Claimant's Case: anticipated evidence of the claimant and claimant's witnesses, including reminders for introduction of exhibits and blank pages for taking notes of the cross-examination.
Tab 5:	Defendant's Case: blank pages for notes of the direct examination of defendant and defendant's witnesses and anticipated cross-examination questions.

Tab 6:	Closing Arguments/Submissions: brief review of the evidence, suggested ways to reconcile conflicts in the evidence, a review of only the most persuasive case law and its application to the facts.
Tab 7:	Case Law: prepare three copies of each case relied on (for you, the judge, and the opposing party). Carefully scrutinize the need for multiple cases to support your argument and limit yourself to as few as possible.
Tab 8:	Exhibits: you will need the original (the exhibit) and three copies (for you, the judge, and the opposing party). You need to be able to prove when, why, and by whom the exhibit was created, and also be able to argue why it is relevant (i.e. document plan or photograph).
Tab 9:	Miscellaneous: any additional documents, notes, lists, and correspondence.

B. Expert Witnesses

Expert witnesses should only be permitted when their expertise and special knowledge is **necessary** for the court to understand the issues. (See *R. v Mohan*, [1994] 2 SCR 9). The expert's testimony cannot include the expert's assessment of the credibility of either the claimant or the defendant. (See *Movahed v Leung*, [1998] BCJ No. 1210; *Brough v Richmond*, 2003 BCSC 512 (CanLII); and *Campbell v Sveinungsen*, 2008 BCSC 381 (CanLII)). Expert witness testimony is inadmissible if it relates to issues that the court is capable of understanding and analysing without assistance. (See *Sengbusch v Priest*, 1987 CanLII 2796 (BCSC)).

Evidence may be given by an expert at trial or through a written report. An expert report must be the opinion of only **one** person. Written reports or a notice of expert testimony must be served at least 30 days before trial (Rules 10(3) and (4)).

An expert witness report should include the resume or qualifications of the expert, a brief discussion of the facts of the case supporting the opinion or conclusion, the opinion or conclusion itself, and what was done to arrive at that conclusion.

An exception to the "in person" rule for expert witnesses is permitted for estimates and quotes. A party may bring a written estimate for the repair of damage or a written estimate of the property value and present it as evidence at trial without calling the person who gave the estimate or quote. Parties should obtain more than one estimate or quote, especially if the sum of money involved is large. Estimates of repairs or value of property are not considered to be expert evidence (Rule 10(8)), but must be served on all other parties at least 14 days before trial.

If the claimant does not serve the estimate in time, they can ask the trial judge for permission to present it anyway at trial. The claimant may or may not get permission to do so. The other party may ask for a trial adjournment to obtain his own estimate or quote. If the adjournment is granted, the claimant could be penalised and ordered to pay the other party's expenses.

C. Witness Preparation

A party should review the evidence of its witnesses at least one week before trial and confirm the witnesses' attendance. Witnesses should understand how a trial is conducted, the role of a witness, and the requirement that witnesses tell the truth.

1. Ensuring Attendance

Each party must ensure that its witnesses will attend court. If a party is not absolutely certain that a witness will attend, the witness should be personally served with Form 8: Summons to a Witness together with reasonable estimated travelling expense at least 7 days before the witness is required to appear (Rules 9(1)-(3)). The minimum travelling expenses must cover round-trip, economy fare such as bus fare to and from the court. While lost salary and other

expenses do not have to be paid, a party should be reasonable and generous if possible to avoid making a witness bear the cost of litigation.

If a witness who has been served with a summons does not appear at trial, the summoning party may ask the judge for an adjournment or a warrant of arrest (Form 9; Rules 9(7) and 14).

2. Telling the Truth

Giving evidence in court is a solemn and serious affair. Lying to the court can be a criminal offence and result in imprisonment. A witness must be well prepared to give evidence.

To emphasise the formality of the proceeding, witnesses must either swear an oath to or solemnly affirm that they will tell the truth. Sworn and affirmed testimony are equally regarded; the choice of whether to swear or affirm is the witness'.

Swearing an oath involves the witness placing their right hand on a religious text and swearing to tell the truth with reference to their chosen religion. While the bible is the default, several religious texts are available if pre-arranged with the court. The standard oath, "Do you swear that the evidence you are about to give the court in this case shall be the truth, the whole truth and nothing but the truth, so help you God?", can be modified according to religious preference. A witness who does not want to swear a religious oath should give a solemn affirmation. The wording of the solemn affirmation is: "Do you solemnly affirm that the evidence you are about to give the court in this case shall be the truth, the whole truth and nothing but the truth?".

A witness does not need to know the details of each party's position. If a witness has been told the merits and legal arguments of each side, there is a risk that the witness may advocate for a party by including arguments while testifying. Such conduct is not persuasive, suggests that the witness may be biased, and may undermine the witness' credibility.

3. Arranging an Interpreter

Trials and hearings are conducted in English. If a party or the party's witness does not speak English, the party must arrange for an interpreter to be present. There is a list of interpreters available from the court registry however the court does not certify interpreters. (See *Sandhu v British Columbia, 2013 BCCA 88*). A party may use any person who is competent to reliably, accurately, and competently translate what is said in court; the judge has, however, discretion to reject the party's choice of interpreter.

An interpreter should be prepared to testify as to their experience and training. An interpreter who is related to a party may be rejected on the basis of potential bias and an interpreter who is inexperienced or untrained may be rejected on the basis of incompetence. If a party does not arrange an interpreter for a hearing or if the court rejects the interpreter, the party may be liable for a penalty and the reasonable costs of the other party. The party requiring an interpreter should ask the judge at the settlement or trial conference to decide whether the chosen interpreter is acceptable.

The party requiring the interpreter is responsible for the costs of the interpreter; these costs can be, however, recovered if the party is successful at trial.

4. General Advice for Witnesses

- Discuss whether the witness will swear or affirm their testimony.
- The microphones in court do not amplify; they are for recording purposes only. Face the judge when testifying and speak slowly, clearly, and loudly enough for the judge to hear.
- Witnesses should wear appropriate business attire.
- Witnesses should never guess, assume, or argue with the judge or one of the lawyers.
- If a lawyer or other party says, “Objection”, or the judge starts speaking, the witness should stop testifying and wait for the judge’s instructions.
- On direct examination, the witness should answer questions fully.
- On cross-examination, the witness should answer as briefly and succinctly as possible.

D. Documentary Evidence

Each party should have the original and three copies of each document to be entered as an exhibit. The original will be marked as an exhibit and the other three are for the judge, the opposing party, and you to work from during the trial. Keep track of the exhibits and always refer to them by the correct number.

Before a document can be marked as an exhibit, it must be authenticated. The witness must identify its origins and that it is a true copy. Give the original document and a copy to the clerk and ask the clerk to show the original to the witness. Ask the witness to identify it: “I’m showing you a letter dated...”, “Do you recognize it?”, “Is this your signature?” or “Is it addressed to you?” When the witness has identified its origins and there are no objections, ask the judge to accept it as an exhibit: “May this be marked exhibit #1?”

NOTE: In exceptional circumstances, the judge may permit a witness to provide evidence by affidavit rather than testifying at trial. (See *Withler and Fitzsimonds v Attorney General (Canada)*, 2005 BCSC 1044 (CanLII), para 18; and *Sangha v Reliance*, 2011 BCSC 371).

NOTE: A judge may examine and compare headshots or handwriting, but should only place very limited weight on their own judgement in these situations. (See *R. v Nikolovski*,[1996] CanLII 158 SCC; and *R. v Abdi*, [1997] CanLII 4448 Ont CA).

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XIV. Trials

A trial is often very difficult, stressful, and unpredictable. If possible, it is generally in the best interests of all parties to settle. However, if the matter cannot be resolved at the settlement/trial conference, a trial will be scheduled (Rule 10). The notice of trial will be sent by mail to the parties' address on file. If a claimant does not attend the trial, the claim will be dismissed. If a defendant or third party does not attend, the claim will be allowed and judgment granted against the absent party.

Statements made by the claimants or the defendants at the settlement/trial conference are protected by settlement privilege and **cannot be used at trial**. A statement made during the settlement/trial conference is not admissible in cross-examination. Also, the judge at the settlement/trial conference will not be the trial judge. This allows the parties to discuss all issues without fear that their statements will be used against them at trial.

Parties should remember that settlement is possible at any time before the judge decides the case. This includes after evidence and arguments are heard at trial.

Parties should watch at least one trial in order to familiarise themselves with the correct procedure.

A. Simplified Trial for Claims: $5,001 - $10,000

Vancouver (Robson Square) and Richmond hold simplified trials pursuant to Rule 9.1. Simplified trials are set for one hour before an adjudicator. An adjudicator will usually be a justice of the peace but may occasionally be a judge. A justice of the peace adjudicator is referred to as "Your Worship". Simplified trials are held in the evening in Vancouver and during the day in Richmond.

The parties must each file a Trial Statement at least 14 days before the trial date and serve each other party at least 7 days before the trial (Rules 9.1(17) and (18)). There are penalties for failing to comply to comply with these timelines (Rule 9.1(19)).

The trial does not need to comply with formal rules of procedure and evidence (Rule 9.1(20)). The adjudicator will ask questions and control the proceedings to stay within the one-hour timeframe.

B. Summary Trial for Financial Debt

At the Vancouver (Robson Square) registry, financial debt claims will be set for a half-hour summary trial before a judge. Financial debt claims are claims in which one of the parties is in the business of loaning money or extending credit. Often, little in the way of defence can be offered in situations of financial debt and the summary trial may in some ways come to resemble a payment hearing. Where a defence with some merit is advanced, the judge may send the claim to mediation, order a trial conference, or order a traditional trial (Rule 9.2(13)). The judge may conduct the trial without complying with the formal rules of evidence or procedure (Rule 9.2(9)). Note the rules requiring early disclosure of all relevant documents (Rules 9.2(7) and (8)).

C. Regular Trial

Rule 10 trials are held at all registries and are the most common form of small claims trial.

1. Courtroom Etiquette

- Be on time. If you are late, apologize and be prepared to give an excellent explanation.
- Introduce yourself and state your name clearly. Remember to spell your surname for the record.
- Use simple words; do not use “legalese”.
- Do not speak directly with opposing parties. Make submissions only to the judge and have him or her ask questions to the opposing party.
- Never call witnesses by their given name. Use Mr., Ms., Miss, or Mrs. followed by their last name.
- A judge of the Provincial Court is referred to as “Your Honour” and the clerk is referred to as “Madame Clerk” or “Mister Clerk”. When referring to another party, use Mr., Ms., Miss, or Mrs. followed by their last name or refer to them according to their status in the claim (e.g., the defendant).
- Generally you should limit objections to issues that are of central importance to your case. If you have an objection, stand up quickly and say “objection”. The judge will acknowledge you and may ask for the reason you are objecting.

2. Court Room Layout

The judge’s bench is usually elevated above the rest of the court so the judge has a good view of the proceedings. The litigants’ table is in front of the judge, and the parties will come and sit there when their case is called. Often there is a raised lectern to hold papers when a litigant stands to ask questions. The court clerk's table is beside the witness box and between the litigants’ table and the judge’s bench. The witness box will be on either the judge’s left or right. The public gallery will fill up the remaining part of the courtroom. Parties will wait in the gallery until their case is called.

There will be microphones throughout. They do not amplify your voice and are for recording purposes only. **Speak at a moderate speed and project your voice.**

3. Check-In Procedure

The court clerk will ask ahead of time for the names of each party and, if they have one, their lawyer. Each party must tell the court clerk or judge as soon as possible if there are any preliminary motions or applications that should be heard first, whether there are any problems with witnesses and possible delays, and whether the number of witnesses or issues has changed from the settlement conference. This will help to determine the schedule of cases for the day and avoid as many delays as possible.

If all matters on a given day proceed to trial, the courtroom will often be overbooked, and you will be asked about the urgency of your trial. If you are not heard first, you may be given a choice to wait and see if another judge becomes available, or to adjourn to another date. If the trial has been previously adjourned, or expert or out of town witnesses are present, the trial will likely be given priority.

When the clerk has everyone organized, the judge will be called in. The clerk will announce, “order in court” and everyone must stand. The judge will bow before sitting and all parties should then bow in return before sitting. Next, the court clerk will call out the name of a case, at which time all parties in that case will come to the front and identify themselves to the judge.

4. General Order of Proceedings

b) Claimant's Case

- Claimant's opening statement
- Claimant's direct examination of its witnesses
- Defendant's cross-examination of the claimant's witnesses
- Claimant's re-examination of its witnesses
- Defendant's re-examination of the claimant's witnesses

c) Defendant's Case

- Defendant's opening statement
- Defendant's direct examination of its witnesses
- Claimant's cross-examination of the defendant's witnesses
- Defendant's re-examination of its witnesses
- Claimant's re-examination of the defendant's witnesses

d) Closing Arguments

- Claimant's closing
- Defendant's closing
- Claimant's rebuttal

5. Opening Statement

The claimant's opening statement should summarise the facts surrounding the claim, the legal basis for the claim, and the relief that is sought. The defendant's opening statement should summarise the defendant's version of the facts and the reasons it opposes the claimant's claim or the relief the claimant is seeking.

The opening statement should also alert the court to the types of evidence that will be presented and from whom the court will hear. Opening statements should not contain legal arguments and should be as brief as possible.

If there are witnesses other than the parties, the claimant should ask for an order excluding those witnesses from the courtroom.

6. Direct Examination

When each party is examining its own witness, it is that party's direct examination. The party calling the witness should tell the court whether the witness will swear or affirm their testimony.

Witnesses can be led on matters that are not in issue (e.g., their name, where they work, etc.). Leading questions tend to be ones where the answer is either yes or no. Leading the witness at the start will help the witness to relax.

When asking questions about issues that are in dispute or are related to a party's claim or defence, that party should refrain from suggesting answers to the witness. The witness must be allowed to give evidence in his or her own words.

A witness must authenticate all documents that are entered into evidence unless the parties have agreed to their authenticity. When authenticating a document, pass three copies to the clerk: one for the judge, one for the court record, and another for the witness. Once the witnessed has identified the document, it will be entered into evidence and given an exhibit number.

When the other party is conducting its direct examination, take detailed notes for cross-examination and closing arguments.

7. Cross-Examination

Once the direct examination of a witness has concluded, the witness may be cross-examined by the other party. There are two main purposes of cross-examination: to point out inconsistencies and omissions and to introduce facts or conclusions. If the witness has performed poorly or has not been damaging, it may not be necessary to cross-examine that witness.

Some questions can make the situation worse. A witness should never be asked to repeat what he or she said in "chief". This only emphasizes the point and allows the witness to clarify or minimise weaknesses

At some point in cross-examination, the opposing version of the facts should be put to the witness to allow them to comment. This is known as the rule in *Browne v Dunn* and, if not followed, can result in less weight being placed on a witness' evidence or the recall of adverse witnesses. (See *Budnark v Sun Life Assurance Co. of Canada*, 1996 CanLII 1397 (BCCA)).

A witness should not allow the cross-examiner to misconstrue their evidence. If a question is unclear, the witness should ask for clarification. Only the question asked should be answered and additional information should not be volunteered. It is okay if the witness does not know the answer to a question; the witness should not guess the answer.

NOTE: Parties should not speak to their witnesses after cross-examination and before or during re-examination about the evidence or issues in the case without the court's permission. (See *R. v Montgomery*, 1998 CanLII 3014 (BCSC)). If such a discussion occurs, the witness' evidence may be tainted and the court may not believe it.

8. Re-Examination

If new evidence is introduced during cross-examination that was not reasonably anticipated in direct examination or if a witness' answer needs to be clarified or qualified, the judge may give permission to re-examine the witness on the new evidence. (See *R v Moore*,[1984] OJ No. 134; and *Singh v Saragoca*, 2004 BCSC 1327 (CanLII) at para. 40). During re-examination, leading questions cannot be asked.

9. Closing Arguments

Closing arguments are an opportunity for each party to persuade the judge of its position. Evidence that strengthens the case should be highlighted and evidence that weakens the case should be explained and addressed. The weaknesses should be addressed in the middle of the closing so that the closing may start and finish on positive notes.

It may be necessary to comment on the credibility of witnesses, conflicts in testimony, and the insufficiency of evidence. The comments should be factual and allow the judge to arrive at a conclusion.

It is also important to summarise the relevant law and refer to specific cases that are on point. All case law should have been shared with all other parties well in advance of the trial.

Closing is not an opportunity to introduce new evidence. If something has been omitted, it can only be introduced if the judge grants permission to re-open that party's case.

10. Judgment

When the evidence, submissions, and closing arguments are finished, the judge must give a decision. The judge may give a decision orally at the end of the trial, at a later date, or in writing (Rule 10(11)). The registrar will notify the parties of the date to come back to court for reasons or, if the decision is in writing, when it was filed in the registry (Rules 10(12) and (13)).

When payment from one party to another is part of the judgment, the judge must make a payment order at the end of the trial and ask the debtor whether he or she needs time to pay (Rules 11(1) and (2)). If the debtor does not require time to pay, the judgment must be paid immediately (Rule 11(7)). If time to pay is needed, the debtor may propose a payment schedule, and if the successful party agrees, the judge may order payment by a certain date or by instalments (Rules 11(2)(b), (3), and (4)). If the creditor does not agree to the debtor's proposal, the judge may order a payment schedule or a payment hearing (Rule 11(5)).

If a payment schedule is not ordered, the debt is payable immediately and the creditor is free to start collection proceedings (Rule 11(7)).

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XV. Costs and Penalties

The court expects parties to act reasonably and follow the rules. Parties who do not follow the rules or are unsuccessful may be liable for certain costs and penalties.

A. Costs to Successful Party

Generally, the unsuccessful party must pay the successful party's expenses (Rule 20(2)). Any reasonable expenses directly related to the proceedings may be claimed. This includes filing fees, costs for document reproduction, and other costs incidental to the trial process.

A list of expenses should be brought to trial and can include expenses incurred due to the lateness, unpreparedness, or general misconduct of a party (Rule 20(6)) as long as the party claiming the expenses has actually spent that amount of money. (*Weeks v Ford Credit Canada Ltd*, [1994] BCJ No 1737).

Wages lost for attending court cannot generally be recovered. (See *McIntosh v De Cotiis Properties Ltd*, 2002 BCPC 57 (CanLII)). Where a claim before the small claims court has been withdrawn and there are no appropriate grounds to recall it, neither costs nor penalties can be assessed. (See Rule 8; and *Northwest Waste Systems v Szeto*, 2003 BCPC 431 (CanLII)).

In circumstances where the successful party has acted unfairly, withheld information, misled the court, or wasted the court's time, the successful party may have to pay the unsuccessful party's costs. (See *Tilbert v Jack*, [1995] BCJ No 938).

NOTE: A lawyer's fees cannot generally be claimed as expenses. (See *Small Claims Act*: s 19(4); and *Weeks v Ford Credit Canada Ltd.*, [1994] BCJ No 1737). The only exception is where the contract between the parties requires the reimbursement of legal costs however this only applies to legal **fees** that are not related to the claim. (See *Wetterstrom et al. v Craig Management Enterprises Ltd.*, 2009 BCPC 165 (CanLII)).

B. Frivolous Claims

A judge has discretion to order a penalty of up to 10 per cent of the amount claimed or the value of the counterclaim if the party proceeded through trial with no reasonable basis for success (Rule 20(5)).

C. Failure to Settle

If there has been a formal offer to settle under Rule 10.1 that was not accepted, a penalty, in addition to any other expenses or penalties – up to 20 per cent of the amount of the offer to settle – may be imposed if the offer was the same or better than the result at trial.

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XVI. Appeals

A. CRT Small Claims Decisions and Appeals

In small claims disputes, the tribunal will provide the final decision by the date communicated by case manager to the parties, and provide any orders resolving the dispute after the time for filing a Notice of Objection has passed and only if no objection has been made. The tribunal Chair may extend the time allowed for providing a final decision and orders resolving the dispute but will notify the parties of that change. A final decision or order can include an order for a party to pay money, an order requiring a party to do or stop doing something, and any order, terms or conditions the tribunal considers appropriate. The tribunal may make an award of expenses but not for legal costs. The tribunal's decisions will be binding and may be enforceable as court orders once they are filed with either the BC Provincial Court or BC Supreme Court.

To object to a tribunal small claims decision, including a default decision, a party must within 28 days of receiving a Notice of Final Decision, submit a completed Notice of Objection Form to the tribunal and pay the required fee (s. 56.1 of the CRTA). Once a Notice of Objection Form has been submitted, the tribunal will provide the parties with a copy of the Notice of Objection Form and a Certificate of Completion indicating that the parties have completed the tribunal's process. The CRT cannot issue an order in a small claims dispute until the deadline for filing a Notice of Objection expires. The Notice of Objection Form can be found at the following link: https://civilresolutionbc.ca/wp-content/uploads/2017/06/FORM-Notice-of-Objection-June-6-2017.pdf.

If a Notice of Objection is filed, the CRT decision is not enforceable. If any party wants to continue any of the claims that were included in the dispute, that party must file a Notice of CRT Claim in the BC Provincial Court. Once filed, the filing party must serve the Notice of CRT Claim on the other parties. The CRT will provide a Certificate of Completion to all the parties. The Certificate of Completion must be included with the Notice of CRT Claim, or the Provincial Court registry will not accept it. If the Notice of Claim is accepted, a new process with the BC Provincial Court will proceed, including a settlement conference or pre-trial conference and a trial

If the civil resolution tribunal has adjudicated a claim, or made an order for payment of case management expenses, and a person has filed a notice of objection, the Provincial Court may order a party to pay a deposit for some or all of the amount of the CRT decision (s. 56.2 of the CRTA). If the person who filed the Notice of Objection does not have a better outcome in the BC Provincial Court than in the CRT's decision, the BC Provincial Court may order that party to pay a penalty to the other party.

It should be noted that appeals of tribunal strata property decisions go through the BC Supreme Court and thus procedure for these matters differs. See s. 56.5 of the CRTA for more information.

B. Appealing from Small Claims Court

Any party to a proceeding may appeal to the Supreme Court an order to allow or dismiss a claim if the judge made the order after a trial (SCA, s 5). An appeal must be started within 40 days, beginning on the day after the order of the Provincial Court is made (SCA, s 6). A review of the order under appeal may be on questions of fact or law (SCA, s 12(a)). A mistake of fact could involve a misunderstanding by the Judge of evidence given by a witness. For example, if a witness reported that a particular event happened and in the decision the Judge bases his/her decision on the fact that event didn't happen, there could be a basis for an appeal. A mistake of law occurs where the Judge makes an error in deciding which law should apply. Not every error made by a Small Claims Court judge will be the basis for a successful appeal. The test which the Supreme Court Judge must apply is called the "clearly wrong test". If the Small Claims Court judge's decision about the facts or the law is not clearly wrong, the appeal will fail. An appeal is usually not a new trial; it will be based on the transcripts of the trial in Small Claims Court. The Supreme Court may, however, exercise its discretion to hear the appeal as a new trial (SCA, s 12(b)). No new evidence may be adduced at the appeal without leave of the court. (See Practice Direction: Standard Directions for Appeals from Provincial Court - Small Claims Act SCA, s 10).

For claims that do not fit the criteria for an appeal, the *Judicial Review Procedure Act*, RSBC 1996, c 241, allows the Supreme Court of British Columbia to review decisions made by Provincial Court judges prior to trial. This includes interlocutory orders, the dismissal of a claim at a settlement conference, and adjudicator decisions in Simplified Trials under Rule 9.1. The appropriate standard of review for orders subject to judicial review is reasonableness. (See "0763486 BCLtd. v Landmark Realty Corp*, 2009 BCSC 810 (CanLII);* Wood and Lauder v Siwak*, 2000 BCSC 397 (CanLII);* Der v Giles*, [2003] BCJ No 938; and* Nicholson v Lum*, [1996] BCJ No 860). For further information on judicial review, see Chapter 5: Public Complaints.*

If an order dismissing a claim is appealed to the Supreme Court, that appeal does not automatically appeal the counterclaim to the Supreme Court, nor vice versa. Each appeal is a separate matter and needs to be filed separately in the Supreme Court. Both appeals will, of course, be heard together. (See *Shaughnessy v Roth*, 2006 BCSC 531 (CanLII)).

1. Filing an Appeal

You must act quickly if you wish to appeal a decision as there are many steps involved and only a short a period of time. Within 40 days of the order being made (SCA, s 6), an appellant must, in one day, do all of the following:

- file a Notice of Appeal in the Supreme Court registry closest to the Provincial Court where the order being appealed was made (SCA, s 7);
- deposit with the Supreme Court $200.00 as security for costs plus the amount of money required to be paid by the order under appeal (SCA, s 8(1) and (2)) or apply to the Supreme Court to reduce the amount required to be paid (SCA, s 8(3));
- apply to the registrar of the Supreme Court for a date for hearing the appeal that is at least 21 days, but not more than 6 months, after the filing date (SCA, s 10);
- file a copy of the Notice of Appeal in the Provincial Court registry where the order under appeal was made (SCA, s 7(b)).

An application to reduce the amount required to be deposited does not need to be served on any person; however, if the court reduces the amount required to be deposited, the appellant must serve notice of this order on the other parties to the appeal (SCA, s 8(6)).

The cost to file a Notice of Appeal in Supreme Court is $200.00 and the cost for filing an application to reduce the amount of the deposit is $80.00. An appellant who cannot afford these fees can apply to the Supreme Court registrar for indigent status.

A copy of both the Notice of Appeal and the Notice of Hearing must be served on every party affected by the appeal (SCA, s 11(1)). Fourteen days after filing the Notice of Appeal, the appellant must provide the Registrar with proof that the Notice of Appeal and the Notice of Hearing have been served on the respondents.

The Appellant must also order transcripts of the oral evidence given at the Small Claims Court trial and the Judge's reasons for judgment. The Appellant must pay for a copy of the transcript for the Court and one for each party to the appeal. Transcripts cost several dollars per page. So, depending on how long the trial lasted, the transcript could be many, many pages and cost hundreds and even thousands of dollars.

For a detailed checklist of the steps you must take to make an appeal, please see Appendix L.

2. The Decision of the Supreme Court

On hearing an appeal, the Supreme Court may make any order that could be made by the Provincial Court, impose reasonable terms and conditions on an order, make any additional order it considers just, and award costs to any party under the *Supreme Court Civil Rules*. (See BC Reg 168/2009 and amendments thereto).

There is no further appeal from a Supreme Court order (SCA, s 7).

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XVII. Enforcement of a Judgement

A judgment is valid for 10 years. (See *Limitation Act*, RSBC 1996, c 266: s 3(3)(f)). During that time, a judgment creditor may use whatever means permitted by law to enforce the order. (See *Court Order Enforcement Act*, RSBC 1996, c 78). First, the successful party must fill out a payment order form (Form 10) and file it in the registry. Interest and expenses need to be included, and a plain piece of paper showing those calculations should be attached. Although it is called a "payment order", the form is used even if no payment of money is ordered. There is space at the bottom of the form for a description of a non-monetary order. The registry will compare it with the court record for accuracy and it will then be signed and ready for pick-up or mailed within a day or two.

The judgment creditor should send a copy of the payment order with a demand letter to the debtor. If the court did not give the debtor a deadline, the judgment debt is due immediately. (See *Court Order Enforcement Act*, RSBC 1996, c 78: s 48(1)). The demand letter should warn that, if payment is not received by a certain date (e.g., 10 days later), other enforcement proceedings will be pursued.

The Small Claims Court has an excellent procedural guide entitled "Getting Results [1]". Once an enforcement strategy has been decided upon, a judgment creditor should consult the booklet for detailed instructions on how to commence enforcement proceedings.

To enforce payment, a creditor may use any of the following methods (Rule 11(11)):

A. Prohibition on Enforcement

While a debtor is in compliance with a payment schedule, the judgment creditor cannot take any additional steps to collect the debt (Rule 11(6)). If a payment hearing is ordered because the creditor did not agree with the debtor's proposed payment schedule, the creditor may not take any steps to collect the debt before the hearing (Rule 11(8)). If a summons to a payment hearing is otherwise filed, the creditor may not attempt to collect the judgment debt until after the hearing is over or the summons is either withdrawn or cancelled (Rule 11(17)).

If the debtor defaults on the payment schedule, the balance becomes due immediately and the creditor may then take other steps to collect the balance (Rule 11(14).

The Small Claims Court may be **unable** to enforce a mediation agreement if doing so would exceed its jurisdiction. Other mediation agreements and the decisions of adjudicators in simplified trials can be enforced. (*Carter v Ghanbari*, 2010 BCPC 266; *Wood v Wong*, 2011 BCSC 794).

It may not be possible to enforce a judgment against a debtor who has discharged the judgment debt in bankruptcy. A judgment creditor who learns that a judgment debtor plans to file for bankruptcy should review the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178 and obtain independent legal advice.

B. Order for Seizure and Sale

An order for seizure and sale allows for personal property belonging to the debtor to be seized by a bailiff and sold at public auction. Examples of personal property that can be seized include vehicles, furniture, and electronics. A personal judgment debtor (i.e., not a corporation) is entitled to retain certain personal property up to a certain value set by regulation. (See *Court Order Enforcement Act*, RSBC 1996, c 78: s 71(1); *Court Order Enforcement Exemption Regulation*, BC Reg 28/98, s 2).

The net proceeds (after deduction of the bailiff's fees and expenses) are given to the judgment creditor. One a judgment creditor has filed Form 11, the registrar can grant an order for seizure and sale if there is no payment schedule or if the

debtor has not complied with a payment schedule (Rules 11(11)(a) and 11(14)(b)).

The debtor is not notified of the order prior to seizure. A seizure and sale is not carried out by the creditor and must be done by private bailiffs. Before an order is issued, the creditor must deposit the estimated fees and expenses of the bailiffs. An order for seizure and sale is valid for one year.

C. Garnishment After Judgment

Garnishment requires a third party, often the debtor's employer or bank, to pay money owing to the debtor into court instead of to the debtor. The creditor must file an affidavit that describes the amount of the payment order, the amount still owing and the name and address of the garnishee. The affidavit must be sworn before a notary, a lawyer, or a justice of the peace at the registry. Certain assets such as social assistance payments (welfare, disability) and joint accounts may not be garnished. With some exceptions, only 30 per cent of the debtor's salary can be garnished. (See *Court Order Enforcement Act*, RSBC 1996, c 78, s-s 3(5)-(7)).

The creditor must also fill out a garnishing order identifying the garnishee (the bank or the employer) with its full legal name and address. In the case of a bank, the specific branch must be identified and must be located in British Columbia. The garnishee will pay the entire amount it owes the debtor (i.e., the positive balance in a bank account). The garnishing order does not freeze the account; the claimant may re-garnish the bank at any time.

Once the creditor receives a garnishing order, he or she must serve both the garnishee and the debtor either personally, or by registered mail.

Once an order for garnished wages is served on the garnishee, the order is only valid for wages due and owing within **seven** days (see *Court Order Enforcement Act*, RSBC 1996, c 78, s 1) – it is therefore critical to have some knowledge relating to the debtor's pay schedule. If the garnishee owes money to the debtor, he or she must pay the amount owed into court. All money paid into court is held until further order of the court.

A creditor may apply for the garnishment of a debtor's bank account and accounts receivable **before** a judgment is reached. This is called a pre-judgment garnishing order. For more information, see Section III.B.4.: "Garnishment of Bank Accounts and Other Accounts Receivable in Chapter 10: Creditors' Remedies and Debtors' Assistance.".

D. Payment Hearing

A payment hearing may be scheduled before a judge or justice of the peace (Rule 12). It will determine the debtor's ability to pay and whether a payment schedule should be ordered (Rule 12(1)). Such a hearing may be requested by a creditor or debtor or ordered by a judge (Rule 12(2)). However, if a creditor has an order for seizure and sale, he or she must get the permission of a judge to also have a payment hearing. The debtor must bring records and evidence of income and assets, debts owed to and by the debtor, any assets the debtor has disposed of since the claim arose, and the means that the debtor has, or may have in the future, of paying the judgment (Rule 12(12). Costs to the applicant in such a proceeding are added onto the sum of the judgment.

A creditor who requests a hearing must file Form 12: Summons to a Payment Hearing. The registry will set a date on the form and the person named in the summons must be served **personally** at least seven days before the date of the hearing (Rules 12(7) and 18(12)(b)); service by mail is not permitted.

If the debtor is having difficulty paying, he or she can request a hearing by filing Form 13: Notice of Payment Hearing which must be served on the creditor at least seven days before the date of the hearing, but may be served by regular mail as long as it is mailed at least 21 days in advance of the hearing date (Rules 12(11),18(12)(b), and 18(13)).

If a person who was properly summoned or ordered by the court to attend a payment hearing does not attend, the creditor may ask that the judge or justice of the peace issue a warrant (Form 9) to arrest that person (Rule 12(15)).

If a creditor does not appear, the hearing may be held, cancelled, or postponed (Rule 12(14)).

E. Driver's Licence Suspension

If damages are a result of a motor vehicle accident involving property damage exceeding $400, bodily injury, or death (see *Motor Vehicle Act*, s 91(1)), the creditor may apply to the Superintendent of Motor Vehicles within 30 days of the judgment to have the debtor's driver's licence suspended. The Superintendent may suspend the licence upon receiving the judgment.

F. Default Hearing

If the debtor does not comply with a payment schedule, the creditor may request a default hearing by filing Form 14: Summons to a Default Hearing. The creditor should request from the debtor the same documents as would be requested for a Payment Hearing. The summons must be served personally by either a court bailiff or a sheriff (i.e., not the creditor) at least seven days before the hearing (Rule 13(5)). The judge at the hearing may confirm or vary the terms of the payment schedule (Rule 13(7)) or imprison the debtor if the defendant does not appear or if the reason for failing to comply with the payment schedule amounts to contempt of court (Rules 13(8) and (9)).

The Registrar's authority to waive fees extends only to registry services and not court bailiff or sheriff's services. If a creditor cannot afford a court bailiff's or the sheriff's services, the claimant can complete an Application to a Judge seeking, pursuant to Rule 13(8), to hold the debtor in contempt and obtain a Warrant of Imprisonment to imprison the debtor for up to 20 days. This application can be served personally by the applicant to avoid the court bailiff's or sheriff's fees. If the creditor will testify at the hearing as to the debtor's failure to comply with the payment schedule, an affidavit is not required.

G. Execution Against Land

If the debtor owns land in British Columbia, the creditor can register the judgment against the land. (See *Land Title Act*, RSBC 1996, c 250, ss 197 and 210). If you do not know whether the debtor owns land, you can do a name search at the land title office, for a fee. If the property is sold or transferred after registration of certificate of judgement, some or allof the judgment may be paid. Registering a certificate of judgment prevents the Debtor from selling or mortgaging the land unless the debt owed to the Creditor is paid off. Even if the Debtor owns land jointly with another person, it may be useful to register a certificate of judgment against the land. A certificate of judgment is subject to a prior registered mortgage and the rights of a *bona fide* purchaser who, before registration of the certificate of judgement, has acquired an interest in land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment. (See *Court Order Enforcement Act*, RSBC 1996, c 78, s 86).

Once the judgment is registered, the creditor may apply for an order to sell the property, but only through the Supreme Court of BC. It is outside the jurisdiction of the Provincial Court to order a lien to be place or removed against property. The process of having a Debtor's land sold to pay off a debt owed to a creditor is very complicated, costly and time-consuming. For example, if the land is used by the Debtor as principal residence in the Capital Regional District or the Greater Vancouver Regional District, and the Debtor's equity in the land is less than $12000 the land is exempt from being taken and sold. If the land is located elsewhere in BC and is used by the Debtor as a principal residence and the Debtor's equity is less than $9000 the land is exempt from being taken and sold. (See *Court Order Enforcement Act*, RSBC 1996, c 78, s 71.1). Because of this complicated process, legal advice should be obtained to determine whether it

would be financially worthwhile to apply for an order to sell.

A certificate of judgment can be obtained at the Small Claims Court Registry from the Registrar. The cost is $30.00. The certificate of judgment can then be registered at the Land Title Office where the land is registered. The cost of filing the certificate of judgment at the Land Title Office is $25.00. The certificate is effective for two years. After the two years expires, a new certificate of judgment must be obtained and filed again.

H. Bankruptcy

If a person files a consumer proposal or becomes bankrupt, the law automatically puts in place a "stay of proceedings". With a few exceptions, a stay prevents any legal action from being commenced or continued against bankrupt. The person's trustee will send legal notice of the stay to any person or business currently engaged in legal action against the person declaring bankruptcy. The stay is also sent to the Court that is handling the person's legal action and if a creditor has already obtained a judgment against the person, a copy is sent to debtor's employer as well to stop the garnishee.

The Stay of Proceedings is only effective against debts that are dischargeable (i.e., can be eliminated) by bankruptcy law. Things like child support, spousal support, restitution orders, repayment of debts based on fraud or misrepresentation and some others are not stopped by a stay. A complete list of the debts can be found under the Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 178.

There are ways for creditors to circumvent a Stay of Proceedings. However, clients with a judgment awarded in Small Claims Court are advised to speak with a trustee and discuss the mechanism of submitting a proof of claim. This form must be filled out to share in the dividends and vote at the first meeting of creditors (if one is held). The form contains the name of the creditor and the bankrupt and the nature and amount of the claim, as well as other information. A list of instructions is usually included. You must attach a Statement of Account providing the details of the claim along with supporting documents or other evidence that establishes the validity of your claim.

I. Debt collection

Part 7 of the *Business Practices and Consumer Protection Act* (BPCPA) deals with debt collection practices and applies to all transactions, including consumer to consumer, business to consumer, and consumer to business. A collector is defined as "any person, whether in British Columbia or not, who is collecting or attempting to collect a debt". Collectors should be aware of the proscriptions in this BPCPA because there are penalties and fines associated with violating the provisions. For example, Part 10 s. 171 of the Act gives rise to a statutory cause of action in Provincial Court to recover damages caused by contraventions of the Act and also gives the Provincial Court jurisdiction for defamation and malicious prosecution.

J. Civil Resolution Tribunal

Under the Civil Resolution Tribunal Act, section 58.1, a CRT order may be enforced by filing it in the BC Provincial Court. This can be done if a party has either a consent resolution order, or a final decision. The BC Provincial Court must be provided with a validated copy of the order. A validated copy of a CRT order is sent with the CRT decision. The CRT will not provide parties with a validated small claims order until the time limit for making a Notice of Objection has expired. Once a small claims order is received, it can be filed immediately.

When a CRT order is filed with the BC Provincial Court, it has the same force and effect as if it were a judgment of the BC Provincial Court. The enforcement procedures are within the Court's jurisdiction.

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References

[1] http://www.ag.gov.bc.ca/courts/small_claims/info/guides/getting_results.htm

Appendix A: Registries

METRO VANCOUVER

ABBOTSFORD

32203 South Fraser Way Abbotsford, BC,V2T 1W6 Telephone: Fax: (604) 855-3200 (604) 855-3232

CHILLIWACK

46085 Yale Rd Chilliwack, BC,V2P 2L8 Telephone: Fax: (604) 795-8350 (604) 795-8345

NEW WESTMINISTER

651 Carnarvon St New Westminster, BC V3M 1C9 Telephone: Fax: (604) 660-8522 (604) 660-1937

NORTH VANCOUVER

200 East 23rd St North Vancouver, BC V7L 4R4 Telephone: Fax: (604) 981-0200 (604) 981-0234

PORT COQUITLAM

Unit A – 2620 Mary Hill Rd Port Coquitlam, BC V3C 3B2 Telephone: Fax: (604) 927-2100 (604) 927-2222

RICHMOND

7577 Elmbridge Way Richmond, BC V6X 4J2 Telephone: Fax: (604) 660-6900 (604) 660-1797

SURREY

14340 57th Ave Surrey, BC V3X 1B2 Telephone: Fax: (604) 572-2200 (604) 572-2280

VANCOUVER (ROBSON SQUARE)

Box 21, 800 Hornby St Vancouver, BC V6Z 2C5 Telephone: Fax: (604) 660-8989 (604) 660-8950

REST OF BC

ATLIN

Box 100 Third Street Atlin, BC V0W 1A0 Telephone: Fax: (250) 651-7595 (250) 651-7707

BURNS LAKE

508 Yellowhead Hwy PO Box 251 Burns Lake, BC V0J 1E0 Telephone: Fax: (250) 692-7711 (250) 692-7150

CAMPBELL RIVER

500 – 13th Ave Campbell River, BC V9W 6P1 Telephone: Fax: (250) 286-7650 (250) 286-7512

CLEARWATER

Box 1981, RR #1 363 Murtle Cres Clearwater, BC V0E 1N1 Telephone: Fax: (250) 674-2113 (250) 674-3092

COURTENAY

420 Cumberland Rd, Room 100 Courtenay, BC V9N 2C4 Telephone: Fax: (250) 334-1115 (250) 334-1191

CRANBROOK

102 11th Ave S, Room 147 Cranbrook BC V1C 2P3 Telephone: Fax: (250) 426-1234 (250) 426-1352

DAWSON CREEK

1201 103 Ave, Room 125 Dawson Creek, BC V1G 4J2 Telephone: Fax: (250) 784-2278 (250) 784-2339

DUNCAN

238 Government St Duncan, BC V9L 1A5 Telephone: Fax: (250) 746-1258 (250) 746-1244

FORT NELSON

Bag 1000 Fort Nelson, BC V0C 1R0 Telephone: Fax: (250) 774-5999 (250) 774-6904

FORT ST. JOHN

10600 100 St Fort St. John, BC V1J 4L6 Telephone: Fax: (250) 787-3231 (250) 787-3518

GOLDEN

837 Park Dr Box 1500 Golden, BC V0A 1H0 Telephone: Fax: (250) 344-7581 (250) 344-7715

KAMLOOPS

223 – 455 Columbia St Kamloops, BC V2C 6K4 Telephone: Fax: (250) 828-4344 (250) 828-4332

KELOWNA

1 – 1355 Water St Kelowna, BC V1Y 9R3 Telephone: Fax: (250) 470-6900 (250) 470-6939

MACKENZIE

64 Centennial Dr Box 2050 Mackenzie, BC V0J 2C0 Telephone: Fax: (250) 997-3377 (250) 997-5617

MASSET

1066 Orr St Box 230 Masset, BC V0T 1M0 Telephone: Fax: (250) 626-5512 (250) 626-5491

NANAIMO

35 Front St Nanaimo, BC V9R 5J1 Telephone: Fax: (250) 716-5908 (250) 716-5911

NELSON

320 Ward St Nelson, BC V1L 1S6 Telephone: Fax: (250) 354-6165 (250) 354-6539

PENTICTON

100 Main St Penticton, BC V2A 5A5 Telephone: Fax: (250) 492-1231 (250) 492-1378

PORT ALBERNI

2999 4th Ave Port Alberni, BC V9Y 8A5 Telephone: Fax: (250) 720-2424 (250) 720-2426

PORT HARDY

9300 Trustee Rd Box 279 Port Hardy, BC V0N 2P0 Telephone: Fax: (250) 949-6122 (250) 949-9283

POWELL RIVER

103 – 6953 Alberni St Powell River, BC V8A 2B8 Telephone: Fax: (604) 485-3630 (604) 485-3637

PRINCE GEORGE

250 George St Prince George, BC V2L 5S2 Telephone: Fax: (250) 614-2700 (250) 614-2717

PRINCE RUPERT

100 Market Pl Prince Rupert, BC V8J 1B8 Telephone: Fax: (250) 624-7525 (250) 624-7538

QUESNEL

350 Barlow Ave Quesnel, BC V2J 2C2 Telephone: Fax: (250) 992-4256 (250) 992-4171

ROSSLAND

2288 Columbia Ave Box 639 Rossland, BC V0G 1Y0 Telephone: Fax: (250) 362-7368 (250) 362-9632

SALMON ARM

550 – 2nd Ave NE PO Box 100 Stn Main Salmon Arm, BC V1E 4S4 Telephone: Fax: (250) 832-1610 (250) 832-1749

SECHELT

5480 Shorncliffe Ave PO Box 160 Sechelt, BC V0N 3A0 Telephone: Fax: (604) 740-8929 (604) 740 8924

SMITHERS

3793 Alfred St Telephone: Fax: (250) 847-7376 (250) 847-7710

1. 40 Bag 5000

Smithers, BC V0J 2N0

TERRACE

3408 Kalum St Terrace, BC V8G 2N6 Telephone: Fax: (250) 638-2111 (250) 638-2123

VALEMOUNT

1300 4th Ave PO Box 125 Valemount, BC V0E 2Z0 Telephone: Fax: (250) 566-4652 (250) 566-4620

VERNON

3001 27th St Vernon, BC V1T 4W5 Telephone: Fax: (250) 549-5422 (250) 549-5621

VICTORIA

2nd Floor, 850 Burdett Ave Victoria, BC V8W 9J2 Telephone: Fax: (250) 356-1478 (250) 387-3061

WESTERN COMMUNITIES

1756 Island Hwy PO Box 9269 Victoria, BC V8W 9J5 Telephone: Fax: (250) 391-2888 (250) 391-2877

WILLIAMS LAKE

540 Borland St Williams Lake, BC V2G 1R8 Telephone: Fax: (250) 398-4301 (250) 398-4459

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Appendix B: Demand Letter

123 Parliament Way
Richmond, British Columbia
V6K 1H6

18 June 2007

WITHOUT PREJUDICE

Mr. Wilfred Laurier
321 Confederation Drive
Vancouver, BCV1K 5L2

Attention : Mr. Laurier

Dear Sir:

Re: Contract with Macdonald Painting & Restoration. Dated January 5, 2000 and amended by way of an oral contract.

On January 5, 2000 you signed a detailed Contract with me outlining the work that was to be completed for $6000.00. In addition, in August 2000, you asked me to repair some damage that a moving company had created and to pressure wash the house. At that time I informed you that this additional work would cost $1400.00.

On or about January 5, 2000 you issued me a $2500 cheque as a deposit for the work to be completed on the home and garage at 321 Confederation Drive. There were problems with the work that was done. I corrected the problems you listed and on March 10, 2000 I notified you that there was $4900.00 due. This amount has not yet been paid.

I am considering starting a legal action in the Small Claims Division of the Provincial Court for debt. Such action could result in a judgment in the amount of $4900.00 plus all disbursements, costs, and interest.

I do not want to litigate and will forgo further action upon receipt of $4,900 in the form of a certified cheque or money order made payable to Mr. Macdonald and mailed to 12345 Macdonald Street, Vancouver, British Columbia, V6T 1Z1. Non-payment within 14 days of the receipt of this letter will result in the commencement of action without further notice. Correspondence should be directed to my attention at my office. If you have any questions or comments do not hesitate to call.

Yours truly,

Mr. John A. Macdonald

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Appendix C: Notice of Claim

	This appendix is available on Clicklaw Wikibooks for download in PDF. A permanent archive version is also available at https://perma.cc/R39W-CPXP. Readers of the print edition please see the "Supplementary Documents for Appendices" section.

a) Claims in Debt

Claims in debt are quantified. Usually, the parties can agree on the amount owing.

SAMPLE: The claimant's claim is for a debt in the amount owing to the claimant on account for (or, for the price of) goods sold and delivered (or services rendered) by the claimant to the defendant at their request. The goods sold (or services rendered) were: (description of goods or services) and were delivered (or rendered) on or about the 29th day of July 2007 at 3875 Point Grey Road in the City of Vancouver, BC. The claimant has demanded payment of this sum by the defendant but the defendant has refused or neglected to pay.

If the defendant has partially paid the original amount owing, this should be detailed in the Notice of Claim.

b) Claims for Damages

Damages are a claim for a loss where the parties do not agree on an amount owed. These claims often refer to breach of contract, misrepresentation, or negligence.

SAMPLE: The claimant's claim is against the defendant(s) (and each of them jointly and severally) for the sum of $3,000 for damages to the claimant's house resulting from a roof installed on or about the 10th day of June, 2007, at (or near) 2120 West 2nd Avenue in the City of Vancouver, British Columbia, due to the roof being negligently installed by the defendant... causing damages of the above amount. The defendant's said negligence consisted of... (e.g. improper installation or materials).

SAMPLE: The claimant had a contract with the defendants to paint the claimant's house for $3,000. The defendants never painted the house. The claimant had to pay XYZ Painters $3,950 to paint the house. This happened in Coquitlam, British Columbia, in May of 2007.

The statement of facts should be broken down into separate paragraphs. Facts should be listed as one fact per numbered paragraph.

In a claim for damages, the claimant may not know what the amount should be. In such cases, the claimant should claim a figure that he or she would accept in settlement, or if doubtful of the amount, $25,000 should be claimed and the court will determine the appropriate amount of damages. Furthermore, Small Claims court can award aggravated and punitive damages. Aggravated damages are considered compensatory and may be awarded even if not plead specifically; see *Epstein v Cressey Development Corp.* [1992] 2 WWR 566 (BCCA). Punitive damages are not compensatory and must be plead specifically; see *Gillespie v Gill Et. Al.* [1999] B.C.P.C. No. 2021. For a discussion of aggravated damages see *Kooner v Kooner* [1989] B.C.S.C. No.62. For a discussion of aggravated and punitive damages, see *Siebert v J & M. Motors Ltd.* [1996] B.C.J. No.876.

c) Other Remedies

The Notice of Claim is designed for claims in debt and for damages, but other claims are available, such as specific performance of a contract, quantum meruit or return (recovery) of an item.

SAMPLE: The claim is against the defendant for the return of their lawn mower, which was borrowed by the defendant who refused to return it. This happened in Surrey, British Columbia, in July of 2007.

In cases such as this, ignore the dollar amount for the “How Much” section. Indicate instead what the claimant seeks, e.g. “The claimant asks for an order that her lawn mower be returned to her”. The client should consider the possible condition of the goods when deciding whether or not to ask for damages instead.

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Appendix D: Reply to Claim

	This appendix is available on Clicklaw Wikibooks for download in PDF. A permanent archive version is also available at https://perma.cc/9CTT-YM8V. Readers of the print edition please see the "Supplementary Documents for Appendices" section.

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Appendix E: Glossary

AMENDMENT

- Modification of submitted materials. Amendments can consist of additions, deletions, and corrections.

ADJOURNMENT

- In court settings, postponement of an appearance date until a later, fixed, date.

BALANCE OF PROBABILITIES

- The civil standard of proof. To prove a civil case, it need only be established that the case is more probable than the other.

BEYOND A REASONABLE DOUBT

- The criminal standard of proof. Explained concisely in widely-cited case *R v W.(D.)*, [1991] 1 SCR 742, which is discussed in Chapter 1: Criminal Law.

CAUSE OF ACTION

- Legal cause for which an action may be brought. The legal theory giving basis to a lawsuit.

CIVIL LAW

- The system of law concerned with relations between individual parties, rather than criminal affairs.

COMMON LAW

- Law derived from custom and judicial decisions rather than statutes.

COMPLETE DEFENCE

- An argument, which, if proven, will effectively end the litigation in favour of the defendant.

CONTINGENCY

- In legal circles, is commonly used to refer to a contingent fee,which is a fee for legal services provided only if the legal action is settled favorably or out of court.

CONTRIBUTORY NEGLIGENCE

- Negligent behavior of the plaintiff that contributes to the harm resulting from the defendant's negligence.

COUNTERCLAIM/COUNTERCLAIMANT

- A claim by a defendant seeking relief from the plaintiff. Generally made as a response to the same facts that make up the issue the plaintiff originally claimed for.

CROWN

- Generally a reference to the government or state acting as a party in legal proceedings.

DEBTOR

- A person judged to owe money after the resolution of a civil case.

DEDUCTIBLE

- In an insurance policy, the amount that must be paid out-of-pocket before an insurer will pay any expenses. Generally, a clause used by insurance companies as a threshold for policy payments.

DEFAULT

- Often used in legal contexts as a verb meaning to fail to fulfill an obligation, generally referring to failure to pay a loan or make a court appearance.

DISBURSEMENT

- Money paid to cover expenses for goods and services that may be currently tax-deductible. Commonly used in the context of business expenses.

DISGORGEMENT

- Stolen money that must be repaid to victims of theft, fraud, or other financial crime.

DISMISS

1. The discharge of an individual or corporation from employment.
2. Judgment in a civil or criminal proceeding denying the relief sought by the action.

EQUITY

- Can mean different things in different contexts. The most common definitions for equity include:

1. The broad concept of fairness
2. An alternative legal system that originated in the English courts as a response to the common-law system

ESTATE

- The degree, quantity, or nature of interest that a person has in real or personal property.

EX PARTE

- In the interests of one side only or an interested outside party.

EXECUTOR/EXECUTRIX

- A person specifically appointed by a will to carry out its wishes. Some of the administrative responsibilities typically added to executor's duties include:
  - Gathering up and protecting the assets of the estate;
  - Locating beneficiaries named in the will and/or potential heirs;
  - Collecting and arranging for payments of debts to the estate;
  - Approving or disapproving creditors' claims;
  - Making sure estate taxes are calculated.

EXTRAPROVINCIAL CORPORATION

- A corporate body which is not incorporated in the province where action has been started.

GARNISHEE

- A third party ordered to surrender money or property lost by a defendant. The third party must possess the money or property but the defendant must own it.

HEARSAY

- A statement made out of court that is offered in court as evidence to prove the truth of the matter asserted. Hearsay evidence is generally inadmissible but there are many exceptions to the hearsay rule.

IN FORCE

- Commonly refers to when a law becomes legally applicable.

INDEMNIFY

- Contract with a third party to perform another's obligations if called upon to do so by the third party, whether the other has defaulted or not.

INDIGENT

- Used in legal contexts to identify a person with no reasonable ability to pay; often used to identify those deserving of legal aid or waived filing fees.

INJUNCTION (MANDATORY, PROHIBITORY, MAREVA, ANTON PILLER)

- A court order requiring an individual to either perform or not perform a particular act.

JUDGMENT PROOF

- Commonly used to refer to defendants or potential defendants who are financially insolvent.

JUDICIAL REVIEW

- A process where a court of law is asked to rule on the appropriateness of a decision of an administrative agency, tribunal, or legislative body.

LEAVE

- Commonly used in the context of leave of the court. Generally refers to permission to perform an action or make a statement.

LITIGANT

- Any party involved in a lawsuit.

MALICIOUS PROSECUTION

- A cause of action relating to a civil suit or criminal proceeding that has been unsuccessfully committed without probable cause and for a purpose other than bringing the alleged wrongdoer to justice.

MISNOMER

- An inaccurate use of a word or term.

PARTNERSHIP

- An association of two or more persons engaged in a business enterprise in which the profits and losses are shared proportionally.

PRIMA FACIE

- Based on first glance; presumed as true until proven otherwise.

PROPRIETORSHIP

- An unincorporated business owned by a single person who is responsible for its liabilities and entitled to its profits.

QUANTUM MERUIT

- Latin for "what one has earned." The amount to be paid for services where no agreement exists.

QUANTUM VALEBAT

- Latin for "what it was worth." When goods are sold without a price specified, the law generally implies that the seller will pay the buyer what they were worth.

REGULATION

- A law on some point of detail, supported by an enabling statute, and issued not by a legislative body but by an executive branch of government.

RELIEF

- A legal remedy – the enforcement of a right, imposition of a penalty, or some other kind of court order – that will be granted by courts in response to a specific action.

ROYAL ASSENT

- In Canada, where the Lieutenant Governor signs a bill to bring it into law. New legislation can exist as a bill but not as binding law if it has not received Royal Assent.

SET-OFF

- A claim by a defendant in a lawsuit that the plaintiff owes the defendant money which should be subtracted from the amount of damages claimed.

SPECIFIC PERFORMANCE

- A legal remedy that compels a party to complete their specific duty in a contract rather than compensate the claimant with damages. Often used when a unique remedy is at issue.

STAND DOWN

- In court, when a matter is postponed for a short period of the time. Differs from adjournment in being less formal; to stand a matter down is usually to postpone it for a short, indefinite period, while adjournments are often for longer fixed periods.

STATUTE

- A written law passed by a legislative body.

STAY OF PROCEEDINGS

- Stoppage of an entire case or a specific proceeding within a case.

SUBROGATE

- To substitute one party for another in a legal proceeding. The facts of each case determine whether or not subrogation is applicable.

SUBSTITUTIONAL SERVICE

- Under court authorization, serving an alternate person when the original named party cannot be reached.

TORT

- A private, civil action stemming from an injury or other wrongful act that causes damage to person or property.

UBERRIMAE FIDEI

- Utmost good faith; commonly used as the standard for dealing in insurance contracts.

WITHOUT PREJUDICE

- A reservation made on a statement that it cannot be used against in future dealings or litigation.

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Appendix F: Limitation Periods

A claim is governed by the (old) *Limitation Act*, RSBC 1996, c 266 [*Old Limitation Act*] if discovery occurred before June 1, 2013. (See *Limitation Act*, SBC 2012, c 13: s 30(3-4) [*Limitation Act*]). The definition of discovery is given in the (new) *Limitation Act* and may be found in the corresponding section of this Appendix. Under the (old) *Limitation Act*, the limitation period depends on the type of claim and who the other party is. A claim may consist of several causes of action and each cause of action may have a separate/different limitation period.

The (new) *Limitation Act*, SBC 2012, c 13 [*Limitation Act*] came into effect on June 1, 2013. A claim is governed by this Act if the claim was discovered after this date, unless the facts underlying the claim arose before the effective date and the limitation period under the old *Limitation Act*, RSBC 1996, c 266 [*Old Limitation Act*] has expired. (See *Limitation Act, SBC 2012, c 13: s 30(3-4) [*Limitation Act*]).*

The Notice of Claim must be **filed** before the limitation period expires. If a notice of claim has not been **served** within 12 months after it was filed, it expires, but the claimant may apply to have it renewed (Rule 16(3)).

It should be noted that for claims brought under Civil Resolution Tribunal, Limitation Dates are treated differently. The CRT is governed by the Limitation Act, SBC 2012, c 13 [*Limitation Act*], however unlike with other courts, the limitation period does not stop when an application for dispute resolution is filed with the CRT. The CRT must issue an initiating notice (Dispute Notice) to pause the limitation period. This should be done within 24 hours of the CRT receiving an Application for Dispute Resolution, but it may take longer. Unlike with other courts the limitation period resumes if a Notice of Objection is filed, so this should be kept in mind during the CRT process. A court or tribunal might decide to extend a limitation period, because the person with the claim couldn’t have found out about it before the countdown finished or if the person who caused the harm or loss does something to confirm the other person’s right to make a claim. This is a discretionary power of the court or tribunal however, and limitation periods are generally followed strictly.

1. Old Limitation Act

Generally, time limitations begin to run from the date of the breach (when all of the elements of the cause of action came into existence). This Act does NOT apply to actions listed under s 3(4), including actions for sexual assault or misconduct. Time limits for the more common causes of action are:

- Default limitation period: 6 years (s 3(5));
- Breach of contract: 6 years (insurance: one year); generally notice period required (note: see bullet point immediately below);
- Damages for the injury of person or property (including economic loss arising from the injury), **whether based on contract, tort, or statutory duty**: 2 years (*Limitation Act*, s 3(2)(a));
- Debt: six years (from the date of the last acknowledgment of the debt, with some exceptions);
- Enforcement of local judgement for money or return of personal property: 10 years (s 3(3)(f));
- Ultimate limitation period: 30 years after all elements of a given cause of action are complete (after all damages have occurred). Applies to all claims falling under the (old) *Limitation Act* except for exceptions under s 8(1);
- Special ultimate limitation period for hospitals, hospital employees and doctors: 6 years (s 8(1)).

In most cases, the action lapses when the time limit expires. In some circumstances, s 6 of the *Limitation Act* allows for the running of the basic limitation period, but NOT the ultimate limitation date, to be postponed. Notably, this is the case for actions for personal injury, damage to property, professional negligence, and any action based on fraud or deceit. In these circumstances the running of time does not begin until such time as the identity of the defendant is known to the plaintiff, and a reasonable person, making normal and appropriate inquiries would have discovered a cause of action to exist. (See *Shah v Governor and Co of Adventurers of England Trading into Hudson's Bay Co (cob Hudson's Bay Co)* [2008] BCJ No 479, 2008 BCCA 114). The limitation period is renewed (up to the 30 year ultimate limitation period) if the cause of action is confirmed (s 5) by the defendant's acknowledgement or part payment of the amount claimed before the original limitation period expires.

NOTE: Where an action has already been commenced, the court has the discretion to allow a third party to be added even if the limitation period for a claim against that third party has expired. See *Teal Cedar Products (1977) Ltd. v Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.) and *Wadsworth v Macleod* (2004), B.C.S.C., 1824 for a discussion. The court will consider factors such as: the extent of the delay, the reason for the delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the claims and the proposed new cause of action.

2. New Limitation Act

Under the new *Limitation Act*, the basic limitation period for most causes of action is 2 years from the date of **discovery** of the claim. Discovery is defined as the day on which the claimant knew or reasonably ought to have known all of the following:

- a) That injury, loss or damage had occurred;
- b) That the injury, loss or damage was caused by or contributed to by an act or omission;
- c) That the act or omission was that of the person against whom the claim is or may be made;
- d) That, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage. (See *Limitation Act*, s 8).

Other limitations include:

- Enforcement of civil judgements (s 7): 10 years from date of judgement;
- Debts owed to government (s 38): 6 years;

- Maximum limitation period (s 21(1)): 15 years after the original act or omission giving rise to the claim occurs. Applies to all claims falling under the (new) *Limitation Act*.

Under the (new) *Limitation Act*, the running of both the basic and ultimate limitation periods may be delayed for minors (s 18), persons while under disability (ss 19, 25), and for fraud or wilful concealment of facts on the part of the defendant (ss 12, 21(3)). Both the basic 2 year limitation period and the 15 year ultimate limitation period are renewed if the defendant gives written and signed acknowledgement of liability (s 24). A counterclaim may be brought even though the limitation period has expired if the counterclaim relates to the claim to which it responds and that claim is within its applicable limitation periods (S 22). The Act generally does not apply to sexual assault claims, child or spousal support claims, or fines under the *Offence Act* (s 3). The Act also does not apply to limitation periods established under other legislation.

3. Other Legislation

Certain Acts will overrule the *Limitation Act*. The *Vancouver Charter*, S.BC1953, c 55; the *Police Act*, R.S.BC1996, c 367; and the *RCMP Act*, RS 1985, c. R-10, all have their own limitation periods and notice provisions, and must therefore be consulted before bringing an action against a party covered by one of these statutes. For limitation dates pertaining to employment, human rights complaints or residential/tenancy disputes, see the corresponding chapters of this manual.

The *Local Government Act*, RSBC 1996, c 323, sets a limitation date for claims against a municipality in BC (s 285) of 6 months after the cause of action arose. Notice of damages must be delivered to the municipality within 2 months from the date on which the damage was sustained unless the damage resulted in death, the claimant has a reasonable excuse, or the municipality is not unfairly prejudiced by the lack of notice (s 286(1-3)).

	Old Limitation Act:	**New Limitation Act:**
Application:	Applies if discovery occurred before June 1, 2013	Applies if discovery occurred after June 1, 2013
Basic Limitation Period:	6 years after events occurred*	2 years after discovery**
Damages to Personal Injury or Property:	2 years after events occurred	2 years after discovery
Debts owed to government:	6 years after events occurred	6 years, including ICBC claims for vehicle indebtedness, student loans and medical fees
Counterclaims:	Not barred by expiry of limitation period if counterclaim connected to the claim to which it responds and the limitation period for that claim has not expired.	Not barred by expiry of limitation period if counterclaim connected to the claim to which it responds and the limitation period for that claim has not expired.
Ultimate Limitation Period:	30 years after all damages occurred 6 years for negligence/malpractice actions against medical practitioners & hospitals	15 years after original events occurred
Enforcement of Judgements:	10 years after judgement	10 years after judgement

*See Limitation Act, RSBC 1996 c 266 for exceptions

**See Limitation Act, SBC 2012 c 13 for exceptions

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Appendix G: Causes of Action

The cause of action is the claimant's reason for bringing a suit against the defendant. While there must always be a cause of action, in Small Claims it is generally sufficient to cite the facts; Small Claims judges will take a liberal view of pleadings and allow litigants to assert claims in non-legalistic language. However, the judge must still be able to find a cause of action in the facts the claimant alleges. Potential claimants should therefore review the following, non-exhaustive list of causes of action to determine if they have a valid claim. Claimants may claim for more than one cause of action on a notice of claim and are advised to do so if they believe more than one cause of action applies or are not sure which one is valid; it is easier to name superfluous causes of action on the notice of claim than to get the claim amended after filing it. The following causes of action may be brought in Small Claims unless the amount claimed is over $25 000 or it states otherwise in the list. They are organized into 3 categories: 1) common; 2) rare; 3) see a lawyer

Defences

For each cause of action there are usually a number of possible defences. Both Claimants and Defendants should be aware of the defences. Below are defences to some of the more common causes of action.

1) Common causes of action

a) Breach of Contract

Contract law governs voluntary relationships between parties. It is a complicated and nuanced area of the law. To bring a claim for breach of contract, a party must demonstrate that the other party failed to perform a contractual obligation. Depending on the type of term that is breached, the other party may be able to "terminate" the contract. Termination. Terms that go to the heart of a contract are usually called "conditions". Breach of a condition by one party entitles the other party to terminate the contract and end their obligations. Less important terms are called "warranties". Breach of a warranty does not give the other party a right to terminate. However, the party not in breach can still sue the other party for breach of contract.

- **Defences:**

1. **No consideration:** In order for a promise or any other contractual obligation to be enforceable by courts, there must be consideration. Consideration is what is given in exchange for a promise that makes the promise binding. If there is no consideration for a promise, the promise will not be enforced by the courts, even if the parties have an otherwise valid contract.
2. **Void contract:** A contract can be void and therefore unenforceable for several reasons, including lack of mental capacity, uncertainty of terms, illegality.
3. **Unconscionability:** A contract is said to be unconscionable and therefore unenforceable where the circumstances surrounding the creation of the contract gave rise to a grave inequality in bargaining power between parties. This is complicated area of contract law, and legal advice should be sought.
4. **Misrepresentation:** If the other party made a statement to you before the contract came into existence that you relied on in entering the contract and that turned out to be false, you may be able to have the contract set aside.
5. **Frustration:** frustration occurs when an unforeseen event renders contractual obligations impossible or radically changes the primary purpose of the contract. Frustration is also another complicated area in contract law. Legal advice should be sought.

Breach of Employment Contract (implied terms)

The courts cannot enforce statutory rights such as those found in the *Employment Standards Act*, as special adjudicative bodies have been created to rule on these types of claims and have exclusive jurisdiction over them. However, many parallel rights exist at common law and may be enforced by the courts. At common law, employment contracts contain numerous implied terms that are actionable through Small Claims, such as the requirement to give reasonable notice or payment in lieu upon termination of an employee. The fact that no written employment contract was signed does not disqualify an employee or former employee from claiming for breach of these terms. See Chapter 9 – Employment Law for more details.

- **Defences:**
  - **Just cause:** If an employer terminates an employee for just cause the employer is not required to give the terminated employee reasonable notice or pay in lieu. The onus to prove just cause is on the employer, and the standard is generally hard to meet. See Chapter 9 – Employment Law for more details.

Debt

Debt claims arise where the defendant owes the complainant a specific sum of money, often for a loan or for unpaid goods or services. There may be some overlap between debt and breach of contract.

- **Defences:** As there likely will be some overlap between debt and breach of contract, see the defences above under breach of contract.

2) Rare Causes of Action

a) Breach of Confidence

Breach of confidence occurs when the defendant makes an unauthorized use of information that has a quality of confidence about it and was entrusted to him/her by the claimant in circumstances giving rise to an obligation of confidence.

b) Nuisance

Nuisance may be private or public. Private nuisance is defined as interference with a landowner or occupier's enjoyment of his/her land that is both substantial and unreasonable. It can include obnoxious sounds or smells or escaping substances, but does not usually arise from the defendant's normal use of their own property. An interference with the enjoyment of land is "substantial" if it is not trivial; that is, it amounts to something more than a slight annoyance or trifling interference. Whether the interference is "unreasonable" depends on the circumstances. Factors that courts will consider (but are not bound to) in assessing reasonableness include the seriousness of the interference, the neighbourhood and surrounding area, and sensitivity of the plaintiff. Public nuisance may be thought of as a nuisance that occurs on public property or one that affects a sufficient number of individuals that litigating to prevent it becomes the responsibility of the community at large.

c) Trespass to Chattels

Where the defendant interferes with the claimant's goods without converting them to the defendant's personal use.

d) Trespass to Land

Trespass to land is actionable even where it occurred by the defendant's mistake. The claimant does not need to show a loss, although their award may be reduced commensurately if the trespass does not cost them anything.

e) Conversion =

Conversion is defined as wrongful interference with the goods of another in a manner inconsistent with the owner's right of possession. This includes theft; it also includes instances where the defendant genuinely believes the goods belong to him/her, even if (s)he purchased them innocently from a third party that stole them. It also applies when the defendant has sold the goods or otherwise disposed of them. The remedy is usually damages for the value of the goods and possibly for losses incurred by the detention of the goods. The value of the goods is assessed from the time of the conversion.

f) Unjust Enrichment

Where the defendant was enriched by committing a wrong against the claimant, the claimant suffered a corresponding loss, and there was no juristic reason for the enrichment.

3) Causes of action to see a lawyer about

a) Assault

Contrary to its criminal law equivalent, civil assault is defined as intentionally causing the claimant to have reasonable grounds to fear immediate physical harm. Mere words or verbal threats are not sufficient; there must be some sort of act or display that suggests the defendant intends to carry through with his or her threat; banging on a door or raising a fist may suffice.

b) Battery

Battery is defined as any intentional and unwanted touching, including hitting, spitting on the claimant or cutting his/her hair.

- **Defences:**
  1. **Lack of Intent:** Battery is an intentional tort which means that the plaintiff must prove the defendant acted with intent in committing battery. The defendant need not intend to cause the plaintiff harm. Rather intent refers to the desire to engage in whatever act amounts to battery. If the defendant can show that he/she did not act with intent, the claim for battery will unlikely be successful. For example, if the physical contact was involuntary or an accident
  2. **Self-defence:** The defendant can defeat a battery claim if he/she can show that the battery was an act of self-defence. There are three basic elements to self-defence which the defendant must prove:
     1. You honestly and reasonably believed that you were being or about to be subject to battery;
     2. There was no reasonable alternative to the use of force; and
     3. The use of force was proportional to the actual or perceived threat.

c) Breach of Privacy

Privacy rights are governed by the *Privacy Act*, RSBC 1996, c 373. Two common law causes of action are codified under this act:

- Intrusion upon seclusion: includes spying upon, observing or recording a person where they have a reasonable expectation of privacy.
- Appropriation of likeness: where a person's personal image, including portraits, caricatures, photos or video footage, are used for commercial gain without their consent.

Breach of privacy is outside the jurisdiction of Small Claims Court.

d) Defamation

Defamation, libel and slander are outside the jurisdiction of Small Claims.

e) Detinue

Detinue occurs when the defendant possesses goods belonging to the claimant and refuses to return them. There is some overlap between detinue and conversion, but conversion still applies where the defendant no longer has goods, while detinue generally does not. The remedy for detinue may be the return of the goods or damages for the value of the goods and possibly for losses incurred by the detention of the goods. The value of the goods is assessed at the time of the trial.

f) False Imprisonment/False Arrest

Where a person is illegally detained against their will. Peace officers have broad authority to arrest. Private citizens, including security guards, have limited authority to arrest in relation to a criminal offence or in defence of property. Usually, a party who is detained and is not convicted of the offence for which (s)he is detained has grounds for a claim in false imprisonment/arrest unless the defendant is a peace officer or was assisting a peace officer in making the arrest.

g) Negligence

Negligence is a complicated but frequently litigated area of law. Put very simply, it is based on the careless conduct of the defendant resulting in a loss to the claimant. Claims in negligence may be for personal injury or for economic loss. Claimants are advised to consult a lawyer before bringing a claim in negligence. Negligence consists of the following components:

1. **Duty of Care** – the claimant must prove that the defendant owed them a duty of care arising from some relationship between them. Many duties of care have been recognized, including but by no means limited to the following:
   - a. Duty towards the intoxicated
   - b. Peace officer's duty to prevent crime and protect others
   - c. Negligent Infliction of Psychiatric Harm/Nervous Shock
   - d. Manufacturer's and Supplier's Duty to Warn
   - e. Negligent Performance of a Service
   - f. Negligent Supply of Shoddy Goods or Structures
   - g. Negligence of Public Authority
2. **Standard of Care** – Once a duty of care is established, the level of care that the defendant owed to the claimant must be determined. This is usually based on the standard of care that a reasonable person would exercise, such as avoiding acts or omissions that one could reasonably foresee might cause the claimant a loss or injury. The level of care expected of professionals in the exercise of their duties is usually higher.

3. **Causation** – The claimant must show that the defendant's carelessness actually caused the claimant loss or injury. The basic test is whether the claimant's loss would not have occurred without the defendant's action and no second, intervening act occurred that contributed to the loss.
4. **Remoteness** – Remoteness is a consideration of whether the loss caused by the defendant's actions was too remote to be foreseeable as a result of the defendant's negligence. If so, the court may not award damages for the loss even though it was a direct result of the defendant's carelessness.
5. **Harm** – Unlike some causes of action, negligence requires the claimant to prove that the defendant's carelessness caused them harm, whether it is personal injury, pure economic loss or otherwise.

h) Misrepresentation

Misrepresentation applies where a claimant was induced to enter a contract on the basis of facts cited by the defendant that turned out to be untrue. Misrepresentation can be claimed in contract law or in torts generally, or in both concurrently. In contract law, the remedy is a declaration that the contract is void (rescission). In torts, the remedy may be damages for the claimant's consequential losses. If the claim is brought in contracts, a distinction must be made between representations, which are statements that induce one to enter a contract, and the terms of the contract, the violation of which gives rise to a claim in breach of contract but not in negligence. There are three specific categories of misrepresentation:

- **Fraudulent misrepresentation** – where the defendant made the statement knowing it was untrue. This is the hardest category of misrepresentation to prove, as the claimant must prove the defendant's state of mind prior to the formation of the contract.
- **Negligent misrepresentation** – where the defendant made the untrue statement carelessly, without regard to whether it was true. This category of misrepresentation is more easily proved than fraudulent misrepresentation. See the section on Negligence below for the basic principles.
- **Innocent misrepresentation** – where the defendant made the untrue statement in the genuine belief that it was true. This form of misrepresentation is the easiest to prove, but it may only be claimed in contract law, so the remedy for a successful claim is always voidness of the contract (rescission).

4) Excluded Causes of Action

Certain causes of action are outside the jurisdiction of Small Claims, including:

- Claims for malicious prosecution.
- Claims involving residential tenancy agreements.
- Claims for statutory rights in employment law (e.g. overtime and statutory holiday pay).
- Claims in divorce, trusts, wills or bankruptcy.
- Claims for breach of privacy, intrusion upon seclusion, or appropriation of likeness.
- Human rights complaints (discrimination)
- Most disputes between strata lot owners and strata corporations, except for recovery of maintenance fees against a strata lot owner (*Strata Plan LMS2064 v Biamonte*, [1999] BCJ No 1267).

Not all claims that are barred from Small Claims must be brought in Supreme Court. Administrative tribunals such as the Employment Standards Branch, Residential Tenancy Branch, and BC Human Rights Tribunal have exclusive jurisdiction over many types of claims. Claimants should consider the nature of their claim and review the corresponding chapter of the LSLAP Manual to determine the proper forum for their complaint.

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Appendix H: Tribunal Procedures

The Civil Resolution Tribunal is designed to facilitate dispute resolution in a way that is accessible, speedy, economical and flexible. It relies heavily on electronic communication tools. It will focus on resolution by agreement of the parties first, and by the Tribunal's binding decisions if no agreement is reached. Resolving a dispute through the Tribunal has up to three stages, described in detail below. The full proposed model can be viewed at: http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/pdfs/CRT-Business-Model.pdf. Please note that there have been amendments made to the Civil Resolution Tribunal process since the original proposed model was released. Most notably, the process will be mandatory starting in 2016 for claims up to $10,000.

First Phase – Self Help

If required under the rules, a claimant must attempt to resolve the dispute using the tribunal's online dispute resolution services. The claimant may first use the website's resources to gather information and diagnose their claim. The parties may then engage in an online negotiation that is monitored but not mediated or adjudicated. This tool will guide the parties through a structured negotiation phase.

If a claimant's attempt at online dispute resolution has been unsuccessful, the claimant must formally request resolution of the claim through the tribunal and pay all required fees. A claimant cannot request tribunal resolution if there is a court proceeding or other legally binding process to resolve the claim that has reached a stage specified in the rules.

If the other party does not agree to tribunal resolution or does not reply to the request for tribunal resolution, the tribunal will not resolve the claim unless the defendant is required to participate under either a statute or a court order.

Despite the consent of both parties, the tribunal retains authority to refuse to resolve a claim or dispute and may exercise this authority at any point before making a final decision resolving the dispute. The general authority for refusing to resolve a claim or dispute is set out in s. 11 of the CRTA.

Second Phase – Case Management

The purpose of the case management phase is to facilitate an agreement between the parties and to prepare for the tribunal hearing should it be required. The Preparation for Tribunal Hearing phase may be conducted at the same time as the Facilitated Dispute Resolution phase.

Facilitated Dispute Resolution (FDR)

A case manager will determine which FDR processes are appropriate for a particular dispute and has the authority to require the parties to participate. FDR may be conducted in person, in writing, by telephone, via videoconferencing, via email, via other electronic communication tools, or a combination of these methods. These negotiations will be mediated by the case manager.

Preparation for Tribunal Hearing

If the FDR process does not result in a settlement, the case manager will assist the parties in preparing for adjudication by ensuring the parties understand each other's positions and by directing the exchange of evidence. Most of this exchange and communication will occur online.

Third Phase - Adjudication

Adjudicators will decide most cases by reviewing the evidence and arguments submitted through the tribunal's online tools. The adjudicator may order a telephone, video or face-to-face hearing if warranted by the circumstance. The tribunal's decisions will be binding and may be enforceable as court orders once they are filed with either the BC Provincial Court or BC Supreme Court. The tribunal may make an award of expenses but not for legal costs.

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Appendix I: Court Fees

Fee Waiver:

> There are no settlement, trial conference or trial scheduling fees, unless an adjournment is requested. If a trial date is reset less than 30 days before the date of the proceeding, the party adjourning the trial must pay $100 to the court. This fee does not apply if the matter must be reset due to the unavailability of a judge, or if the party requesting the change was not notified of the trial date at least 45 days in advance (Rule 17(5.2)). There are no fees for "interlocutory" applications. There are fees for some collection orders. Filing fees, interest, disbursements and, in most cases, reasonable expenses may be recovered from the unsuccessful party (Rule 20(2)). Legal (i.e. a lawyer's) fees are not recoverable. If a party cannot afford the court's fees, they may apply to the registrar to be exempt from paying the fees (Rule 20(1)) by completing a Form 16 (Rule 16(3)).

Common Fees:

For filing a notice of claim	
(a) for claims up to and including $3 000	100
(b) for claims over $3 000	156
For filing a reply, unless the defendant has agreed to pay all of the claim	
(a) for claims up to and including $3 000	26
(b) for claims over $3 000	50
For filing a counterclaim or a revised reply containing a new counterclaim	
(a) for counterclaims up to and including $3 000	100
(b) for counterclaims over $3 000	156
For filing a third party notice	25
For resetting a trial or hearing with less than 30 days' notice before the date of the proceeding as set on the trial list, unless the matter must be reset due to the unavailability of a judge	100
For personal service by the sheriff	

(a) for receiving, filing, personally serving one person, and returning the document together with a certificate or affidavit of service or attempted service	100
(b) for each additional person served at the same address	20
(c) for each additional person served not at the same address	30

Other Fees:

For a full list of fees see the Small Claims Rules Schedule A [1].

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References

[1] http://tinyurl.com/nfdrfwk

Appendix J: Settlement Conference

Settlement Conference Preparation Checklist

1. Be prepared to define the issues
2. List who will attend settlement conference
3. Authority to settle: obtain instructions and ensure a representative with authority to settle is in attendance
4. List who will speak to what issues
5. Witnesses: how many and names/evidence
6. Expert witnesses: bring report or summary of opinion expected
7. Expected schedule for delivery of expert reports
8. Documents to be sought and schedule for delivery
9. List documents to bring
10. Consider admissions or seek agreed facts, or alternative methods of proof
11. Time estimate for trial, available dates for counsel and witnesses
12. Other orders: in advance of trial, consider if a separate hearing will be required for one or more of the following:
    - a) summary judgment or dismissal
    - b) production of other documents or evidence
    - c) addition of parties or amendment of pleadings
    - d) change of venue
    - e) consolidation of claims, joining trials
    - f) inspection or preservation of property
    - g) independent medical examination
13. Ask the judge to review the prospect of the penalties in Rules 10.1, 20(5) and 20(6)

SOURCE: *Small Claims Court - 1994*, Continuing Legal Education Society Manual.

NOTE: The Small Claims BC website has their own settlement conference checklist [1]

NOTE: For **trial conferences** under the pilot project in Vancouver (Robson Square), at least 14 days in advance of the conference, each party is required to complete a Trial Statement (Form 33) and file it, along with **all relevant documents**, at the registry (Rule 7.5(9)). Each party must serve the other parties to the claim with a copy of the trial statement and attachments at least 7 days before the trial conference (Rule 7.5(10)).

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References

[1] http://www.smallclaimsbc.ca/sites/default/files/pdf/settlement-conference-checklist.pdf

Appendix K: Payment Hearing

Both the debtor and the creditor can request a payment hearing, or a judge may order one. A creditor may request a payment hearing to ask the debtor about their ability to pay or to disclose the debtor's assets so they may be seized or garnished. Either the creditor or the debtor may request a payment hearing to propose a payment schedule or changes to a payment schedule.

Creditor Checklist

1. Before the Payment Hearing:

- If you are the party requesting a payment hearing, you must complete and file a summons in Form 12 at the registry: http://www.smallclaimsbc.ca/court-forms.If the debtor is a corporation, you may name an officer, director, or employee to appear and give evidence on behalf of the debtor (Small Claims Rule 12(5)).
- After you file the summons, you must serve it on the debtor at least 7 days before the date of the payment hearing (Rule 12(7)).
- If the person who serves the summons on the debtor will not be at the hearing to provide oral evidence, you should have them prepare an affidavit of service, available at the website above, and file it at the registry in case the debtor does not show up to the hearing; otherwise you will not be able to get a warrant for their arrest.

2. At the Payment Hearing:

- Bring a list of questions you wish to ask the debtor about their assets. Lists of the types of questions that may be asked can be found at: http://www.lawsociety.bc.ca/docs/practice/checklists/E-5.pdf (designed for Supreme Court but may be adapted for Small Claims), OR: http://www.thelawcentre.ca/self_help/small_claims_factsheets/fact_16
- Be prepared to propose a payment schedule and defend it or argue why one should not be ordered.

3. After the Payment Hearing:

- If the debtor misses a payment, the balance of the judgement becomes due immediately and you may proceed to collections. See Chapter 10: Creditor's Remedies and Debtors' Assistance for information on collections procedures.

Debtor Checklist

1. Before the Payment Hearing:

- If you are the party requesting a payment hearing, you must complete and file a notice in Form 13 at the registry: http://www.smallclaimsbc.ca/court-forms.
- After you file the notice, you must serve it on the creditor at least 7 days before the date of the payment hearing (Rule 12(11)).
- If the person who serves the summons on the creditor will not be at the hearing to provide oral evidence, you should prepare an certificate of service (Form 4), available at http://www.smallclaimsbc.ca/court-forms, and file it at the registry in case the creditor does not show up to the hearing.

2. At the Payment Hearing:

- Be prepared to answer questions about your finances such as contained in the lists in Creditor Checklist – Section 2 above.
- Bring financial records and evidence of income and assets, including:
  - Bank records
  - Credit-card statements
  - Tax returns and supporting documents
  - Property, sales of property and mortgages
  - Receipts for insurance, medical bills, utilities
  - RRSP, TSFA and other investment statements
  - Debts you owe and debts that are owed to you (including future debts)
  - Assets you have disposed of since the claim arose
  - Employment and pay-stubs
  - Evidence of means that you have or may have in the future of paying the judgement
- Prepare a Statement of Income and Expenses, available at: http://www.ag.gov.bc.ca/courts/forms/scl/scl024.pdf
- Be prepared to suggest a payment schedule or changes to the payment schedule that you can manage
- Be prepared to argue why your financial circumstances justify the schedule or changes you are proposing
- If you are on welfare or other income assistance, be sure to bring this to the judge’s attention

3. After Judgement:

- If you are having difficulty managing your debts, see Chapter 10 Creditor’s Remedies and Debtors’ Assistance.

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Appendix L: Appeal

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There are two main grounds of appeal: an error of fact and an error of law. In order to appeal a decision from the Small Claims Court, one must argue that the Judge made either an error of fact or an error of law. The following provides a step by step guide on how to appeal a decision from Small Claims Court.

Step 1: Obtain a copy of the written Order made by the Small Claims Court Judge which is being appealed

- If you do not already have a copy of the Order that you want to appeal, you should go to the Court Registry in the Court House where the Order was made. Ask the Clerk for a copy. There may be a small photocopying fee which you will have to pay.

Step 4: Pay the $200 Filing Fee (See *Supreme Court Civil Rules*, BC Reg 168/2009, Appendix C) and $200 Security for Costs (See *Small Claims Act*, s 8(1))

- Also, deposit with the Court Registry the amount of money the Small Claims Court Judge ordered to be paid to the Respondent. Alternatively, bring an application to a Judge to reduce the amounts payable.
- If you cannot afford the filing fee, you may want to apply to a Supreme Court Judge to reduce the amount to be paid.
- To succeed in reducing the filing fee, you must be able to prove that you are indigent (see *Supreme Court Civil Rule* 20 -5). The BC Court of Appeal has considered the meaning of that word in a case called *Johnston v. Johnston*. The Court said "indigent" means "a person who has some means but such scanty means that he is needy and poor."
- The Court refused to approve any particular standard for determining whether a person is "indigent", and each case will be looked at individually. However, if you receive social assistance or persons with disabilities benefits and you prove this to the court, you are likely to be declared indigent.
- If you cannot afford to pay the security for costs (or the amount required to be paid to the Respondent by the Small Claims Court Order) you may want to apply to a Supreme Court Judge to reduce the amounts to be paid.
- It is not clear what test the Court will apply to succeed in an application to reduce these amounts. However, it is clear that evidence of an inability to pay the amount required will be vital.

Step 5: File the Notice of Appeal in Small Claims Court on the same day it was filed in Supreme Court

- When you file the Notice of Appeal, be sure to attach the Supreme Court Practice Direction, Standard Directions for Appeals from Provincial Court pursuant to the *Small Claims Act*.
- Section 7 of the *Small Claims Act* says that the Notice of Appeal must be filed in the Small Claims Court Registry on the same day that it is filed in the Supreme Court Registry. However, in a case decided in 1993 called *First City Trust v. Bridges Café Ltd.*, the court recognized that in certain places in British Columbia the distance between the location of the Supreme Court Registry and the Small Claims Registry was so great as to make it very difficult to comply with Section 7. (See *First City Trust v Bridges Café Ltd*, [1993] BCJ No 1353). In that case, the filing took place on the next day. The Court held that the right of appeal would not be lost, even if the filing did not occur on the same day, as long as the Respondent was not prejudiced. Therefore, every reasonable effort should be made to file the Notice of Appeal in the Small Claims Court Registry on the same day or at the latest the day after the Notice of Appeal was filed in Supreme Court Registry.

Step 6: Within 7 days of filing the Notice of Appeal, serve the Notice of Appeal on each person who was a party to the lawsuit in Small Claims Court who will be affected by the Appeal.

- If you need more time to serve the Notice of Appeal, you must bring an application to a Supreme Court Judge. See Step 4 above.
- The Appellant can serve the Notice of Appeal, or can have a process server or a friend give the documents to the Respondent. If you decide on using a process server, look in the yellow pages under "Process Servers." To save money you should telephone several process servers to get quotes about how much it will cost to have the documents served because prices vary. You should also confirm that the process server will provide you with a sworn Affidavit of Service. An Affidavit of Service is a document that proves to the Court that the documents were served on the Respondent.
- The person who is going to serve the document should be given two copies of the document. They should compare the two copies to ensure that they are the same. This is because one copy will be given to the Respondent to be served and the second copy will be attached to an Affidavit of Service. In the Affidavit of Service the person serving the document will be swearing that they gave a copy of the document to the Respondent. Unless they first compare the documents, they will not know that the copy of the documents attached to the Affidavit of Service are the same as those given to the Respondent.
- If the person delivering the documents does not already know the Respondent, they should confirm that the documents are being given to the right person. This can be done simply by asking the name of the person being given the documents.
- After leaving a copy of each document with the Respondent to be served, the person serving the document must make a note of the time, date, and place (street address, city, and province) where the documents were served. This information will be needed to prepare an Affidavit of Service

Step 7: Apply to the Registrar for a date for hearing the Appeal

- That date cannot be less than 21 days after applying for the date. Before the Registrar will set a hearing date, the Appellant must prove the money to be deposited in Step 4 has been deposited (or an Order has been obtained which reduces the amount required to be deposited).

Step 8: Serve the Notice of Hearing of Appeal on the Respondent

- Also, serve any Order obtained under Step 4. Be sure to act quickly. There is a deadline which must be met (unless a Judge grants an Order extending the time). See Step 10 for instructions on how to serve the documents.

Step 9: The Appellant must order transcripts of the oral evidence given at the Small Claims Court trial and the Judge's reasons for judgment

- The Appellant must pay for a copy of the transcript for the Court and one for each party to the appeal. Act quickly.
- Transcripts are prepared by Court Reporters. You will have to make arrangements with the Court Reporters who work in your area of the Province to prepare the transcripts that you will need. To find out who may do the work in your area you may wish to speak to the Court Registry staff. Alternatively, you may wish to telephone Court Reporters listed in the yellow pages under "Reporters-Court & Convention."

Step 10: Within 14 days of filing the Notice of Appeal, the Appellant must prove to the Registrar that the transcript has been ordered and that the Notice of Appeal, Notice of Hearing of Appeal, and the Order reducing the amount of money to be paid under Step 4 (if any) have been served on the Respondent (See the Practice Direction of the Chief Justice regarding Standard Directions for Appeals from Provincial Court Pursuant to the Small Claims Act [1])

- To prove that the Notice of Appeal, Notice of Hearing of Appeal and Order (if any) have been served, you will need to file an Affidavit of Service. A process server usually will prepare and have sworn an Affidavit of Service as part of the work they do for you. If you or a friend serve the documents, you will have to prepare your own Affidavit of Service.

Step 11: Prepare a Statement of Argument

- Before you can prepare your Statement of Argument you must first pick up the transcript from the Court Reporter. Next, you must carefully read your copy of the transcript. You should make a note of the pages in the evidence or the Judge's reasons for judgment that contain the error in fact or law that you say should result in your appeal being successful. You should also look at copies of any exhibits which were given to the Judge during the Small Claims trial (like contracts, photos, reports, affidavits) to see if the exhibits contain evidence which would help your appeal.
- When completing a Statement of Argument, the first step is to decide whether parts of the Small Claims Order are acceptable, or whether you do not agree with the entire Order. Then, on the Statement of Argument, list what you do not agree with.
- Then, on the Statement of Argument you should list the evidence and the page and line numbers in the transcript, which will show the Supreme Court Judge where the Small Claims Court Judge made an error. This will become more clear to you if you view the sample and complete your Statement of Argument in the same way. The sample is based on the case described earlier in this Factsheet in which the Judge failed to apply the *Limitation Act*.
- Finally, in the portion of the Statement of Argument dealing with the nature of the Order you are seeking, you should state what you want the Judge to do. For example, if you brought a lawsuit in Small Claims Court and you lost, you may want the Supreme Court Judge to make an Order for what you sued for. So, if you were owed money and you sued for $8000 and you lost, you would ask in your Statement of Argument for an Order that the Respondent pay you $8000. On the other hand, if you were the Defendant in the same lawsuit and you lost at the trial, you might want an Order dismissing the claim.
- It would be very useful to get some legal advice when filling in the Statement of Argument.

Step 12: Within 45 days of filing the Notice of Appeal, the Appellant must:

1. File at the Supreme Court Registry the original copy of the transcript;
2. File a Statement of Argument; and
3. Serve a copy of the transcript and Statement of Argument on the Respondent. (See the Practice Direction of the Chief Justice regarding Standard Directions for Appeals from Provincial Court Pursuant to the Small Claims Act [2]).

- After you have prepared the Statement of Argument make a photocopy for yourself and each Respondent. Take the original and each copy, plus a copy of the transcript to the Supreme Court Registry. The Registry will date stamp the Statement of Argument. You can then serve the Statement of Argument and transcript on the Respondent.

Step 13: At this point the Respondent will have to prepare a Statement of Argument.

- The Respondent must file the Statement of Argument and deliver a copy to the Appellant not less than 14 days before the hearing of the appeal. A Respondent's Statement of Argument is a document which sets out:
  1. What paragraphs the Respondent disagrees with in the Appellant's argument;
  2. Why the Respondent disagrees with the Appellant's argument; and,
  3. What Order the Respondent would like to see the Supreme Court Judge make.
- The Respondent should start to prepare the Respondent's Statement of Argument by first carefully reading the Appellant's Statement of Argument. Note where you think errors were made. The Respondent should then read the transcript and review all the exhibits and list the page and line on the transcript that supports the Respondent's case. Then fill in the form in a manner similar to that in which the Appellant's Statement of Argument was completed.
- It would be very useful to get some legal advice when filling in the Statement of Argument.

Step 14: Prepare for the hearing

- The hearing will not be a new trial. A Judge could order a new trial at the end of the hearing. But the trial would occur at a later date. So the hearing will have a different format than what you experienced at the trial. For example, no witnesses will be called to give evidence. Instead, what usually happens is that the Appellant first tells the Judge what the trial was about. The Appellant then tells the Judge what decision(s) made by the Small Claims Court Judge that the Appellant disagrees with and why. The Appellant may go through the Appellant's argument set out in the Statement of Argument. The Judge might read the portions of the transcript and the exhibits which the Appellant refers to in the Statement of Argument. The Judge may also ask the Appellant questions. The Appellant might conclude by noting the Order that the Appellant would like the Judge to make.
- It would then be the Respondent's turn. The Respondent might take the Judge through the Respondent's argument asset out in the Respondent's Statement of Argument. The Respondent would answer questions the Judge had. The Respondent would conclude by telling the Judge what Order the Respondent would like the Judge to make.
- To prepare for this type of hearing you should carefully review your Statement of Argument and any exhibits that you are going to refer to. You might also make notes of what you want to say.
- Small Claims appeals do not happen often. However, if you can watch one before your case occurs it will help to give you a good idea of what is likely to happen. To find out if an appeal will happen before your case goes ahead, call the Supreme Court Registry and ask to speak to the Trial Coordinator.

Step 15: Appear in Court

- Make sure you bring your copy of the Statement of Argument, transcript, and exhibits to Court with you on the day of your hearing. Arrive earlier than the time appointed for the hearing to begin.
- Find the trial list, which will usually be posted somewhere in the Court building. This list tells which cases are to be tried on that date and in which particular Courtroom they will take place. If your case is not on the list, then you should immediately check with the Court Clerk or Registry. Otherwise, go to the proper Courtroom and be seated in the gallery.
- When your case is called move forward to the Counsel table. Stand while speaking to the Judge. Introduce yourself to the Court. In Supreme Court a Judge is called "My Lord or My Lady" or "Your Lordship or Your Ladyship."
- The Judge probably will have read both Statements of Argument and will have some familiarity with the case. The Appellant will then present their case first, followed by the Respondent.

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References

[1] http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD%20-%2021%20Standard%20Directions%20for%20Appeals%20from%20Provincial%20Court%20-%20Small%20Claims%20Act.pdf
[2] http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD%20-%2021%20Standard%20Directions%20for%20Appeals%20from%20Provincial%20Court%20-%20Small%20Claims%20Act.pd

Chapter Twenty One – Welfare Law

I. Introduction

This chapter gives a general overview of a very complex area of law governed by lengthy and detailed legislation. It is not designed to be used on its own. Users of this chapter should be sure in each case to refer to the applicable welfare legislation.

A. What is welfare?

Welfare is a basic form of income support provided by the state to those in need. In BC, the provincial government administers welfare via the Ministry of Social Development and Poverty Reduction (the Ministry; formerly the Ministry of Social Development and Social Innovation). Welfare is a "payer of last resort", which means that in order to receive welfare, a person must demonstrate that he or she has exhausted all other forms of support. This chapter will use the term "welfare" to describe all forms of income support provided by the BC government under the province's welfare legislation.

B. Welfare policy

While the government's policy on welfare is not law, it is an important lens for understanding welfare law in BC. Ministry policy sets out the practical details of how welfare is to be administered. The Ministry's welfare policies are contained in "BC Employment and Assistance Policy and Procedure Manual", which is available at http://www2.gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual The Policy and Procedure Manual incorporates MSDPR policy with the rules set out in the welfare legislation. It is an extremely useful tool for researching welfare law and policy.

C. Types of Welfare

Under the current welfare legislation in BC, the following types of welfare benefits are available to those who qualify:

- **INCOME ASSISTANCE.** This is a basic monthly support and shelter allowance provided under the Employment and Assistance Act [EAA]. This is the benefit most people get when they receive welfare.

On income assistance, a single person under age 65 currently receives **$710.00 per month** to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

- **DISABILITY ASSISTANCE.** This is a slightly higher, but still modest, monthly support and shelter allowance provided under the *Employment and Assistance for Persons with Disabilities Act* [EAPWDA] to those who meet the definition of "person with disabilities" in s 2 of that Act.

On disability assistance, a single person under age 65 currently receives **$1033.42** to cover housing, utilities, food, transportation, clothing, and all other basic necessities (or $52 per month more if the person chooses not to have a bus pass).

- **PPMB ASSISTANCE.** This is a special form of income assistance for people who have “persistent multiple barriers” to employment according to the criteria set out in s 2 of the *Employment and Assistance Regulation* [EAR]. It is for people who have a medical condition that makes it difficult or impossible to look for work or to keep a job. Technically, it falls within the definition of “income assistance” but this chapter will refer to it as a distinct form of welfare benefits.

On PPMB assistance, a single person under age 65 currently receives **$757.92** per month to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

- **HARDSHIP ASSISTANCE.** This is a support and shelter allowance provided under s 5 of the EAA and s 6 of the EAPWDA to persons who are not otherwise eligible for income assistance, PPMB, or disability assistance (see also part 4 of the EAR and part 4 of the EAPWDR). Some (but not all) categories of hardship assistance are repayable, i.e. a person receiving hardship assistance may accrue a debt owing to the government. It is usually temporary assistance. People with the PPMB or PWD designation may also receive hardship assistance, if they are not otherwise eligible for PPMB or PWD benefits. Therefore, there are different rates of hardship assistance

On regular hardship assistance, a single person under age 65 currently receives a maximum of **$710.00 per month** to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

On PPMB hardship assistance, a single person under age 65 currently receives **$757.92 per month** to cover housing, utilities, food, transportation, clothing, and all other basic necessities.

On disability hardship assistance, a single person under age 65 currently receives **$ 1,133.42 per month** to cover housing, utilities, food, transportation, clothing, and all other basic necessities (or $52 per month more if the person chooses not to have a bus pass).

- **HEALTH SUPPLEMENTS.** Recipients of income assistance, PPMB, and disability assistance may qualify for various health supplements from the Ministry. See Part 5, division 5 of the EAR, and the EAPWDR. The Ministry has a useful table summarizing health supplements that may be available, at http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables/health-supplements-and-programs-rate-table
- **SUPPLEMENTS.** These are other forms of assistance that may be provided on a case-by-case basis for specific purposes set out under the EAA and EAPWDA and their associated regulations. See especially Part 5 of the EAR, Part 5 of the EAPWDR, and Ministry website (http://www2.gov.bc.ca/gov/content/family-social-supports/income-assistance/on-assistance/supplements).

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II. Governing Legislation and Resources

A. Governing Legislation

Welfare law in BC is governed by the following statutes and regulations, all of which are available at www.bclaws.ca [1]:

Employment and Assistance Act, SBC 2002, c 40 [EAA];

Employment and Assistance Regulation, BC Reg 263/2002 [EAR];

Employment and Assistance for Persons with Disabilities Act, SBC 2002, c 41 [EAPWDA]; and

Employment and Assistance for Persons with Disabilities Regulation, BC Reg 265/2002 [EAPWDR].

Forms regulations under the EAA and EAPWDA create many of the forms that the Ministry uses in administering welfare. See also the Child in the Home of a Relative Transition Regulation, BC Reg 48/2010.

Please keep in mind the following important points when dealing with a welfare law issue.

- **Be current.** The statutes and especially the regulations governing welfare in BC can change often. Therefore, it is very important to check the BC Laws website and confirm that one is dealing with the most current legislation.
- **Be comprehensive.** Be sure to read the relevant section of the appropriate act or regulation in its entirety and to scan the legislation for other relevant sections. The legislation is complex and often a number of provisions work together to govern a particular program or benefit.
- **Be alert to mandatory versus discretionary wording.** Welfare legislation contains a mix of mandatory provisions (requiring the government to do or provide something) and discretionary provisions (which permit, but do not require, the government to act in a particular way). Consider whether the legislative provisions relevant to the client's case are mandatory or discretionary.

B. Referrals

See **Chapter 22: Referrals** for additional referrals.

Community Legal Assistance Society (CLAS)

- May advise on general welfare matters and help clients with judicial reviews.

Online	Website [2]
Address	300 - 1140 West Pender Street Vancouver, B.C., V6E 4G1
Phone	(604) 685-3425 Fax: (604) 685-7611

Disability Alliance of BC

- Offers one-on-one assistance to individuals applying for benefits or appealing the denial of benefits. Particularly experienced in appeals about eligibility for the Persons with Disabilities ("PWD") designation from MSDSI, which is needed to qualify for welfare disability assistance.
- Has created a library of useful help sheets about disability assistance from MSDSI, and guides to applications and appeals (Website [3])

Online	Website [4]
Address	204 - 456 West Broadway Vancouver, B.C. V5Y 1R3
Phone	(604) 872-1278 Fax: (604) 875-9227

First United Church

- Serves the Downtown Eastside. Provides advocacy and assistance for welfare, housing, and other poverty law issues. Operates a drop-in intake clinic. Hours are posted on their website.

Online	Website [5]
Address	320 East Hastings Street Vancouver, B.C., V6A 1P4
Phone	(604) 681-8365 Fax: (604) 681-8928

Kettle Friendship Society Advocacy Centre

- Advocacy focused on welfare, debt, housing, and child protection problems for clients with mental health issues. Also has a weekly Pro Bono Legal Clinic (please call ahead if you wish to refer a client).

Online	Website [6]
Address	1725 Venables Street Vancouver, B.C., V5L 2H3
Phone	(604) 251-2801 Fax: (604) 251-6354

Downtown Eastside Women's Centre

- Focuses on providing legal and non-legal support and advocacy for women with mental health issues.

Online	Website [7]
Address	**Drop-in shelter:** 302 Columbia Street Vancouver, BC, V6A 4J1 **Emergency shelter** 412 Cordova Street Vancouver, B.C., V6A 4J1
Phone	(604) 681-8480 Fax: (604) 681-8470

ATIRA Women's Resource Society

- Focuses on providing support for abused women. Their legal advocate program can provide advice, advocacy, and support with appealing welfare issues, and other poverty law issues.

Online	Website [8] E-mail: legaladvocate@atira.bc.ca
Address	101 East Cordova Street, Vancouver, B.C.
Phone	(604) 331-1407 (105)

AIDS Vancouver Community Resource Centre

- Service staffed by volunteers. Can provide short-term financial assistance to persons living with HIV/AIDS.

Online	Website [9] E-mail: support@aidsvancouver.org
Phone	604-893-2201

Povnet: Find an Advocate

- Can be used to find other advocates and organization that can help with welfare issues in all parts of BC.

Online	Website [10]

C. Useful Publications by Outside Agencies

In addition to this LSLAP manual chapter, other useful publications include:

- **BC Disability Benefits Help Sheets**. These 15 guides are published by Disability Alliance BC. They are available at http://disabilityalliancebc.org/category/publications/bc-disability-benefits-guides/and cover many areas relating to applying for benefits and appealing decisions.
- **Legal Services Society Help Guides**, the Legal Services Society has published several plain language guides for welfare applicants. They are available at http://www.lss.bc.ca/publications/subject.php?sub=17.

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III. Eligibility

This section deals with eligibility for income assistance, PPMB assistance, and disability assistance, but not for hardship. Please see Section VI: Hardship for information on eligibility for hardship assistance.

A. Application Process

Applicants for income assistance, PPMB assistance, and disability assistance must comply with the application process set out in s 4 of the EAR and s 4 of the EAPWDR, and are subject to the numerous eligibility requirements set out below.

Applications may be filed online, by telephone, or in person. For more detail, see the LSS publication How to Apply for Welfare (at http://www.lss.bc.ca/publications/subject.php?sub=17).

1. **Online Application**
   Online applications can be filled out at myselfserv.gov.bc.ca. Applicants must create a My Self Serve account, which requires an email address, Social Insurance Number (SIN), and information about the applicant's spouse, including common law partners.
2. **Phone Application**
   To make a phone application, applicants may call toll-free at 1-866-0800. After the initial call, a ministry worker will call back within three business days to fill out the application form with the applicant. Five business days after the phone application, the applicant must go to the ministry office or Service BC centre to sign the application form.
3. **In Person Application**
   An applicant can go to their local ministry office to apply in person.
   If the applicant has access to a phone, a ministry worker will call within three business days to fill out the application form with the applicant. Five business days after the phone application, the applicant will need to go to the ministry office or Service BC Centre in person to sign the form.
   If the applicant does not have access to a phone the applicant may make an appointment to meet with a ministry worker in person. At the appointment the ministry worker will fill out the application form with the applicant.

B. Obligation to Provide Information to the Ministry

Ministry staff are empowered (by s 10 of the EAA and s 10 of the EAPWDA) to require welfare applicants and recipients to demonstrate their eligibility by providing relevant information. Ministry employees are also empowered to independently verify that information.

At the same time, welfare recipients are obliged to respond to enquiries by the Ministry, submit reports to the Ministry as requested, and alert the Ministry to any changes in their circumstances that may affect their eligibility (s 11 of EAA and s 11 of EAPWDA). Section 33(1) of the EAR requires that by the fifth day of each calendar month a recipient of income assistance or PPMB assistance must submit a report (in a prescribed form) giving relevant information about eligibility. Meanwhile, s 29 of the EAPWDR requires that those on disability assistance submit the form only when there is a change in their circumstances that may affect their eligibility for benefits (e.g. change in their assets, income, or family situation).

If an applicant fails to comply with the Ministry's requirements to provide accurate information on factors affecting eligibility, this may result in the suspension or reduction of benefits.

Note that a "trusted third party" must witness many Ministry forms. This can be a welfare worker (EAW) or other Ministry staff. If an applicant cannot get to a Ministry office in person, the Ministry may accept a signature from another government worker or a prescribed professional (doctor, nurse, nurse practitioner, social worker, psychologist, chiropractor, or physical/occupational therapist).

To be eligible for income assistance, PPMB assistance, or disability assistance, applicants must show that they meet the:

- **asset** limits;
- **income** limits;
- **citizenship** requirements; and
- **age** requirements.

To be eligible, applicants must also:

- Pursue all other forms of support;
- Assign any spousal support rights to the Ministry (effective May 1, 2015, the assignment of child support rights to the Minsitry is voluntary).
- Have been financially independent for two years in the past (with some exceptions as discussed below);
- Complete a three or five-week work search (with some exceptions as discussed below); and
- Comply with employment-related obligations and an employment plan (with some exceptions, discussed below).

Those wishing to receive disability assistance or PPMB assistance must first show they qualify for PPMB or PWD status under the relevant sections of the legislation (s 2 of the EAA for PPMB status, and s 2 of the EAPWDA for PWD status).

The above eligibility criteria will be discussed briefly below. Certain applicants who do not meet the eligibility criteria for income assistance, PPMB assistance, or disability assistance may still be eligible for hardship assistance. See Part 4 of EAR and Part 4 of EAPWDR for details.

C. Asset Limits

In order to be eligible for income assistance, PPMB assistance, or disability assistance, applicants must exhaust their assets. As noted above, welfare is a "payer of last resort". Accordingly, the EAR (ss 11-13) and the EAPWDR (ss 10-12) set out limits on which assets a person can possess and still remain eligible for income assistance, PPMB assistance, or disability assistance.

Asset limits vary depending on the size of the family unit receiving welfare and the type of welfare the family unit is receiving.

Read the EAR (ss 1 and 11-13) and the EAPWDR (ss 1 and 10-12) carefully to identify the asset criteria. Note in particular the definitions of "asset", which is set out in s 1 of the EAR and EAPWDR.

The following table summarizes the asset limits for different family sizes applying for or receiving different forms of welfare. A more detailed table is available at: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ bc-employment-and-assistance-rate-tables/ assets-rate-table.

Applicant	Maximum Allowable Assets
Single person on income assistance or PPMB	$2 000
Family (more than one person) on income assistance or PPMB	$4 000
Family unit that includes one person on, or applying for, disability assistance (this includes single people)	$100 000
Family unit that includes two people on, or applying for, disability assistance	$200 000

1. Exempt Assets

Sections 11(1) of EAR and s 10(1) of EAPWDR should be reviewed in detail to see if any of a person's particular assets are exempt, i.e. do not count toward their asset limit. Some key exempt assets are:

- **Clothing** and necessary household equipment
- **One vehicle** per household and only if used for day-to-day transportation needs
  - A person who is applying for or receiving disability assistance can have a vehicle with any amount of equity in it as an exempt asset.
  - A person who is applying for or receiving income assistance or PPMB assistance can have a vehicle with up to $10 000 equity in it as an exempt asset. This limit does not apply where the vehicle has been significantly adapted to accommodate the disability of a recipient, or where the vehicle is used to transport a disabled child in the care of a recipient.
- **A family unit's place of residence**
- **A child tax benefit** or GST credit under the Income Tax Act (Canada)
- **A BC early childhood tax benefit**
- **A sales tax credit** under the Income Tax Act (British Columbia)
- **A registered disability savings plan** or "RDSP" (see http://www.rdsp.com for more information)
- **An uncashed life insurance policy** with a cash surrender value of $1 500 or less;
- **Business tools**

2. Asset Development Accounts are Exempt Assets

Section 12 of the EAR and s 11 of the EAPWDR provide that the Ministry may approve savings accounts for the purpose of "future self-sufficiency", and that these accounts will be exempt assets.

3. Disability Trusts are Exempt Assets

Under s 13 of the EAR and s 12 of the EAPWDR, assets of up to $200 000 can be held in a non-discretionary trust for a person with PWD status (or an applicant for PWD status, or for another individual with disabilities in certain circumstances) without disqualifying the person from income assistance or disability assistance. In certain circumstances, the Ministry can authorize a non-discretionary trust to hold more than $200 000. There is no limit on the amount that may be held in a discretionary trust.

D. Income Limits

In order to be eligible for income assistance, PPMB assistance, or disability assistance, applicants must exhaust all other sources of income to support themselves and their dependants, except for income specifically exempted by legislation or policy.

The net income limits for welfare recipients are set out in s 10 of the EAR and s 9 of the EAPWDR. Schedule B in both regulations sets out the manner in which a person's net income is calculated for the purpose of welfare eligibility.

1. Types of Income Relevant to Income Limits

The Ministry distinguishes between earned and unearned income for the purpose of the net income calculation.

EARNED INCOME. EAR, s 1 and EAPWDR, s 1 define "earned income" as:

- Any money or value received in exchange for work or the provision of a service
- Pension plan contributions that are refunded because of insufficient contribution to create a pension
- Money or value received from providing room and board at a person's place of residence
- Money or value received from renting rooms that are common to and part of a person's place of residence

UNEARNED INCOME. EAR, s 1 and EAPWDR, s 1 define "unearned income" as any income that is not earned income. They give a non-exhaustive list of examples including:

- Any type of CPP benefits
- WCB benefits and other disability payments and pensions
- Inheritances
- Rental income from land or property
- Education or training allowances, grants, loans, bursaries, and scholarships
- Winnings from lotteries and other forms of gambling
- Criminal injury compensation or crime victim compensation
- "Any other financial awards or compensation"
- Funds received from a sponsor under a sponsorship agreement pursuant to the *Immigration and Refugee Protection Act*.

2. Deductions and Exemptions from Income

Earned and unearned income is deducted dollar-for-dollar from a recipient's monthly cheque, subject to a list of deductions and exemptions set out in ss 1-9 of Schedule B of EAR and in ss 1-9 of Schedule B of EAPWDR. **These sections should be carefully reviewed to determine if the applicant's income is exempt or subject to deductions.**

Money withdrawn from a disability trust for certain purposes is also exempt as income. See s 13 of the EAR, and s 12 of the EAPWDR. Also see s 7(1)(d) of Schedule B to the EAR and the EAPWDR.

Money from structured settlement annuity payments that is used for certain purposes is also exempt as income. See Schedule B, s 7 of the EAR and EAPWDR for details.

The following are **some** examples of income exempted by Schedule B of the EAR and EAPWDR. This list is far from exhaustive. Note that an applicant or recipient of welfare benefits **must** report their receipt of all income to the Ministry, even if it is exempt.

- Income tax refunds
- Universal child care benefits
- Canada child tax benefits
- Withdrawals from a Registered Disability Savings Plan
- Child support payments (as of Sept 1, 2015; before Sept 1 2015, payments were considered unearned income and deducted dollar-for-dollar)
- CPP orphan's benefit (as of Sept 1, 2015)
- A one-time gift, if it does not make the recipient exceed their asset exemption level
- Some portion of WCB Temporary Wage Loss Replacement Payments issued under ss 29 and 30 of the *Workers Compensation Act*, if:
  - at least one person in the family unit is has the PWD designation, and either
    - the family unit has received PWD benefits for at least one month or
    - the family unit has received PWD benefits in the past.
- EI maternity and parental benefits, and EI benefits for caring for a critically ill child (as of October 1, 2016). Before October 1, 2016, such payments were considered unearned income and deducted dollar for dollar.

See ss 1-9 of Schedule B of the EAR and ss 1-9 of Schedule B of EAPWDR for a complete list of income exemptions.

3. Earnings Exemptions

Recipients of income assistance, PPMB assistance, and disability assistance all have an earnings exemption. The earnings exemption for income assistance and PPMB assistance is monthly; as of January 1, 2015, the earnings exemption for recipients of disability assistance is calculated per year (i.e. annual earnings exemption). The exemptions apply to all earned income, including wages from employment, money received from providing room, and board at a person's place of residence, or money received from renting rooms that are common to the person's place of residence.

For recipients of income assistance and PPMB assistance, there is a one month waiting period to claim any earnings exemption. This means that a family unit cannot claim an earnings exemption for the first month in which they become eligible for income assistance or PPMB assistance, but can claim an earnings exemption for any subsequent months.

For recipients of disability assistance, there is a one-month waiting period to claim an earnings exemption unless:

- A member of the family unit has received disability benefits at any point in the past OR
- A member of the family unit received income assistance or PPMB assistance in the month before the family unit became eligible for disability assistance.

Current earnings exemptions are as follows:

- Family units, without children, receiving income assistance: $200/month
- Family units receiving income assistance who have a dependant child or are caring for a supported child: $400/month (up from $200 as of September 1, 2015)
  - **Exception:** a single parent of a child or foster child who has a disability that prevents the parent from working more than 30 hours per week has an earnings exemption of $500/month while receiving income assistance (up from $300/month as of September 1, 2015)
- Family unit receiving PPMB assistance: $500/month
- Family unit receiving disability assistance:
  - $9600 per calendar year for a single adult (or single parent) with the PWD designation;
  - $12 000 for a family unit with two adults where one adult has the PWD designation, and the other adult does not.
  - $19,200 per calendar year for families where two adults have the PWD designation.

If a child is under 19 and in school full-time, a family unit can still keep the entirety of that child's income without it affecting their benefits (although the child's income must still be reported to the Ministry). If a child is under 19 and not in school full time, then any income the child earns counts toward the family unit's earnings exemption.

For more information on earnings exemptions, see EAPWDR schedule B, s 3, and EAR, schedule B, s 3.

It is very important to note that all earned income must be reported to the Ministry, even if it is below a person's earnings exemption.

E. Citizenship Requirements

Under s 7 of the EAR and s 6 of the EAPWDR, at least one person in a family unit that is applying for or receiving income assistance, PPMB assistance, or disability assistance must be a:

- Canadian citizen;
- Permanent Resident;
- Convention refugee;
- Person on a Temporary Resident Permit;
- Refugee claimant; OR
- Person under a removal order that cannot be executed.

The only exception to these citizenship requirements is that some parents without status who have been abused, may be eligible for temporary assistance (see below).

Where an applicant for, or recipient of, income assistance, PPMB assistance, or disability assistance meets the citizenship requirements but an adult dependant of the applicant does not, assistance and supplements may be issued for the other members of the person's family unit, but not for the adult dependant who does not meet the citizenship requirements. However, the assets and income of the person who does not meet the citizenship requirements will be included when determining the household's income and assets.

1. Single parents without status who have been abused

A single parent who does not meet the requirements for citizenship, permanent residency, refugee status, or temporary residence might be eligible for welfare on a temporary basis if he or she has:

- a dependent child who is a Canadian citizen; AND
- left an abusive spouse; AND
- applied for status as a permanent resident; AND
- cannot leave BC because of ONE of the following:
    - another person who lives in BC has parenting (also called custody and access) or contact (visitation) rights with at least one of the person's dependent children through a court order, agreement, or other arrangement, AND leaving BC with his or her children would go against the court order; OR
    - another person who lives in BC is claiming parenting or contact rights regarding the child or children; OR
    - The parent or child is being treated for a medical condition and leaving BC would be dangerous to that person's physical health.

For more information, see s 7.1 of the EAR, and s 6.1 of the EAPWDR.

Note: The parent should also be excused from the work search and the past financial independence requirements.

F. Age Requirements

Generally, a person must be 19 years of age in order to apply independently for welfare, but there are some circumstances where those under 19 may (or must) apply for welfare. See s 5 of EAR and s 5 of EAPWDR. Minors under 19 who do not live with their parents or guardians have the right to apply for income assistance from the Ministry. To qualify, the Ministry has to be convinced that their parents will not support them.

1. Income Assistance for Children and Youth

Minors under 19 who do not live with their parents or guardians have the right to apply for income assistance from the Ministry. Before granting assistance to such a minor, the Ministry must make reasonable efforts to have the minor's parents or guardians assume financial responsibility for the minor's support. If the parents or guardians are unwilling to support the minor, the Ministry may grant the minor income assistance.

The Ministry will refer minors under 17 who apply for income assistance to a social worker with the Ministry of Child and Family Development before assistance is provided. The Ministry will refer minors between 17 and 19 to a social worker only if it considers there to be child protection issues.

Note that as of 1 April 2010, the Ministry will no longer pay Child in the Home of a Relative benefits to new applicants.

2. Disability Assistance for youth 18 and over

Disabled youths may be eligible for the PWD designation and disability assistance at the age of 18, even if they live with their parents. To qualify, a youth must have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. Additionally, this impairment must directly and significantly restrict the person's ability to perform daily living activities either continuously or periodically for extended periods, in the opinion of a health professional. Finally, as a result of those restrictions, the person must require help to perform those activities (see s 2(2) of the EAPWDA. An application for PWD benefits can be started 6 months before the youth's 18th birthday.

3. Welfare for Teenaged Parents Living at Home

If a child is under 19, has a dependent child, and lives with his or her own parent who is also on income assistance, PPMB assistance, or disability assistance, the Ministry may consider the two sets of parents as separate family units. This change would mean that both might both be entitled to a shelter allowance in addition to a support allowance. The Ministry's decision will depend on the child's age. For more information, see s 5 of the EAR.

Other options:

4. MCFD Youth agreements for 16 to 18-year-old youths

Youths aged 16 to 18 years who have left home and do not have a parent or other persons willing to take responsibility for him or her, or who cannot return home for reasons of safety, may be eligible for a Youth Agreement with the Ministry of Child and Family Development ("MCFD"). A Youth Agreement assists at-risk youth to live independently, return to school, and gain work experience or life skills. For more information on whether a person qualifies, contact the nearest MCFD office. Also see http://www2.gov.bc.ca/gov/content/safety/public-safety/protecting-children/youth-agreements.

5. MCFD Extended Family Program

If a young person under 19 lives with extended family members or close friends, the caregiver may be eligible for benefits to care for the young person under MCFD's Extended Family Program. The child's parent(s) must live elsewhere, must request these benefits from MCFD, and must agree with the placement. Extended Family Program benefits are usually temporary. A caregiver who is also the child's legal guardian is not eligible for Extended Family Program benefits. For more information, see: http://www2.gov.bc.ca/gov/content/family-social-supports/fostering/temporary-permanent-care-options/placement-with-a-person-other-than-the-parent

G. Obligation to Pursue Other Support and Not Dispose of Property

Applicants are eligible for all forms of welfare only after they take full advantage of every source of income, asset, or other means of support that is or might become available to them or to their dependants.

Applicants may become ineligible for assistance if they "dispose of property" for consideration that the Ministry thinks is inadequate. This means that a person cannot, for example, give away a valuable asset and then remain eligible for welfare. For details, see EAA, ss 13-14; EAR, ss 29 and 31; EAPWDA, ss12-13; and EAPWDR, ss 25 and 27.

If an applicant or his or her dependants fail to take advantage of other resources that they might use to support themselves, or if they dispose of assets for inadequate consideration, the Ministry can reduce the amount of assistance granted to the family unit or declare the family unit ineligible for a period set by the regulations (see EAR, ss 29 and 31; EAPWDR, ss 25 and 27). Some ineligible persons may be considered for hardship benefits if they agree to repay the amount they receive.

1. No Obligation to Assign Child Support Rights

Until May 1, 2015, applicants for and recipients of welfare were required to assign to the Ministry any rights they had to pursue or respond to legal proceedings involving maintenance for their dependent children (i.e. child support) and for themselves (i.e. spousal support). That requirement has been repealed. Currently, a person applying for or receiving welfare has the choice whether or not to assign their right to pursue child or spousal support to the Ministry. See section 20 of the EAR and section 17 of the EAPWDR.

a) Child support not considered income

As of September 1, 2015, the Ministry no longer considers child support payments received to be unearned income, and child support will not be deducted from welfare cheques.

If a client wants the Ministry to provide them with legal help in pursuing an order or agreement for child support (or possibly varying an old Court order or agreement), the client can contact the Ministry and ask to voluntarily assign their child support rights to the Ministry. The guidelines the ministry will apply in deciding whether to accept a voluntary assignment of child support rights are at http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/general-supplements-and-programs/family-maintenance-servicecs.

If a client already has a child support order or agreement enrolled for enforcement with the Family Maintenance Enforcement Program (FMEP) as of May 1, 2015, the client can now choose to either:

- continue to have the order enforced, or;
- withdraw the order from FMEP;

If a client decides to withdraw an order or agreement from registration with FMEP, the client can still try to enforce the order themselves through the court (i.e. collect on child support payments or arrears) procedures set out in the *Family Maintenance Enforcement Act*, RSBC 1996, c 127.

b) Spousal Support still considered income

While an applicant for or recipient of welfare is no longer legally required to assign their right to pursue spousal support to the Ministry, any spousal support received is still considered unearned income and will be deducted dollar-for-dollar from all welfare benefits. If the Ministry considers that a person has a right to spousal support but the person does not pursue it (either independently or by assigning their spousal support right to the Ministry), the Ministry may reduce the amount of assistance granted to the person's family unit or declare the family unit ineligible for a period set by the regulations (see EAR, ss 29 and 31; EAPWDR, ss 25 and 27).

If an applicant for or recipient of welfare is interested in assigning their spousal support rights to the Ministry so they can get legal help obtaining a court order or agreement for spousal support, the client can contact the Ministry and ask to voluntarily assign their right to spousal support. Where that person's ex-partner is abusive toward them, it is important for the person to disclose this to the Ministry. Ministry policy provides discretion not to pursue spousal support under an assignment where doing so could put the applicant or recipient at risk. For more information, see the Ministry's risk assessment policy at: http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/general-supplements-and-programs/family-maintenance-services

H. Two Years' Past Financial Independence Requirement

The EAA, s 8 and the EAR, s 18 state that in order to be eligible for income assistance, applicants must show that they have been financially independent for two consecutive years at some point in the past. This usually involves showing they have:

- Worked for 840 hours a year for two consecutive years
- Earned at least $7 000 a year for two consecutive years
- Worked for part of a two-year period, and collected Employment Insurance or another income replacement (excluding income assistance or a training allowance) for the rest of the two-year period

This requirement does not apply to applicants for PPMB assistance or disability assistance and there are numerous other exemptions including, among other things (EAR, s 18(3) and (4)):

- People under 19

- Pregnant women
- People with dependent children
- People who have recently left an abusive relationship and this has affected their ability to work
- People who were supported by an employed spouse or supported by a combination of an employed spouse and other benefits for two years
- People whose medical condition prevented them from working for at least six of the last 24 months or will prevent them from working for the next 30 days
- People who have earned a two-year certificate or diploma, bachelor's degree, or post-graduate degree
- People who were in prison for at least 6 months of the past 2 years

The exemption also covers those who "were for any reason unable, due to circumstances beyond their control, to search for or accept employment, and will otherwise experience undue hardship".

I. Five-Week Work Search

All new applicants, including persons with disabilities, must go through the application process set out in ss 4, 4.1 and 4.2 of the EAR and ss 4, 4.1 and 4.2 of the EAPWDR.

As of 1 October 2012, new applicants for assistance are required to do a 5-week work search (up from 3 weeks). Most returning applicants will be required to do a 3-week work search.

New applicants must (unless they are exempted as set out below) wait five weeks to apply for income assistance and during this five-week period they must attend an orientation session and complete a job search. Applicants can do the orientation session at a session organized by the Ministry, by phone or in person with Ministry staff, or online at https://www.iaselfserve.gov.bc.ca/HomePage.aspx The online orientation is only available in English.

An applicant must keep clear records to prove to the Ministry what they have done to look for work. The Ministry assesses the reasonableness of a job search on a case-by-case basis. Generally, a reasonable work search usually includes things like writing up a resume; looking for jobs on the Internet, by phone, and through personal contacts; submitting applications or resumés; going to job search workshops; going to employment agencies; asking for "job shadowing opportunities"; and going to job interviews.

Certain groups are exempt from the orientation and job search; see ss 4.1(4),(5), and (6) and s 4.2(5) of each Regulation (EAR and EAPWDR) for details.

NOTE: if a person can show that they have an immediate need for food, shelter, or urgent medical attention, they may qualify for (non-repayable) hardship assistance from the Ministry while they do their work search. A person in this situation should request an "immediate needs assessment" from the Ministry. The Ministry's service standard is that a person requesting immediate needs assessment should have their situation assessed by the Ministry, and their immediate need met, within one business day. See the Ministry's policy on immediate needs assessments at http://www2.gov.bc.ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/ application-and-intake/ immediate-needs

An applicant does not have to do a work search (either three or five weeks) if they:

- Are prohibited from working in Canada;
- Are age 65 or over;
- Have a physical or mental condition that precludes the person from completing a search for employment as directed by the minister;
- Are fleeing an abusive spouse or relative; OR

- Are the single parent of a child under three (this includes foster children and some children placed in their care by MCFD).

J. Ongoing Employment Obligations: Employment-related Obligations and Employment Plans

If the Ministry considers a recipient of welfare benefits to be employable, the person will have “employment-related obligations” under s 13 of the EAA and s 29 of the EAR. This means that they must actively look for work and accept any job offer that the Ministry considers “suitable” (appropriate). They must also not refuse suitable employment. For more information, see “Failure to meet employment-related obligations” under section III below.

Certain persons are exempted from having employment-related obligations; see EAR s 29(4) for details. For example, people with PPMB status or the PWD designation, single parents of children under 3, and people 65 and over do not have employment-related obligations. Recipients of assistance who have employment-related obligations must also have an Employment Plan (EP) under s 9 of the EAA. Even recipients with certain barriers to employment, such as drug and alcohol problems or other medical conditions, may be required to follow an EP. However, the EP is meant to be tailored to the abilities and skills of the recipient. EPs for recipients under the age of 19 focus on completing high school.

An EP outlines the conditions (activities and expectations) that the Ministry thinks a person must complete to become employed or more employable and includes a timeframe. The EP may include independent work search, referral to job placement programs, specific training for employment, or other services. Recipients must complete an activity report monthly while they are looking for work, and every second month once they obtain work, until they become independent of income assistance.

People with the PPMB and PWD designation are not required to have an employment plan. The Ministry may encourage them to sign a “voluntary participation plan”, however this is not mandatory. Having a voluntary participation plan may however be required to get access to certain training programs.

The Ministry has established various programs for employment, self-employment, and volunteering by people on income assistance, PPMB assistance, and disability assistance. These programs are optional if the person does not have employment related obligations.

K. Single Parent Employment Initiative

Effective September 1, 2015, the Ministry introduced a new “single parent employment initiative.” Under this initiative, if a single parent on income assistance, PPBM or disability assistance is assessed as needing training in order to gain employment in certain fields, they may be eligible for the Ministry to pay tuition of up to $7500 for their training, and to continue receiving income or disability assistance for up to 12 months while participating in an approved training program. Single parents may be eligible for additional child care and transportation supports while participating in the training program or paid work experience program. Single parents that are eligible for the child care subsidy may also have access to additional child care supports during their training period and their first year of their employment.

For more details on this program, see the Ministry’s Policy and Procedures Manual under “Single Parent Employment Initiative” at http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/eligibility/education-and-training

L. Persons With Disabilities (PWD)

To obtain disability assistance,) a person must show that he or she qualifies under the s 2(2) EAPWDA definition of “person with disabilities” (“PWD”). This section defines a “person with disabilities” as a person over 18 with a severe mental or physical impairment that:

- in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least two years; and
- in the opinion of a prescribed professional (a doctor, psychologist, physical or occupational therapist, social worker, nurse, nurse practitioner, or chiropractor):
  - directly and significantly restricts the person’s ability to perform daily living activities either
    - continuously; or
    - periodically for extended periods; and
  - as a result of those restrictions, the person requires help to perform those activities.

People who wish to receive disability assistance must complete an extensive application form with the assistance of a doctor and another medical professional, and satisfy the Ministry that they meet the above definition.

"Requiring help" includes:

- Help from an assistive device (like a wheelchair);
- Significant help from another person; OR
- Help from an assistance animal (such as a guide dog).

> **NOTE:** In *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461, the BC Supreme Court made several important findings about the eligibility criteria for persons with disabilities designation under the EAPWDA. For a helpful summary of the findings in Hudson, the Community Legal Assistance Society has published at: summary [1].

1. Simplified PWD Application for Certain Applicants

As of September 1, 2016 certain applicants need only complete a simplified 2 page form to qualify as a PWD for the purposes of s 2(2) of the EAPWDA. Under the EAPWDR s 2.1, an applicant must be one of the following to qualify for the simplified form:

- A person who is considered to be disabled under s 42 (2) of the Canadian Pension Plan (Canada) (that is, the person is receiving CPP disability benefits);
- A persons enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, BC Reg. 73/2015;
- A person who has at any time been determined to be eligible for payments from the Ministry of Children and Family Development’s At Home Program;
- A person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- A person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act.

M. Persistent Multiple Barriers (PPMB)

To obtain PPMB (Persons with Persistent Multiple Barriers to employment) assistance, a person must qualify under s 2 of the EAR, which involves the application of an "employability screen" designed to determine whether the person faces challenges in securing and maintaining employment. A person will have to prove to the Ministry that they have done everything reasonable to try and overcome their problems, but that the problems themselves made it impossible for them to do so.

A person can only qualify for PPMB benefits if they have already received income assistance or hardship assistance for at least 12 out of the last 15 months.

Disability Alliance BC has a detailed help sheet for people applying for, or appealing, decisions about PPMB status, at http://disabilityalliancebc.org/category/publications/bc-disability-benefits-guides/.

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References

[1] http://d3n8a8pro7vhmx.cloudfront.net/clastest/pages/79/attachments/original/1401252006/PWD_Eligibility_Summary_HUDSON.pdf?1401252006

IV. Special Situations

A. People Living on a First Nations Reserve

People (whether aboriginal or non-aboriginal) living on a First Nations reserve must seek welfare benefits through the Band Social Development Program, administered by Aboriginal Affairs and Northern Development Canada.

For First Nations persons living off a reserve, the usual policies and procedures for granting welfare through the the Ministry apply.

For more information, see the following Legal Services Society's publications:

- Aboriginal People and Law [1], chapter 16 (Social Assistance)
- Social Assistance on Reserve in BC [2]

B. Transients and People Staying at Emergency Shelters and Transition Houses

Section 1 of the EAR defines "transient" as a person who

- a. has no dependent children;
- b. has no fixed address; and
- c. in the minister's opinion, is not taking up permanent residence in the community in which the person submits an application for income assistance.

Transient persons may qualify for the cost of housing in a hostel and food (EAR, Schedule A, s 10). A transient person is not eligible for an earnings exemption under the EAR, schedule B, s. 3(7), or for Health Supplements under Division 5 of the EAR.

A person or family staying in emergency shelters or transition houses may be covered for the actual cost of accommodation and care as well as a comfort allowance calculated for the family unit of the applicant (EAR, Schedule A, s 9; EAPWDR, Schedule A, s 8).

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References

[1] http://www.lss.bc.ca/publications/pub.php?pub=5
[2] http://www.lss.bc.ca/publications/pub.php?pub=100

V. Eligibility Factors

A. Family Units, Dependency, and Spousal Relationships

Under the welfare legislation, assistance is paid not to individuals, but rather to "family units". Family units are deemed under the legislation to include a welfare applicant or recipient, his or her "dependent children" and his or her "spouse." Note that "spouse" and "dependent child" are defined in the legislation.

If two or more people are considered to be part of the same family unit, their **combined** assets and monthly income will be used to determine their ongoing eligibility for assistance and their monthly benefit amount will be calculated as a lump sum for a family unit of that size.

See the definitions of "applicant", "dependent", "dependent child" "family unit", and "recipient" in s 1 of the EAA and the definition of "spouse" in s 1.1. The same definitions exist in the corresponding sections of the EAPWDA.

A "family unit" includes a person who is applying for or getting welfare as well as that person's dependants. A "dependant" can be a spouse or partner living with the applicant and can also be a child. Note: other relatives, such as parents or adult children, are not considered dependants, even if they live with and rely upon the applicant.

To be considered a "dependent child", a child must:

- Be under 19 years old (unless the child is 18 and getting PWD benefits);
- Rely on the applicant for food, shelter, and clothing; AND
- Live with the applicant for more than half of each month.

If roommates do not want to be considered a family unit, they must be able to show that they do not fit the definition of "spouse" in s 1.1 of the EAA and EAPWDA. In determining whether roommates fit the definition in s 1.1, the Ministry may look at common-sense indicia of a spousal relationship such as:

- whether the parties have separate bedrooms;
- whether they have separate bank accounts, divide bills, etc.;
- whether have they acknowledged a common law or sexual relationship as existing between them, either socially or for any other purpose;
- whether they share household responsibilities on a consistent basis, i.e. childcare, meal preparation, laundry, shopping, house cleaning, etc.; and
- whether either party has an ongoing sexual relationship with another person.

B. Failure to Meet Employment-Related Obligations

Under EAA s 13, EAPWDA, s 12, EAR s 29 and EAPWDR s 25, the Ministry may reduce assistance (for households that include dependent children) or declare a household ineligible for a period set by regulation (for households with no dependent children) if a recipient or adult dependant who has employment-related obligations:

- a. fails to accept **suitable employment**;
- b. voluntarily leaves employment **without just cause**;
- c. is dismissed from employment **for just cause**; or
- d. fails to demonstrate reasonable efforts to search for suitable employment.

“Suitable employment” is not defined in the income assistance legislation, but a past Ministry operational directive defined suitable employment as “available employment which the person is able to perform, that pays at least the minimum wage, and which will maximize the person’s independence from assistance”.

“Just cause” for leaving employment is not defined in the legislation, but the Ministry Policy and Procedure Manual [1] states that just cause for leaving employment includes:

- a. a physical or mental condition which precludes maintaining employment;
- b. sexual or other harassment;
- c. discrimination;
- d. dangerous working conditions;
- e. following a spouse to new employment;
- f. leaving an abusive or violent domestic situation;
- g. having to care for a child or other immediate family member who has a mental or physical condition which requires the person to care for them; or h.reasonable assurance of another job.

If the Ministry decides that the person was fired for just cause or quit a job without just cause, penalties may apply, including:

- If the person does not have dependent children, the Ministry may not allow the person to apply for income assistance or hardship assistance for two calendar months.
- If the person does have dependent children, the Ministry can allow them to apply for income assistance or hardship assistance, but the benefits will be reduced by $100 for two months.

NOTE: The details of the sanctions that the Ministry may apply under EAA s 13, EAPWDA s 12, EAR s 29, and EAPWDR s 25 are summarized in the Ministry's Policy and Procedures Manual [1] in a table under "reasons for sanctions".

The above employment-related sanctions do not apply to recipients listed in EAR s 29(4).

C. Failing to Accept or Pursue Income or Assets or Disposing of Property

Section 14 of the EAA (s 13 of the EAPWDA) and s 31 of the EAR (s 27 of the EAPWDR) outline the sanctions that the Ministry may apply to applicants who fail to pursue income or assets or who dispose of property for inadequate consideration.

NOTE: The details of the sanctions that the Ministry may apply under EAA s 14 (s 13 of the EAPWDA) and EAR s 31 (s 27 of the EAPWDR) are summarized in the Online Resource [1] in the table as above, indexed under "Reasons for Sanctions".

D. Conviction or Civil Judgment for Welfare Fraud

As of Sept 1, 2015, a person is no longer ineligible for income assistance, PPMB assistance or disability assistance ONLY because of either:

- a conviction under the *Criminal Code* in relation to obtaining welfare benefits by fraud or false or misleading representation (i.e. lifetime ban repealed);
- a conviction of a statutory offence under the EAA or EAPWDA (or prior welfare legislation); OR
- a declaration of ineligibility by the Ministry following the Ministry obtaining a civil judgment against them for a welfare overpayment.

People convicted of such offences either before or after September 1, 2015, or with declarations of ineligibility related to a civil judgment, can now qualify for regular income assistance, PPMB or disability assistance, if they meet all other eligibility requirements.

These family units are liable to repay the government, under section 27 of the EAA (s 18 of the EAPWDA), the amount or value of the overpayment that was the subject of the *Criminal Code* conviction and/or conviction under the EAA/EAPWDA and/or civil judgment. This amount is known as an “offence overpayment.”

Section 89 and 89.1 of the EAR (74 and 74.1 of the EAPWDA) detail a minimum monthly welfare benefit deduction and repayment structure that applies to an “offence overpayment,” as well as the exemptions from those deductions. The basic rule is a reduction of $100 per month reduction in welfare benefits for each person in a family unit who has an “offence overpayment.” Where a person was convicted under the *Criminal Code*, that deduction continues until the amount of the overpayment is repaid in full. Where a person was convicted of a statutory offence under the EAA or EAPDA, that deduction continues for:

1. 12 months for a first conviction (unless the overpayment is repaid in less than 12 months)
2. 24 months for second conviction, (unless the overpayment is repaid in less than 24 months); and
3. For a third or subsequent conviction, until the amount of the third or subsequent overpayment is repaid.

There is some degree of ministerial discretion to waive the minimum $100 repayment requirements in a given benefit month. The minister may waive the repayment for the following reasons:

- The minister is satisfied that the family unit is homeless or at risk of becoming homeless
- The minister is satisfied that a deduction would result in danger to the health of a person in the family unit; OR
- A recipient in the family unit is liable for an offence overpayment but the person convicted of the criminal code offence or Act offence that resulted in the offence overpayment is not a member of the family unit for the benefit month.

Clinicians should consult these sections to see what specific repayment structure matches the client’s current family unit and welfare benefit status, and what exemptions they might be entitled to.

E. Providing Inaccurate or Incomplete Information to the Ministry

If a household provides inaccurate or incomplete information regarding eligibility (under s 10 or 11 of the EAA or EAPWDA), and as a result receives assistance for which it was not eligible, the Ministry may apply sanctions under s 15.1 of the EAA (s 14.1 of the EAPWDA) and ss 32-34 of the EAR (ss 28-30 of the EAPWDR).

NOTE: The details of the sanctions that the Ministry may apply under s 15.1 of the EAA (s 14.1 of the EAPWDA) and ss 32-34 of the EAR (ss 28-30 of the EAPWDR) are summarized in the Ministry's Policy an Procedures Manual at http:/ / www on the Online Resource in a table as above: http:/ / www. gov. bc. ca/ gov/ content/ governments/ policies-ffor-government/bcea-policy-and-procedure-manual/eligibility/sanctions

F. Outstanding Warrants

Effective 1 June 2010, the legislation (EAA, s.\ 15.2 and EAPWDA, s 14.2) provides that where there is an outstanding warrant for a person under the *Immigration and Refugee Protection Act* or any other enactment of Canada in relation to an indictable offence, that person will be ineligible to receive income assistance, disability assistance, or hardship assistance. Exceptions to these rules include people under 18, pregnant women, and people in the end stage of a terminal illness (see the EAR, s 38.1 and EAPWDR, s 34.1 for details).

If the Ministry cuts off a person’s assistance due to an outstanding warrant, the person may appeal the decision by requesting reconsideration by the Ministry. If the reconsideration is unsuccessful, a further appeal may be filed to the Employment and Assistance Appeal Tribunal (EAAT). While the appeal is in progress, the person should be able to collect a repayable appeal supplement.

If a person is ineligible to collect assistance due to an outstanding warrant, he or she may be able to collect two other forms of financial help:

- A repayable monthly supplement may be paid if a person can show that without financial help, undue hardship will be experienced. Normally, this form of assistance can only be paid for three consecutive months, unless the Ministry authorizes payment for up to three additional months or
- A repayable transportation supplement may be available to those whose warrants were issued in a jurisdiction other than the one in which they live and who are not able to cover the expense of traveling to that jurisdiction to deal with the warrant. The amount of this supplement is limited to the cost of the least expensive mode of travel.

If the Ministry denies a person’s application for these two supplements, a request for reconsideration may be filed, but if that fails, no appeal may be made to the EAAT.

If a person has a warrant that makes them ineligible for welfare, other people in their family unit can still get welfare.

For more information about how an outstanding warrant may affect a person’s eligibility for income assistance, the Community Legal Assistance Society of BC has a published a detailed fact sheet [2].

G. Labour Disputes

Applicants are not eligible for income assistance, PPMB assistance, or disability assistance if they or their adult dependant is on strike or locked out (EAR, s 14 and EAPWDR, s 13). An applicant in this situation may, however, qualify for hardship assistance under s 45 of the EAR or s 40 of the EAPWDR. If a person is not on strike themselves but cannot go to work because their union is honouring another union's picket line, they can apply for income assistance.

H. Being in Prison or "Other Lawful Place of Confinement"

A person in a "lawful place of confinement" or on temporary leave from such a place is not eligible for assistance: s 15 of EAR and s 14 of EAPWDR. However, pre-release prisoners are eligible to apply for welfare on an expedited basis, based on an immediate needs assessment (see the Ministry's policy [3]). This is intended to ensure that they can receive welfare immediately upon their release. The John Howard Society [4] provides pre-release planning assistance for prisoners, including help with welfare applications.

I. Being a Full-Time Student

Full-time students who are eligible for student loan funding are not eligible for income assistance or PPMB assistance during the school term (EAR, s 16). The dependent children of income assistance and PPMB recipients are not affected by this limitation.

Section 1 of the EAR defines the term "full-time student," and s 16(2) of the EAR sets out the period during which a full-time student is ineligible for income assistance or PPMB.

Full-time students who are no longer eligible for student loan funding because they have used up their allowable loans, bursaries, or grants may be eligible for income assistance during summer break if they cannot find work.

Recipients of disability assistance, and their dependants, are not restricted from being full-time students.

Students who are enrolled in unfunded programs (where student loans are not available) — such as high school completion and adult basic education or students whose post-secondary education is sponsored under a federal or provincial government plan—may remain eligible for income assistance if they have received prior approval from the minister. See EAR s 16(1)(b).

Single parents approved for the Single Parent Employment Initiative may also remain eligible for income assistance or PPMB benefits while they attend a funded program of studies (providing those studies are required in their Employment Plan). See EAR s 16(1.2)

Part-time students remain eligible for income assistance provided other eligibility requirements, including employment obligations, are met.

J. Student funding and income exemptions

For students who receive **disability assistance**, education and training allowances, scholarships, grants, bursaries and money from an RESP are all exempted as income. However, student loans advanced to recipients of disability assistance are only exempt as income up to the amount of the person’s “education costs” and “daycare costs.” Both those terms are defined in section 8 of Schedule B to the EAPDWR Regulation.

Certain students who receive **income assistance or PPMB benefits** can have funds from training allowances, student loans, grants, bursaries, scholarships, or RESPs exempted by the Ministry as their “income” up to the amount of their “education costs” and “childcare costs.” Both those terms are defined in section 8 of Schedule B to the EAR. This applies if:

- The student is the dependent child (under 19) of a recipient of income assistance or PPBM benefits;
- The person is a part-time student in a program that is not eligible for student loan funding;
- The person has received prior permission from the Ministry to enroll as a full-time student in a program that is not eligible for student loan funding;
- The student has been excused by the Ministry from having employment-related obligations under s 29(4) of the EAR, and is enrolled part-time in a program that is eligible for student loan funding;
- The student is a part time student in a program that is eligible for student loans (note that students in this situation cannot have grants, bursaries or scholarships from Canada Student Loans exempted as income);OR
- The student is in Ministry’s Single Parent Employment Initiative and in a program that is eligible for student loans (note that students in this situation cannot have grants, bursaries or scholarships from Canada Student Loans exempted as income).

K. Leaving the Province for More Than 30 Days

Recipients who leave British Columbia for more than a total of 30 days in a calendar year usually cease to be eligible for income assistance (EAR, s 17 and EAPWDR, s 15).

If a recipient wishes to leave the province for more than 30 days in a calendar year, he or she should try to obtain prior authorization for continued assistance. The minister has discretion to authorize absences required to avoid undue hardship, to allow participation in a formal education program, or to obtain medical therapy that has been prescribed by a medical practitioner.

L. 24-Month Time Limit on Welfare Removed

Prior to October 1, 2012, recipients classified as employable were only eligible for benefits for a total period of 24 months out of every 60 months (see former section 27 of the EAR). Now, there is no longer a time limit and after 24 months there will be no reduction in benefits.

M. If the EAW Denies Welfare

If a person is denied welfare due to ineligibility, ensure that they receive this in writing, as they may want to challenge this decision. They may also still be eligible for hardship assistance.

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References

[1] http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/eligibility/sanctions
[2] http://d3n8a8pro7vhmx.cloudfront.net/clastest/pages/79/attachments/original/1401252000/Outstanding_warrants_fact_sheet_FINAL.pdf?1401252000
[3] http://www.gov.bc.ca/meia/online_resource/application/immneeds/policy.html
[4] http://www.johnhowardbc.ca

VI. Hardship Assistance

Applicants who do not qualify for a regular monthly allowance under the EAA or EAPWDA might still qualify for hardship assistance. See s 5 of the EAA and Part 4 of the EAR, and s 6 of the EAPWDA and Part 4 of the EAPWDR. For example, applicants who do not meet citizenship requirements, who cannot provide a Social Insurance Number, who have excess income or assets, are on strike or locked out, or have been disqualified from assistance due to welfare fraud, may be eligible for hardship assistance. Someone who has applied for income from another source that is not yet available may also be entitled to hardship assistance.

Hardship assistance is provided only for the month in which it is applied for. Applicants who are still in need the following month must apply again. Hardship rates are different for people with and without PWD status. Schedule D of the EAR and of the EAPWDR lists the maximum rates of hardship assistance. Section 1 of Schedule D in each Regulation states that applicants in this category are not entitled to a specific amount of hardship assistance and that the actual amount is at the discretion of the Ministry, based on the financial need of the applicant. However, in practice, the Ministry usually grants eligible applicants the maximum hardship rate. A table showing maximum hardship rates is available at http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables.

The minister may require that applicants for hardship assistance enter an agreement to repay any assistance received under s 5 of the EAA and s 6 of the EAPWDA. Only some categories of hardship assistance are repayable, as set out in Part 4 of the EAR and EAPWDR.

In order to qualify for hardship assistance, one must:

- Be at least 19;
- Live in BC;
- Meet the citizenship requirements for income assistance; AND
- Fall into at least ONE of the following categories:
  - A sponsor cannot or will not support them and they are waiting for the Ministry to make a decision about the application made for income assistance.
  - They are waiting for a Social Insurance Number or other identification documents.
  - They have applied for money from another source (e.g. Employment Insurance or Old Age Security), but they have not received it yet (this hardship assistance will have to be paid back).
  - They are on strike or locked out and they do not have money to support themselves (this hardship assistance will have to be paid back).
  - They have more income or assets than people applying for welfare are allowed to have, but they have a dependent child or children and cannot use the income or assets to support themselves or their family (this hardship assistance will have to be paid back).
  - The person has an immediate need for food, shelter or urgent medical attention and cannot complete the three or five week work search without hardship assistance (“immediate needs assessment”)

NOTE: If the Ministry declares that someone does not qualify for hardship assistance, this decision can be appealed.

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VII. Overpayments and Fraud

A. What is a Welfare Overpayment?

If a person receives any form of welfare benefit or supplement that he or she is not entitled to, those benefits are considered to be an overpayment. Overpayments can range from a few dollars to tens of thousands of dollars. **Many overpayments arise not out of fraud by the welfare recipient but rather out of an honest error on the part of either the recipient or the Ministry.**

When a person has received an overpayment from the Ministry for any form of benefit under the welfare legislation, the overpayment is a debt owed to the Crown. According to EAA, ss 27-28 andEAPWDA, ss 18-19, the government may recover the debt by deducting funds from subsequent payments of income assistance or pursuing a court action.

> **NOTE:** If a client faces a civil lawsuit for a welfare overpayment resulting from failure to provide complete or accurate information, refer him or her to a lawyer at the Community Legal Assistance Society.

B. Repayment Agreements and notifications of other Overpayments

The Ministry often asks people suspected of having received a welfare overpayment to sign a repayment agreement acknowledging the alleged debt. Before signing a repayment agreement, clients should ask to review the Ministry's evidence and its reasons for the determination that there is an overpayment and, if possible, get legal advice or help from an advocate. The Ministry can often make errors in its overpayment determinations. See the Ministry's policy on recoveries and overpayments at http:/ / www2. gov. bc. ca/ gov/ content/ governments/ policies-for-government/ bcea-policy-and-procedure-manual/compliance-and-debt-management/recoveries

In many situations, it is advisable to **not** sign an acknowledgment. However, if the client does choose to sign an acknowledgment and repay the overpayment, repayment schedules can be negotiated for as low as $10 each month. The Ministry is not presently charging interest on repayments.

C. Appealing an Overpayment Decision

A welfare recipient can appeal a decision by the Ministry that he or she owes an overpayment. However, the Ministry’s decision about the **amount** of a person’s overpayment is **not open to appeal** (EAA, s 27(2) and EAPWDA, s 18(2)), although a person can apply for a reconsideration of the amount of an overpayment (for more on reconsiderations, see section IX below).

In *Newfoundland (Social Services Appeal Board) v Butler*, [1996] NJ No 91, the court held that the Ministry could not recover the monies paid out to Ms. Butler by mistake. Ms. Butler successfully used the defence of change of circumstance. The court held that because Ms. Butler had made expenditures that she would not otherwise have made without the overpayment, it would be unjust to force her to pay the Ministry back. Therefore, it may be that in similar situations, recipients of overpayments will not be obligated to repay social assistance for monies paid under a mistake of fact. Please note that in this case, Ms. Butler reported the income to the Ministry and the Ministry erred in not deducting it.

D. Welfare Fraud

Some overpayments result not out of an honest error, but rather out of a recipient's knowing failure to provide the Ministry with accurate information about his or her eligibility.

Section 31 of the EAA and s 22 of the EAPWDA set out when a person is considered to have committed a statutory offence of welfare fraud. Welfare recipients can also be charged with fraud under the Criminal Code.

Where the Ministry receives information regarding potential fraud or non-disclosure, it will investigate and may take one or more of the following steps:

- refer to the Crown for charge approval under the *Criminal Code*, the EAA or the EAPWDA;
- take civil action to recover the overpayment;
- enter into a repayment agreement with the recipient;
- deduct the overpayment(s) from future benefits;
- or declare the person ineligible for assistance for three benefit months.

> **NOTE:** If a client has been charged criminally with welfare fraud, refer him or her to the Legal Services Society to apply for a legal aid criminal lawyer.

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VIII. Payment Issues

A. Income Assistance, PPMB Assistance, and Disability Assistance Rates

People who are eligible for income assistance, PPMB assistance, or disability assistance are entitled to the amounts determined in Schedule A of the EAR or EAPWDR, minus any non-exempt net income available to the family as determined under Schedule B.

All rates are monthly and set out in Schedule A of the EAR and EAPWDR. The rates are divided into a portion for shelter, and a separate portion for support (which is intended to cover all living expenses other than shelter, including food, clothing, etc.). The shelter portion is listed as a maximum. The Ministry will only pay the lesser of a person's actual shelter costs or the maximum listed shelter allowance. Below are examples of monthly rates for different family configurations:

- For a single person under age 65 on income assistance: $235.00 for support plus up to $375.00 for shelter, for a total of **$610.00 per month**.
- For a single person under 65 on PPMB assistance: $282.92 for support plus up to $375.00 for shelter, for a total of **$657.92 per month**.
- For a four-person family (two parents, both under age 65, and two children) on income assistance: $401.06 for support plus $700.00 for shelter, for a total of **$1 101.06 per month**.
- For a couple under age 65 where one person has Persons with Disabilities status: $827.56 for support (including a $52/month transportation supplement allowance for the person with the PWD designation) and $570 for shelter, for a total of *$1 397.56 per month.*

NOTE: The BC government announced on July 20, 2017 that all income assistance, PPMB and disability assistance support rates would be increasing by $100 per month effective September 20, 2017. If there are two people with the PWD designation in a household, the increase is expected to be $200 per month.

As of September 1, 2016, a $52/month transportation subsidy will be given to all recipients of disability assistance who have PWD designation. With this change, the former "special transportation subsidy" that some recipients of disability assistance received, has been eliminated. The recipient of the new $52/month transportation subsidy then has the option each month to:

- purchase a monthly bus pass for $52 through the Ministry. If the person wants to do this, they must contact the Ministry by the 5th of the month prior to the month they want the bus pass.)

OR

- keep the $52 in a given month and spend it on their transportation or other needs.

NOTE: Helpful rate tables are online at http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/bc-employment-and-assistance-rate-tables. These show the shelter support rates for all forms of assistance under the EAA and EAPWDA.

In addition to the support allowance, families may also receive the Canada Child Benefit for children under 18, which includes the old Universal Child Care Benefit for children under 6, the former Canada Child Tax Benefit, and what was called (until 2016) the national child benefit supplement. If a family's Canada Child Benefit for a given month is less than what sections 1 of the EAR and EAPDR define as the "BC child adjustment amount" (see table below) for each child aged two months to 18 years, (e.g. because a child is ineligible or a check is delayed), then the Ministry may issue a top up to that amount, as per the chart below. See also EAR Schedule A, section 2(2).

Number of Children	Maximum BC child adjustment amount)
One	$195.02 per month
Two	$367.56 per month
Each additional child beyond two	$164.18 per child, per month

B. Calculating the Shelter Allowance

Recipients of income assistance, PPMB assistance, and disability assistance are eligible for a monthly shelter allowance equivalent to their actual shelter costs, **up to the maximum set out in the Regulations** for their household size:

Family Unit Size	**Monthly Shelter Rate (Max.)**
1 person	$375
2 person	$570
3 person	$660
4 person	$700
5 person	$750
6 person	$785
7 person	$820
8 person	$855

Recipients are not eligible for the full monthly shelter allowance if they are not paying that much in shelter costs. Schedule A, s 5 of the EAR and EAPWDR set out what expenses items can be included when calculating shelter costs. They are: rent, mortgage payments, house insurance premiums, property taxes for the recipient's own home, utility costs, and the actual cost of maintenance and repairs for the recipient's own home **if** these costs have been approved. Note that

the definition of “utility costs” in Schedule A, s 5(1) of the EAR and EAPWDR is quite broad.

Where two or more family units share the same place of residence, the family units’ shelter costs are calculated according to s 5(4) of Schedule A of the EAR and EAPWDR.

C. Rates for People Receiving Room and Board

Schedule A, s 6 of the EAR and EAPWDR set out the method for calculating the income assistance and disability assistance rates for a family unit receiving room and board.

If recipients receive room and board from a parent or child, only the support allowance that is payable to that family unit size shall be paid.

The Ministry has announced that the support rate will also be increased as of September 1, 2016 for people with the PWD designation who receive room and board. The announcement is that they will receive a $25 support rate increase and have the choice between buying a bus pass from the Ministry each month or receiving a $52 transportation allowance each month.

D. Rates for People Living in Emergency Shelters and Transition Houses

Schedule A, s 9 of EAR and EAPWDR provide for the level of assistance for a family unit is receiving accommodation and care in an emergency shelter or transition house.

E. Rates for “Transients”

Schedule A, s 10 of the EAR sets out the amount of income assistance available to a person that falls under the legislative definition of “transient” (in s 1 of the EAR). The EAPWD legislation does not have a definition of “transient” nor rules that apply to “transients.”

F. Rates for People in a Special Care Facility

“Special care facility” is defined in s 1 of each regulation as a specialized adult residential care setting approved by the Ministry or a licensed boarding home, alcohol or drug treatment centre, a personal care facility, or intermediate care facility.

Schedule A, s 8 of EAR and the EAPWDR sets out what the Ministry will cover for shelter and support for a person residing at such a facility.

G. Children in the Home of a Relative (CIHR) - repealed

Until 31 March 2010 the EAA provided that if a child was supported in the home of a relative other than the child’s parent and no parent of the child was able to pay the total cost of the child’s care, the Ministry would pay income assistance according to the child’s age:

Age Group	Monthly Rate
Birth – 5 years	$257.46
6 – 9 years	$271.59
10 – 11 years	$314.31
12 – 13 years	$357.82
14 – 17 years	$402.70
18 years	$454.32
	(less any financial contribution by parents)

The CIHR provisions were repealed as of 1 April 2010 (BC Reg 48/2010). **However, these provisions still apply to families that include children who were approved under the old provision prior to 31 March 2010, or who filed their applications prior to 31 March 2010 and were subsequently approved** under the old provision (see the Child in the Home of a Relative Transition Regulation). The following repealed sections contained key provisions dealing with Children in the Home of a Relative: EAR s 6; s 11(1)(b)(iv); s 27; s 29; s 33; s 34; s 34.1; 49; 50; 60; 61; 67; 67.1; 68; 71; 73; 74.01; 75; and Schedule A, s 11.

H. Method of Payment of Assistance

The Ministry's standard method of payment is by direct deposit by Electronic Funds Transfer (EFT) into the recipient's bank account.

Applicants can generally get an exemption where EFT payment is not appropriate for them. Such recipients typically receive their benefit cheque by picking it up from the Ministry office.

The Ministry also commonly pays recipients' shelter allowances directly to their landlords. This is optional.

I. Lost or Stolen Cheques

Section 92 of the EAR and s 77 of the EAPWDR authorize the issuance of a replacement of an unendorsed assistance cheque as long as:

- (a) in the case of theft, the matter has been reported to police; and
- (b) in the case of loss or theft, the recipient
  - (i) makes a declaration of the facts; and
  - (ii) undertakes to promptly deliver the lost or stolen cheque to the Ministry if it is recovered.

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IX. Additional Benefits

The Ministry may provide a number of additional supplements in certain specific circumstances. This section will outline some of these supplements. However, Part 5, Divisions 1-4 and 6 of the EAR and Part 5, Divisions 1-3 and 5 of the EAPWDR will need to be reviewed for complete details.

A. Crisis Supplements

A crisis supplement is a one-time grant for a welfare recipient who requires an “unexpected item of need” and is unable to obtain it due to lack of money or assets or inability to obtain credit. Crisis supplements are provided pursuant to s 59 of the EAR and s 57 of the EAPWDR and do not have to be repaid.

Before issuing a crisis supplement, the Ministry must decide that failure to obtain that item will result in:

- imminent danger to the physical health of any person in the family unit or
- removal of a child under the *Child, Family and Community Service Act*.

A person might be eligible for a crisis supplement to buy necessities like winter coats, baby cribs, or a new appliance. If a recipient loses possessions in a fire, runs out of food or fuel, is threatened with Hydro cut-off, or must make an essential house repair, he or she may ask the Ministry for a crisis supplement.

The legislation sets out maximum amounts for crisis supplements:

- For food, $20 per person per month;
- For clothes, $100 per person per year or $400 per family per year, whichever is less;
- For shelter, the actual shelter costs up to the maximum shelter rate of the family for one month only.

Note: If the crisis supplement is for clothing or furniture, the Ministry may ask the applicant to look for second-hand goods. They may ask the applicant to get three estimates for the cost of the service of goods required.

The maximum cumulative total of crisis assistance provided in any 12 month period is the equivalent of two months’ assistance for the family unit.

The amount of a crisis supplement is not subject to appeal, but the denial of a crisis supplement can be appealed.

If a person is given six or more crisis supplements in 12 months, their benefits may be administered, which means that the Ministry may begin sending the welfare recipient several small cheques over the course of a month instead of one cheque. The Ministry may also begin paying the person’s rent directly to their landlord.

B. Other Supplements

Apart from crisis supplements, other supplements that may be available under the legislation include:

- a pre-natal shelter supplement;
- a Christmas supplement;
- school start-up supplements;
- community volunteer supplements;
- clothing and transportation supplements for people confined to special care facilities;
- supplements where a person needs to obtain new proof of identity;
- supplements associated with an employment plan or a confirmed job;
- moving and transportation supplements;
- supplements for security deposits;

- advances for lost, stolen, delayed, or suspended family bonus cheques;
- supplements for guide animals;
- seniors' supplements;
- funeral, burial, or cremation supplements; and
- transportation supplements.

Note that this is a non-exhaustive list.

Some of these supplements are repayable and others are not. See Part 5 of the EAR and EAPWDR for details.

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X. Health Supplements

A. Introduction

Schedule C of the EAR and EAPWDR set out the availability of supplements for health and dental services, including optical and orthodontic services. See also Part 5, Division 5 of the EAR and Part 5, Division 4 of the EAPWDR.

B. General Health Supplements

Section 67 of the EAR and s 62 of the EAPWDR set out the eligibility criteria for general health supplements. These criteria should be reviewed carefully in relation to any issue relating to a health supplement.

C. "Medical Services Only"

Section 66.3 of the EAR and s 61.1 of the EAPWDR provide that persons may be eligible for "medical services only" in certain circumstances when they are not eligible for income assistance, PPMB, or disability assistance.

D. Optical Care

If the person is between 19 and 64 and gets income assistance, hardship assistance, PPMB, or PWD benefits OR has Medical Services Only Status, they can receive an eye exam every 24 months. Further, children may receive one pair of glasses per year and adults may receive one pair of glasses every three years.

Ss 67.1 and 67.2 of the EAR and ss 62.1 and 62.2 of the EAPWDR set out eligibility criteria for certain optical benefits. See also ss 2.1 and 2.2 of Schedule C of the EAR and ss 2.1 and 2.2 of Schedule C of the EAPWDR.

E. Dental Care

Ss 68, 68.1, 69, 70, and 71 of the EAR and ss 63, 63.1, 64, and 65 of the EAPWDR set out eligibility criteria for supplements for dental work, crown and bridgework, dentures, emergency dental and denture work, and limited orthodontic work. See also ss 4, 4.1, 5, 6, and 7 of Schedule C of the EAR and ss 4, 4.1, and 5 of Schedule C of the EAPWDR.

F. "Healthy Kids" supplements

Section 72 of the EAR provides for certain optical and dental supplements for dependent children of welfare recipients. See also Schedule C.

G. Alternative Hearing Supplement

S 77.2 of the EAA, Schedule C, s 11 of the EAR, and Schedule C, s 11 of the EAPWDR allow a $100 supplement for applicants with profound hearing loss. This supplement may only be provided where the applicant has profound hearing loss in both ears and would not benefit from a hearing instrument.

H. Diet and nutrition

Ss 73, 74, 74.01, 74.1, and 75 of the EAR and ss 66, 67, 67.01, 67.1, and 68 of the EAPWDR set out eligibility criteria for supplements for diet supplements, nutritional supplements, supplements for those who require tube feeding, infant health supplements, and prenatal supplements for pregnant women. See also ss 8, 9, and 10 of Schedule C of the EAR and ss 6-10 of Schedule C of the EAPWDR.

Note: Monthly nutritional supplements are only available for people who receive disability benefits from the Ministry. Further, the person must be being treated for a "chronic, progressive deterioration of health on account of a severe medical condition". It is very hard to meet the requirements for this supplement. See s 67(1.1) of the EAPDWR for more information. Disability Alliance BC has a useful help sheet regarding the monthly nutritional supplement, at http://www.disabilityalliancebc.org/docs/hs4.pdf?LanguageID=EN-US.

I. Medical equipment and devices

Where a person meets eligibility criteria (see s 67 of the EAR and s 62 of the EAPWDR), the Ministry may provide funding for certain medical equipment and devices. The devices and eligibility criteria are listed in s 2(3) of Schedule C of each regulation. The devices may include:

- canes, crutches, and walkers;
- wheelchairs;
- scooters;
- bathing and toileting aids;
- hospital bed;
- pressure relief mattresses;
- floor or ceiling lift devices;
- positive airway pressure devices;
- apnea monitors;
- nebulizers;
- positioning items on a bed, positioning chairs, and standing frames;

- ventilator supplies;
- orthoses;
- and hearing aids.

NOTE: In order to qualify for these supplements, a prescription from a qualified medical practitioner must be supplied and the cost must be pre-approved by the Ministry. There are very detailed eligibility criteria that must be met for each item requested.

See Schedule C of both Regulations for details.

J. Medical and Surgical Supplies

Certain “disposable or reusable” medical supplies may be provided if they are necessary to prevent the recipient from becoming very ill (to avoid what the Ministry calls “an imminent and substantial danger”) and if they are prescribed by a doctor. See s 2(1)(a) of Schedule C of each Regulation.

The supplies are only available if they are needed for one of these following purposes: wound care; ongoing bowel care required due to loss of muscle function; catheterization; incontinence; skin parasite care; or limb circulation care.

The supplies must be the least expensive ones appropriate for the purpose. Exclusions to this list include: nutritional supplements, food, vitamins and minerals, and prescription medications.

K. “Direct and Imminent Life-Threatening Health Need”

Section 76 of the EAR and s 69 of the EAPWDR provide that the Ministry may provide certain health supplements to a person who is otherwise ineligible for the supplements (or indeed, for welfare benefits), if the person can show that the person faces an **imminent and life threatening need** that cannot be addressed except by the supplement. See the Regulations for details.

L. Alternative and Complementary Therapies

Up to 12 visits per calendar year are payable by the minister for any combination of physiotherapy services, chiropractic services, massage therapy services, non-surgical podiatry services, naturopathy services, and acupuncture services for which a medical practitioner or nurse practitioner has confirmed an acute need. See Schedule C, s 2 of each Regulation, especially s 2(c).

M. Transportation to Medical Appointments

Under Schedule C, s 2(f) of each Regulation, the Ministry may cover the cost for the least expensive mode of transportation to and from the office of a local medical practitioner, nurse practitioner, specialist, general hospital, rehabilitation hospital, provided that:

- the transportation is to enable the person to receive a benefit under the *Medicare Protection Act* or a general hospital service under the *Hospital Insurance Act*;
- and there are no resources available to the person's family unit to cover the cost.

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XI. Appeals

A. What Can Be Appealed

It is possible to appeal most Ministry decisions that deny, reduce, or discontinue welfare benefits of any kind, including supplements. See s 17 of the EAA and s 16 of the EAPWDA.

The legislation list certain supplements for which decisions can not be appealed to the Employment and Assistance AppealTribunal: see EAR, s 81, and EAPWDA, s 73. Note however that a person may still apply for reconsideration of decisions related to those supplements. In addition, one cannot appeal decisions regarding the terms of employment plans to the Tribunal, but they can be reconsidered (see s 9 and 17(1)(e) of the EAA).

NOTE: If a client would like a review of a decision that is not open to reconsideration and/or appeal, they may still request an internal administrative review by registering a complaint with the supervisor at a local Ministry office. This may be particularly useful for service quality issues. This is entirely separate from the appeal process.

B. Two-Level Appeal Process

There is a two-level appeal process for reviewing decisions by the Ministry. The levels are:

- reconsideration (which is an administrative review done within the Ministry) and
- appeal to the Employment and Assistance Appeal Tribunal or "EAAT" an independent tribunal).

To seek reconsideration, a person must obtain and complete a "Request for Reconsideration" form and return it to the Ministry **within 20 business days of being notified of a decision**, along with relevant documents, to request a reconsideration of a Ministry decision.

"Request for Reconsideration" forms can be picked up at Ministry offices.

To appeal a reconsideration decision to the EAAT, a person must submit a Notice of Appeal form within **seven business days** of being notified of the reconsideration decision.

C. Reconsideration and Appeal Supplements (Benefits While an Appeal is Pending)

If a recipient is seeking reconsideration or appeal of a decision to discontinue or reduce a benefit or supplement, he or she may continue to receive the benefit or supplement while awaiting the outcome of the reconsideration or appeal. This is called a "reconsideration supplement" or "appeal supplement".

Before paying a reconsideration or appeal supplement, the Ministry requires people to sign an agreement saying they will repay the benefit if the appeal fails. See s 54 of EAR and s 52 of EAPWDR.

D. Commonly Appealed Decisions

Some decisions for which people commonly seek reconsideration and appeal are:

- A decision denying someone PWD status under s 2 of the EAPWDA;
- A decision denying someone a special supplement for which he or she has applied;
- A decision that a person is in a "dependent" relationship with someone he or she lives with (e.g.a spousal relationship), and that they must therefore be treated as being in the same family unit; and
- A decision that a person has received a welfare overpayment that he or she must repay.

There are many other types of decisions that can be appealed.

NOTE: Whenever a client asks about appealing a decision, begin by checking s 17 of the EAA, s 16 of the EAPWDA, s 81 of the EAR, and s 73 of the EAPWDR to ensure the decision is appealable. Then, review the legislation to understand the law affecting the decision.

E. APPEAL LEVEL 1: Reconsideration

Reconsideration is a "paper review" by the Ministry with no hearing. To request reconsideration, the client needs to fill in Request for Reconsideration form. He or she may need to ask for this form, although often it will come with the Ministry decision.

The client **must** get the completed request for reconsideration in to the Ministrywithin 20 business days from the day the client was informed of the decision.

A client should submit the following with a request for reconsideration:

- **Evidence:** any relevant documentary evidence can be submitted with the request for reconsideration. It is essential to provide complete evidence at this stage, and cover all possible evidentiary issues, as only limited evidence is allowed at next appeal stage and
- **Argument:** it is also good to provide a one-page written summary of outlining why the client is eligible for the benefit.

If a client is not able to submit all relevant evidence and argument to the Ministry within the 20 business day deadline, they can request (in writing) an extension to do so of up to 10 business days. They must still submit the completed Request for Reconsideration form to the Ministry within the initial 20 business day deadline, but can indicate on that form that they require an extension of time to provide supporting evidence and argument.

Once a completed Request for Reconsideration form is submitted to the Ministry, the Ministry must provide a written response to the reconsideration request within 10 business days. Section 80(b) of the EAR, and s 72(b) of the EAPWDR provide that, with the agreement of both parties, the Ministry may have up to an additional 10 business days to make its decision. These are the sections that are relied upon when requesting an extension of time to provide additional evidence and argument in support of a client's completed Request for Reconsideration form.

NOTE: While going through this process, it is also well worth contacting the Supervisor at the client's Ministry office to try and negotiate a solution, particularly if the decision appears to be obviously unfair and out of line with the legislation.

F. APPEAL LEVEL 2: Appeal to the EAAT

The EAAT is an independent tribunal. See its website at http://www.gov.bc.ca/eaat. Its website has many useful materials including a set of practices and procedures, guidelines, forms, and a member code of conduct.

The EAAT holds oral and written hearings. Oral hearings may be done in person or by teleconference. An oral, in-person hearing should always available if the client requests one, although it may lead to a delay in scheduling.

To request an appeal, file a Notice of Appeal with the EAAT or deliver it to a local Ministry office. The EAAT or the Ministry must receive the notice of appeal within **7 business days** from the day the client gets the reconsideration decision.

One does not need to file evidence or argument at the same time as filing the Notice of Appeal, although one could do so.

The EAAT will hold the hearing within 15 business days of the notice of appeal, unless the client consents to having it later.

If an applicant needs more time once he or she has filed the notice of appeal, the Tribunal has an adjournment request form online. Ideally the applicant should get the Ministry to consent to the adjournment and send the form in at least 24 hours before the hearing. Applicants can also ask for an adjournment on the day if there is good reason.

The following are some notes about the EAAT process:

- Appeal panels typically have 3 members, but sometimes have 2 or even 1 member;
- The EAAT applies the income assistance legislation and common law;
- It cannot apply the Charter or *Human Rights Code* (see the *Administrative Tribunals Act*);
- While an EAAT hearing is formal, it is less formal than court. Rules of evidence are not strictly applied;
- The Ministry sends a representative to advocate for its point of view at most EAAT hearings; and
- Appellants before the EAAT may be represented by an advocate or legal counsel. LSLAP students may act in this capacity for clients.

The EAAT hearing must be held within 15 business days of delivery of the appeal notice. The hearing can be postponed if both parties and the chairperson agree to a later date. Applicants can request an adjournment if there is good reason to do so, using an “Appeal Adjournment Request Form”. See also s 85 of the EAR.

Evidence can be given at an EAAT hearing in the following forms:

- **Documentary evidence**, which should be set it in to EAAT in advance if possible, but it is acceptable to bring it to the hearing, with enough copies for the three panel members and the Ministry representative) and
- **Oral evidence** from client or supporters.

Completely new evidence is not supposed to be allowed before the EAAT, whereas evidence “supporting” what was put forward at reconsideration is allowed. There can sometimes be a fine line between new evidence and supporting evidence. The EAAT has a useful guideline on this issue, at http://www.gov.bc.ca/eaat/popt/additional_evidence.html

The EAAT must decide whether the Ministry's reconsideration decision:

- Is reasonably supported by evidence OR
- Is a reasonable application of the legislation to the circumstances of the person appealing the decision (s 24 of the EAA).

If so, the panel must uphold the Ministry's decision, and if not, the panel must rescind the Ministry’s decision. If the decision of the tribunal cannot be implemented without some further determination, then the tribunal must refer the further determination back to the Ministry.

The EAAT panel must render its decision within five business days of the conclusion of the hearing. The EAAT chair then has five business days to mail a copy of it to all parties.

NOTE: If a client failed to submit key pieces of evidence with his or her request for reconsideration, it may not be worthwhile to appeal the decision to EAAT, since appellants are not permitted to present completely new information on appeal to EAAT. Therefore, it may be in the client's best interest to re-apply for the benefit and provide proper documentation on the new application.

What can be appealed to the EAAT

- A denial of PPMB or PWD status;
- A denial of a monthly benefit or supplement;
- A reduction of the amount of money received for monthly benefits or for a supplement;
- The existence of an alleged overpayment; OR
- A cancellation of a monthly benefit or supplement.

What cannot be appealed to the EAAT:

- Whether someone has to sign an employment plan or have certain conditions in the employment plan;
- Refusing to change or cancel an employment plan once signed;
- How much of an overpayment is owed to the Ministry;
- Refusing to take part in a program set up under the welfare laws;
- Refusing certain benefits while the case is under reconsideration or appeal; OR
- Not giving a person a supplement related to their employment plan or to a confirmed job.

G. Judicial Review (if the Appeal to the EAAT is Unsuccessful)

If the EAAT decision is unfavourable, the appellant has 2 options:

OPTION 1: Where the appellant has applied for a benefit and been denied, and where it is important for her to get the benefit right away, she can re-apply. If there is new evidence on which to base a new application that should be submitted; otherwise she can still reapply although her appeal rights on the new application will be limited if she cannot show that there has been a change in the applicant's circumstances relevant to the appeal since she last appealed to the EAAT (see section 17 of the EAPD Act and section 18 of the EA Act).

OPTION 2: Where the decision is very seriously problematic (see below) and there is some benefit to having a court overturn the original decision, students can advise the client to seek judicial review.

A judicial review may be possible where the Tribunal decision has very serious problems with it, such as:

- issues of procedural fairness;
- errors of law; or
- glaring errors of fact that a judge would be able to see just by reading the decision and looking at the documentary evidence.

Note there is a **60 day time limit** for bringing judicial reviews. A client who is interested in applying for judicial review of an EAAT decision should be referred to a lawyer at the Community Legal Assistance Society to have their case assessed for merit.

H. Tips for the LSLAP Student Representative

- Representatives should read Part 6 of the EAR carefully to offer advice on the appeal process.
- The representative should determine what the issues are and read all of the relevant sections of the EAA or the EAPWDA and the associated Regulations.
- A representative should have the client fill out an "Authorization for Advocate and Confidentiality" form authorizing the representative to examine the client's Ministry file. Also, if the case is at the EAAT level, a "Release of Information" form from the EAAT website should be completed. These forms are needed to communicate with the Ministry and the EAAT about the client's case.
- If a client has received a decision from the Ministry but has not yet taken any appeal steps, the representative should advise him or her to obtain a "Request for Reconsideration" form from the Ministry office and to complete and return it to his or her local Ministry office. This must be done within **20 business days** of getting the decision. If there is enough time, it is very helpful if you can help the client to fill in the Request for Reconsideration.
- If an applicant has already received a reconsideration decision, and the matter is appealable (see above) advise him or her to complete a Notice of Appeal form and to send it to the EAAT **within seven business days** of getting the reconsideration decision.
- With the law as set out by the Act and regulation in mind, the representative should get copies of all relevant documents and review the details of the client's case. It is vital to have a clear, comprehensive account of the facts as your client understands them.
- If the applicant submits additional documentation as evidence, such as medical reports, affidavits, or receipts, make enough copies for the Ministry's representatives and the tribunal members. Because there is no registry for administrative support for the tribunal system, advocates must assume responsibility for seeing that all documentation is well-organized.
- At all levels of appeal, it is best to have a written statement of one's presentation of the facts in case there is a judicial review. Hearings at the EAAT are not otherwise recorded.
- See above for specific tips on each level of appeal.

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Chapter Twenty Two – Referrals

I. General

APB's Lawyer Referral Service

Consultation with a lawyer for up to 30 minutes for free. Any legal assistance will require paying the lawyer's regular fees

Online	www.cbabc.org/for-the-public/lawyer-referral-service [1]
Phone	604-687-3221 Toll-Free: 1-800-663-1919

Access Pro Bono

Several programs are available:

• **Summary Legal Advice Program**: Volunteer lawyers provide up to a half-hour of free legal advice to clients at summary legal advice clinics

• **Roster Program**: Pro bono representation for Court of Appeal, family law, Federal Court of Appeal, judicial review and wills and estates issues

• **Civil Chambers Program**: Civil (non-family) chambers litigation matters before the Supreme Court and the Court of Appeal in Vancouver

• **Consumer Protection Clinic**: Summary advice for individuals with Consumer Protection cases

• **Employment Standards Program**: Volunteer lawyers and students provide free legal representation to employees at the Employment Standards Branch

• **Mental Health Program Telephone Clinic**: Free legal advice appointments over the phone to people detained under the Mental Health Act or their relatives

• **Residential Tenancy Program**: Legal representation for low-income tenants and landlords appearing before the Residential Tenancy Branch

• **Solicitors' Program**: Connects non-profit organisations of limited means with pro-bono legal services

• **Paralegal Program**: Appointments for self-represented litigants to get help preparing legal documents (604-660-2084)

• **Wills Clinic**: Appointments for low-income seniors and people with terminal illnesses. Trained lawyers and articling students draft and execute simple wills and representation agreements. (604-424-9600)

Online	www.accessprobono.ca [2]
Phone	604-878-7400 Toll-Free: 1-877-762-6664

Legal Services Society

Representation for criminal charges, mental health and prison issues, serious family problems, child protection matters and immigration problems

Online	www.lss.bc.ca [3]
Phone	**Legal Aid Applications** 604-408-2172 Toll-Free: 1-866-577-2525 **General Inquiries** 604-601-6000

Community Legal Assistance Society

Housing, income security, debt issues, access to education, community living supports, access to public services, employment insurance, workers' compensation, information and privacy for people with disabilities, mental health, human rights

Online	www.clasbc.net [4]
Phone	604-685-3425 Toll-Free: 1-888-685-6222

Vancouver Justice Access Centre

• Legal information, self-help and other resources; limited legal advice on family and civil law issues (low-income eligibility requirements apply). No legal advice for criminal matters, small claims court forms and filings and personal injury matters.

• Can give advice on family and civil justice issues such as separation or divorce, guardianship, child or spousal support, parenting after separation, protection orders, income security, employment, housing, debt, human rights, consumer issues, wills and estates, EI, worker's compensation, and immigration/refugee issues.

Online	www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legal-help/jac/how-to-find-us/vancouver [5]
Phone	604-660-2084

Seniors First BC (Victims Services Program and Legal Programs)

- Helps victims of abuse or a crime to access the justice system
- Provide practical and emotional support
- Assistance can be provided over the phone
- Preparation and support for older adults who will be testifying in court about abuse or other crime
- Provide services to people age 55 and over
- **Does not prepare wills or power of attorneys, or give advice on estate administration, real estate, criminal law or family law matters**

Online	www.bcceas.ca [6]
Phone	604-437-1940 Toll-Free: 1-866-437-1940

Dial-A-Law

- General information on a variety of topics on law in British Columbia
- Library of legal information prepared by lawyers
- Available in English, Chinese and Punjabi by telephone and online

Online	www.dialalaw.org [7]
Phone	604-687-4680 Toll-Free: 1-800-565-5297

Clicklaw

Legal information, education and help for British Columbians

Online	www.clicklaw.bc.ca [8]

Law Students' Legal Advice Program

Telephone: 604-822-5791 Website: www.lslap.bc.ca [9]

• Free legal assistance through appointments for low income individuals in the Greater Vancouver area, including representation, document drafting, summary advice, and referrals

• Help with criminal law (summary offences) tenancy, employment, small claims, welfare, human rights, immigration, and more

• No family law, personal injury, supreme court, business law, real property, or criminal law where there is a risk of jail time

• Publishes this legal advice manual

• Operates a Criminal Code s. 684 project which helps convicted individuals fill out s. 684 applications for a court to assign counsel to act for an accused in an appeal

The Kettle Society

Telephone: 604-251-2801 Website: www.thekettle.ca [10]

• Advocacy and support, with a focus on mental health

• Family, tenancy, tax, welfare, ID replacement, and human rights

Amici Curaie

Telephone: 778-522-2839 Website: www.legalformsbc.ca [11]

• Free assistance in completing legal forms (no Criminal, elder law, or wills and estates)

• Operate a clinic helping temporary workers apply for uncontested divorce orders

The Law Centre (University of Victoria)

Telephone: 250-385-1221 Website: www.uvic.ca/law/about/centre [12]

• Law students in Victoria provide legal assistance to low income individuals in criminal, family, and civil law, including help with human rights, employment insurance, tenancy, welfare, and other administrative tribunals

Pov Net

Website: www.povnet.org [13]

• Comprehensive source of legal referrals

• Can be used to search for legal help by region in British Columbia

First United Church Advocacy

Telephone: 604-251-3323 Website: firstunited.ca/advocacy

• Broad range of legal advocacy for low-income and vulnerable people in the Downtown Eastside Vancouver

• Focus on tenancy and social assistance

St Paul's Advocacy Office

Telephone: 604-683-4287 Website: stpaulsanglican.bc.ca/site1/outreach-2/advocacy-outreach

• Supports people facing difficulties in day-to-day living

• This includes accommodation needs, landlord-tenant disputes, health and disability issues, and access to government services

Together Against Poverty Society (TAPS)

Telephone: 250-361-3521 Website: www.tapsbc.ca [14]

• Legal advocacy in Victoria

• Income assistance, disability benefits, employment standards, tenancy, and income tax

Civil Resolution Tribunal

Telephone: 1-844-322-2292 Website: www.civilresolutionbc.ca [15]

• Tribunal which handles small claims matter under $5,000

• Solution explorer for alternative dispute options

• Start your claim online

• Also handles motor vehicle injury under $50,000, strata disputes, societies and cooperative associations disputes, and shared accommodations and some housing disputes

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by the Law Students' Legal Advice Program on July, 2019.

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References

[1] http://www.cbabc.org/for-the-public/lawyer-referral-service
[2] http://www.accessprobono.ca
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[5] http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legal-help/jac/how-to-find-us/vancouver
[6] http://www.bcceas.ca
[7] http://www.dialalaw.org
[8] http://www.clicklaw.bc.ca
[9] http://www.lslap.bc.ca
[10] http://www.thekettle.ca
[11] http://www.legalformsbc.ca
[12] http://www.uvic.ca/law/about/centre
[13] http://www.povnet.org
[14] http://www.tapsbc.ca\
[15] http://www.civilresolutionbc.ca

II. Family Law

Legal Services Society (Family LawLINE)

- Free legal advice over the telephone
- Lawyers give brief "next step" advice

Online	www.familylaw.lss.bc.ca/help/who_telephoneAdviceLine.php [1]
Phone	604-408-2172 Toll-Free: 1-866-577-2525

Vancouver Justice Access Centre

- Family maintenance, custody, support, parenting
- Assistance with enforcement and paperwork
- Mediation
- NO DIVORCE ASSISTANCE

Online	www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legal-help/jac/how-to-find-us/vancouver [2]
Phone	604-660-2084

Family Justice Centres

- Services to British Columbians going through separation or divorce
- Help families with child custody, access, guardianship and support issues

Online	www.clicklaw.bc.ca/helpmap/service/1019 [3]
Phone	604-660-6828

Family Law in British Columbia

Website about family law

Online	www.familylaw.lss.bc.ca [4]

MediateBC (The Family Mediation Program)

Affordable mediation services for families

Online	www.mediatebc.com/familymediation.aspx [5]
Phone	604-684-1300 ext. 205 Toll-Free: 1-877-656-1300 ext. 205

British Columbia Family Maintenance Enforcement Program

Monitor and enforce maintenance orders and agreements

Online	www.fmep.gov.bc.ca [6]
Phone	604-775-0796

Ann Davis Transition Society

- Provides shelter and support for abused women and their children
- Individual and group counselling for women, children, youth, couples and families

Online	www.anndavis.org [7]
Phone	Administration/Counselling: 604-792-2760 Shelter from Abuse: 604-792-3116

North Shore Women's Centre

Women's drop-in resource centre

Online	www.northshorewomen.ca [8]
Phone	604-984-6009

B.C. Men's Resource Centre

Individual, couple and family counselling

Online	menbc.webs.com [9]
Phone	604-878-9033

Battered Women's Support Services

Telephone: 604-687-1867 Toll-Free: 1-855-687-1868 Website: bwss.org

• Summary advice, workshops, and advocacy in family, immigration, refugee, and criminal law

• Court form preparation clinic for drafting supreme court forms for family law proceedings

• Offers counselling, support, information, and other resources

BC Pro Bono Collaborative Roster Society

Website: bccollaborativerostersociety.com/practice/probono

• Collaborative team works with both parties in a divorce to come to a satisfactory settlement, low income families can apply for free service

Downtown Eastside Women's Centre

Telephone 604-681-8480 Website: dewc.ca

• Advocacy in welfare, tenancy, housing applications, and family law

Family Services of Greater Vancouver

Telephone: 604-731-4951 Website: fsgv.ca

• Family law information, counselling, and support services

Grandparents Raising Grandchildren Support Line

Telephone: 604-558-4740 Toll-free: 1-855-474-9777

• Phone line staffed by advocates trained in advocacy, social work, family law, and government services related to kinship caregiving

Representative for Children and Youth

Telephone (youth): 1-800-476-3933 Children's Help Line: 310-1234 Website: rcybc.ca

• Assists children and youth understand their rights and advocates on their behalf

RISE Women's Legal Centre

Telephone: 236-317-9000 Website: womenslegalcentre.ca

• Provides legal services to women in family law and immigration applications for permanent residence on humanitarian and compassionate grounds

• Summary advice, court preparation, and legal representation

Sources Legal Resource Center

Telephone: 778-565-3638 Website: sourcesbc.ca/our-services/legal-resource-centre

• Legal information, resources, and advice in family law, as well as immigration, criminal and civil matters

• Wide variety of counselling and support services

• In Surrey

Society for Children and Youth

Telephone: 778-657-5544 Toll-Free: 1-877-462-0037 Website: www.scyofbc.org [10] Email: cylc@scyofbc.org

• Can provide free legal advice to children and youth on family law issues and more

• Operate a drop-in clinic once a month

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References

[1] http://www.familylaw.lss.bc.ca/help/who_telephoneAdviceLine.php
[2] http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legal-help/jac/how-to-find-us/vancouver
[3] http://www.clicklaw.bc.ca/helpmap/service/1019
[4] http://www.familylaw.lss.bc.ca
[5] http://www.mediatebc.com/familymediation.aspx
[6] http://www.fmep.gov.bc.ca
[7] http://www.anndavis.org
[8] http://www.northshorewomen.ca
[9] http://menbc.webs.com
[10] http://www.scyofbc.org

III. Residential Tenancy

TRAC Tenant Resource & Advisory Centre

- Provides tenants with legal education and information
- Provides free representation to tenants at dispute resolution hearings in limited circumstances
- No income cutoff, priority to those who cannot afford a lawyer
- Lower Mainland only

Online	www.tenants.bc.ca [1]
Phone	604-255-0546 Toll-Free: 1-800-665-1185

Residential Tenancy Branch

Provides landlord and tenants with information and dispute resolution services

Online	www.rto.gov.bc.ca [2]
Phone	604-660-1020 Toll-Free: 1-800-665-8779

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References

[1] http://www.tenants.bc.ca
[2] http://www.rto.gov.bc.ca

IV. Human Rights

BC Human Rights Clinic

• Operated by CLAS

• Short service clinic has appointments for a 30 minute appointment with a human rights lawyer/advocate.

• Legal services program provides summary advice, legal assistance, or representation to complainants who apply for representation and qualify for assistance.

• You should apply within 30 days of the Tribunal accepting the complaint for filing.

Online	www.bchrc.net [1]
Phone	604-622-1100 Toll-Free: 1-855-685-6222

Canadian Human Rights Commission

- Administers the *Canadian Human Rights Act*
- Ensures compliance with the *Employment Equity Act*
- Information about how to make a formal complaint

Online	www.chrc-ccpd.ca [2]
Phone	Toll-Free: 1-888-214-1090

BC Human Rights Tribunal

Deals with human rights complaints that arise in British Columbia and are covered by the *Human Rights Code*

Online	www.bchrt.bc.ca [3]
Phone	604-775-2000 Toll-Free: 1-888-440-8844

BC Civil Liberties Association

Telephone: 604-630-4986 Website: bccla.org

• Assists the general public complaints against police officers and infringements on freedom of speech

• Provides a Legal Advocate Support Line which can provide legal information, referrals, and consultations for legal advocates working with clients facing civil liberties infringements

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References

[1] http://www.bchrc.net
[2] http://www.chrc-ccpd.ca
[3] http://www.bchrt.bc.ca

V. Wills & Estates

Access Pro Bono (Wills Clinic Project)

Draft and execute simple wills and representation agreements for low-income seniors and people with terminal illnesses

Online	www.accessprobono.ca/willsclinic [1]
Phone	604-424-9600

Society of Notaries Public of British Columbia

Wills, power of attorneys, representation agreements and advance directives

Online	www.notaries.bc.ca [2]
Phone	604-681-4516

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References

[1] http://www.accessprobono.ca/willsclinic
[2] http://www.notaries.bc.ca

VI. Immigration & Refugee

Immigration Services Society of BC

- Support services for immigrants and refugees
- Settlement, education and employment services

Online	www.issbc.org [1]
Phone	604-684-2561

MOSAIC

Website: mosaicbc.org

• Offers settlement information and services for immigrants

• Legal advocacy program for low-income immigrants (604-254-9626)

• Interpretation and translation services (Interpretation: 604-254-8022 Translation: 604-254-0469)

Immigration, Refugees, and Citizenship Canada Client Support Centre

Telephone: 1-888-242-2100

• Pre-recorded information about immigration programs, live chat with agents for general questions and specific questions about your case

Settlement Orientation Service

Telephone: 604-255-1881 Website: www.sosbc.ca [2]

• Supports refugee claimants throughout the process, including assistance filling out application forms, applying for Legal Aid, using the healthcare system, cultural orientation, and other general settlement services

Vancouver Association for Survivors of Torture

- Provide clinical and support services for survivors of torture, trauma and political violence
- Refer to other agencies and professionals

Online	www.vast-vancouver.ca [3]
Phone	604-299-3539 Toll-Free: 1-866-393-3133

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References

[1] http://www.issbc.org
[2] http://www.sosbc.ca
[3] http://www.vast-vancouver.ca

VII. Disability

Disability Alliance BC (Advocacy Access)

- Free one-to-one assistance with provincial and federal disability benefits
- Advocacy service
- Help to apply for benefits or appeal the denial of benefits

Online	www.disabilityalliancebc.org [1]
Phone	604-872-1278 Toll-Free: 1-800-663-1270

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References

[1] http://www.disabilityalliancebc.org

VIII. Employment

Employment Standards Branch

Administers the *Employment Standards Act* and *Regulation*

Online	www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards [1]
Phone	Toll-Free: 1-800-663-3316

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References

[1] http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards

IX. Debt

BankruptcyCanada.com

Bankruptcy information

Online	bankruptcycanada.com [1]

Credit Counseling Society

- Free, confidential credit counselling
- Debt consolidation, repayment and settlement
- Money management and budgeting assistance
- Information and referrals

Online	www.nomoredebts.org [2]
Phone	604-527-8999 Toll-Free: 1-888-527-8999

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References

[1] http://bankruptcycanada.com
[2] http://www.nomoredebts.org

X. Aboriginal

UBC First Nations Legal Clinic

Legal services for disadvantaged members of the First Nations Community

Online	www.allard.ubc.ca/iclc/indigenous-community-legal-clinic [1]
Phone	604-684-7334

Native Courtworker and Counselling Association of British Columbia

Services for aboriginal people in conflict with the law

Online	www.nccabc.ca [2]
Phone	604-985-5355 Toll-Free: 1-877-811-1190

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References

[1] http://www.allard.ubc.ca/iclc/indigenous-community-legal-clinic
[2] http://www.nccabc.ca

XI. Police Complaints

Office of the Police Complaint Commissioner

Complaints against Municipal Police

Online	www.opcc.bc.ca [1]
Phone	250-356-7458 Toll-Free: 1-877-999-8707

Civilian Review and Complaints Commission for the RCMP

Complaints against the RCMP

Online	www.crcc-ccetp.gc.ca [2]
Phone	Toll-Free: 1-800-665-6878 TTY: 1-866-432-5837

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References

[1] http://www.opcc.bc.ca
[2] https://www.crcc-ccetp.gc.ca

XII. Chinese Language

S.U.C.C.E.S.S.

- Booking appointments at the LSLAP Chinatown clinic
- Service in Mandarin and Cantonese

Online	www.successbc.ca [1]
Phone	604-684-1628

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References

[1] http://www.successbc.ca

XIII. Others

The Law Society of British Columbia

Considers all complaints about lawyer conduct or competency

Online	www.lawsociety.bc.ca [1]
Phone	604-669-2533 Toll-Free: 1-800-903-5300

VictimLinkBC

- Provides information and referral services to all victims of crime
- Immediate crisis support to victims of family and sexual violence

Online	www.victimlinkbc.ca [2]
Phone	Toll-Free: 1-800-563-0808

The Vancouver Police Department (Victim Services)

- Provide crime victims, witnesses and their family members with professional, supportive and timely assistance
- Emotional support, information and assistance with Victim Impact Statements and Crime Victim Assistance forms

Online	vancouver.ca/police/crime-prevention/victim-services [3]
Phone	604-717-2737

Crisis Intervention and Suicide Prevention Centre of BC (Crisis Centre)

- Emotional support
- Immediate response

Online	www.crisiscentre.bc.ca [4]
Phone	**Crisis Line** 604-872-3311 Toll-Free: 1-866-661-3311 **Suicide Line** 1-800-SUICIDE (784-2433)

Vital Statistics Agency

Registers all births, marriages, deaths and changes of name

Online	www.vs.gov.bc.ca [5]
Phone	250-952-2681 Toll-Free: 1-888-876-1633

Community Legal Assistance Society (Mental Health Law Program)

Legal advice and representation for those who have been involuntarily detained pursuant to the B.C. *Mental Health Act* or those who have custody or conditional discharge orders pursuant to the mental disorder provisions of the *Criminal Code of Canada*

Online	www.clasbc.net/mental_health_law_program [6]
Phone	604-685-4325 Toll-Free: 1-888-685-6222

Alma Mater Society of the University of British Columbia (Advocacy Office)

- Provides confidential assistance and representation for undergraduate students involved in formal conflict with the University
- Help with academic appeals, student discipline cases and appeals, housing appeals, parking disputes and library fine appeals

Online	www.ams.ubc.ca/services/advocacy-ombuds/advocacy-office/ [7]
Phone	604-822-9855

Brydges Line

Telephone: 1 (866) 458-5500 • Telephone line for individuals to speak to lawyer if they are arrested, detained, and under investigation (but not charged)

West Coast Prison Justice Society

Telephone: 1-888-839-8889 (call for a referral)

• Protects prisoners' rights

• Assists with issues like solitary confinement, involuntary transfers, parole suspensions, disciplinary hearings, human rights, and health care

Personal Injury Resource Centre

Website: www.murphybattista.com/injury-resources/personal-injury-resource-centre [8]

• Offers a range of services for injured individuals, including free legal advice at monthly appointments

Better Business Bureau

Telephone: 604-682-2711 Website: www.bbb.org [9]

• Can file complaints against businesses

• Provides resources for consumer education

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References

[1] http://www.lawsociety.bc.ca
[2] http://www.victimlinkbc.ca
[3] http://vancouver.ca/police/crime-prevention/victim-services
[4] http://www.crisiscentre.bc.ca
[5] http://www.vs.gov.bc.ca
[6] http://www.clasbc.net/mental_health_law_program
[7] http://www.ams.ubc.ca/services/advocacy-ombuds/advocacy-office/
[8] http://www.murphybattista.com/injury-resources/personal-injury-resource-centre
[9] http://www.bbb.org