Dial-A-Law

A Library of Legal Information from the Canadian Bar Association, BC Branch

Contents

Family Law

Introduction to Family Law (Script 114)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is family law?

Family law is the area of the law that deals with family issues. Most of the time, these issues involve couples that have been in a married or unmarried relationship and have now separated. Family issues can also involve people who have never been in a long-term relationship, like a couple who never dated but have a child together, and people who have never been in a romantic relationship at all, like a grandparent who would like to have time with or care for a grandchild.

It's important to know that in British Columbia, family law applies to people in same-sex relationships exactly as it does to people in opposite-sex relationships. There is no legal difference between heterosexual relationships and gay and lesbian relationships.

This script provides an introduction to family law, the courts that deal with family law issues and the laws about family law issues. It ends with definitions for some common legal words and phrases used in family law.

Common family law problems

When a couple separates they have a lot of decisions to make:

- Where will the child live? How will decisions about their care be made? How will the parents share the children's time?
- Whether the child is entitled to ongoing financial support from a parent? If so, which parent should pay child support and in what amount?
- Does a spouse need financial support from the other spouse? Can the other spouse afford to pay it, and if so, in what amount and for how long?
- Who will stay in the family home? Can everybody still live together, or does someone need to move out?
- How will property divided? How will responsibility for debts be shared?

Different rules for different relationships

Family law deals with all of these decisions and more. However, not every couple needs to deal with all of these issues. The decisions a couple has to make and the law that applies changes depending on the type of relationship the couple is in. Family law talks about four types of relationship:

- **Married Spouses:** Married couples are legally married and require a divorce to end their legal relationship.
- **Unmarried Spouses:** Unmarried spouses, also called common-law spouses, have lived together in a "marriage-like relationship" for at least two years for claims about property, or for less than two years if the couple has had a child together, for claims about spousal support. Unmarried spouses don't require a divorce to end their legal relationship. Their relationship ends is over when they separate.
- **Parents:** Parents have had a child together and can be married spouses, unmarried spouses, in a dating relationship or not in a relationship with each other at all. Parents can also be people who have had a child by adoption or assisted reproduction, or people who have helped a couple to have a child by assisted reproduction, by donating eggs or sperm, or by being a surrogate mother.
- **Child's Caregivers:** People who have a significant role in a child's life but aren't the child's parents.

Family law legislation

Family law involves two different laws that apply depending on the type of relationship:

- ***Divorce Act***: The *Divorce Act* is a law of the government of Canada and applies throughout Canada. The *Divorce Act* only applies to people who are married to each other or who used to be married to each other.
- ***Family Law Act***: The *Family Law Act* is a law of British Columbia and applies to married spouses, unmarried spouses, parents and child's caregivers. Not all of the *Family Law Act* applies to all of these relationships. The parts that talk about child support and the care of the child apply to everyone. The parts that talk about spousal support only apply to married spouses and all unmarried spouses. The parts that talk about dividing property and debt only apply to married spouses and to unmarried spouses who have lived together for at least two years.

This chart shows which law applies to whom and for what purpose:

	Married Spouses	***Unmarried Spouses***	***Parents***	***Child's Caregivers***
Divorce	√			
Custody (*Divorce Act*)	√			
Access (*Divorce Act*)	√			
Guardianship (*Family Law Act*)	√	√	√	√
Parental Responsibilities and Parenting Time (*Family Law Act*)	√	√	√	√
Contact with a Child (*Family Law Act*)	√	√	√	√
Child Support (*Divorce Act*)	√			
Child Support (*Family Law Act*)	√	√	√	
Spousal Support (*Divorce Act*)	√			
Spousal Support (*Family Law Act*)	√	√		
Property and Debt (*Family Law Act*)	√	√		
Protection Orders (*Family Law Act*)	√	√	√	√

Resolving family law issues

Family law issues can be resolved through negotiation, mediation, collaborative settlement processes and arbitration without going to court. If a couple can't resolve these problems themselves, they may have to go to court to have a judge resolve their problems for them.

Going to court

There are two courts that deal with family law issues, Family Court, a division of the Provincial Court, and the Supreme Court. Family Court doesn't charge court fees and its rules are simplified and easy to understand. The rules of the Supreme Court can be very complicated and the court charges fees to file certain documents and schedule certain hearings. However, the Supreme Court can deal with many family law issues that Family Court can't:

- **Family Court**: Family Court can deal with issues about guardianship, child care, child support and spousal support. Family Court can only deal with issues under the *Family Law Act*.
- **Supreme Court**: The Supreme Court can deal with all of these issues as well as divorce and the division of property and debt between married spouses and unmarried spouses who have lived together for at least two years. The Supreme Court can deal with issues under both the *Divorce Act* and the *Family Law Act*.

	Supreme Court	***Family Court***
Family Law Act	√	√
Divorce Act	√	
Divorce	√	
Custody (*Divorce Act*)	√	
Guardianship (*Family Law Act*)	√	√
Access (*Divorce Act*)	√	√
Parental Responsibilitis and Parenting Time (*Family Law Act*)	√	√
Contact with a Child (*Family Law Act*)	√	√
Child Support	√	√
Spousal Support	√	√
Property and Debt	√	
Protection Orders	√	√

Family law words and phrases

Please review the following definitions of some common words ad phrases before moving to the other scripts on family law.

- **Access**: A parent's time with a child, usually fixed by a schedule. Access is a term used in the federal *Divorce Act*.
- **Application**: A formal request for a court order.
- **Arbitration**: A process in which family law issues are resolved by a neutral arbitrator after a formal hearing.
- **Case Conference**: An informal meeting with a judge to review the issues in a court case and explore options for settlement. In Family Court, a "Family Case Conference." In the Supreme Court, a "Judicial Case Conference."
- **Child**: Any person under the age of 19, the age of majority in British Columbia. May include an adult child for the purposes of child support. The *Divorce Act* uses the term "child of the marriage."
- **Child Support**: Money paid by one parent to the other for the financial support of their child.
- **Child Support Guidelines**: A federal regulation, in force throughout Canada except Quebec, that talks about how child support is calculated.
- **Collaborative Settlement Processes**: A kind of negotiation in which the parties and their lawyers sign an agreement to do everything they can to resolve family law issues without going to court, often with the assistance of counsellors, child psychologists and financial experts.
- **Consent Order**: An order that the parties to a court case agree the court should make.
- **Contact with a Child**: The time a person who is not a guardian has with a child, usually fixed by a schedule. Contact is a term used in the provincial *Family Law Act*.
- **Court Case**: A court proceeding between two or more people. Also called an "action" or a "lawsuit".
- **Custody**: A parent's right to have the child live in his or her home and to make decisions about the care of the child. Custody is a terms used in the *Divorce Act*.
- **Divorce**: The legal end of a marriage by a court order.
- ***Divorce Act***: A federal law that talks about divorce, custody of and access, child support and spousal support.
- **Excluded Property**: Property owned by a spouse before the spouses began to live together or married, plus certain kinds of property received afterwards like gifts and inheritances, that is excluded from family property and normally remains the property of the owning spouse. Excluded property is a term used in the *Family Law Act*.
- **Family Debt**: Debt incurred by either or both spouses during their relationship, normally shared between both spouses. Family debt is a term used in the *Family Law Act*.
- **Family Property**: Property owned by one or both either or both spouses at the end of a relationship, normally shared between both spouses. Family property is a term used in the *Family Law Act*.
- **Family Court**: A division of the Provincial Court of British Columbia which deals with family law issues under the *Family Law Act*.
- **Family Justice Counsellor**: A Family Court staff member trained in mediation and available to help with issues about the care and control of the child, child support and spousal support.
- ***Family Law Act***: A provincial law that talks about guardianship, parenting arrangements, contact with a child, child support, spousal support and the division of property and debt.
- **Guardianship**: The right to make parenting decisions for a child and the right to get information from and give instructions to the important people involved in a child's life, such as teachers, doctors, counsellors and coaches. Guardianship is a term used in the *Family Law Act*.
- **Hearing**: A formal meeting with a judge for a conference, to argue an application or for a trial.
- **Interim Application**: An application for an interim order.

- **Interim Order**: An order made after a court case has begun but before it has ended by a trial or a settlement. Interim orders are temporary and last until they are changed by another interim order or until trial or settlement.
- **Litigation**: A process for resolving a dispute through the court system, which starts with service of the court forms stating the court case and describing the legal claims and concludes with the abandonment of the court by the person who started it, a settlement or a trial.
- **Married Spouse**: Someone who has been legally married to someone else.
- **Mediation**: A voluntary, formal bargaining process in which the parties try to resolve a family law dispute with the assistance of a neutral mediator.
- **Negotiation**: A voluntary, informal process in which the parties try to resolve a family law dispute by bargaining with each other.
- **Order**: The mandatory direction of a judge.
- **Parent**: Someone who is the natural parent of a child, the adopted parent of a child a parent by assisted reproduction, or, in certain circumstances, a donor of eggs or sperm and a surrogate mother.
- **Parental Responsibilities**: Decisions about the upbringing and care of a child made by the child's guardians. Parental responsibilities is a term used in the *Family Law Act*.
- **Parenting Arrangements**: The arrangements made in an order or agreement for parental responsibilities and parenting time. Parenting arrangements is a term used in the *Family Law Act*.
- **Parenting Time**: A guardian's time with a child, usually fixed by a schedule. Parenting time is a term used in the *Family Law Act*.
- **Payor**: Someone who is obliged to pay child support or spousal support to someone else, the "recipient," as a result of a court order or an agreement.
- **Property**: Anything that has value, such as a house, a bank account, a company, clothing, the contents of the family home and any other asset.
- **Protection Order**: An order restricting a person's behaviour for the protection of someone else. Protection order is a term used in the *Family Law Act*.
- **Separation**: The breakdown of a romantic relationship. Separation usually means that a couple have moved out and are living apart from each other, but it is possible to be separated and while continuing to live under the same roof.
- **Separation Agreement**: A written agreement recording a settlement of some or all of the issues in a family law dispute.
- **Settlement**: The resolution of a legal dispute on terms agreed to by the parties. May be recorded in a written agreement or in a consent order.
- **Spousal Support**: Money paid by one spouse to the other, the "recipient", to help pay for that spouse's living expenses.
- **Spousal Support Advisory Guidelines**: An academic paper which describes mathematical formulas that can be used to calculate the amount of spousal support payable, when a spouse is entitled to receive it, and the length of time it should be paid for.
- **Spouse**: A married spouse, under the *Divorce Act* the *Family Law Act*, or an unmarried spouse, under the *Family Law Act*.
- **Stepparent**: Someone who is the spouse of a parent.
- **Supreme Court**: British Columbia's superior court which deals with family law issues under the common law, the *Family Relations Act* and the *Divorce Act*.
- **Recipient**: Someone who is entitled to receive child support or spousal support from someone else, the "payor," as a result of a court order or written agreement.
- **Trial**: The resolution of a court case by presenting evidence and argument to a judge.

- **Unmarried Spouse**: A person who has lived with someone else in a marriage-like relationship for at least two years. For the purpose of claims for spousal support, includes people who have lived together for less than two years and have had a child together.

More information:

- See other Dial-A-Law scripts in this family series for more detail.
- See also the wikibook *JP Boyd on Family Law*, from Courthouse Libraries BC, which provides comprehensive information about family law, including links to the rules of court and court forms, at JP Boyd on Family Law.
- Check the *Family Law Act* available at www.bclaws.ca [1].
- Also check the *Divorce Act* at http://laws-lois.justice.gc.ca.

[updated February 2015]

References

[1] http://www.bclaws.ca
[2] http://www.dialalaw.org

Family Court (Script 110)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses ways to resolve family law disputes without going to court.

How to avoid going to court?

All sorts of people can have family law issues, including couples who are married, couples who aren't married, people who have had a child together and anyone, such as a relative, who has an interest in a child. Most family law issues involve separating parents.

When a couple decides to separate, they usually have to make a number of decisions. Where should the child live most of the time? What will the parenting schedule look like? Should support be paid, and if so, to whom and in what amount? Who should stay in the family home? How will the family property and family debt be divided?

Many people believe that going to court is the only way to resolve these issues. However, if the couple can work together they may be able to avoid court altogether. Going to court is sometimes unavoidable, which might be the case if someone was threatening to hide property, be violent or take the child out of town. Apart from urgent problems like these, most family law issues can be resolved out of court.

People who can work together despite their separation can try to negotiate a settlement between them. If this won't work, the most common options other are:

- Mediation
- Collaborative settlement processes

What is "mediation"?

In mediation, parties will work together to identify and resolve the problems arising from the separation with the help of a neutral third party, a mediator. Usually the mediator is a lawyer or another trained professional. A lawyer mediator, called a Family Law Mediator, cannot provide independent legal advice to either party, but can provide some general information about family law and facilitate the settlement process.

The mediator will listen to what's important to each party, ask for their opinions on the issues, and help them to come to their own solutions for the future. If parties have a child, the mediator will help them to make decisions that are in the child's best interest. The mediator won't make decisions for the parties; the mediator helps them to make their own decisions.

How to prepare for mediation?

Before hiring a mediator, each party may wish to get independent legal advice from a lawyer. The lawyer can give an idea about the range of potential outcomes, explain what to expect at the mediation and suggest what documents may be useful to take to the first session.

How much does mediation cost?

Mediation is usually less expensive than going to court with a lawyer. When parties first meet with a mediator, the mediator will discuss the costs and the process. Mediators usually charge an hourly rate and people usually split the mediator's costs between them.

How long does mediation take?

Mediation meetings are normally two to six hours long. There is usually more than one meeting, depending on how many issues need to be resolved and how complicated those issues are. Sometimes the mediator will meet with one or each party separately. The mediator may also give parties extra tasks to be performed between meetings, usually to gather additional documents and information.

Who prepares the agreement?

When the mediator is a lawyer, the mediator will usually prepare a written agreement describing the settlement reached through mediation. When the mediator is not a lawyer, a party's lawyer will usually prepare the agreement. Regardless of who writes the agreement, each party needs to get an independent legal advice from a lawyer before they sign the agreement. It is very important to understand exactly what the agreement means and how it affects each party's legal rights and obligations.

What are "collaborative settlement processes"?

Collaborative settlement processes are a kind of negotiation where the parties work with lawyers and agree that they will do everything possible to reach a settlement without going to court. The parties and the lawyers work together to find a settlement. Specialists like counsellors, child psychologists and financial experts may be used to help find a settlement. Collaborative processes are centered on parties' needs and their child's needs. Communications are usually open and transparent.

How long do collaborative processes take to resolve matters?

More than one meeting will be required to come to an agreement on all issues. The number of meetings required will depend on how many issues need to be resolved and how complicated they are. Occasionally an agreement is reached after only one meeting between the parties and their lawyers.

Is an agreement reached through mediation or collaboration binding?

The agreement is a binding legal contract and can be enforced by the court.

Can the agreement be changed?

Separation agreements can only be changed if parties agree or if the court sets all or just part of the agreement aside. If parties agree to change the agreement or talk about changing the agreement, they can go back to mediation or a collaborative process to discuss the potential changes. Alternatively, they can go to court. Although the court will generally be reluctant to change an agreement that was fairly negotiated, the court may make an order on different terms if there was an important change in circumstances after the agreement was signed that wasn't expected when the agreement was negotiated.

When is mediation or collaborative process not appropriate?

While these are very good ways of resolving family law issues, they may not be appropriate if there has been family violence or child abuse, or if the other party won't participate fairly during the process.

How to find a qualified and experienced mediator?

- For a Family Law Mediator, phone the Lawyer Referral Service at 604.687.3221 in Vancouver or 1.800.663.1919 toll-free elsewhere in BC. A Family Law Mediator is especially useful if one of the family law issues is dividing up the assets and property.
- Call Family Mediation Canada at 1.877.362.2005 (toll-free) and ask for a list of the closest family mediators. Their website is www.fmc.ca [1].
- Contact the Mediate BC Society, which maintains a list of family mediators. Call 1.888.713.0433 or click on www.mediatebc.com [2].
- Family Justice Counsellors may be able to help at no cost. Family Justice Counsellors typically help people with custody, access, guardianship or child support disputes in Provincial Court. Phone 604.660.2421 in the lower mainland, 250.387.6121 in Greater Victoria or toll-free 1.800.663.7867 elsewhere in BC, and ask to speak with a Family Justice Counsellor in the nearest Family Justice Centre. Also see the Family Justice website at www.justicebc.ca/en/fam/ [3].

How to find a lawyer trained in collaborative settlement processes?

- Phone the Lawyer Referral Service at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in BC.
- Visit BC Collaborative Roster Society's website at www.bccollaborativerostersociety.com [4] and search for collaborative lawyers or other collaborative professionals nearby.
- Visit Collaborative Divorce Vancouver's website at www.collaborativedivorcebc.org [5] for the name of a member lawyer, as well as for names of other collaborative professionals. All members of the association have received both collaborative family law and mediation training.

- In the lower mainland, visit Collaborative Association's website at www.nocourt.net [6] for more information and list of professionals.
- In Victoria, call 250.704.2600 or go to www.collaborativefamilylawgroup.com [7] for information on the Collaborative Family Law Group of Victoria and the name of a member lawyer.
- In Kelowna and the Okanagan area, check the Okanagan Collaborative Family Law Group at www.collaborativefamilylaw.ca [8].
- In West Kootenays, call 1.866.926.1881 and visit www.resolutionplace.ca [9] or www.nocourt.ca [8] for more information on Resolution Place and the Collaborative Law Group of the Nelson.

What questions should parties ask the mediator or collaborative lawyer?

When parties have the names of some mediators or collaborative lawyers, they may want to ask each of them the following questions before deciding whom to hire:

- Does the person belong to any professional organizations for mediators or collaborative family law lawyers?
- Is the person a lawyer or a mental health professional?
- What kind of training has the person received, and how long have they practiced as a mediator or collaborative lawyer?
- What kinds of mediation or collaborative family law issues do they handle? (Some mediators, for example, may only deal with child custody and access disputes. Other only deal with financial and/or property issues.)
- How much will it cost?

[updated February 2015]

References

[1] http://www.fmc.ca
[2] http://www.mediatebc.com
[3] http://www.justicebc.ca/en/fam/
[4] http://www.bccollaborativerostersociety.com
[5] http://www.collaborativedivorcebc.org
[6] http://www.nocourt.net
[7] http://www.collaborativefamilylawgroup.com
[8] http://www.nocourt.ca
[9] http://www.resolutionplace.ca
[10] http://www.dialalaw.org

Mediation and Collaborative Settlement Processes (Script 111)

This script discusses ways to resolve family law disputes without going to court.

How can you avoid going to court?

All sorts of people can have family law disputes, including couples who are married, couples who aren't married, people who have had a child together and anyone, such as a relative, who has an interest in a child. Most family law disputes involve separating parents.

When a couple decides to separate, they usually have to make a number of decisions. Where should the children live most of the time? What will the parenting schedule look like? Should support be paid, and if so, to whom and in what amount? Who should stay in the family home? How will the family property and family debt be divided?

Many people believe that going to court is the only way to answer these questions. However, if the couple can work together they may be able to avoid court altogether. Going to court is sometimes unavoidable, which might be the case if someone was threatening to hide property, be violent or take the children out of town. Apart from urgent problems like these, most family law disputes can be resolved out of court.

People who can work together despite their separation can try to negotiate a settlement between them. If this won't work, the most common options other are:

- Mediation
- Collaborative settlement processes

What is "mediation"?

In mediation, you and the other party will work together to identify and resolve the problems arising from your separation with the help of a neutral third party, a mediator. Usually the mediator is a lawyer or another trained professional. If you see a lawyer mediator (called a Family Law Mediator), he or she cannot give you individual legal advice, but can give you general information about family law.

The mediator will listen to what's important to each of you, ask for your opinions on the issues, and help the two of you come to your own solutions for the future. If you have children, the mediator will help you make decisions that are best for them. The mediator won't make decisions for you; the mediator helps you to make your own decisions.

How do you prepare for mediation?

Before you hire a mediator, you and your spouse may wish to meet separately with your own lawyers, who can give you an idea about the range of potential outcomes and will tell you what to expect at the mediation and what documents you may need to take with you to the first session.

How much does mediation cost?

Mediation is usually a lot less expensive than going to court if you go to court with a lawyer. When you first meet with a mediator, the mediator will discuss the costs with you and your spouse. Mediators usually charge an hourly rate and people usually split the mediator's costs between them.

How long does mediation take?

Mediation meetings are normally two to six hours long. There is usually more than one meeting, depending on how many issues need to be resolved and how complicated those issues are. Sometimes the mediator will meet with one or each of you separately. The mediator may also give you extra tasks to be performed between meetings, usually to gather additional documents and information.

Who prepares the agreement?

When the mediator is a lawyer, the mediator will usually prepare a written agreement describing the settlement reached through mediation. When the mediator is not a lawyer, your lawyer will prepare the agreement. Regardless of who writes the agreement, you need to get advice from a lawyer before you sign it. It is very important that you understand exactly what the agreement means and how it affects your legal rights and obligations.

What are "collaborative settlement processes"?

Collaborative settlement processes are a kind of negotiation where the parties work with lawyers and agree that they will do everything possible to reach a settlement without going to court. The parties and the lawyers work together to find a settlement. Specialists like counsellors, child psychologists and financial experts may be used to help find a settlement. Collaborative processes are centered on your needs and your children's needs, and communications are open and transparent.

How long do collaborative processes take to resolve matters?

More than one meeting will be required to come to an agreement on all issues. The number of meetings required will depend on how many issues need to be resolved and how complicated they are. Occasionally an agreement is reached after only one meeting between the parties and their lawyers.

Is an agreement reached through mediation or collaboration binding?

Your agreement is a legal contract and binding on you and the other party and can be enforced by the court.

Can the agreement be changed?

Separation agreements can only be changed if you and the other party agree or if the court sets all or just part of the agreement aside. If you agree to change the agreement or talk about changing the agreement, you and your spouse can go

back to mediation or a collaborative process to discuss the potential changes. Alternatively, you can go to court. Although the court will generally be reluctant to change an agreement that was fairly negotiated, the court may make an order on different terms if there was an important change in circumstances after the agreement was signed that wasn't expected when the agreement was negotiated.

When are mediation or collaborative processes not appropriate?

While these are very good ways of resolving family law issues, they may not be appropriate if there has been family violence or child abuse, or if the other party won't participate fairly during the process.

How can you find a qualified and experienced mediator?

- For a Family Law Mediator, phone the Lawyer Referral Service at 604.687.3221 in Vancouver or 1.800.663.1919 toll-free elsewhere in BC. A Family Law Mediator is especially useful if one of your issues is dividing up the assets and property.
- Call Family Mediation Canada at 1.877.362.2005 (toll-free) and ask for a list of family mediators in your area. Their website is www.fmc.ca [1].
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What questions should you ask the mediator or collaborative lawyer?

When you have the names of some mediators or collaborative lawyers, you may want to ask each of them the following questions before deciding whom to hire:

- Does the person belong to any professional organizations for mediators or collaborative family law lawyers?
- Is the person a lawyer or a mental health professional?
- What kind of training has the person received, and how long have they practiced as a mediator or collaborative lawyer?
- What kinds of mediation or collaborative family law issues do they handle? (Some mediators, for example, may only deal with child custody and access disputes. If you want to mediate financial and/or property issues, you'll want a Family Law Mediator who has training and experience in that field.)
- How much will it cost?

[updated October 2014]

References

[1] http://www.fmc.ca
[2] http://www.mediatebc.com
[3] http://www.justicebc.ca/en/fam/
[4] http://www.bccollaborativerostersociety.com
[5] http://www.collaborativedivorcebc.org
[6] http://www.nocourt.net
[7] http://www.collaborativefamilylawgroup.com
[8] http://www.collaborativefamilylaw.ca
[9] http://www.resolutionplace.ca
[10] http://www.nocourt.ca
[11] http://www.dialalaw.org

Applying for an Interim Order in a Family Law Case in the Supreme Court (Script 112)

This script explains why people may need an interim order in a family law case in the British Columbia Supreme Court, how to apply for an interim order, and what to do before the hearing. The reference to "applicant" in this script apply to a party asking for a court order.

At the end of the script, other information sources with much more detail are listed, including where to get the Supreme Court Rules and Forms.

What is an interim order in a family law case in the Supreme Court?

People involved in a family law case will often need an “interim order” after the case has begun but before it has wrapped up. Interim orders are temporary orders that are only meant to last until another interim order is made, or until the case is resolved with a final order or a settlement. Interim orders can deal with urgent problems that can’t wait, such as stopping someone from disposing of property or stopping the child from being taken out of town, or they can deal with questions about how the family will function until the case is resolved, such as where the child will live, whether support should be paid and if so to whom and in what amount.

Applying for an interim order

Rule 10-6 of the Supreme Court Family Rules describes how to apply for an interim order, called making an “interim application.” One party (the “applicant”) starts the process by preparing a Notice of Application using Form F31, found in Appendix A of the Rules. This form tells the judge the sort of order the applicant is looking for, explains why the judge should make that order, says what materials the applicant will be showing to the judge when making the application, and sets the day when the application will be heard.

The applicant will also prepare at least one affidavit, using Form F30. An affidavit is a written statement of the facts important to the application that is signed under oath before a commissioner for taking oaths, like a lawyer, court clerk or notary public. The affidavit gives the judge the information he or she will need to make a decision about the application.

Unless the application is made giving without notice to the other party (the “application respondent”) or the application is agreed to, both the Notice of Application and affidavit must be sent to the application respondent. Rule 6-2 says how these documents are sent to the other side, a process called “ordinary service.” Most of the time, ordinary service is accomplished by sending these materials by mail to the application respondent’s address for service, by fax to the application respondent’s fax number for service or by email to the application respondent’s email address for service.

Picking the hearing date

The applicant must set the date when the application will be heard in the Notice of Application. Except for urgent applications, the very soonest an application can be heard is eight business days (business days are days then court is open for business, and don't include weekends and holidays) from the date the application materials are sent to the application respondent. The applicant gets to pick the day of the hearing unless the hearing will take two hours or longer, in which case the applicant must schedule the hearing date with the court registry staff. Even if the application will take less than two hours, the applicant should contact the court registry to find out whether the day she or he has picked is a day when interim applications in family law matters are heard. Some court registries only have family law chambers on certain days.

Responding to the application

The application respondent has five business days after the day of ordinary service to file his or her Application Response and supporting affidavits in court and send them, by ordinary service, to the applicant. The Application Response says which of the orders sought in the application are agreed to and which are opposed, and why the court shouldn't make the orders that are opposed.

Replying to the application respondent's response

The applicant is allowed to prepare one more affidavit to address any important points raised in the application respondent's materials. This affidavit must be filed in court and sent to the application respondent by ordinary service before 4:00 p.m. one business day before the date set for the hearing of the application.

The Application Record

The applicant must prepare an Application Record for the hearing. An Application Record is a binder containing the following documents, separated by tabbed pages:

1. the Notice of Application,
2. the Application Response,
3. all of the affidavits that the applicant will show to the judge, listed in his or her Application plus any new affidavits prepared in response to the application respondent's materials, and
4. all of the affidavits that the application respondent will show to the judge, listed in his or her Application Response.

(Any kind of bound format will do, but it's usually easiest to put these documents into an ordinary three-ring binder.) The Application Record must begin with an index that says what document is at each tab.

The applicant must file the Application Record, along with an extra copy of the Notice of Application, in court and send a copy of the index on the application respondent by ordinary service before 4:00 p.m. one business day before the date set for the hearing of the application. (This is the same deadline as the deadline for the applicant to file any new affidavits prepared in response to the application respondent's materials.)

The applicant and the application respondent should prepare exact copies of the Application Record for themselves. The application respondent will make his or her copy using the index that was sent by the applicant.

The hearing

Judges and Masters hear interim applications in chambers, a public courtroom where all of the interim applications set for that day are heard. (Rule 10-6 says how interim applications are filed in court and schedule for a hearing in chambers. Rule 10-4 talks about how affidavits are prepared, and Rule 10-3 talks about the hearing process.)

On the day of the hearing, the applicant and the application respondent should go to the chambers courtroom at 9:45 a.m. and check in with the court clerk to say they are present in court. When the court clerk calls the name of the case, the applicant and application respondent (or their lawyers) should approach the table before the judge and the clerk and introduce themselves to the judge or master.

The applicant will start the hearing by describing the orders that he or she is asking for, listed in the Notice of Application, and by talking about the facts stated in the affidavits that explain why the judge should make those orders.

When the applicant has finished, the application respondent will summarize his or her Application Response, the facts stated in the affidavits that explain why the court shouldn't do as the applicant asks.

After the application respondent finishes, the applicant will be allowed to make a short reply to answer any new points raised by the application respondent.

It is important to know that the judge will only consider the facts that are stated in the affidavits. Neither the applicant nor the application respondent will be testifying during the hearing, and neither the applicant nor the application respondent will be able to ask each other questions. All of the evidence is provided through the affidavits in the Application Record.

The decision

After reviewing the documents and listening to the parties' arguments, the judge or master will make an order. The court may make all, some or none of the orders that the applicant is asking for.

The written order

If one of the parties is represented by a lawyer, the lawyer will prepare the written interim order from the judge's decision and file it in court. If neither party has a lawyer, a court clerk will prepare the written order.

It is important to know that the order is in force from the moment the judge or master gives his or her decision, not from the date the written order is prepared, and that the interim order will remain in force until the court makes another interim order on the same subject or until the family law case is resolved by a trial or a settlement.

Summary

The applicant begins an interim application by filing a Notice of Application and supporting affidavits in court and serving those materials on the application respondent at least eight business days before the date set for the hearing.

If the application respondent wants to object to any part of the application, he or she must file an Application Response and supporting affidavits in court and serve those materials on the applicant at least five business days after the date he or she was served with the applicant's materials.

By 4:00 p.m. on the business day that is one business day before the hearing date, the applicant must: file any reply affidavits in court and serve them on the application respondent; prepare the Application Record and file it in court; and, serve a copy of the Application Record index on the application respondent.

The applicant should check in with the court clerk by 9:45 a.m. on the day of the hearing. When the application is called, the judge or master will listen to each party explain why the orders sought by the applicant should or shouldn't be made. The judge or master will make a decision that will be prepared as a written order and filed in court.

The interim order is in force from the moment of the judge or master's decision and remains in force until another interim order is made or until the family law case is resolved.

More information

Much more information on this complicated topic is available on several websites, including:

- The Justice Education Society's "Court Tips for Parents" at www.courttips.ca [1] has instructional videos on presenting a case in chambers.
- The Vancouver Justice Access Centre's Self-Help and Information Services at www.supremecourtselfhelp.bc.ca [2]. Also, see the Court's home page at www.courts.gov.bc.ca/supreme_court [3] with a link to Court Services Online.
- The Legal Services Society's Family Law in British Columbia website at www.familylaw.lss.bc.ca [4] —see the self-help guides [5].
- The Justice Education Society at www.justiceeducation.ca [6]—click on "Self-Help", then on "Guidebooks for Representing Yourself in Supreme court".
- The wikibook *JP Boyd on Family Law*, from Courthouse Libraries BC, has a helpful description of the interim application process and links to the applicable rules and court forms.

[updated February 2015]

References

[1] http://www.courttips.ca
[2] http://www.supremecourtselfhelp.bc.ca
[3] http://www.courts.gov.bc.ca/supreme_court
[4] http://www.familylaw.lss.bc.ca
[5] http://www.familylaw.lss.bc.ca/guides/
[6] http://www.justiceeducation.ca
[7] http://www.dialalaw.org

Family Violence (Script 155)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is family violence?

Family violence is more than just beating a partner or child. It's the abuse of power to harm or control a person who was or is a family member. Family violence includes:

- physical abuse, such as pushing, hitting or forcible confinement, and attempts to physically abuse
- sexual abuse, and attempts to sexually abuse
- psychological or emotional abuse
- harassment, intimidation and coercion
- threats, including threats to other people and to pets
- stalking and following
- restricting a person's independence, including their financial independence
- damaging property

In the case of children, family violence includes being exposed to family violence, including indirect exposure to family violence

Although family violence is often directed by men at women, anyone can be abused.

Abuse is wrong

No one deserves to be abused. It's against the law for anyone to physically abuse, threaten or harass another person. A person who does these things to their partner (whether in a married relationship or an unmarried relationship) can be charged with assault.

What can you do about family violence in your relationship?

If it is an emergency, call the police. In addition to ensuring you are safe, the police can assess whether criminal charges may be necessary. They can also connect you to community services, which might include helping you find emergency shelter. You and your children might be able to stay in a nearby transition house for up to several weeks. This will help give you time to find a new place to live.

Whether it's an emergency or not, you can also apply to court for a "protection order" under the provincial *Family Law Act*. This is discussed below.

If it's not an emergency and you wish to stay in your relationship, you might want to think about getting some counselling for your partner or for both of you and your partner. Abuse is wrong; your partner does not have the right to abuse you. If he or she will not stop, you should think about separating. Contact information for a number of counselling services is provided below.

What if you're not sure about involving the police?

If you're afraid but don't know about calling the police, the following services can help:

- The Vancouver General Hospital operates a 24-hour Domestic Violence Service at Jim Pattison Pavilion – Emergency Department (920 West 10th Avenue, Vancouver). It offers clinical counselling services provided to women and men who have been abused by an intimate partner or family member. Services are free under the Medical Services Plan. Call 604.875.5458 or contact Social Worker Department at 604.875.5218.
- For more services, visit www.vch.ca/our_services/find_health_services/find_services [1] and search under "domestic violence".

What counselling or similar services are available to help?

Victims of family violence should seek help from community support workers, social workers or health care professionals to make sure that they have a plan for protecting their health and safety. Some people have coverage to pay for counselling through their extended health benefit plans or employee assistance programs. But some services are free and you don't have to pay. If going to counselling with your partner isn't an option, you may benefit from speaking with a counsellor on your own to determine the next steps for yourself and your children.

Some of the services available include the following:

- **VictimLINK** is a 24-hour victim's information and help line. Call toll-free 1.800.563.0808 from anywhere in BC to connect with a Stopping the Violence Counselling or Children Who Witness Abuse Counselling Program in your area.
- The **Battered Women's Support Services** offers support groups, advocacy, counselling over the telephone and much more. The intake and counselling line is 604.687.1867 and toll-free 1.855.867.1868, and their website is www.bwss.org [2].
- The **Vancouver & Lower Mainland Multicultural Family Support Services Society** offers counselling for victims of domestic violence and children who witness abuse, and can provide a translator for police or court interviews. The phone number is 604.436.1025, and the agency is open from 9:00 am to 5:00 pm from Monday to Friday. See their website at www.vlmfss.ca [3].
- **Family Services of Greater Vancouver** offers a wide variety of services for victims of domestic violence, including programs relating to abuse prevention and trauma. Call 604.731.4951 or see their website at www.fsgv.ca [4]. Also, in partnership with Family Services, the Vancouver Police Department operates a Domestic Violence and Criminal Harassment Unit that provides follow-up, especially if your partner has assaulted you violently or often.
- The **BC/Yukon Society of Transition Houses** offers safe temporary shelter for up to 30 days for women and children experiencing domestic violence. They also offer group and individual counselling for children and youth who witness family conflicts and violence. Contact the society at 604.669.6943 in Vancouver or 1.800.661.1040 elsewhere in BC; also check their website at www.bcsth.ca [5].
- **Vancouver Rape Relief & Women's Shelter** operates a transition house for women and their children and a 24 crisis line for women who are trying to prevent or escape male violence. Call crisis line anytime at 604.872.8212, and check their website at www.rapereliefshelter.bc.ca [6].
- Check a **Directory of Victim Services and Violence Against Women Programs** at www.pssg.gov.bc.ca/victimservices/directory/ [7].

What about criminal court as an option?

If you contact the police, they will investigate by taking a statement from you, your partner and any witnesses. If the police believe that criminal charges are appropriate, they'll prepare a report for the prosecutor, called "Crown Counsel". Crown Counsel will review the report and will decide whether to lay a criminal charge.

What happens if criminal charges are laid?

If Crown Counsel charges your partner with a criminal offence such as assault, the police will arrest him or her. Most people charged with a criminal offence aren't kept in police custody, but are released on bail on conditions ordered by a judge. For example, your partner may be released on conditions that he or she not have any contact with you or come to your home.

If your partner doesn't obey the conditions, you can tell the police. He or she may be arrested and charged with breaking the bail order.

If such conditions are ordered, but you and your children want to have contact with your spouse or partner, you'll need to talk to Crown Counsel about changing the bail order.

Can the criminal charges be dropped?

If your partner is charged, he or she may pressure you to get the charge dropped. This may not be possible, because it is Crown Counsel who lays the charge against your partner, not you. Any unwanted pressure or contact should be reported to the police.

Will there be a trial?

If your partner doesn't plead guilty to the criminal charge, a trial will be held. You'll tell the judge what happened. Although Crown Counsel is the government's lawyer, Crown Counsel will help you prepare to testify. You can also get help in monitoring the criminal court process and getting ready for trial by contacting the Vancouver Police Department Victim Services Unit at 604.717.2737. For more information on the court process, see the Provincial Court website at www.provincialcourt.bc.ca [8].

What happens if your partner is convicted?

If your partner is convicted of assaulting or threatening you, he or she would usually be ordered to pay a fine or will be placed on probation with conditions, such as not contacting you, or attending counselling or an anger management program. The judge probably won't send your partner to jail, unless he or she was previously convicted of assault or the incident was extremely violent.

What is a peace bond?

You may decide that the criminal court process isn't the best way for you and your partner to deal with violence in your relationship. Crown Counsel may be willing to drop the criminal charge against your partner if he or she enters into a peace bond under section 810 of the *Criminal Code*. This involves your partner undertaking to keep the peace and obey certain conditions, for example, not contacting you for a period of time. If your partner obeys the conditions, he or she won't have a criminal record. If your partner doesn't obey the conditions, he or she can be sent to trial on the original criminal charge plus a new charge for breaching the peace bond.

What about asking for a protection order in civil court?

Another option is to apply to the Provincial Court or to the Supreme Court for a protection order under the provincial *Family Law Act*. A protection order can:

- restrain or restrict how your partner communicates with you;
- restrain your partner from going to your home, school or place of employment;
- restrain your partner from stalking you;
- restrain your partner from possessing weapons;
- require the police to remove your partner from the home;
- require the police to escort your partner while your partner removes his or her personal property from the home;
- require the police to seize your partner's weapons; and
- require your partner to report to the court.

The *Family Law Act* requires the police to enforce protection orders.

Do you need a lawyer to get a protection order?

You can apply yourself for a protection order in either the Supreme Court or the Provincial Court, but you may find the paperwork easier in Provincial Court. In the Supreme Court, you will need to prepare a Notice of Family Claim and a Notice of Application or just a Notice of Application if there is already a court proceeding between you and your partner, plus an affidavit describing what has happened and what your concerns are. In the Provincial Court, you will need to prepare an Application to Obtain an Order and a Notice of Motion, or just a Notice of Motion if there is already a court proceeding, and you will need to either prepare an affidavit or testify in court about your concerns.

A family justice worker or legal aid duty counsel might be able to help you. Depending on the court's location, a protection order can often be obtained quickly – even in the same day in some circumstances.

What if you are concerned about someone else?

Any one can apply for a protection order on behalf of someone who is at risk of family violence.

What if the protection order conflicts with another order?

The *Family Law Act* says that if a protection order, including orders that are like protection orders made in another province or under the *Criminal Code*, conflicts with another order made under the *Family Law Act*, the parts of the other order that conflict with the protection order are suspended. This might happen if there is an older order for parenting time and a newer protection says that the restrained person cannot communicate with the children; the parts of the older order about parenting time would be suspended.

What if your partner ignores the protection order?

If your partner continues to harass you, he or she can be arrested. Your partner can be charged with a criminal offence for breaching the protection order and can be brought before the court. Your partner will be released if the judge is satisfied that he or she isn't a danger to your safety.

Free legal services are sometimes available

Legal aid is available to some people who cannot afford a lawyer if they qualify financially. To find a legal aid location [9] near you, go to the Legal Services Society (LSS) website at www.legalaid.bc.ca [10] and under "Legal aid", click "Legal aid offices". Or call the LSS Call Centre at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (call no charge, elsewhere in BC). When applying for legal aid, you should mention that you fear further and continued violence from your partner.

Other sources of free legal advice include:

- Supreme Court Self Help Centre in Vancouver, www.supremecourtselfhelp.bc.ca [11].
- Access Probono at 1.877.762.6664, www.accessprobono.ca [12].
- Justice Access Center in Vancouver (604.660.2084), Nanaimo (1.800.578.8511) and Victoria (250.356.7012), www.ag.gov.bc.ca/justice-access-centre/ [13].

Where can you find more information?

- Refer to script 217 on "Applying for a Peace Bond and Filing Assault Charges".
- See the provincial government's Victim Services website at www.pssg.gov.bc.ca/victimservices [14].
- Read the booklet Surviving Relationship Violence and Abuse by the Legal Services Society, BC and available free on their website at www.legalaid.bc.ca [10]. To find it, click "Our publications" then under "I want to find a publication by subject", click "Abuse & Family violence".
- Also see the Legal Services Society's Family Law in BC website at www.familylaw.lss.bc.ca [15], – under "Your legal issue," click "Abuse [16]".

[updated February 2015]

References

[1] http://www.vch.ca/our_services/find_health_services/find_services
[2] http://www.bwss.org
[3] http://www.vlmfss.ca
[4] http://www.fsgv.ca
[5] http://www.bcsth.ca
[6] http://www.rapereliefshelter.bc.ca
[7] http://www.pssg.gov.bc.ca/victimservices/directory/
[8] http://www.provincialcourt.bc.ca
[9] http://www.legalaid.bc.ca/legal_aid/legalAidOffices.asp
[10] http://www.legalaid.bc.ca
[11] http://www.supremecourtselfhelp.bc.ca
[12] http://www.accessprobono.ca
[13] http://www.ag.gov.bc.ca/justice-access-centre/
[14] http://www.pssg.gov.bc.ca/victimservices
[15] http://www.familylaw.lss.bc.ca
[16] http://www.familylaw.lss.bc.ca/legal_issues/abuse.aspx
[17] http://www.dialalaw.org

Separation and Separation Agreements (Script 115)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is separation?

Married and unmarried couples have separated when one or both of them make the decision that their relationship cannot continue, and communicate that decision to the other person. People do not need to agree to separate; only one person needs to decide that the relationship is over for a couple to be separated.

Separation usually involves the end of the couple's life together as a couple. Most people stop eating together, stop doing chores for each other, stop going out together and stop sleeping together.

Separation does not require that the couple move into separate homes. People sometimes stay living together under the same roof, although often in separate beds, because it's cheaper to live together with one set of household bills than live apart with two sets of bills. If the couple stays living under the same roof, they will usually move into different bedrooms, stop sharing meals together and so on.

Separation doesn't always mean that a relationship is over for good. Some people go to counselling and use their time apart to rebuild their relationship, with the hope of eventually reconciling and resuming life as a couple. For others, reconciliation is impossible and separation ends their relationship.

What is a "legal separation"?

There is no such thing as a legal separation in British Columbia. There are no papers to sign to separate and you don't need to see a judge or a lawyer to separate.

Who is a spouse?

Under the federal *Divorce Act*, a "spouse" is someone who is or was married to someone else. Under the provincial *Family Law Act*, the term "spouse" includes:

- people who are married to each other;
- people who lived together in a marriage-like relationship for at least two years; and,
- people who lives together in a marriage-like relationship for less than two years, if the couple has had a child together.

Do you have to think about divorce now?

Only married spouses need to divorce to end their legal relationship. However, if you're married and have just separated, you don't have to worry about divorce yet. Divorce is usually a fairly low priority. Most married spouses have more important things to think about, such as where the children will live, how the children's time will be shared, whether support should be paid and how property and debt should be divided.

When can you get a divorce?

Married spouses may apply to court for a divorce order after they have been separated for one full year. Married spouses can live together to try to reconcile for up to 90 days without interrupting the one year period of separation; if the spouses live together for more than 90 days trying to reconcile, the one year period starts again on the date of their last separation.

Married spouses can apply for divorce sooner than one year if one of them has committed adultery, which hasn't been forgiven by the other spouse, or if one of them has abused the other and it is not possible to continue the relationship. Most marriage spouses apply for a divorce because of their separation, not because of adultery or cruelty. The only thing you get for asking for a divorce on these grounds is a quicker divorce. If you are thinking of asking for a divorce because of adultery or cruelty, remember that you must be able to prove that the adultery or the cruelty happened.

For information on the grounds for divorce, refer to script 120 on "Requirements for Divorce and Annulment".

What is a "separation agreement"?

A separation agreement is the written record of how a couple has settled of the issues arising from the end of their relationship.

For spouses, these issues usually include:

- Whether a spouse is entitled to financial help meeting his or her expenses, and, if so, who should provide that help and in what amount. This is called spousal support.
- For married spouses and unmarried spouses who have lived together for at least two years, how family property will be divided and how responsibility for family debts will be shared.

For parents, including spouses who are parents, these issues include:

- Who the children should live with and how decisions about the care of the children will be made? Under the *Divorce Act* this is called custody; under the *Family Law Act* this is called parental responsibilities and parenting arrangements.

- How the parents will share the children's time. Under the *Divorce Act* this is called access; under the *Family Law Act* this is called parenting time and contact.
- How the parents will cover the children's financial needs. This is called child support.

If you can manage to settle these issues, you should consider making a separation agreement for two reasons. First, separation agreements are legal contracts recording the terms of your settlement that can be enforced by the court. Second, it's much cheaper and often quicker to resolve these issues by an agreement than going to court.

The care of children

A couple might agree that the children will live mainly with one parent, and the other parent can have time with the children on specified days. Or, a couple may agree to share responsibility for looking after the children and have them live partly with each parent. There are many different types of parenting plans that can be agreed to in a separation agreement. You may want to get some advice first from a counsellor or lawyer.

Support

For more information about support, refer to script 117 on "Child Support" and script 123 on "Spousal Support". The income tax rules about support payments are important too, so you should also refer to script 133 on "Income Tax Implications of Support Payments".

The family home

A separation agreement can also say whether one spouse will get to keep the family home or whether it will be sold. Don't forget that even if the house is in one spouse's name, the other spouse is almost always entitled to some share in it. Some spouses think it's best to let the parent who usually has the children stay in the house; for others, it may be best for the children to stay in the house while the parents move in an out when it's their time with them. There are many choices, and a lawyer can help you decide what's best.

Other property

When a couple separates, each spouse has a right to a share in the property that accumulated during the relationship as well as the increase in value of any property brought into the relationship. If you own other property in addition to your home (for example, a car, a cottage or investments), a separation agreement can cover how to divide these assets too. Refer to script 124 on "Dividing Property and Debts" for more on this topic.

Debts

When a couple separated, each spouse is usually responsible for one-half of the debt accumulated during the relationship. This can be covered in a separation agreement too. Until then, decisions must also be made about paying for the family bills. Does the spouse who gets the use of the house have to pay the mortgage? Who will pay for the credit cards and utilities? Refer to script 124 on "Dividing Property and Debts" for more on this topic.

Family businesses

If you run a business together you probably won't want to be business partners any longer. It is important to resolve all of the financial issues relating to your business. These can also be dealt with in a separation agreement.

Are mediation or collaborative settlement processes a good idea?

Mediation can be very helpful if you and your partner want to make decisions in the most cooperative way possible and are having trouble negotiating with each other. A trained mediator can work with you to develop a parenting plan for the children and make other decisions. Your lawyer may or may not be with you at the mediation sessions, but if you see a mediator, it's important that you consult a lawyer about your rights and responsibilities before signing any agreement.

A collaborative approach may also be used to settle things. In these processes, the couple and their lawyers agree to cooperate and work together to negotiate an agreement that resolves the issues arising from the separation. The couple and their lawyers will sign a collaborative participation agreement which says that no one will go to court or use threats of going to court. If the collaborative process breaks down, the spouses must hire new lawyers if they want to go to court.

For more information on this, refer to script 111 on "Mediation and Collaborative Settlement Processes".

A lawyer should prepare your separation agreement

Separation agreements can have a serious and long-lasting impact on your legal rights and obligations. As a result, it's always a good idea to have a lawyer prepare your separation agreement. **Both people** can't use the same lawyer, and each you should each get your own lawyers to learn about your rights and obligations and about what your agreement means.

What does a separation agreement cost?

The cost of a separation agreement depends on the lawyers you pick and how complicated your situation is. Ask your lawyer at the beginning for an idea of what it will cost. To save time and money, take as much information with you as you can when you see your lawyer. Take things like:

- Income tax returns
- Paystubs for you and your partner
- Documents about the house and mortgage
- Papers about other assets such as RRSPs, investment accounts and savings accounts
- Documents relating to any debts such as credit cards and lines of credit

Also, think about what your financial needs are and consider preparing a list of your monthly expenses before you go. This way your lawyer can give you informed advice about financial matters.

How long does a separation agreement last?

Most separation agreements last until one or both people die; most are meant to be permanent. Agreements that end sooner will say so.

What happens if one spouse dies during negotiations?

The death of one person before the couple have signed a separation agreement or the court has made a final order can have a serious impact on how property and debts are shared. This can get complicated, so you should obtain legal advice from a lawyer about how best to protect yourself if there is a chance your partner may die before things are resolved.

Summary

You don't need a separation agreement to separate, and you don't need to see a lawyer or a judge to separate. You and your partner don't even need to agree to separate.

If you have separated, and if you have children or property or need financial support, it's best to have a formal written agreement if you can reach a settlement on these issues and want to avoid going to court. If you can negotiate a settlement, you should have a lawyer prepare the written agreement and you should each have your own lawyer to give you advice about the meaning and legal effect of the agreement.

More information

- The laws referred in this script are available at www.bclaws.ca [1] or http://laws-lois.justice.gc.ca [2].
- You can more information about separation, separation agreements, caring for children after separation, child support and spousal support, and the sharing of property and debt the from wikibook *JP Boyd on Family Law*, published by Courthouse Libraries BC, at wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law [3].

[updated October 2014]

References

[1] http://www.bclaws.ca
[2] http://laws-lois.justice.gc.ca
[3] http://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law
[4] http://www.dialalaw.org

Separation: Deciding Who Will Move Out (Script 116)

This script discusses moving out when you separate, including:

- who should move out;
- whether you can lock your spouse out of the home;
- getting a court order to make your spouse move out; and,
- what to do if your spouse harasses you after you have separated.

Should someone move out?

Some couples stay together after they separate, usually because it's cheaper to live in one place with one set of household bills than in two places with two sets of bills. This isn't possible for everyone, particularly if there is a high level of conflict in your relationship after separation, and especially if there is a high level of conflict and you have children.

Who should move out?

If you have children, and you and your partner can talk about this issue, several things will influence your decision about who will stay in the house and who will move out:

- Do the two of you get along well enough to stay in the home together? If you argue, how much are the children exposed to your conflict?
- Where are the children likely to stay after the separation, and who will be mostly responsible for looking after them?
- Where do the children go to school or daycare? Where are their extracurricular activities located?
- Can you afford to get a second home big enough for the children?
- Will either one of you be keeping the home? Can either of you afford to keep the home?

It often makes sense that the person who will be caring for the children or keeping the home should stay in the house, and that the other person should leave.

When should you move out?

There's no rule that says when you can and can't move out, or that you must tell your partner ahead of time that you're moving out. If it's a very emotional separation or there has been violence between the two of you, you might want to move out when your spouse isn't home.

Can you move back in after you've moved out?

If you are both owners of the home or are both listed on the lease or rental agreement, you can move back in if you want. It's your place too. However, you should let your partner know about your plans first, and you may want to think twice about moving back in if it's just going to escalate your conflict.

Do you risk losing your share of the property if you leave?

You may be worried that if you leave, this will affect who gets what. Don't worry. If you have a right to a share in the property, you won't lose that right by moving out. However, if you move out of the home while your spouse remains, it might be difficult later to convince the court that you should be allowed to return.

If you are a married or an unmarried spouse, haven't started a court case yet, and the property is only in your spouse's name, considering filing a *Land (Spouse Protection) Act* entry against the home to prevent your spouse from selling the property without notice to you. If a court case has started, married and unmarried spouses can also file a certificate of pending litigation against title of the home under the *Land Title Act* to protect your interest in the property from creditors.

Can you take any of the household belongings?

Each of you has the right to a reasonable share of the household belongings and to anything that you brought into the relationship. If you're the one who is moving out and you're taking the children with you, you'll need to consider their needs when deciding what to take and what to leave behind. But don't strip the place bare or take more than a fair share, and don't take things out of spite. Later on, you can always apply to the court if there are more things that you want from the home and you and your spouse can't agree on whether you can have them.

What to take with you

If you plan to leave your relationship and you want your children to live with you, you'll need to take the children with you when you move out. You should also take important documents and information, such as:

- Your marriage certificate, if you're married
- Financial information, such as your tax returns for at least three years, statements from bank accounts, investment accounts, RRSP accounts and debt accounts, and copies of recent paystub
- Your CareCard and other health and dental insurance cards
- Your SIN card, your driver's licence, your passport, and any immigration papers you may have
- You children's birth certificates and passports
- Medications and prescriptions, including optometrists' prescriptions
- Some but not all of your children's clothing, furniture and personal belongings
- Copies of your partner's financial information, such as paystubs, tax returns, company records and ledgers, bank accounts, investment accounts, and RRSP accounts
- A record of your partner's Social Insurance Number, CareCard number and date of birth

Can you take money from a joint account?

If you have a joint bank account with your partner, you can usually take half the money in the account. Don't take any more than half, and consider not taking anything if you have an income and your partner doesn't or if payments for important family expenses like the mortgage come from the account.

What about debts?

If you have any joint credit cards with your partner, consider calling the bank and telling them that you are separating and asking them to cancel your card for the joint account. You don't want the bank to hold you responsible for new charges on the account if you can avoid it.

If you have a line of credit or an open mortgage with your partner and you're worried that your partner might withdraw more money, consider calling the bank and asking them to: freeze the line of credit or mortgage; reduce the credit limit to the present balance; convert the account to deposit-only; or, require two signatures to withdraw more money. You should talk to a lawyer before doing anything that might look unfair.

What if you want to stay in the house?

If you have children, it might be in the children's best interests to stay in the home. In general, the more stability children have, the easier it is for them when their parents separate. But if you want to stay in the house with the kids, your partner refuses to leave and you simply cannot continue to live under the same roof together, you'll have to get legal advice to find out if you can make your partner move out.

Can you get a court order to make your spouse leave?

The *Family Law Act* allows the court to make an order giving a spouse "exclusive occupancy" of the family home; this rule applies to property that is owned and property that is rented. To get an order for exclusive occupancy, you must show the judge two things:

- that it's practically impossible for the two of you to remain together in the same home, and
- that it's more convenient for you to live there than for your spouse.

Where there has been family violence or there's a risk of family violence, the court can make a protection order that only one person will be allowed to live in the home. This applies to couples who qualify as spouses and to spouses who do not.

Can you lock your partner out?

Usually each person has as much legal right to be in the home as the other until a court decides otherwise or one of you agrees to move out. Simply not wanting to live with your partner isn't enough for you to lock your partner out of his or her home. However if you fear that there might be violence, it may be reasonable to lock your partner out until the police can be contacted or a protection order can be obtained. But if the possibility of violence isn't an issue, there's a risk that locking out your partner will backfire and allow your partner to complain that he or she has been treated unfairly by you. If possible, obtain the advice of a lawyer before locking out your partner.

Who should pay the household bills?

If you want your partner to move out, or if you're asking for an order for exclusive occupancy of the home, you should be prepared to pay the household bills, such as the rent or mortgage, utilities, taxes and the like. However, you can apply for an order for support from your partner, if you qualify as spouses, to help you with these bills and the court can also make a conduct order that requires one of you to pay the household bills

Be aware that if you and your partner are spouses or if you are both on title of your home, your partner may be able to ask that the house be sold and the money from the sale kept in trust until your case is resolved.

These issues are complex, and you should speak to a lawyer before deciding what to do.

Should you get a separation agreement?

The best solution when a couple separates is to get an agreement, as long as the couple can get along well enough to negotiate a settlement. A separation agreement puts in writing who will live in the house. It can also sort out other issues, such as if and when the house will be sold, how the children will be cared for, and whether support will be paid. Make sure that you get a lawyer's advice before you sign a separation agreement, even one negotiated by a mediator, to get proper information about what the agreement means and how it affects your legal rights and obligations.

For more information about separation agreements, refer to:

- script 115 on "Separation and Separation Agreements"
- script 124 on "Dividing Property and Debts"

Summary

Your first decision when you separate will be whether you need to live in separate homes, and if so whether you will move out yourself or try to have your partner move out. If you want to stay, but your partner refuses to leave, you'll have to go to court for an order giving you the sole right to live in the home if you can't continue to live under the same roof. If you can agree on what will happen after you've separated, you can make a separation agreement.

[updated October 2014]

References

[1] http://www.dialalaw.org

Requirements for Divorce and Annulment (Script 120)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script only applies to married spouses. Unmarried spouses and other unmarried couples do not need to get a divorce and, because they are not married, cannot get an annulment.

What is a divorce?

A divorce is a court order, made under the *Divorce Act*, that ends a marriage. Only married spouses need to get a divorce to end their relationship; unmarried spouses and other unmarried couples do not need to divorce. Their relationships are over when they separate.

Some religions allow for religious or ritual divorces. These divorces do not legally terminate a marriage. In the eyes of the law, you and your spouse will remain married until a judge makes a divorce order.

What are the grounds for getting a divorce?

The *Divorce Act* applies to all divorces in Canada, whether you were married inside Canada or elsewhere. Under the *Divorce Act*, the one reason why a divorce order can be granted is because of “marriage breakdown”. There are three reasons why marriage breakdown may have occurred:

- the spouses are separated and have lived separate and apart for at least one year
- one spouse has committed adultery which the other spouse hasn’t forgiven
- one spouse has been mentally or physically abusive to the other spouse, called “cruelty” in the *Divorce Act*, and that spouse can no longer continue in the marriage

Most people ask for a divorce based on separation. To claim a divorce based on adultery or cruelty, you must be able to prove that the adultery or cruelty occurred, and that can be difficult.

What does it mean to be separated for a year?

Separation usually means living in separate places. Some couples can be separated even though they continue to live under the same roof, as long as the marriage-like quality of their relationship has ended and they have stopped sleeping together, doing chores for each other, going to family events together and so on.

When does the one-year period of separation start?

The start of separation is usually when one spouse tells the other that he or she wants to separate. The decision to separate can be made by one or both spouses. It is not necessary for both spouses to agree to the separation.

What if you reconcile for a short time?

Spouses are separated can get back together and live together again to try and make the marriage work. But within the one-year separation period, they can only live together for a total of 90 days or less. If they live together for more than 90 days, the one-year period of separation starts all over again from the date of the last separation. For more information on separation, refer to script 115 on "Separation and Separation Agreements".

When can you get the divorce proceedings started?

You can begin a court case for divorce any time after you have separated, as long as you have lived in the province in which you are starting the court case for at least one year.

Which court do I go to?

Although there are two courts that deal with family law problems, the Family Court and the Supreme Court, only the Supreme Court can make divorce orders and other orders under the *Divorce Act*. If you want a divorce, you will need to start a divorce proceeding in the Supreme Court.

What is a desk order divorce?

A "desk order divorce" is a court process that allows you to get a divorce without appearing in court at a trial. Once a court case has started, and providing you and your spouse agree on the other orders you want the court to make, you can apply for the divorce order by filing a bunch of court forms, including:

- a Requisition asking for the order,
- an Affidavit of Service proving that your spouse was served with the documents beginning the court case,
- a draft order, and
- your affidavit giving the court the information it needs to decide if the divorce order is justified.

If you have children, you will also have to file a Child Support Affidavit, which gives the court additional information about your income and your spouse's income, and the arrangements that have been made for child support. Refer to script 121 on "Desk Order Divorces: The Do-It-Yourself Divorce Process" for more information.

What about adultery?

Adultery is when a spouse has sex with someone who isn't his or her spouse. Adultery is usually proved by having the spouse who committed adultery admit it in an affidavit. If your spouse won't admit to the adultery, then you will have to prove it some other way, for example, by having your spouse or another witness testify about the adultery in court.

What about cruelty?

Cruelty can be either physical or mental. You have to prove that your spouse's behaviour toward you made it impossible for you to go on living together. Mental cruelty is more difficult to prove than physical cruelty. You should speak to a lawyer to see if you have enough evidence to prove mental cruelty.

Is there an advantage to proving adultery or cruelty?

Divorce is "no fault" in Canada, which means that the court rarely draws any conclusions from a spouse's adultery or cruelty beyond making the divorce order without having to wait for the one-year period of separation to pass. The court will not take adultery or cruelty into account in dividing property or awarding support, and it will only take such behaviour into account when making decisions about children if the behaviour actually affects a spouse's ability to parent the children.

In certain circumstances, it is possible to make a claim for a financial award called "damages" if you can prove an assault occurred. This is a difficult claim to make and involves presenting medical evidence demonstrating the nature of the injuries and the consequences of those injuries. You should speak to a lawyer if you are thinking about making a claim for damages as a result of your spouse's cruelty.

Are there reasons why a judge won't grant a divorce?

Yes, they are:

- collusion
- connivance
- condonation
- insufficient arrangements for child support

What do collusion, connivance and condonation mean?

Collusion is when you work with your spouse to lie to the court, either in an affidavit or through your testimony, to get a divorce. For example, if a couple agrees that they will lie about the date of separation to speed up the divorce process.

Connivance is when one spouse encourages the other spouse to commit adultery or tricks the other spouse into committing adultery to speed up the divorce.

Condonation is when you have forgiven your spouse for his or her adultery or cruelty. If you have forgiven your spouse, you cannot use your spouse's adultery or cruelty to claim a divorce.

What about insufficient child support?

Before granting a divorce, the judge must be satisfied that appropriate arrangements have been made for the financial support of the children. Most of the time, this means that child support is being paid in the amount required by the Child Support Guidelines, whether because of a court order or a separation agreement. Refer to script 117 on "Child Support" for more information on this.

What is annulment?

A divorce is a court order which ends a valid marriage. An annulment is a court declaration that a marriage is invalid. If the court declares that a marriage it is unnecessary to get a divorce.

For example, a marriage might be invalid if one spouse was already married when he or she married the other person, if one of the spouses was under the age of 16 at the time of the marriage ceremony, or if a spouse married someone other than the person he or she intended to marry. If the court finds that the marriage is invalid it will make a declaration that the marriage is void, as if it had never happened. It is important to know that even if a marriage is annulled, the parties are still able to make claims against each other about the parenting of children, the payment of support and the division

of property and debt under the *Family Law Act*.

The law about the annulment of foreign marriages is complicated. You should speak to a lawyer if you are thinking about trying to annul a foreign marriage.

Some religions allow for religious annulments. These annulments do not legally void a marriage. In the eyes of the law, you and your spouse will remain married until a judge makes a declaration of annulment.

Summary

To get a divorce, you must prove that your marriage has broken down. The reasons for marriage breakdown are separation for one year, your spouse's adultery or your spouse's cruelty toward you. Efforts to deceive the court through collusion or connivance, or your forgiveness of your spouse's conduct may prevent the divorce from being granted. In all cases, before granting a divorce the judge must be satisfied that appropriate arrangements have been made for the financial support of the children. If the marriage was invalid, an annulment may be granted instead of a divorce.

More information

- For a step-by-step description of the desk order divorce process see script 121.
- For a description of the process and copies of the necessary court forms, see the Divorce page of the wikibook *JP Boyd on Family Law*, provided by Courthouse Libraries BC. More information about invalid and void marriages is available at Marriage & Married Spouses.

[updated October 2014]

References

[1] http://www.dialalaw.org

Desk Order Divorces: The Do-It-Yourself Divorce Process (Script 121)

This script discusses the desk order divorce proceedings, the do-it-yourself court process that applies where there are no disagreements between you and your spouse relating to the parenting of children, spousal support or child support, and dividing family property and family debt. In many cases, you'll want to hire a lawyer to handle your divorce, but the information in this script should help you understand the procedure involved.

This script only applies to married spouses. Unmarried spouses and other unmarried couples do not need to get a divorce.

How do I get a divorce?

To get divorced, you need to get a divorce order. Only the court has the ability to divorce a married couple. To get a court order you have to start a court case, even if you and your spouse don't need the court to make an order about anything else other than the divorce. The legal reasons or grounds for granting a divorce are discussed in script 120 on "Requirements for Divorce and Annulment".

What is a desk order divorce?

In this type of court case, one spouse starts a court case that the other spouse, the person being sued, doesn't dispute. Once the time for the other spouse's defence has come and gone, the spouse who started the court case applies for the divorce order. This application is done by completing a bunch of court forms and filing them in court, and there's no need for anyone to appear before a judge.

It is possible for both spouses to start the court case together using special court forms. This is a bit cheaper and faster than if only one spouse starts the court case, since there's no need to have a spouse served with the court forms that start the court case and there's no need to wait for a spouse to fail to defend the case.

The process when one spouse starts the court case is called a "sole divorce proceeding." The process when the spouses start the court case together is called a "joint divorce proceeding." Both of these processes are called "undefended divorce proceedings." This script describes the process for the sole divorce proceeding.

First, get your marriage certificate

If you don't have an original, government-issued marriage certificate, you'll need to get one. Photocopies won't be accepted by the court registry, except in special circumstances and with special permission. However, a copy of an original marriage certificate that is certified to be a true copy of the original by a lawyer, notary public or a government official may be acceptable.

If you were married in British Columbia, you can get an original marriage certificate from the Vital Statistics Agency. See www.vs.gov.bc.ca [1], or call 604.660.2937 in the lower mainland, 250.952.2681 in Greater Victoria, or toll-free 1.800.663.8328 elsewhere in BC for information on applying for a certified copy. If you were married outside of BC, you'll need to contact the equivalent government agency where you were married to obtain your marriage certificate.

Note that it's not the certificate from the person that performed the marriage that's needed but the government-issued record of your marriage.

Second, prepare the Notice of Family Claim in Form F3

This is the document that starts the court case. It states the grounds for the divorce and gives information about you, your spouse and any children, as well as the details about your marriage and separation.

The Notice of Family Claim also allows you to ask for other orders along with a divorce order. Other orders might be about the parenting arrangements for your children, child support, spousal support or the division of property and debt. Be careful when you are making other claims. If your spouse doesn't agree to the claims you are making, he or she will probably file a defence to your case and your divorce won't be able to proceed as an undefended divorce proceeding.

Third, file your marriage certificate and the Notice of Family Claim in court

Once you have filled out and signed the Notice of Family Claim, it must be filed in court along with your marriage certificate. You'll need to file the original plus at least three photocopies of the Notice of Family Claim; the court will keep the original and give you the copies back, stamped with the court's official stamp.

Fourth, serve your spouse with the Notice of Family Claim

Someone who is being sued, even in an undefended divorce proceeding, must be given formal notice about the court case. "Personal service" means arranging for the Notice of Family Claim to be physically delivered to your spouse, and you cannot serve the Notice of Family Claim yourself. You must get someone else to do this, and your server must swear an Affidavit of Personal Service in Form F15 describing how, when and with what your spouse was served.

What if it's not possible to personally serve your spouse?

If it's not possible for your spouse to be personally served, for example because you don't know where he or she lives, other means of letting your spouse know about the divorce are available. This is called "substitutional service." You must have a court order to use substitutional service.

The court may, for example, make an order allowing notice to be served through a classified ad in a local newspaper, or the court may order that the Notice of Family Claim be given to someone known to your spouse, such as his or her parents, a coworker or a roommate.

Fifth, wait for 30 days

Your spouse has 30 days to defend the court case by filing a Response to Family Claim. If your spouse files a Response to Family Claim, your divorce won't be able to proceed as an undefended divorce.

In addition to responding to your Notice of Family Claim, your spouse may also choose to file a Counterclaim and make claims against you. For more information on defending a divorce proceeding, see script 122 on "The Respondent in Divorce Proceedings".

Sixth, if your spouse does nothing, apply for a divorce order

After the 30 days has run out, you can go ahead and apply for the divorce order by filing in court a Requisition in Form F35 (a document asking for the divorce order), a Divorce Affidavit in Form F38 (a document giving your evidence in support of the divorce order) and a draft of the order you want the court to make in Form F52 (the formal divorce order). If you have children you'll also have to file a Child Support Affidavit in Form F37 (a document describing the arrangements made for the financial support of the children).

Remember that if you are asking for a divorce based on separation, you can only apply for the divorce order after you and your spouse have lived separately and apart for one year. If you are asking for a divorce based on your spouse's adultery or cruelty toward you, you must provide proof of the adultery or cruelty in your Divorce Affidavit.

When divorce proceedings are undefended, a court hearing usually isn't required

The evidence the court needs to make an order will be given in the affidavits you have filed in court. Unless the court decides that further evidence or a full hearing is required, the divorce order will usually be made without the need for anyone to attend as a witness.

The court may scrutinize a divorce order that includes division of property or debt

If you are asking for an order dividing family property and family debt other than equally, your affidavit should explain why the unequal division you propose is fair. See script 124 on "Dividing Property and Debts".

The court will scrutinize a divorce order if there are children

The court will need evidence that "reasonable arrangements" have been made for the financial support of the children. This is the case even if the spouse who has the children most of the time is happy with the support arrangements. The court has a special duty to satisfy itself that the arrangements are appropriate. It needs evidence about your income and your spouse's income, the children's living arrangements and the amount of child support being paid. Without this information, the court will not make an order for divorce.

When does the divorce take effect?

You are not divorced on the day that the divorce order is made. Unless there are special circumstances, the divorce will not take effect until 31 days after the divorce order is granted, so you'd better not plan on remarrying within that 31-day period.

Once the 31 days have passed, if your spouse hasn't filed an appeal of the divorce order, you can ask the court to issue a Certificate of Divorce confirming that the divorce order has taken effect. However, once the 31 days have passed, you will be divorced whether you get the Certificate of Divorce or not.

What about joint divorce proceedings?

If both of you agree to the divorce order, and to any other orders you want the court to make, you can start the divorce proceeding together by filing a Notice of Joint Family Claim in Form F1.

Service is not required in a joint divorce proceeding and, depending on whether the one-year period of separation has passed, you may be able to apply for the divorce order on the same day that you file your Notice of Joint Family Claim. Both of you will sign the Notice of Joint Family Claim and both of you will have to file Divorce Affidavits and, if you have children, Child Support Affidavits.

Where can you get help or find more information?

- Contact the Legal Services Society (LSS) Family LawLINE: If you are a low-income person experiencing a family law issue, you may be eligible for free legal advice over the telephone from a family lawyer. To be considered for this service, contact the LSS Call Centre at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (call no charge, elsewhere in BC) between 9:30 am and 12:00 pm on weekdays.
- Also see the Legal Services Society's Family Law in BC website at www.familylaw.lss.bc.ca [2] and choose the appropriate guide (either "Sole application" or "Joint application") at www.familylaw.lss.bc.ca/guides/divorce [3].
- Visit the Divorce page of the wikibook *JP Boyd on Family Law*, provided by Courthouse Libraries BC.

[updated October 2014]

References

[1] http://www.vs.gov.bc.ca
[2] http://www.familylaw.lss.bc.ca
[3] http://www.familylaw.lss.bc.ca/guides/divorce
[4] http://www.dialalaw.org

The Respondent in Divorce Proceedings (Script 122)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script will be helpful if your spouse is about to begin divorce proceedings, or if you've already been served with divorce papers. In most cases, you'll want to hire a lawyer to represent you, but this script should give you a general understanding of your situation. Note that you only have a limited time to respond to the divorce papers.

This script will be helpful if your spouse is about to begin divorce proceedings, or if you've already been served with divorce papers. In most cases, you'll want to hire a lawyer to represent you, but this script should give you a general understanding of your situation. Note that you only have a limited time to respond to the divorce papers.

This script only applies to married spouses. Unmarried spouses and other unmarried couples do not need to get a divorce.

What are the court forms used to start a divorce court case?

The document you'll receive (or have already received) is called a Notice of Family Claim. Your spouse, the person who started the court case, is called the claimant. You are the respondent.

The claimant must arrange for personal service of the Notice of Family Claim. This means that the Notice of Family Claim must be delivered to you in person. If you're not available to receive the papers or the claimant has difficulty personally serving you, he or she can ask the court to serve you "substitutionally" by, for example, leaving the papers at your last known address, with your close relatives, or in your mailbox.

Make sure you read the Notice of Family Claim carefully. This document states the orders that the claimant wants the court to make. Whether and how you respond to the Notice of Family Claims depends on the orders the claimant is asking for.

Consider consulting a lawyer

Because the claims made in the Notice of Family Claim could significantly affect your rights, you should consider asking a lawyer to review them with you and explain exactly what orders your spouse is asking the court to make.

There are strict time limits to respond

You must respond to the Notice of Family Claim within 30 days of the date you were served by filing a Response to Family Claim in court and serving the filed Response to Family Claim on the claimant by "ordinary service." It is very important that you do this if you disagree with any of the orders the claimant is asking for. If you don't respond, the court can make orders without any further notice to you.

Ordinary service means mailing or faxing (or sometimes emailing) a document to the claimant's Address for Service, which can include a fax number for service and an email address for service. The claimant's Address for Service will be set out in his or her Notice of Family Claim.

What's in the Notice of Family Claim?

The Notice of Family Claim gives the court basic information about you and your spouse, and the details of your marriage and separation. The schedules to the Notice of Family Claim describe the orders your spouse is asking the court to make. At a minimum, this will be an order for your divorce, but your spouse can also ask for orders about the parenting of your children, spousal support and child support, the division of family property and family debt and other subjects.

The reasons why your spouse is asking for a divorce will be given

For information on the legal grounds for divorce, refer to script 120 called "Requirements for Divorce and Annulment". If you don't dispute the basis upon which your spouse is applying for a divorce, such as a one-year separation, you might not object. On the other hand, if he or she is claiming adultery or cruelty and those claims aren't true, you might want to contest the court case.

Consider carefully the claims made

The claimant's "claims" are the orders your spouse wants the court to make. If your spouse is seeking sole custody of the children under the *Divorce Act*, do you feel that joint custody is better, or should you have sole custody? If property is to be divided, do you want half or more than half of the family property? Is there a reason to apply to share of your spouse's excluded property? If you dispute any of the claimant's claims, you must do so in a Response to Family Claim, which is explained a little later. If you wish to make claims of your own, you must do so in a Counterclaim, also explained later on in this script.

What if you don't agree with what's being asked for in the Notice of Family Claim?

You should file a Response to Family Claim, which tells the court what claims you agree with and which you oppose. Be aware, however, that filing a Response to Family Claim changes the proceeding from an "uncontested divorce proceeding" which doesn't require an appearance before a judge to a "contested divorce" that a trial may be necessary to resolve if they can't be settled beforehand.

What if you want to make your own claims?

If you have claims of your own that you want to make, for example about the parenting of your children, child support, spousal support, the division of property and debt, or another order, you must file a document called a Counterclaim. The Counterclaim states the orders that you want the court to make.

What's a "judicial case conference"?

You or the claimant can schedule a judicial case conference after you have filed a Response to Family Claim or Counterclaim. A JCC is an informal hearing before a judge or master to talk about the claims each of you have made, see what can be agreed to and talk about how the claims will be resolved. JCCs are held in private and on a "without prejudice" basis. Without prejudice means that each of you can make settlement proposals at the JCC without being held to your proposal later on.

The JCC is an excellent opportunity to tell the judge and the claimant what you really want

Everything you say at a JCC is confidential and cannot be repeated outside the hearing room or used later, so speak your mind and explain what orders you're looking for and why. The judge won't make any decisions, however, unless you and your spouse both agree.

When will the divorce be granted?

If the claim for divorce is based on separation, the divorce order can be made any time after the one-year period is over. If the claim is based on cruelty or adultery, the order can be made at any time. (Remember that no matter why the divorce is claimed, the court must be satisfied that adequate arrangements have been made for the financial support of any children before it can make the divorce order.)

Although the divorce order can be made before all of the issues are resolved, the court will usually be reluctant to make a divorce order in advance without a very good reason for doing so.

What is an "interim application"?

It can take a year or more from the time the Notice of Family Claim is filed to have a trial if a divorce proceeding can't be settled. Before the trial, you or your spouse may need the court to make temporary orders about important issues, such as the payment of child support or spousal support, where the children will live, or who will live in the family home. These are called "interim orders," and are made following a party's application to the court, called an "interim application." Interim orders last until another interim order is made or until the final order ending the case is made.

Interim applications are made by filing a Notice of Application (a court form which explains the orders you want the court to make and sets the date for the hearing of the application) and a supporting affidavit (a sworn statement describing the background to the application), to which the other spouse will have the opportunity to reply. Typically, these pre-trial applications take anywhere from 15 minutes to 3 hours to complete, depending on the complexity of the issues.

Interim applications should be taken very seriously as interim orders are often influential in the final outcome of the case. For more information, see script 112 on "Applying for an Interim Order in a Family Law Case in the Supreme Court".

Remember that each time you go to court, it will cost time and money

The more you can agree on things with your spouse, the easier it will be for each of you. Try to save interim applications for really important problems, and always (if you can) see whether you can reach an agreement about the interim application before going to court. If you need help talking with your spouse, you can contact a mediator. For more information on mediation, refer to script 111 on "Mediation and Collaborative Settlement Processes".

Can you object to a divorce?

You can object to a divorce, but you're not likely to succeed. Most of the time, the judge will make a divorce order as long as the ground for the divorce is proven, whether you want the divorce or not. There are rare situations where a divorce might be refused, for example, if the divorce means the termination of pension benefits a spouse is receiving or if adequate arrangements have not been made for the support of any children.

When does the divorce order take effect?

Divorce orders take effect 31 days after the date the order is made, unless the judge making the divorce order says that it will take effect sooner. The reason for the delay is to allow a spouse to appeal the divorce. Appeals like these are very rare.

What are your rights after the divorce order is made?

If your divorce order doesn't make orders about the division of property or debt and you didn't claim a division of assets in your Notice of Family Claim or Counterclaim, you have two years after the date of your divorce to make the claim under the *Family Law Act*. After the two years, you will be out of time to make the claim.

Divorced spouses are always entitled to make a claim for spousal support under the *Divorce Act*, no matter how long they have been divorced. Divorced spouses are always entitled to make a claim about children, such as claims for custody or child support, as long as the children qualify as "children of the marriage" under the *Divorce Act* or as "children" under the *Family Law Act*.

More information

- For more information about divorce and divorce proceedings see the Divorce page of the wikibook *JP Boyd on Family Law*, published by Courthouse Libraries BC.
- For more information about responding to a divorce proceeding, see the page Replying to a Court Proceeding in a Family Matter.

[updated October 2014]

References

[1] http://www.dialalaw.org

Dividing Property and Debts (Script 124)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses dividing property and debt between married spouses and unmarried spouses when their relationship breaks down.

Who is a "spouse"?

Property and debt are divided between spouses under the *Family Law Act*. Under this act, the "spouses" who are entitled to apply for an order dividing property and debt under the act are:

- people who are married; and
- people who have lived together in a "marriage-like relationship" for at least two years.

Claims for the division of property and debt must be made within two years of the date married spouses are divorced or their marriage is annulled or, for unmarried spouses, the date of their separation.

If you don't qualify as a "spouse", the laws that apply to your situation are different, and this script does not apply to you. You should refer to script 148 on "Other Relationships: Your Income, Support and Property Rights".

The basic principles of the *Family Law Act*

The law about dividing property and debt is contained in the *Family Law Act*. In general:

- Each spouse is entitled to keep the property they brought into the relationship, plus certain kinds of property received during the relationship, like inheritances and court awards, as his or her "excluded property."
- Each spouse is entitled to one-half of the property bought during their relationship, plus one-half of the increase in value of each other's excluded property. The property spouses are entitled to share is called "family property."
- Each spouse is liable for one-half of the debt run up during the relationship, including any debt incurred after separation to maintain family property. The debt spouses are obliged to share is called "family debt".

What is "family property"?

Family property is all of the property owned by either or both spouses on the date of separation, minus any excluded property. Family property includes: interests in companies, partnerships and businesses; money owed to a spouse; bank accounts, RRSPs and pensions; and, interests in certain kinds of trusts. Family property includes the amount of the increase in value of any excluded property.

Each spouses is presumed to have a one-half interest in all family property, regardless of their use of or contribution to that property.

What is “excluded property”?

Excluded property is the property a spouse brings into a relationship, including some kinds of property received during the relationship. Excluded property received after a relationship starts includes, inheritances and gifts from people other than the other spouse; court awards; insurance money; and, interests in certain kinds of trusts. Excluded property includes property bought with excluded property.

Excluded property is presumed to remain the property of the spouse that owns it.

What is “family debt”?

Family debt is all debt run up by either or both spouses during their relationship. Family debt includes debt run up after separation if the debt was incurred to pay for or maintain family property.

Spouses are presumed to have a one-half responsibility for family debt, regardless of their contribution to the debt or the use that was made of it.

Are RRSPs and pensions family property?

Yes. The amount of any RRSPs or pensions that accumulated during the relationship is family property. There are special rules in the *Family Law Act* for dividing most kinds of pension. There are separate rules for dividing of other pensions and Canada Pension Plan credits that aren’t found in the *Family Law Act*. A lawyer can help with this.

Are shares in a company family property?

Yes. A spouse’s shares in a company are family property. This can be a complicated issue and you should speak to a lawyer if you or your spouse has an interest in a company.

Is an inheritance family property?

No. An inheritance that a spouse receives before, during or after a relationship is part of that spouse’s excluded property. However, for inheritances received before separation the amount the inheritance increased in value during the relationship is family property.

What happens if a spouse tries to hide or sell property?

The court can prevent the transfer of property to a third person if the court believes that the transfer is being made to avoid the other spouse’s interest in that property. The court can also reverse a transfer that’s already occurred, whether before or after separation, and make a “compensation order” to repay a spouse for property that was transferred to frustrate the spouse’s interest in that property.

Are there any exceptions to the equal division rule?

Yes. If an equal division of family property or family debt would be significantly unfair, the court can order a division that is unequal. Although the presumption of an equal division of family property and family debt is very strong, the court’s main duty is to ensure that property is divided fairly.

What does the court look at when dividing family property or family debt unequally?

The factors the court will take into account in determining whether an equal division would be significantly unfair include: the length of the spouses' relationship; whether debt was incurred in the normal course of the spouses' relationship and whether the amount of debt exceeds the amount of property; whether a spouse caused a significant increase or decrease in the value of debt or property after separation; and whether taxes must be paid to divide family property between the spouses.

Can spouses agree to an unequal division of family property and family debt?

Yes. Spouses can agree to an unequal division of property and debt in a separation agreement or by an order that they both agree the court should make, called a "consent order," or they might have made a marriage agreement or cohabitation sorting out their interests in excluded property or family property when they got married or began to live together.

The court cannot order a division of property and debt different than a valid marriage agreement or cohabitation agreement requires unless the agreement is overruled. For more information on marriage agreements and cohabitation agreements, refer to script 162 on "Marriage Agreements and Cohabitation Agreements".

Can the court divide excluded property?

Yes. Although the presumption that a spouse should be entitled to keep his or her excluded property is very strong, the court can divide excluded property if: family property or family debt outside British Columbia cannot be divided; or if it would be significantly unfair not to divide excluded property considering the length of the spouses' relationship and the non-owning spouse's direct contribution to the excluded property.

Can spouses agree to divide excluded property?

Yes. Spouses can make an agreement at the start or end of their relationship that excluded property will be treated like family property and be divided between them.

When does each spouse get their share of the family property and become responsible for the family debt?

On the date the spouses separate, each spouse becomes a one-half owner of all family property as a tenant in common, and each becomes responsible for one-half of the family debt.

When do you have to apply for a division of property and debt?

It isn't necessary to start a court case to divide property or debt, and you don't need to get a divorce order first if you're married. However, if an agreement about dividing property and debt can't be reached:

- married spouses must apply to court for a division of property and debt under the *Family Law Act* within two years of the date the that court made a divorce order or a declaration that their marriage is a nullity; and
- unmarried spouses must apply to court for a division of property and debt under the act within two years of the date they separated.

Summary

When married or unmarried spouses separate, each spouse is entitled to an interest in all family property and becomes responsible for all family debt. Normally the interest in family property is a half interest and the liability for family debt is for one-half of that debt; the spouses' interests might be unequal if an equal share would be significantly unfair. Each spouse will usually keep his or her excluded property, but will have to share half of the amount that the excluded property increased in value during the spouses' relationship.

Because the division of family property and family debt raises some very complex legal issues, it's important to get legal advice immediately. With proper advice and help, it's often possible to settle the division of property and debt without having to go to court.

More information

For more information about family property, excluded property and family debt, see the property and debt section of the *wikibook JP Boyd on Family Law* provided by Courthouse Libraries BC.

[updated October 2014]

References

[1] http://www.dialalaw.org

What Happens When Your Spouse Dies (Script 150)

This script discusses what happens when your common-law relationship ends because of the death of your common-law spouse. Topics include:

- pension and survivor benefits
- inheritance rights of any children born to you and your spouse
- custody and guardianship of any children
- your rights if your spouse left a will
- what happens if your spouse did not leave a will

In law, a common-law relationship is like a marriage

In general, if two people live together in a common-law relationship, the law treats their relationship like a married relationship in many ways. But there are some differences, especially when it comes to limitation periods, and deadlines for making certain legal claims.

Being in a common-law relationship means that you and your partner qualify as “spouses” under a particular law. The provincial *Family Law Act* and many other provincial laws define a “spouse” as someone who is legally married as well as someone who has lived in a “marriage-like relationship” for at least two years. The Canada Pension Plan and many other federal laws define a spouse as someone who has lived in marriage-like relationship for at least one year. If your rights depend on a particular law, it is important that you know exactly how that law defines “spouse”.

What rights do you have to pension and survivor benefits?

You may be entitled to pension and survivor benefits when your spouse dies. Some pension plans recognize common-law spouse when it comes to paying out death benefits. Generally, you need to apply to the administrator of a pension plan to receive benefits.

Specifically, are you entitled to CPP benefits?

You can receive Canada Pension Plan benefits if you and your spouse lived together for a year or more before your spouse’s death. CPP provides three kinds of survivor benefits:

- a death benefit, which is a one-time payment
- a widow or widower’s pension, which is a monthly payment
- an orphan’s benefit, which is a monthly benefit paid to biological or adopted children

You have to apply for CPP survivor benefits [1]. They will not come automatically. You can pick up an application kit from any Human Resources Canada Centre office and at many funeral homes, or you can apply online at www.servicecanada.gc.ca [2]. Call the main federal government CPP office at 1.800.277.9914 if you need help.

What are the inheritance rights of a child born outside of marriage?

If a parent says in a will: "I leave all my estate to my children in equal shares", that parent's children share equally, whether or not they were born while the parent was married or not.

If your spouse's will does not sufficiently take care of the needs of a child you had or adopted together, the child can apply to court to fix the problem. The *Wills, Estates and Succession Act* allows a biological or adopted child to apply to the court to change a deceased parent's will, and the court may vary the will if it does not adequately provide for the child's financial support. This does not apply to step-children.

If your spouse died without making a will, any children you had or adopted with your spouse are entitled to a share of the estate under the *Wills, Estates and Succession Act*. The amount depends on the size of the estate and whether your spouse left behind a married spouse or other children.

Incidentally, this leads to an important point. If you are the parent of a child born from a different relationship, or the step-parent of a child, you should have your own will prepared, to ensure all of your children would be looked after in the way you would like after your death.

What are your rights if your spouse left a will?

If your spouse left you a fair share of his or her estate in the will, you just have to go through the regular legal steps to inherit. To receive your inheritance, the will go through a procedure called "probate" if the value of the estate is more than $25,000 or contains an interest in real estate. Refer to script 178 on "Your Duties as Executor" to learn more about probating a will.

But if your spouse left you nothing or too little, you should talk to a lawyer right away. Under the *Wills, Estates and Successions Act*, a court can vary the will to provide something for a common-law spouse. To be eligible:

- you must have been living with your spouse at the time of his or her death,
- you must have been living with your spouse in a marriage-like relationship for at least two previous years from the date of death including relationships between persons of the same gender, and
- the court case must be started within 180 days of the grant of probate in British Columbia.

There's another situation to consider. Let's say your spouse made a will and looked after you and your children in it. But let us also say that your spouse had another spouse or children from another relationship, and did not leave them very much or anything at all. They too can go to court to have the will changed to better look after them.

For more information on getting a greater share of a deceased person's estate, refer to script 179 on "The Disappointed Beneficiary".

What are your rights if your spouse did not make a will?

In general, a common-law spouse has the same rights as a married spouse.

Let us say you lived with your spouse for at least two full years before he or she died. If he or she dies leaving you and surviving descendants, you would receive the household furnishings and a preferential share in the estate. If all the descendants of the deceased are also biological or adopted children of you and your spouse, your preferential share would consist of at least $300,000 from the estate. If, however, the descendants of the deceased are not related to you, your preferential share would only consist of at least $150,000 from the estate. In both cases, after the preferential share has been determined, you would receive one-half of the remainder of the estate, and your spouse's biological and/or adopted children receive the other half. If the estate is less than the determined preferential share, the entire estate would be distributed to you. You should consult a lawyer if your common-law spouse has died, leaving children and no will.

The surviving spouse may acquire the spousal home to satisfy, in whole or in part, the surviving spouse's interest in the estate.

Now, if you and your spouse lived separate or apart for at least two years, or one or both of you agreed to separate, or live apart permanently prior to the two year period before his or her death, you would not inherit the estate. But if you separated only a short time before, you may be able to apply for support from the estate, and you should consult a lawyer immediately.

Do you need to apply for custody and guardianship of your children?

That depends on the circumstances:

- If both biological parents are living together and no guardian has been designated when one of the parents dies, the surviving parent is the guardian of any children, whether you were married or not at the date of the death of the other parent.
- If the biological parents are separated, the parent with whom the child usually resides is the sole guardian of the child, unless the two of you have made a joint guardianship agreement, or a court has ordered joint guardianship.

For step-children, you will have to apply to the court for guardianship of them, even if they are already living with you, if your spouse did not make a will appointing you as guardian or if he or she was a joint guardian with the other biological parent. You should speak to a lawyer if you have any questions about this situation.

What is the effect of appointing a guardian in a will?

In a will, the guardian of a child can designate a person who will become the guardian of a child upon his or her death. However, if that designated guardian then dies, the child would become a ward of the province, because a guardian appointed under a will cannot designate another guardian through the guardian's will. The Ministry of Child and Family Services would investigate the matter, and would not oppose a suitable person applying to the court for guardianship of a child. A lawyer should be consulted immediately if a guardian appointed under a will has died.

Where parents are joint guardians, and they each appoint someone else who is not necessarily the other parent to be the successor guardian in their wills. It is not clear if guardianship would go to the surviving parent or to the successor guardian named in the deceased parent's will. If your deceased spouse shared joint guardianship with you, but named someone else to be the children's guardian, you should speak with a lawyer.

Where can you get more information?

- Read the booklet entitled Living Together or Living Apart: Common-law Relationships, Marriage, Separation, and Divorce [3] by the Legal Services Society, BC and available free on their website at www.legalaid.bc.ca [4]. To find it, click "Our publications" then under "I want to find a publication by subject," click "Families & children [5]".
- Also see the Legal Services Society's Family Law in BC website at www.familylaw.lss.bc.ca [6] — under "Your legal issue," click "Common-law relationships", click on "The basics [7]".

[updated January 2015]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [8].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.servicecanada.gc.ca/eng/services/pensions/cpp/survivor-pension.shtml
[2] http://www.servicecanada.gc.ca
[3] http://www.legalaid.bc.ca/publications/pub.php?pub=347
[4] http://www.legalaid.bc.ca
[5] http://www.legalaid.bc.ca/publications/subject.php?sub=3
[6] http://www.familylaw.lss.bc.ca
[7] http://www.familylaw.lss.bc.ca/legal_issues/commonLawBasics.php
[8] http://www.dialalaw.org

Getting Married in British Columbia (Script 160)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses getting married. If you plan to get married in British Columbia, there are a number of formalities that are required and procedures you should know about.

Before you can get married in BC, certain qualifications must first be met

They are as follows:

- Each of you has to be unmarried; in other words, you can't be in a marriage with someone else.
- You must not be too closely related to each other: you cannot marry anyone in your immediate family or any near relation.
- Each of you has to be 19 years of age or older. If you're under 19, you may still get married, but you need the agreement of both your parents or of your guardians. If you're under 16, you need a court order to get married.

In BC, and in the rest of Canada, opposite- as well as same-sex couples can marry, and the rules that apply to same-sex couples are exactly the same as the rules that apply to opposite-sex couples.

Assuming you meet the qualifications, you'll need a marriage licence

In order to apply for a marriage licence, one of you has to go, in person, to a Vital Statistics Agency office, which is the office of the Registrar of Births, Deaths and Marriages. In the lower mainland, the office is at 250 - 605 Robson Street, and in Greater Victoria, the office is at 818 Fort Street. There are also many other government agent offices in Vancouver, Victoria and all around the province. To find out the location of a Marriage License Issuer in the area closest to you, call 604.660.2937 in Vancouver, 250.952.2681 in Victoria, or toll-free 1.800.663.8328 elsewhere in BC.

What does a marriage licence cost?

There's a fee of $100 for the marriage license that must be paid at the time of your application. If one or both of you was previously married, you must provide proof of the divorce before you can get the license, usually by providing a copy of your divorce order or certificate of divorce. The marriage license is valid when you get it but expires if you don't get married within three months.

Next, you need to get married in a religious or civil ceremony

In either case, the person performing the ceremony must be licensed under the provincial *Marriage Act* to perform marriages, and not all religious officials are licensed under the Act. For civil ceremonies, this person is known as a "marriage commissioner". The marriage ceremony must be held in the presence of at least two witnesses, in addition to the marriage commissioner or religious official.

If you wish, you can be married in a civil ceremony and then have a religious ceremony afterwards as well. If you have your religious ceremony second, it doesn't matter whether the religious official is licensed to perform marriages, since you will have been legally married at the civil ceremony.

It is not necessary that banns or another public announcement of the marriage be published before the marriage ceremony takes place.

What if someone objects to the marriage?

Any person who believes there is some reason why two people should not marry can file a "caveat" with the Vital Statistics Agency. If this happens, a marriage licence will not be issued until the agency is satisfied that the issuing of the licence shouldn't be prevented or the caveat is withdrawn by the person who filed it. If a caveat has been filed, you should speak to a lawyer.

Summary

If a couple wishes to get married, they must be qualified to marry. If they can marry, they must obtain a marriage licence. Then, they must have the marriage ceremony performed by a religious representative or marriage commissioner licensed to do so, and the ceremony must be witnessed by at least two other witnesses.

Where can you get more information?

- See the information posted on the website for BC's Vital Statistics Agency at www.vs.gov.bc.ca/marriage [1].
- See also the Marriage & Married Relationships page of the wikibook *JP Boyd on Family Law*, hosted by Courthouse Libraries BC, at Marriage & Married Spouses.

[updated November 2014]

References

[1] http://www.vs.gov.bc.ca/marriage
[2] http://www.dialalaw.org

Changing Your Name (Script 161)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses changing your name, including when you get married or divorced, as well as changing a child's name.

In general, you can use whatever name you want

This is true as long as you aren't changing your name for improper reasons, like avoiding paying your debts. However, important government documentation, such as passports and drivers' licences, will only be issued in your legal name.

Marriage is one situation where people may change their names

Many people, women especially, choose to use their spouse's last name when they marry. Actually, you have a number of choices for your last name when you get married:

- You can each keep the same last name that you had before the marriage, including, for example, your previous married last name if you were married before.
- You can take the last name of the person you're marrying.
- You can use the last name that you had at birth or by adoption.

These changes can be made automatically. Other name changes require an application to the Vital Statistics Agency:

- You and your new spouse can apply for an entirely new last name. For example, Mary Smith and Robert Jones can apply to have their names legally changed to Mary and Robert Black. Or to Cecilia and Walter Black, if they wish.
- You can apply to have a combined or hyphenated last name of both your spouse's and your own last name, such as Smith-Jones.

You don't have to change your name if you don't want to.

How do you get ID in your new name after getting married?

You can start getting identification and other documents, like credit cards, business cards and so forth, in your new name as soon as you like. For automatic name changes that don't require an application to the Vital Statistics Agency, you'll need to provide a copy of your government-issued marriage certificate. If you had to apply for a name change, you'll need a copy of your certificate of change of name.

When do you need to apply for a legal change of name?

You have to apply for a legal name change if you want an entirely new last name or if you want a hyphenated surname.

How do you apply for a legal change of name?

You must be at least 19 years old and have lived in BC for three months, or consider BC your permanent residence, before making your application. In addition, you must be able to provide certain supporting documents such as:

- An original birth certificate if you were born in Canada
- Certified copies of immigration and citizenship documents if you weren't born in Canada
- An original marriage certificate if you were married in Canada
- A photocopy of your marriage certificate if you were married outside of Canada

You may also be asked to show proof of residency. In addition, you may need consent forms if you're applying to change the name of a child under the age of 19.

Note that the originals of the supporting documents that you provide with your application won't be returned to you upon completion of the change of name, so make photocopies first.

The first step is to obtain a Change of Name application package

These forms can be obtained by picking them up in person from any Vital Statistics Agency or government office, or by ordering them from the Vital Statistics Agency by telephone, fax or email. The phone number for the Vital Statistics Agency is 250.952.2681 in Greater Victoria, and their website is www.vs.gov.bc.ca [1]. Because specialized envelopes, specifically designed for the application process, must be used, these forms aren't available for downloading from the Internet.

Fingerprinting and a criminal record check is next

Once you've completed the Application for Change of Name, take it together with the required fee and supporting documents to your local police or RCMP detachment. As of October 1, 2002, anyone 18 or over who wants to change their name must have their fingerprints taken. The officer taking the prints will then forward them in a sealed envelope, along with the application form and all related fees and documents, to the Vital Statistics Agency in Victoria for processing. Fees for fingerprinting must be paid directly to the local police or RCMP, and these fees are in addition to the fees for the Application for Change of Name.

Can a name change be refused?

The Vital Statistics Agency will decide whether to grant or refuse your application. It will be refused if it appears to be made for an improper purpose or if the director believes that the name change would cause confusion or embarrassment to anyone.

What happens if your name change is granted?

After your application has been processed and the name change registered, the envelope containing your fingerprints will be sent by the Vital Statistics Agency to the RCMP in Ottawa to conduct a criminal record check. The RCMP will then return your fingerprint record to you. Your fingerprint record won't be kept on file with the local police detachment, the Vital Statistics Agency or the RCMP as a result of this application process.

A copy of your Certificate of Change of Name will be sent to you

This will allow you to apply for other identification in your new name.

The name change will be recorded in government records

Your change of name will be published on a private government Change of Name web site. As well, if your birth or marriage is registered in BC, a note will be made on the original registration, and any later copies will be issued in your new name. But a marriage registration won't be changed where there has been a divorce or if the husband or wife has died.

Do you need a lawyer?

You don't need a lawyer to prepare the Application for a Change of Name. But if you're trying to change the name of a child in your custody and cannot obtain permission from the other parent, you should talk to a lawyer.

What if you divorce, or just want to return to a previous name?

Then you may choose any of the following:

- Your current married last name from before the divorce
- Your previous married last name, if you were married before
- Your name at birth

You don't have to apply for a legal change of name, you can just start using one of these last names.

What if you're divorcing and want a completely new name?

If you want to change your name to a name you've never used before, there's a special procedure provided at the time of a divorce. You can file the appropriate forms with your application for the final divorce order, but you must have asked for this order in your Notice of Family Claim or Counterclaim. By using this procedure you can avoid the fingerprinting process and the criminal record check. (This procedure isn't necessary if the change is back to your maiden surname or your previous married surname.)

Where can you get more information?

- See the website of the Vital Statistics Agency at www.vs.gov.bc.ca [1], or phone the Agency in Victoria at 250.952.2681.
- See also the Naming & Change of Name page of the wikibook JP Boyd on Family Law, published by Courthouse Libraries BC, at Naming and Changes of Name.

[updated November 2014]

References

[1] http://www.vs.gov.bc.ca
[2] http://www.dialalaw.org

Marriage Agreements and Cohabitation Agreements (Script 162)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Relationships don't always last forever

About one in every two marriages will end in a divorce. The rate of breakdown of unmarried relationships is even higher. Although you love the person you are living with and probably expect the relationship to be permanent, it's sometimes prudent to make plans how things will unfold in the event it comes to an end.

You could consider a marriage agreement or a cohabitation agreement

This script will tell you about marriage and cohabitation agreements – what they are, what they can and can't do, and the reasons for having or not having one. A cohabitation agreement is sometimes also called a "living together agreement", and marriage agreements are sometimes known as a "pre-nuptial agreement" or just a "pre-nup".

Note that this script only covers married spouses and unmarried spouses. People who aren't spouses or don't think they will become spouses require special legal advice.

Who is a spouse?

Under the provincial *Family Law Act*, a spouse is:

- someone who is married;
- someone who has lived with someone else in a marriage-like relationship for at least two years; and
- for the parts of the *Family Law Act* that don't deal with property and debt, someone who has lived with someone else in a marriage-like relationship for less than two years if the couple has had a child together.

What are marriage agreements and cohabitation agreements?

Marriage agreements and cohabitation agreements are legal contracts, just like any other type of contract such as the contract you might have with a landlord or a business partner. They are written documents that summarize each person's legal obligations to the other.

Marriage agreements can be between spouses who are already married, or people who are planning to marry. Cohabitation agreements can be between people who are already living together or people who are planning to live together and expect to be living together.

Marriage agreements and cohabitation agreements identify who each of the parties are and usually makes some statement about the purpose of the agreement. Then they set out a series of promises that you each make to the other, usually about what will happen in the event the relationship ends, but sometimes also about what will happen during the relationship. They also say when they will take effect, which might be the date the couple marry or begin living together, or the date the agreement is signed.

What are the legal requirements for a marriage agreement or cohabitation agreement?

Marriage agreements and cohabitation agreements must be in writing. Both of you must sign the agreement, and your signatures must be witnessed by at least one other person. The witnesses do not become bound by your agreement; by witnessing your agreement, they are just saying that they saw you sign your name.

Marriage agreements and cohabitation agreements usually deal with financial issues

Typically, marriage agreements and cohabitation agreements talk about who will be responsible for managing and owning property and debts during the relationship, and about how those financial issues will be handled if the relationship breaks down. They sometimes also say whether spousal support will be paid in the event the relationship breaks down.

For example, an agreement might say that each spouse will keep whatever property they had before they started living together, even if they later break up. In addition, it might say that if the spouses separate, one spouse will have the right to stay in the family home (at least temporarily) and perhaps receive support from the other spouse for a period of time and a certain portion of the family property. It may also say that each spouse will get an increasing share of the other spouse's own, excluded property the longer the relationship lasts. There are many possible arrangements for how property, debts and spousal support will be dealt with and you should speak to a lawyer if you are thinking about getting a marriage agreement or cohabitation agreement.

Marriage agreements and cohabitation agreements sometimes also talk about how children brought into the marriage will be cared for after separation. They usually don't talk about how children born during the marriage will be handled, and they usually don't talk about child support.

Does the agreement have to be fair?

If both spouses get legal advice from their own lawyers and the agreement is reasonable, it will most likely be enforced by a court if one spouse tried to ignore the agreement after the relationship breaks down. However, contracts that are obviously unfair to either person, were unfairly entered into, or were made without full financial disclosure may be set aside or changed by the court, especially if one or both parties did not get independent legal advice about the meaning of the agreement and the consequences of signing it.

What things will not be enforced?

With or without a written agreement, the law imposes certain obligations on married and unmarried spouses that you cannot contract out of. Also, some terms will never be enforced by a court, such as a contract about having sex, remaining childless, or to end the marriage after a certain period of time.

Agreements about children

Although you can make a marriage or cohabitation agreement which talks about the care and financial support of any children born during the relationship, the contract will not be binding on you if your relationship breaks down.

When and why are marriage agreements and cohabitation agreements used?

Marriage agreements and cohabitation agreements are sometimes intended to govern how things will work during a relationship. More often they're intended to govern how things will work out if the relationship ends, in order to settle these issues now, in advance of separation, in the hope of avoiding future conflict and litigation. The issues easiest to resolve ahead of time usually involve the division of family property and excluded property, responsibility for debts and the payment of spousal support.

Marriage agreements and cohabitation agreements seem to be used more often in second relationships than in first relationships, especially when there are children from a previous relationship. This is probably because someone who has gone through an unpleasant breakup might want to avoid going through that unpleasantness again.

Can you change or end an agreement?

You and your spouse can always change or cancel your agreement, providing of course that you both agree to the change or cancellation. Marriage agreements and cohabitation agreements are changed by making a second written agreement, called an "addendum agreement" or an "amending agreement", to change some parts of the first agreement or to cancel and replace the first agreement. Like the first agreement, you must sign the new agreement and your signatures must be witnessed.

You should consult a lawyer

If you want a marriage agreement or cohabitation agreement, you can write down some general ideas and expectations with your spouse and either prepare a written agreement based on these notes or have a lawyer draft the agreement. It's important to know that an agreement signed under pressure a day or two before a wedding may not be enforceable.

Whether you have a lawyer write the agreement or not, it is very important that you meet with a lawyer who is familiar with this area of the law for advice about how the agreement affects your rights and obligations, including your future rights and obligations, before you sign it.

Your spouse must see a lawyer too

This may seem unnecessary when the two of you have an agreement. But having your own lawyers at this stage lowers the chance of either of you being able to say to a court at a later date, "I didn't know what I was signing" or "I only signed it because I thought I had no choice". If you want a marriage agreement or a cohabitation agreement, you want to make sure it's going to do the job, and it's usually worthwhile to spend the extra time and money to do it properly.

Summary

If you're considering a marriage agreement or a cohabitation agreement, discuss the idea with your spouse or future spouse, and then discuss it with a lawyer. Marriage agreement and cohabitation agreements usually deals with financial issues. If trouble comes and your spouse breaks the agreement, you can sue to enforce the agreement, just like any other contract.

For more information about cohabitation agreements, see the Cohabitation Agreements page of the wikibook *JP Boyd on Family Law*, hosted by Courthouse Libraries BC. For more information about marriage agreements, see the Marriage Agreements page.

[updated November 2014]

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- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [1].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.dialalaw.org

Your Income, Support and Property Rights (Script 148)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains your income, financial support and property rights when you are in or have left a relationship that is not a spousal relationship. Topics covered include:

- your rights to social assistance, pension plan benefits, employment insurance benefits, medical and dental coverage, and coverage under ICBC insurance programs;
- responsibility for debts;
- your right to financial support if you separate;
- what happens to the property you acquire during your relationship; and
- why you should have a will.

Who is a “spouse”?

Under the provincial *Family Law Act*, “spouse” includes people who are married to each other as well as:

- people who have lived together in a marriage-like relationship for at least two years; and
- for some parts of the act, people who have lived together in a marriage-like relationship for less than two years if they have had a child together.

This script is for people who are not spouses.

Can you get income assistance while living in an unmarried relationship?

The welfare office may treat you like spouses as soon as you start to live together, whether you are spouses or not. When you apply for welfare, your caseworker will look at the income and assets for both of you. If you get income assistance, you'll get it at the rate for a couple or family, and not as two single people. If you're under 19, you may be refused welfare, but you can appeal this decision. Information about income assistance appeals can be found in script 288.

It's important to know that if you claim welfare as a single person when you're actually living with someone else as a couple, you may be required to repay any benefits you have received if your relationship is discovered. You may also face a civil court case or even criminal charges, and you could be refused future services by the Ministry.

What about getting benefits under a pension plan?

Pension benefits under Canada's Old Age Security program are paid to Canadian residents over the age of 65. A Spouse's Allowance is also paid to the spouses of pensioners for spouses between the ages of 60 and 65. To qualify for the Spouse's Allowance as a spouse, you only need to be living together for one year. For more information on Old Age Security benefits, refer to script 239 on "Senior Law and Elder Abuse".

Private pension plans generally do not provide benefits for people who are not spouses.

Can you get Employment Insurance benefits?

Employment Insurance will treat you as if you are spouses if you and your partner have lived together for at least 12 months or are living together and expecting a child together.

If your partner moves to another city or province, you can quit your job to go with him or her, you may still have the right to get Employment Insurance benefits. Note, however, that you can be denied benefits if there's no work at all for you in the new town.

Are you covered under your partner's medical and dental plans?

The BC Medical Service Plan covers people who live together. There's no requirement about how long you must have been living together.

Medical or dental plans or extended-health plans from an employer generally do not provide benefits for people who are not spouses.

Are you responsible for your partner's debts?

If you sign for a loan, it's your loan and your responsibility, not your partner's. Likewise, if partner signs for a loan, it's his or her responsibility.

If you both sign for a loan, however, you are both responsible to repay the debt, even if you're just a guarantor and you both mean the loan to be your partner's responsibility. This means that if your partner is unable or refuses to make the payments, you'll be responsible, even though you may not have had any benefit from the loan. But if you end up paying some or all of a joint loan, you can apply to the court for an order that him or her pay you back.

If you separate can you get spousal support from your spouse?

Spousal support is money paid by one spouse to the other after separation to help that spouse meet his or her financial needs. The *Family Law Act* allows unmarried people who have lived with someone in a marriage-like relationship for less than two years to apply for spousal support, but only if the couple have a child together.

The amount of spousal support payable is usually fixed using mathematical formulas set out in the Spousal Support Advisory Guidelines based on your incomes, the length of time you lived together and other factors. For information on spousal support, refer to script 123 on "Spousal Support".

If you separate can you get child support from your spouse?

Child support is money paid by one parent to the other after separation to help that parent meet the financial needs of the children. Child support is payable by anyone who is a parent, whether they are married spouses, unmarried spouses or neither.

The partner of a parent can be required to pay child support, but only if both are parents of the child or the couple are spouses. Someone who is not the spouse of a parent doesn't qualify as a stepparent who may be responsible for child support.

The amount of child support payable is fixed by the Child Support Guidelines according to the payor's income and the number of children support is being paid for. For information on child support, refer to script 147 on "Unmarried Spouses: About the Children in Your Family".

What rights do you have to property acquired during the relationship?

This is where there are the biggest differences between being a spouse and not being a spouse. The *Family Law Act* requires that family property be shared between spouses, and for the purposes of this part of the act, "spouse" is defined as:

- someone who is married; and,
- someone who lived with someone else in a marriage-like relationship for at least two years.

If you do not qualify as a spouse, the only property you are presumed to have an interest in is the property you own and the property you jointly own with your partner. If you own an asset together (like a house, a car, or a bank accounts), you are each presumed to have an equal interest in the asset. If you contributed to the purchase of an asset owned only by your partner, or paid more for the purchase of a joint asset than your boyfriend or girlfriend, you may be able to get out what you put in, however you have to be able to prove your contributions to the purchase and that you didn't mean to give your extra contributions to your partner as a gift.

The law in this area is complex and you should to speak to a lawyer.

What about the law of "unjust enrichment"?

If you contributed in some way to the assets owned by your partner, you may be entitled to a share of that property based on an "unjust enrichment" claim. To claim an interest in your partner's property, you must show three things:

- that your partner gained a benefit from your contributions;
- that you suffered a loss of some sort as a result of making those contributions; and
- that there is no legal reason why your partner should have received the benefit of your contributions at the cost of your loss.

If you can prove these things, the court may agree that your partner was unjustly enriched by your contributions and that you should be compensated for your losses. The court will make an order requiring your partner to compensate you. If he or she can't afford to make the payment, the court may impose a trust, called a "constructive trust", on your partner's property so that you can be paid the compensation you are owed.

The law in this area is very complex and you should to speak to a lawyer.

What if you have to go to court?

If you separate, you may have to go to court to sort out some of your support rights and perhaps your property rights. Family Court is a part of Provincial Court, where you can settle many questions dealing with support for you and your children, plus guardianship, parenting arrangements and contact. Family Court can't deal with property issues and it can't make orders about who will live in the family home. For this, you'll have to go to Supreme Court, and you'll likely need a lawyer.

For more information on Family Court, refer to script 110 on "Family Court".

Do you need to make a will?

If you want to make sure your partner and children are taken care of after your death, you need to make a will. In your will, you can say who you want your property to go to. You can also name a guardian who'll be legally responsible for your children after you and your partner die. A court can always make an order that is different than your intentions for the children, however, if this would be in the children's best interests. You should encourage your spouse to make a will too.

For more information, refer to script 150 on "What Happens When Your Spouse Dies" and script 177 on "What Happens When You Die without a Will?".

Where can you get more information?

- Read the Other Unmarried Relationships page of the wikibook *JP Boyd on Family Law*, published by Courthouse Libraries BC.
- Read the booklet "Living Together or Living Apart: Common-law Relationships [1], Marriage, Separation, and Divorce" by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [2]. To find it, click "Our publications" then under "I want to find a publication by subject," click "Family law".
- Refer also to the other scripts in this Dial-A-Law series [3].

[updated November 2014]

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References

[1] http://www.legalaid.bc.ca/publications/pub.php?pub=347
[2] http://www.legalaid.bc.ca
[3] http://http://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Family-Law
[4] http://www.dialalaw.org

Children Born Outside Marriage (Script 140)

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This script discusses issues relating to children born to parents who aren't married, including parents in unmarried spousal relationships, sometimes called common-law relationships. These issues include birth registration, guardianship, parenting arrangements and contact, inheritance rights, and so on.

What is the legal status of a child born outside of marriage?

There is no legal difference in the status of a child born to someone who is legally married, to a single mother, to a person in an unmarried spousal relationship, to a couple in a same-sex relationship or to a couple in an opposite-sex relationship. A child born outside marriage is treated in exactly the same way as a child born inside marriage.

How is the birth registered when a child is born outside of marriage?

BC's *Vital Statistics Act* requires that a child born in BC must be registered with the government by filing a Registration of Live Birth within 30 days after the birth. The Act usually requires both parents to sign this form, unless one or both parents are incapable. If the father is unknown or doesn't acknowledge that he is the father, the child's mother can sign the birth registration alone.

How is the child's last name chosen?

The parents may choose any last name they like, if they agree. Otherwise, the child's last name will be a hyphenated combination of both surnames in alphabetical order. If only the birth mother signs the birth registration, she can choose the last name.

Can the child's birth certificate be changed later to show the other parent?

If the parents agree, they can amend the birth registration to list them both as parents and, if they want, to change the child's name. If they don't agree, the other parent may apply to court to establish the child's parentage and ask for a change to the child's birth certificate, including a change to the child's last name.

Before making name changes, however, the court must consider the change to be in the best interests of the child. The court must also consider the wishes of any child over age seven, and children over 12 must agree to the change in last name. If these conditions are satisfied, the court may order the last name to be the last name of either parent or a hyphenated combination of their last names.

The Vital Statistics Agency handles birth registrations

For more information, call the Vital Statistics Agency at 604.660.2937 in the lower mainland, 250.952.2681 in Greater Victoria, and toll free 1.800.663.8328 if you live elsewhere in BC. Also check the Agency's website at www.vs.gov.bc.ca [1].

Does a parent have to consent to the adoption of his or her child?

Say a single mother wants her child to be adopted by another family. In this case, BC's Adoption Act says that the consent of the biological father is usually required. The father must be notified about the proposed adoption, unless the court rules that it's not in the child's best interests or the circumstances justify not giving the father notification. There is also a Birth Father Registry that will ensure that registered fathers are notified of a proposed adoption.

For more information on adoption, refer to refer to script 145 on "Adoption" and script 146 on "Adoption Registries".

Is a parent automatically a guardian of his or her child?

Sometimes. The *Family Law Act* says that parents who live together after their child's birth are the child's guardians, both during their relationship and after they separate. For parents who never lived together after their child was born, they are only presumed to be a guardian of their child if:

- they are a parent because an assisted reproduction agreement says they are a parent;
- the parent and all of the child's guardians make an agreement that the parent will be a guardian; and,
- they regularly care for the child.

However, this also means that a single father or single mother who never lived with the other parent after the child's birth is not a guardian of his or her child, even if the parent cares for the child full time. This is probably a mistake in the writing of the legislation that will probably be corrected in the future.

If a parent isn't a guardian, the parent can apply to the court to be appointed as the guardian of his or her child.

What does “guardianship” mean?

People who are the guardians of a child have parental responsibilities, the responsibility for making decisions about how the child is nurtured and raised, and the duty of making those decisions in the child’s best interests. Parental responsibilities include making decisions about where the child lives and goes to school, how the child gets treated when sick, and giving or withholding permission on behalf of the child.

Parental responsibilities can be shared between two or more guardians, meaning that that they are all responsible for making decisions about the child and must consult each other when making decisions. Parental responsibilities can be allocated among guardians, so that a guardian has sole responsibility for certain kinds of decisions, and can make those decisions without having to consult the other guardians.

The time a guardian has with a child is called parenting time. During a guardian’s parenting time, the guardian is responsible for the care of the child and decision-making about day to day matters involving the child.

What does it mean if a parent isn’t a guardian?

A person who isn’t a guardian of a child, including a parent who isn’t a guardian, doesn’t have any parental responsibilities for the child and isn’t entitled to be consulted when decisions are being made about the child.

The time someone who isn’t a guardian has with a child is called contact.

How do you apply to be appointed as a guardian? Only people who aren’t already guardians need to be appointed as a guardian. To be appointed, you must apply to court and must complete a special affidavit required by the court rules. This affidavit requires you to get a criminal records check, a protection order registry check and a records check from the Ministry for Children and Family Development, and to provide certain information about the children that are and have been in your care.

Can you get child support for children born outside marriage?

Child support is a right of the child not the parent, and each parent is legally responsible for the financial support of their children, whether the parents are married to each other or not.

For more information on child support, refer to script 117 on "Child Support”.

What are the inheritance rights of children born outside of marriage?

The rights depend on whether or not the parent made a will and whether the parent has a spouse or other children at the time of death:

- If a person has a spouse and dies without a will, the spouse is entitled to a certain share of the dead person’s estate and the person’s children split what’s left, whether they’re born outside marriage or not.
- If a person dies without a will and doesn’t have a spouse, the person’s children are entitled to share in the dead person’s estate, whether they’re born outside marriage or not.
- If a person dies with a will, children born outside of marriage will receive whatever the dead person has left to the children in his or her will.

However, the child can apply to vary the will if the child believes that he or she didn’t receive a fair share of the dead person’s estate.

For more information on inheritance rights, refer to script 179 on "The Disappointed Beneficiary” and script 177 on “What Happens When You Die Without a Will”. As wills can be complicated, you should get advice from a lawyer.

More information

- For more information about family law and children, see the Children page of the wikibook *JP Boyd on Family Law*, hosted by Courthouse Libraries BC.
- For more information about guardianship, contact and applications to be appointed as a guardian, see the page Guardianship, Parenting Arrangements and Contact.

[updated November 2014]

References

[1] http://www.vs.gov.bc.ca
[2] http://www.dialalaw.org

Child Protection and Removal (Script 141)

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This script discusses investigating a child protection report, what the results can be (including removing a child from home), and the court hearing that occurs when a child is removed.

Know when you need a lawyer

If the Ministry of Children and Family Development becomes concerned regarding the welfare of your child or has removed your child, you should talk to a lawyer as soon as possible. You should consult with a lawyer at any time during a child protection investigation or a subsequent court hearing. If you cannot afford a lawyer and your child has been taken into care, you may be able to get a free lawyer from the Legal Services Society (LSS). To find a legal aid location near you, go to the LSS website at www.legalaid.bc.ca [1] and under "Legal aid," click "Legal aid locations [2]". Or contact the LSS call center at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (toll free, elsewhere in BC).

There is a legal duty to report suspected child abuse

The provincial *Child, Family and Community Service Act* says that anyone who believes that:

- the child has been, or is likely to be, physically harmed by the child's parent;
- the child has been, or is likely to be, sexually abused or exploited by the child's parent;
- the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;
- the child has been, or is likely to be, physically harmed because of neglect;
- the child is emotionally harmed by the parent's conduct;
- the child is deprived of necessary health care or necessary consent to health care if refused by the parent;
- the child's parent is unable or unwilling to care for the child;
- the child is or has been absent from home in circumstances that endanger the child's safety or well-being;
- the child's parent is dead and adequate provision has not been made for the child's care;
- the child has been abandoned and adequate provision has not been made for the child's care, etc;

must promptly report the matter to the Ministry. The 24-hour toll free Children's Help Line for reporting suspected abuse can be called at 310.1234 anywhere in BC. You don't need to dial an area code. Callers can remain anonymous if they wish.

The Ministry looks into all reports of suspected abuse or neglect

When suspected child abuse is reported, a social worker assesses the information in the report and determines if the child may be at risk. If the child is at risk, the Ministry must consider less intrusive means of protecting the child such at in-home supervision, coming up with plans to better care for the child or suggesting an agreement between the parents and the child to better care for the child. If the child is in imminent risk of harm, the Ministry can remove the child from the parents' care.

Investigations by the Ministry

A child protection investigation is done when there are more serious concerns about the child involved. It involves a more detailed enquiry to determine if the child needs protection, and the sort of protection that is best in the circumstances. Each child protection investigation includes:

- seeing and interviewing the child as soon as possible;
- checking out the child's living conditions;
- interviewing the parents;
- reviewing whatever documents and reports are available and relevant to the report; and
- getting information from people who know the family and the child.

What if the report of suspected abuse or neglect is about a youth?

If the concern is about a "youth" – a child aged 16 to 19 – services may be provided to keep the young person safe and help the youth develop supports and life skills. A child protection investigation is generally not the best response for a youth.

Will the police be advised?

Social workers will advise the police if a report of suspected abuse suggests that a child may have been physically harmed or sexually abused, or that a criminal act may have occurred which affects the safety of a child.

What rights do parents have during a child protection investigation?

The social worker must make sure the parents know the details of the report. The parents may also be told that the child will be interviewed, however the parents might not be told about this interview beforehand if the social worker and his or her supervisor believe this might put the child at risk.

The parents have the right to tell their side of the story and to ask questions. They also have the right to have a lawyer or someone else with them at meetings with the social worker. The family must be given as much information as possible about the progress of the investigation and the available support services.

What happens after a child protection investigation?

When an investigation is completed, there are two possible outcomes: a decision that the child doesn't need protection or a decision that they do need protection.

When the child doesn't need protection

If the social worker decides that the child isn't at risk, the parents will be advised and no further action will be taken. If the parents ask for voluntary help or the social worker suggests it, the social worker can refer the parents to services available in the community.

When the child needs protection

If the social worker determines that the child needs protection, but aren't in immediate danger, a plan is developed with the family to keep the child safe. This might include:

- providing voluntary services to help the parents to care safely for the child;
- arranging for the child to live with relatives or someone who has a significant relationship with the child; and
- getting a court order to allow the social worker to supervise the child in the home.

Removing the child from the home may also be considered

Removing the child is considered only when the child is or may be in immediate danger or if, after fully exploring all available options, there is no other way to keep the child safe.

Where will removed child stay?

As much as possible, the decision about where the child should stay will be made in consultation with the child, family, extended family like aunts, uncles or grandparents, and other adults who have significant relationships with the child. The social worker will try to place the child with a family member, but if this isn't possible the child will be placed in a Ministry-approved foster home.

If the child is removed, there will be a "presentation hearing"

A presentation hearing is a short hearing in family court that must be held within seven days of child being removed. The Ministry must report to the Court the circumstances that led to the removal and any less disruptive measures that were considered by the director before removing the child. This hearing is to decide whether the child should be returned to home or remain in the care of the Ministry until another hearing, called the "protection hearing", is held to decide whether the child is in need of protection.

What if a protection hearing is arranged?

The court may decide that the Ministry should have custody of the child until the protection hearing. Usually the Ministry encourages contact between the child and his/her family members, but if a family member poses a risk to the child, the visits may not be allowed or may be supervised by someone approved by the Ministry.

The protection hearing must begin within 45 days after the presentation hearing

If, at the beginning of the protection hearing, the parents and social worker can't agree on what should happen next, the judge will order that a case conference take place. A case conference is a meeting of the parents, the social worker, their lawyers and a judge to discuss the case and see if an agreement can be worked out. Mediators can also assist with reaching agreements.

If the parent believes his/her contact with the child has been wrongfully removed by the Ministry

In many child custody cases, one parent may make false reports to the Ministry alleging that his/her child has been physically or sexually harmed by his/her partner. In some cases, these allegations are not true. Once a report of physical or sexual abuse is made to the Ministry, the Ministry often reports it to the police or has the child undergo a medical examination to see whether there is any evidence of such abuse. These are all a part of the Ministry's investigation.

During this investigation period, the accused parent will often have no right to see the child or will have the liberty to have supervised contact with the child.

If you believe that you have been wrongfully accused of abusing your child and have no or little contact with her/him as a result, the following are steps you can take to ensure contact is reestablished with the child:

- Seek a Court Order to see all medical files relating to the child including results of physical examinations;
- Seek a court Order that the police and the Ministry produce their investigation records to see what reports your spouse has made and how the investigation was done;
- Ask for a s.211 report under the *Family Law Act* to have a psychologist assess the emotional estate of your spouse who made such allegations;
- Immediately apply to the Court and set down a Hearing to have a judge determine whether your child was or was not abused by you;

Where can you get help or find more information?

- See the link on "Protecting Children" on the Ministry of Children and Family Development's website at www.mcf.gov.bc.ca [3].
- Also see the *Child, Family and Community Service Act*, found at your local library and on www.bclaws.ca [4].
- Refer to script 156 on "Reporting Suspected Child Abuse". Read the booklet "Parents' Rights, Kids' Rights: A Parent's Guide to Child Protection Law in BC [5]" by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [1]. To find it, click "Our publications" then under "I want to find a publication by subject," click "Family law".
- Read the brochure "If Your Child is Taken: Your Rights As a Parent [6]" by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [1]. To find it, click "Our publications" then under "I want to find a publication by subject," click "Family law".

- Also see the Legal Services Society's Family Law in BC website at www.familylaw.lss.bc.ca [7] — under "Your legal issue," click "Child protection/removal [8]".

[updated January 2015]

References

[1] http://www.legalaid.bc.ca
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[3] http://www.mcf.gov.bc.ca
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[5] http://www.legalaid.bc.ca/publications/pub.php?pub=77
[6] http://www.legalaid.bc.ca/publications/pub.php?pub=28
[7] http://www.familylaw.lss.bc.ca
[8] http://www.familylaw.lss.bc.ca/legal_issues/childProtection.aspx
[9] http://www.dialalaw.org

Custody and Access, Guardianship, Parenting Arrangements and Contact (Script 142)

For couples that are thinking about separating or have already separated, the continued parenting of the children is often the biggest concern. This script discusses custody and access under the *Divorce Act* and guardianship, parenting arrangements and contact under the *Family Law Act*. It applies to anyone who is a parent, regardless of the nature of the parents' relationship with each other.

Which law applies?

Both the federal *Divorce Act* and the provincial *Family Law Act* talk about the care of children when their parents have separated. The *Divorce Act* only applies to parents who are or were married to each other. The *Family Law Act* applies to all parents, whether they were in married or unmarried spousal relationship, were in a dating relationship or weren't dating at all.

What does "custody" mean?

Custody is a term used by the *Divorce Act*. It means the right to exercise a parent's authority over a child and includes the right to say how a child is raised and make decisions on behalf of the child, like where the child goes to school, how the child gets treated when sick and what sports the child plays.

What are the different ways to decide custody?

Both spouses can have custody of a child after they separate, called "joint custody", or only one spouse can have custody of a child, called "sole custody". When a spouse has sole custody, only that spouse has parental authority over the child.

Custody is usually resolved by a written agreement between the parents or by going to court and applying for an order about custody. Note that a court order always takes priority over an agreement, so if you're having difficulty resolving custody with the other spouse, you should apply to the court for a custody order.

Most of the time spouses wind up with joint custody of their child. Joint custody doesn't mean that the child's time is divided equally between the spouses, although that is a common way of distributing children's time, but it does mean that the spouses have to work together when making decisions about the child.

Sole custody can be awarded to a spouse if: there has been family violence; the other spouse has drug or alcohol problems; the spouses are constantly arguing with each other about parenting decisions; the other spouse has been absent from the child's live; or for other similar reasons.

What does "access" mean?

Access is a term used by the *Divorce Act*. It usually refers to the visitation schedule of the spouse with the least amount of time with the children.

A spouse's access can sometimes be subject to a requirement that the spouse do or not do something during the access visit, such as smoking, drinking alcohol or driving with the child in the car. Access that depends on certain requirements of a parent's behaviour is called "conditional access".

Where there is a serious risk to the safety of the child, a spouse's access can be subject to the requirement that the access occur in the presence of another adult. This is called "supervised access".

How is access decided?

Access is settled the same way as custody – either by court order, written agreement or the spouses' informal arrangements. When spouses must go to court, the court will make a decision based on the best interests of the child. The court's primary concern is the best interests of the child and choosing the access arrangement that is best for the child.

What does "guardianship" mean?

Guardianship is a term used by the *Family Law Act*. Guardians are the people, usually parents, who are responsible for a child's upbringing and wellbeing. Guardians exercise "parental responsibilities" and have "parenting time" with a child, which will be discussed in a moment.

Who is a guardian?

The *Family Law Act* says that parents who live together are presumed to be the guardians of their child, during their relationship and after they separate. A parent who never lived with his or her child is not presumed to be a guardian of the child unless:

- the parent "regularly cares" for the child;
- the person is a parent because of an assisted reproduction agreement; or
- the parent and all of the child's guardians make an agreement that the parent will be a guardian.

Someone who is not a guardian can only become a guardian by a court order appointing him or her as a guardian or by being appointed as a guardian on a guardian's death or incapacity.

How do you apply to be appointed as a guardian?

Only people who aren't already guardians because of the presumptions in the *Family Law Act* must apply to court to be appointed as the guardian of a child. People applying for appointment as a guardian must complete a special form of affidavit required by the rules of court. This affidavit requires you to get: a criminal records check; a protection order registry check and a records check from the Ministry for Children and Family Development; provide the details of any court proceedings that are relevant to the child's best interests; and, provide information about the children that are and have been in your care.

How do you appoint someone as guardian upon your death or incapacity?

A guardian can appoint another person to become the guardian of his or her child upon death by will or by Form 2 of the *Family Law Act Regulation*. A guardian who is facing a terminal illness or a permanent mental incapacity can appoint another person to become a guardian when he or she is no longer able to act as guardian using Form 2.

A guardian cannot appoint a guardian with more parental responsibilities than those that she or he held at the time of the appointment.

What do "parental responsibilities" and "parenting time" mean?

Parental responsibilities is a term used by the *Family Law Act*. It refers to guardians' responsibility for making decisions about how the child is nurtured and raised, and the duty of making those decisions in the best interests of the child.

Parenting time is another term used by the *Family Law Act*. The time a guardian has with a child is called parenting time. During a guardian's parenting time, the guardian is responsible for the care of the child and decision-making about day-to-day matters involving the child.

People who are not guardians, including parents who are not guardians, do not have parental responsibilities or parenting time.

How are parental responsibilities and parenting time decided?

Parental responsibilities and parenting time are decided either by a court order or the written agreement of the child's guardians. Where guardians must go to court, the court will make a decision based only on the best interests of the child. The court's primary concern is the best interests of the child.

Parental responsibilities can be shared between two or more guardians, which usually means that they are all responsible for making decisions about the child and must make those decisions in consultation with one another. Parental responsibilities also can be allocated among guardians, so that a guardian has sole responsibility for certain kinds of decisions, like about health care or schooling, and can make those decisions without having to consult the other guardians.

The arrangements made in an agreement or order for parental responsibilities and parenting time are known as "parenting arrangements."

What is "contact"?

Contact is a term used by the *Family Law Act*. Contact is the time that someone who is not a guardian has with a child. Parents who are not guardians may have contact, as might grandparents, aunts and uncles, other family members or any one else who has an important relationship with a child.

How is contact decided?

Contact is decided the same way as parenting time – either by a court order or by the written agreement of the person with contact and the child's guardians. When people must go to court, the court will make a decision based only on the best interests of the child. The court's primary concern is the best interests of the child.

Can a child decide whom to live with?

If a child is old enough and mature enough, the judge will consider the child's wishes when determining arrangements for custody, parenting time and contact. The importance given to the child's views will depend on the age and maturity of the child, the reason why the child wishes to live with a particular person, and how strongly the child feels about wanting to live with that person. But there is no particular age at which children have the right to decide who they will live with. However, in general the older the child is, the more weight the court will give to the child's wishes. Usually, the wishes of a child over age 12 are taken into consideration, and an older teenager's wishes are likely to be decisive.

What about "needs of the child assessments"?

Section 211 of the *Family Law Act* allows the court to order an assessment, prepared by a social worker, a psychologist, a psychiatrist or another mental health professional, of:

- the wishes of a child;
- the needs of a child; and,
- the capacity of a person to meet the child's needs.

These assessments will usually make a recommendation about the sort of parenting arrangements and contact that the assessor considers to be in the best interests of the child.

These assessments are known as needs of the child assessments. (Under the old *Family Relations Act*, these were known as "section 15 reports" or "custody and access reports".) They can cost at least $5,000. A report can also be prepared for free by a Family Justice Counsellor, but it may take eight months or longer to complete.

What about "views of the child reports"?

A views of the child report, sometimes called a "hear the child report", describe the child's views about a particular issue or about how the child is experiencing his or her parents' separation.

These reports can be prepared by a mental health professional under section 211 of the *Family Law Act*. Reports prepared by mental health professionals are usually evaluative, which means that the mental health professional may offer an opinion about what the child has said.

Non-evaluative views of the child reports can be prepared under section 202 of the Act. Non-evaluative reports simply repeat what the child has told the person preparing the report, and do not offer an opinion. These reports are also prepared by mental health professionals but can also be prepared by Family Justice Counsellors or any one with special training, including a lawyer.

Are orders and agreements about custody and access, and parenting arrangements and contact, final?

No order or agreement about these issues is every absolutely final. Orders and agreements about custody and access, and parenting arrangements and contact, may be changed whenever there has been a significant change in circumstances of the child, including because of a change in circumstances of another person, providing that the change affects the child's best interests and justifies changing the order or setting aside the agreement.

Do you need a lawyer?

You may need a lawyer if you're seeking a custody order or an order about parenting arrangements in the Supreme Court. Orders about parenting arrangements can also be made in Family Court, in which case you may not need a lawyer because the court processes are simpler and more user-friendly. If you go to Family Court, most court registries will require you to take a free government-sponsored "Parenting After Separation" course before you can be heard by the court. Many people find the course to be very helpful, and you should consider taking the course whether the court requires you to take the course or not.

Should you try to mediate or use collaborative settlement processes?

Mediation and collaborative settlement processes are excellent ways to help parents reach an agreement on custody and access, and parenting arrangements and contact.

Mediation can help avoid a bitter court dispute – including going to court in the first place. Apart from paid, private mediators, the provincial government has trained mediators, called Family Justice Counsellors, who don't charge for their services and are available to help couples come to an agreement about parenting. Call Service BC at 604.660.2421 in the lower mainland, 250.387.6121 in Greater Victoria or 1.800.663.7867 elsewhere in BC. Remember that an agreement drafted by a Family Justice Counsellor will have long-term consequences and may be difficult to change, so be sure to get independent legal advice before signing it. Your lawyer can also refer you to a mediator. For more information on mediation, refer to script 111 on "Mediation and Collaborative Settlement Processes".

Collaborative settlement processes are a kind of negotiation where you and the other party, along with your lawyers, agree to work together to resolve the problems arising from your separation without going to court. Collaborative processes often involve child specialists who give advice to the parties and their lawyers about the child's needs and how the child is experiencing their separation.

What should you do if the other parent won't follow the order or agreement?

The *Family Law Act* has special provisions for the enforcement of orders and agreements for parenting time and contact. In special circumstances, the court can also require police to help enforce these orders and agreements, however this should be a last resort only.

If you're afraid the other parent is about to take your children out of the country and not bring them back, see a lawyer immediately. There are special provisions in the *Family Law Act* that can help with this too.

Where can you get help or more information?

- Refer to the "Family Justice" website of the provincial Ministry of Attorney General at www.justicebc.ca/en/fam/ [1].
- See the Children section of the *wikibook JP Boyd on Family Law*, hosted by Courthouse Libraries BC.
- The laws referred in this script are available at www.bclaws.ca [2] or http://laws-lois.justice.gc.ca/eng/.

[Updated November 2014]

References

[1] http://www.justicebc.ca/en/fam/
[2] http://www.bclaws.ca
[3] http://www.dialalaw.org

Adoption (Script 145)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains the adoption process in British Columbia – both adopting a child within BC and adopting a child from overseas.

How does a child become available for adoption?

A child may be placed for adoption by:

- the government, through a Director of Adoption, or
- a licensed non-profit adoption agency, or
- a birth parent or other guardian (called a direct placement).

Who oversees the adoption process?

Only the provincial Ministry of Children and Family Development or non-profit adoption agencies licensed in BC are authorized to handle adoptions. Even with a direct placement, where the birth parents choose the adoptive parent or parents, the Ministry or a licensed adoption agency must be involved before the adoptive parents receive the child.

Are there fees involved?

It's against the law to give or receive money for placing a child for adoption. But certain fees and expenses are allowed, namely costs relating to the birth and adoption are allowed for various people involved in the adoption process, such as the birth mother, licensed adoption agencies and lawyers providing legal services. For example, the *Adoption Regulation* allows a prospective parent to pay the birth mother's expenses for such things as medical services, the cost of reasonable accommodation, counselling services and the like.

The Ministry of Children and Family Development does not charge fees if you're adopting a child from the Ministry's care.

Who can adopt?

Anyone over 19 who is a resident of British Columbia is eligible to adopt. You can be single, in a common-law relationship or married, and you can be straight, gay or lesbian.

What factors are considered in placing a child?

The most important thing is making sure that the best interests of the adopted child are looked after. To determine the child's best interests, various factors are looked at, including:

- the child's safety,
- the child's physical and emotional needs,
- the importance of continuity in the child's care,
- the child's positive relationship with a parent and a secure place as a family member,
- the child's relationship with the birth parent,
- the child's cultural, racial, linguistic and religious heritage, and
- the child's views.

What information is given to the birth mother and prospective adoptive parents?

Before a child is placed, government officials or the adoption agency must inform the birth parent about the adoption process and its alternatives. Staff also gather as much information as possible about the medical and social history of the child's birth family, preserve this for the child and give it to the prospective adoptive parents.

Is a home study done?

Yes. The home study includes an educational component, as well as an assessment of the prospective adoptive parent or parents through visits to their home. The home visits can take up to three or four months. The prospective parents will be asked to get a medical assessment from their family doctor and to consent to criminal record and reference checks.

What if it's a direct placement?

In a direct placement, a pre-placement assessment must still be done before the child can be received in the home (unless the adoptive parents are related to the birth parents).

What happens after the child is placed?

If everything looks fine, the child is placed in the adoptive home. For the first six months, the adoption worker visits the child in the home. Then after the child has lived with the adoptive parent or parents for at least six months, the parents can apply to the Supreme Court for an adoption order. If it's a Ministry adoption, the worker makes the court application for the parents. If the court is satisfied that the proposed adoption is in the child's best interests, it makes the adoption order.

Does the birth mother have to consent?

The birth mother must consent to the adoption unless the child is in the permanent care of the government. But her consent is only valid if the child is at least 10 days old when she consents. The consent must be in proper written form, and there are other required documents too.

What if the birth mother changes her mind?

She can revoke or withdraw her consent within 30 days of the child's birth – even if the child has already been placed for adoption. But her revocation must be in writing and received by a Director of Adoption or the administrator of the adoption agency before the end of the 30 days.

Is the biological father's consent required?

The biological father's consent is usually required too, but there are exceptions. Usually the father must be notified of the proposed adoption, unless the court rules that it's not in the child's best interests to do so.

Is an older child's consent required too?

A child 12 or older must be willing to be adopted and has to give consent. The views of a child between 7 and 11 must be considered, and if the child is mature enough, the child must receive counselling about the effects of adoption.

What about adopting an aboriginal child?

The *Adoption Act* expresses special concern for aboriginal children. The act insists that the aboriginal child's cultural identity be considered when looking at the child's best interests. If the child is under 12 and the birth parent or other guardian doesn't object, the Ministry or adoption agency involved will notify the child's aboriginal community and consult with them about planning for the adoption. Under the federal *Indian Act*, an aboriginal person who is adopted doesn't lose any of the rights or privileges they have as a "status Indian" under the *Indian Act* and other laws.

Can the birth mother choose an open adoption?

If they want, the birth parents and adopting parents can choose to communicate with each other after the child is adopted. Before an adoption order is made, they can make an agreement about how much and what type of ongoing communication or contact they want between the birth parents and the adoptive parents after the adoption. If an agreement isn't made before the adoption order, they can register with the Post-Adoption Openness Registry.

For more information on openness and making an openness agreement, refer to script 146 on "Adoption Registries".

What about international adoptions?

The process of adopting a child from another country must involve one of the licensed adoption agencies in BC. Like domestic adoptions, an international adoption requires a home study to assess the adoptive parents' suitability to adopt. So if you plan on adopting a child from another province or country, it's important that you inform the adoption agency you plan to work with early in the planning process.

Where can you find more information?

- Call 1.877.ADOPT.07.
- Also see the Ministry of Children and Family Development's website on adoption at www.mcf.gov.bc.ca/adoption [1].

Summary

Only the government or an adoption agency licensed by the government can handle an adoption. As long as you're over 19 and reside in BC, you're eligible to adopt. When deciding on placing a child, many factors are looked at to determine if the placement is in the child's best interests. The birth mother can consent to placing her child for adoption once the baby is 10 days old, but she can still change her mind within 30 days of the birth if she does it in writing. Usually the biological father's consent is necessary, and older children may have to give their consent too.

[updated March 2013]

References

[1] http://www.mcf.gov.bc.ca/adoption
[2] http://www.dialalaw.org

Adoption Registries (Script 146)

This script explains the different adoption registries in BC. It includes information on:

- the Birth Father Registry
- making an “openness agreement” after a child has been adopted
- searching for an adopted child or birth parent

Society’s attitudes toward adoption have changed over the years

Many people who were adopted want to know about their origins. Many birth mothers want to know how the child they placed for adoption is doing. And many adopted people and birth parents want to meet one another. In BC, several adoption registries exist to help connect birth parents, adoptive parents and adoptees with each other. These include the following registries:

- Birth Father Registry
- Post-Adoption Openness Registry
- Exchange Registry
- Adoption Reunion Registry

What is the Birth Father Registry?

A biological father who registers with the Birth Father Registry is entitled to receive written notice of a proposed adoption placement, which gives him the opportunity to be involved in the planning for his child. The father can register any time before the birth and up to 150 days after the date that the child was placed. There’s no fee to register.

What is the Post-Adoption Openness Registry?

Many people believe that adoption creates a permanent kinship network between birth and adoptive families, and that adoption shouldn’t sever relationships – it should create them. They believe that an on-going relationship with birth parents and other birth family members can help an adopted child develop a healthy sense of identity and belonging. The Post-Adoption Openness Registry is meant for birth parents, adoptive parents and relatives of an adopted child under the age of 19 who wish to communicate with each other after the child has been adopted, if no “openness agreement” was made before the adoption order. There are no fees to register.

How does the Post-Adoption Openness Registry work?

Once an application is made, the registry is checked to see if there's a match. For example, if both the adoptive parents and the birth mother register, then there's a match. Registry staff will contact you to discuss the type of openness you want. You'll be asked to arrange for a facilitator to help you reach an openness agreement acceptable to both of you – be it saving letters and photographs to give to the adopted child at a certain age, or a continuing exchange of letters or phone calls, or even visits.

In figuring out how much openness is best, the best interest of the child is the most important consideration. And participation is voluntary – both the adoptive parents and the birth mother or relatives must register.

An application to the Post-Adoption Openness Registry stays in effect until the adopted child reaches 19 years of age, at which time, if no match has been made, an application can be made to the Adoption Reunion Registry (discussed later in this script).

What is the Exchange Registry?

The Exchange Registry is used by people who have negotiated a non-identifying openness agreement, where the adoptive family and the birth family don't communicate directly with each other, but through the registry. It facilitates communication between the adoptive family and the birth family as agreed to in their openness agreement. Communications are sent to the Exchange Registry, which redirects that to the other person or family. The Exchange Registry remains in effect until the adopted child turns 19. After that point, the adult adoptee or the birth family member can apply to the Adoption Reunion Registry to make direct contact with each other.

What is the Adoption Reunion Registry?

The Adoption Reunion Registry connects adopted adults with their birth families. This government registry can help if the adoption took place in BC. Everyone must be 19 or over – you must be an adult, and the person you want to connect with must also be an adult.

The Adoption Reunion Registry operates two registries:

- a Passive Registry
- an Active Registry

How does the Passive Registry work?

If you register your name, and the person you're looking for also registers for contact with you on the Passive Registry, a match is made. A staff social worker will then contact both of you by letter or telephone and help you to make contact with each other.

How does the Active Registry work?

After you register, staff will actively search for the person you want to locate. If they succeed, a social worker will then contact you to discuss the next step. If the person you're looking for also wants a reunion, the social worker will explore with both of you the type of contact you want, i.e., letters, phone calls, or a meeting or visits in person. The social worker will stay involved for a limited period of time to assist in facilitating the contact.

Who can apply to register on the Adoption Reunion Registry?

Adult adoptees, birth parents, birth siblings of an adopted adult and other birth relatives can all apply. There are different requirements, depending on who you are.

You register by mail

If you're the adult adoptee or birth mother, you need to submit the following three documents:

- A signed application form
- A copy of your birth certificate (as proof of your identity)
- The registration fee, unless the fee has been waived

If you are requesting an active search, you'll also need to submit a copy of the original birth registration document and/or adoption order. These are obtained from the Vital Statistics Agency (information on how to get documents from the Vital Statistics Agency is explained later in this script). The original birth certificate and adoption order aren't needed for a search on the Passive Registry.

If you're the birth sibling of an adult adoptee or the biological father or other relative, there are other or different documents you have to submit. For example, if you're the birth sibling of an adult adoptee (i.e., you're looking for your birth sibling who was adopted), proof of death of the birth parent is required, for example, a copy of the deceased birth parent's death certificate from Vital Statistics.

What does it cost to register?

There's a $25 registration/processing fee to register with the Adoption Reunion Registry. If you want an active search on the Active Registry, you'll be asked to submit an additional fee of $250. If it's hard for you to pay these fees, you can request an income test. If you qualify, the fees will be reduced or waived.

Counselling is offered

The social work staff at the Adoption Reunion Registry can offer brief counselling and support during the reunion search process. You may also wish to pursue additional counseling through a local agency or private therapist.

How do you get the documents needed from the Vital Statistics Agency?

You have to submit an application form to the Vital Statistics Agency. Visit their website at www.vs.gov.bc.ca/adoption [1]. Or call 604.660.2937 in the lower mainland, 250.952.2681 in Greater Victoria, or 1.800.663.8328 elsewhere in BC.

There's a fee of $50 to obtain copies of the adopted adult's original birth registration and/or adoption order. The names of and information about the adoptive parents is deleted to protect their privacy.

What if a birth parent or adopted child doesn't want to be known or found?

Individuals who want their privacy respected can have a "disclosure veto" or "no-contact declaration" placed on their records in the Vital Statistics Agency.

What's a disclosure veto?

A disclosure veto prevents the release of any information on the birth registration or adoption order identifying the person who placed the veto. A disclosure veto also prevents the Adoption Reunion Registry from providing assistance in locating the person who filed the veto. You can place a disclosure veto if you're a birth parent or adopted person involved in an adoption that took place before 1996.

What's a no-contact declaration?

A no-contact declaration allows information to be released, but prohibits any contact with the person who has placed the no-contact declaration. If a no-contact declaration has been placed on the birth and/or adoption records you're searching, you'll have to sign a statutory declaration promising that you won't contact the other person as long as the no-contact declaration is in effect. If you break your promise, you'll face up to six months in jail and/or a fine of up to $10,000.

A written statement may be included

The person placing a disclosure veto or no-contact declaration can also place or file a written statement. This statement may include social, medical and health information and perhaps the reason the person doesn't want to be contacted. If the birth and adoption records you're searching at the Vital Statistics Agency contain a written statement, you'll be given a copy.

Where can you get help or find more information?

- Call 1.877.ADOPT.07 or 250.387.3660.
- See the Ministry of Children and Family Development's website on adoption and adoption registries at www.mcf.gov.bc.ca/adoption [2].

[updated March 2013]

References

[1] http://www.vs.gov.bc.ca/adoption
[2] http://www.mcf.gov.bc.ca/adoption
[3] http://www.dialalaw.org

Unmarried Spouses: About the Children in Your Family (Script 147)

This script discusses issues relating to the children of unmarried parents who qualify as spouses. The topics discussed include:

- child support
- guardianship and the care of children
- adopting a child or your spouse's child
- safety concerns

Who is a "spouse"?

Under the provincial *Family Law Act*, "spouse" includes people who are married to each other as well as:

- people who have lived together in a marriage-like relationship for at least two years; and,
- except for the parts of the act about property and debt, people who have lived together in a marriage-like relationship for less than two years if they have had a child together.

Does an unmarried spouse have to pay child support?

The unmarried parents of a child, whether they're spouses or not, each have a legal responsibility to support their child. This obligation lasts until their child reaches the age of majority, 19 in BC. They may also have to support their child after the age of 19 if the child is financially dependent on them because of disability or illness, or because the child is pursuing post-secondary education.

What about support for a stepchild?

A person who is the spouse of a parent may have to pay support for the parent's child. A stepparent who qualifies as a "parent" as defined by the provincial *Family Law Act* has this obligation. The definition of a parent includes the unmarried spouse of a parent as long as the spouse has contributed to the support of the child for at least one year and the claim for child support is brought within one year of the stepparent's last contribution to the support of the child.

The rules on child support are a bit different for stepparents. To find out more about child support upon separation, go to script 117 on "Child Support".

How are the children cared for if you break up?

If you and your spouse cannot decide who the children should live with or how their time should be shared, then a mediator can help you decide, or a judge will make a decision according to what's in the best interests of the children. The court can also make decisions about how often the children will see each parent (called parenting time or contact) and how parenting decisions about the children will be made (called parental responsibilities). For more information, refer to script 140 on "Children Born Outside Marriage" and script 142 on "Custody and Access, Guardianship, Parenting Arrangements and Contact".

Can unmarried spouses adopt a child?

Unmarried spouses have the same rights as married spouses to adopt a child. Refer to script 145 on "Adoption" for more information on this topic.

What if you want to adopt your spouse's child?

You can only adopt your spouse's child if the child's other parent is prepared to give up his or her rights. If the other parent is agreeable, you can adopt your spouse's child. It's important to know that when you adopt a child, you get all of the obligations of a parent of the child, including the obligation to pay child support and contribute to the cost of the child's expenses. Note that a child 12 or older must be willing to be adopted and has to give consent.

What if you want to place your child for adoption?

Usually both parents have to agree to the adoption. Before a court will make an adoption order, the judge must be satisfied that the other parent has been told about the adoption and has been given an opportunity to say whether he or she agrees. For more information, refer to script 145 on "Adoption".

What rights do you have to be kept safe from an abusive ex-spouse?

If you or your children are being threatened by your former spouse, you can apply for a protection order under the *Family Law Act* and you can file a report with the police. You can get a court order saying that your spouse must stay away from you and your children. If your spouse breaks this order, he or she can face criminal charges. For more information, refer to:

- script 217 on "Applying for a Peace Bond and Filing Assault Charges"
- script 155 on "Family Violence"
- script 156 on "Reporting Suspected Child Abuse"

Can you use your spouse's last name?

Yes. In fact, you can call yourself any name you choose, so long as you don't do it to break the law or to cheat anyone. However you won't be able to get government identification documents in any name other than your legal name. You can apply for a legal name change if you wish. For more information, refer to script 161 on "Changing Your Name".

Can your children use your spouse's last name?

You can also use whatever last name you want for your children. You can apply to legally change the children's last name to your spouse's last name, as long as your spouse doesn't mind. The Director of Vital Statistics can process a change of name for your children even if the children's other parent doesn't consent, but you have to convince the Director that the children's names should be changed. Children over the age of 12 also have to agree to the legal change of their name.

For more information on this, see the Vital Statistics Agency's website at www.vs.gov.bc.ca [1], or call the main office in Victoria at 250.952.2681.

Where can you get help or more information?

- Family Justice Counsellors in Family Justice Centres throughout BC can help you with custody, child support, and related issues. Their services are free. Call 604.660.2421 in the lower mainland, 250.387.6121 in Greater Victoria, or toll-free 1.800.663.7867 elsewhere in BC, and ask to speak with a Family Justice Counsellor in the Family Justice Centre nearest you.
- Also see the Family Justice website at www.ag.gov.bc.ca/family-justice [2].
- Read the booklet "Living Together or Living Apart: Common-law Relationships, Marriage, Separation, and Divorce [3]" by the Legal Services Society. BC and available free on their website at www.legalaid.bc.ca [4]. To find it, click "Our publications", then under "I want to find a publication by subject" click "Family law".
- Also see the Legal Services Society's Family Law in BC website at www.familylaw.lss.bc.ca [5] — under "Your legal issue," click "Common-law relationships [6]".
- Visit the wikibook [JP Boyd on Family LawlJP Boyd on Family Law], hosted by Courthouse Libraries BC.

[updated November 2014]

References

[1] http://www.vs.gov.bc.ca
[2] http://www.ag.gov.bc.ca/family-justice
[3] http://www.legalaid.bc.ca/publications/pub.php?pub=347
[4] http://www.legalaid.bc.ca
[5] http://www.familylaw.lss.bc.ca
[6] http://www.familylaw.lss.bc.ca/legal_issues/commonLaw.aspx
[7] http://www.dialalaw.org

Reporting Suspected Child Abuse (Script 156)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

The protection of children is considered one of society's greatest obligations

In addition to the normal rules of criminal and civil law that apply to everyone, there's also specific provincial legislation called the *Child, Family and Community Service Act*, which is intended to protect children from sexual and physical abuse and from neglect. The Act defines a "child" as any person under 19 years of age.

How is abuse and the neglect of children defined?

The law defines these things as follows:

- **Physical abuse**: This means any physical force or action by a parent or adult which could injure a child and which exceeds "reasonable discipline".
- **Sexual abuse**: This means any sexual touching or intercourse between a child and an older person, or using a child for sexual purposes.
- **Sexual exploitation**: This is a form of sexual abuse that occurs when a child engages in sexual activity, usually through manipulation or coercion, in exchange for money, drugs, food, shelter and other things.
- **Emotional harm**: This is defined as a child having serious anxiety, depression, withdrawal or self-destructive/aggressive behaviors due to persistent emotional abuse by a parent, such as scapegoating, blaming, rejection, threats, insults or humiliation. Emotional harm can also happen to children who witness violence in their homes.
- **Neglect**: This means a parent failing to look after the physical, emotional or medical needs of a child, so that the child's health, development or safety is endangered.

You must report suspected child abuse or neglect

If you have reason to believe that a child has been or is likely to be abused or neglected or is in need of protection, section 14 of the *Child, Family and Community Service Act* requires you to report your concerns to the Ministry of Children and Family Development. "Reason to believe" means that you suspect that a child could be at risk, based on what you have seen or information you have. You do not need proof. Just report what you know.

It does not matter if you think someone else is reporting the situation or if a child welfare worker is already involved with the child – you must still make a report. It also does not matter if the suspected abuser is your neighbour, patient or family member, a member of your church, temple, mosque or synagogue, your manager or employer, or someone else altogether. Your duty to report your suspicions takes priority over any confidentiality or privilege that might apply to your relationship with the suspected abuser.

It is a provincial offence not to report suspicions of abuse or neglect. The only exception is for a lawyer who may have concerns that involve his or her client.

You will not be sued or prosecuted for reporting your suspicions

The *Child, Family and Community Service Act* protects you from being sued or prosecuted for reporting a suspected abuser. This assumes, of course, that you are acting in good faith and honestly believe your concerns are true when you make your report.

How do you make a report?

You may make a report by calling either of the following:

- A Ministry of Children and Family Development office in your area. The Ministry's offices are listed in the provincial government blue pages of the phone book. The Ministry's offices are also listed on their website at www.mcf.gov.bc.ca/sda/contacts.htm [1].
- The 24-hour toll free Children's Help Line for reporting suspected abuse. Dial 310.1234 anywhere in BC. You do not need to dial an area code.

If a child is in immediate danger, call the police

Dial 911 for the operator and ask for police assistance.

What happens when you make a report?

The report that you make to the Ministry will be taken by a social worker. The social worker will want as much information as possible from you, including the name and address of the child, the parents, anyone else involved, and the reasons why you think that the child has been or will be abused or neglected.

You do not have to give your name when you make a report

But it is helpful for the social worker to have your name. Unless a criminal court hearing results from criminal charges being laid by police and you're needed as a witness, your name will remain confidential. However, even if your name isn't released, your identity may become known as a result of the details of the information you provide.

The social worker will look into the matter

The social worker will assess the information that you provide and determine the most appropriate response to ensure the child's safety and well-being and to help the family care safely for the child. The responses can include:

- Taking no further action.
- Referring the family to support services.
- Where concerns for the safety of the child exist, providing a "family development response" or conducting an investigation.

What is a family development response?

A family development response may be provided for less serious allegations of abuse or neglect when the child's parents will work cooperatively with the social worker. This response involves an intensive, time-limited, supportive approach. It consists of an assessment of the family's strengths and problem areas, and the provision of support services to help the family while monitoring the child's safety.

When is a child abuse investigation done?

If you report allegations of serious abuse or neglect, the social worker may decide to conduct a child abuse investigation. If the allegations involve physical or sexual abuse, the social worker will also advise the police, who may conduct their own investigation as well.

The investigation and prosecution of abuse cases is sensitive to the feelings of children. Whenever possible, the Ministry of Children and Family Development and the police conduct a joint investigation to reduce the number of interviews and the anxiety felt by a child involved in the process.

Will the child be removed from the home?

If the child is in danger of continued abuse or neglect during or at the end of an investigation and there are no other ways of keeping the child safe, the child may be taken into the care of the Ministry or placed with a relative or other person who has a significant relationship with the child.

What about criminal charges?

If the police determine that a criminal offence has been committed, they may decide to lay criminal charges against the abuser that will result in criminal court hearings. The prosecutor works with the police and the Ministry in alleged child abuse cases to make the court experience less upsetting for a child.

What if there is a family law court proceeding?

Under the provincial *Family Law Act*, family violence, which includes child abuse, is a factor the court must consider when making decisions about children. The court must also consider whether the child was directly or indirectly exposed to other family violence in the home.

The presence of family violence may result in the suspected abuser have limited or no time with a child, or having time with the child on conditions such as supervision. It is also possible to ask the court for a "protection order" to protect the well-being of the child and limit the child's time with or exposure to the suspected abuser. Anyone can apply for a protection order on behalf of someone he or she believes is at risk of family violence.

Is there help for victims of child abuse?

If you or someone you know has been a victim of child abuse, there may be an organization in your community that can provide help and support. If you don't know who to contact, call the toll-free Victims Information Line at 1.800.563.0808.

Where can you find more information?

- See the link on "Protecting Children" on the Ministry of Children and Family Development's website at www.mcf.gov.bc.ca [2]. Specifically, refer to the Ministry's booklet entitled "Responding to Child Welfare Concerns: Your Role in Knowing When and What to Report" found at www.mcf.gov.bc.ca/child_protection/pdf/child_welfare_your_role.pdf [3].
- For more information on child removal, refer to script 141 called "Child Protection and Removal".

[updated March 2015]

References

[1] http://www.mcf.gov.bc.ca/sda/contacts.htm
[2] http://www.mcf.gov.bc.ca
[3] http://www.mcf.gov.bc.ca/child_protection/pdf/child_welfare_your_role.pdf
[4] http://www.dialalaw.org

Child Support (Script 117)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is child support?

Child support is money paid by a parent, or a stepparent, to the other parent for the financial benefit of the child. Child support is paid when the relationship between the parents has ended. Normally, the parent who has the child for the least amount of time pays support to the parent who has the child for the most amount of time.

Why is child support paid?

Every child has the right to receive financial and emotional support from their parents. The parent who has the child for the most amount of time supports the child in many different ways, including financially. The parent who has the child for the least amount of time pays child support to the other parent to help make sure that the child's needs are met when they are in the other parent's care.

Payments of child support can be required because of a written agreement between the parents, such as a separation agreement, a child support agreement or a parenting agreement, because of the award of an arbitrator or because of a court order.

It is important to know that after parents separate, child support is owing, whether there is an agreement or order in place or not.

Who has to pay child support?

Biological parents, parents who have had a child through assisted reproduction and adoptive parents are obliged to pay child support, including unmarried parents and married parents.

When a child was conceived with assisted reproduction, a surrogate mother can be a parent obliged to pay child support unless the people who wanted to have the child have an agreement with the mother that says otherwise. A donor of egg or sperm is not a parent who is required to pay child support unless the people who wanted to have the child have an agreement with the donor that says otherwise.

Someone who is the spouse of a parent is a stepparent and can be required to pay child support to the parent. This can happen under the *Divorce Act* if the couple was married and the stepparent had a parent-like relationship with the child. Under the *Family Law Act*, married spouses and unmarried spouses can be obliged to pay child support to the parent as long as: the stepparent contributed to the support of the child for at least one year; the application is brought within one year of the stepparent's last contribution to the support of the child; and the stepparent and parent have separated. Stepparents can be obliged to pay child support even when the other biological parent is already paying child support.

How to get child support?

Child support can be agreed to in a separation agreement. If parents can't agree, they can ask the court for an order that child support be paid by starting a court case.

If a parent is receiving income assistance, she or he will have given his or her right to apply to court for child support to the Family Maintenance Program, and the program will decide whether to make an application for child support with no input from the parent. Child support will be paid to the program while the parent is receiving income assistance. The parent may be entitled to some of the support that is paid; thus, he or she should speak to the case worker for more information.

Which court to apply to?

An application for a child support order can be to either the Family Court or the Supreme Court. Each court has its own set of forms and rules. Usually, it's simpler and less expensive to obtain a child support order in Family Court. However, Family Court cannot deal with claims for divorce, the division of property or debt, the protection of property or claims under the *Divorce Act*. If the parent may need to ask for orders like these, it may be better to proceed in Supreme Court, where everything can be dealt with in one court case.

How is the amount of child support calculated?

The amount of child support payable is determined by the Child Support Guidelines. For most people, the Guidelines specify the amount of support based on the paying parent's income and the number of child support is being paid for. The exceptions to this general approach are discussed below.

People can find the Child Support Guidelines [1] and calculate the support amount using Child Support Online Look-up [2] on the federal Department of Justice website at www.canada.justice.gc.ca [3]. Select "Programs and Initiatives", click on "Child Support" link, and then select "Federal Child Support Amounts" under "Resources".

What costs does child support cover?

The basic child support amount is a contribution to all of the child's basic expenses and to the cost of raising the child, including: the child's share of the rent or mortgage, phone bill, electricity bill, cable bill and grocery costs; new clothing and new shoes; haircuts, school supplies and toiletries, and so forth.

What are "special or extraordinary" expenses?

In some cases, both parents can be obliged to contribute to certain of the child's expenses on top of the basic amount of child support. There are four types of expenses that may qualify as special or extraordinary expenses:

- child care expenses, often so the parent who looks after the child can work or go to school in order to get work;
- medical or health related expenses for the child, including the cost of medical insurance;
- some educational expenses, including for post-secondary education or private school fees; and
- some expenses for extracurricular activities like music or art lessons, or sports.

These types of expenses don't automatically qualify as "special or extraordinary" expenses. To qualify, the expenses have to be reasonable in light of the parents' financial circumstances and the child's needs. As a result, piano lessons might qualify as a special or extraordinary expense for one family but not for another.

How are “special or extraordinary” expenses paid?

When an expense qualifies as a “special or extraordinary” expense, both parents must contribute to the cost of the expense in proportion to their incomes.

If both parents have the same income, they would each pay for one-half of the cost of the expense. If parents have different incomes, they pay in the proportion of their individual incomes to the total income of both parents. For example, say a father has an income of $20,000 and a mother has an income of $30,000. Together, their incomes total $50,000. Of this total amount, the father earns $20,000 or 40%, and the mother earns $30,000 or 60%. The father would pay for 40% of the cost of a qualifying special or extraordinary expense and the mother would pay for the remaining 60% of the cost.

The cost of special expenses that parents share is the cost left over after any tax benefits or subsidies, like the federal tax deduction available for child care expenses, are taken into account.

What if parents share the care of the child?

If the parent paying child support looks after the child for at least 40% of their time, a parenting arrangement called “shared custody”, the parent may be able to pay a smaller amount of support than what the Child Support Guidelines normally require. In cases like this, the parents should take a careful look at their financial circumstances and the financial needs of the child.

Where parents have shared custody, the court can make an order that child support be paid in a lower amount than the Guidelines require or the parents can reach an agreement that a lower amount will be paid.

What if each parent has a child in their care?

If the child lives with each parent, called “split custody”, each parent is supposed to pay the full Guidelines amount of child support to the other parent for the child in that parent’s care. The amount that changes hands is the difference between the higher amount and the lower amount.

For example, say that a father would have to pay a mother $400 per month for the child in her care, and the mother would have to pay the father $250 per month for the child in his care. The father would pay the mother $150, the difference between what he owes her and what she owes him.

Where parents have split custody, the court can make an order that child support be paid in a lower amount than the Guidelines require or the parents can reach an agreement that a lower amount be paid.

What if the person paying child support is a stepparent?

If the paying parent is a stepparent, he or she may pay less child support than what the Child Support Guidelines would normally be required. There is no formula to do this calculation; often the court treats the stepparent’s obligation as a top up to the amount that should be paid by the child’s other parent.

In determining the amount of support paid by stepparents under the *Family Law Act*, the court can consider:

- the length of time the child and stepparent lived together; and
- the child's standard of living when he or she lived with the stepparent.

What if the amount set by the Child Support Guidelines is too high or too low?

In certain other circumstances the court can order that more or less child support be paid than what the Child Support Guidelines require. For this to happen, a parent must show that the payments required by the Guidelines would cause "undue hardship". Undue hardship means that the required payments would be very unfair and cause a *very* significant financial problem for either the parent receiving support or the parent paying it.

When a claim of undue hardship is made, the court will look at the standard of living of each parent's household, including the income from a new spouse or live-in boyfriend or girlfriend, and compare each household's standard of living against the other. Proving undue hardship is complicated, and it is better to speak with a lawyer.

When must the financial circumstances be disclosed?

To obtain an order for child support, financial disclosure must be made. The paying parent must provide proof of his or her income, which usually includes paystubs, recent income tax returns and other financial documents. In some cases, such as where the parents are paying for "special or extraordinary" expenses or share the child's time, the receiving parent will also be required to make financial disclosure.

What is an "interim" child support order?

After a court case is started, a parent can apply to court for an interim order for child support. The amount of the payments the court requires may be different than it requires after a trial when the best information about the parents' incomes is usually available. Interim orders are meant to last until the claim is settled or goes to trial, and can usually be obtained relatively quickly. Interim orders remain in effect until they are either changed by another interim order or a final order is made at the end of the court case.

How long is child support paid for?

Child support is paid for as long as the child continues to be a "child" as defined by the legislation. In British Columbia, a child is someone under the age of 19, the provincial age of majority, or who is 19 or older but is financially dependent on a parent. For example, a college student or an adult child with serious health problems may continue to qualify as a child even though they are older than the age of majority.

Can a child support order cover the past?

Child support orders can be made to start at an earlier date. These are called "retroactive" orders. In general, the court will make a retroactive order when there is an obligation to pay child support that wasn't met, or an obligation to pay a higher amount of support than what was paid, but usually for no more than three years before the date of the application for retroactive child support.

What if circumstances change and child support needs to change?

Either parent can apply to have an order or agreement about child support changed if there is a change in circumstances, such as an increase or decrease in someone's income or a change in the child's living arrangements. The law requires updated financial information to be exchanged each year if a parent, usually the parent receiving support, asks for or if there is a change of income. If there has been a change, the Child Support Guidelines should be consulted to determine what new amount of child support should be paid.

What to do if child support isn't paid?

If a parent doesn't pay the child support owing under an order or an agreement, the Family Maintenance Enforcement Program can help. Program staff will help to collect support payments that are owed and monitor a support order to make sure payments continue to be made. For more information on this, refer to script 132 on "Enforcing Orders and Agreements for Support".

For more information refer to the following resources:

- Family Justice Counsellors in Family Justice Centres throughout British Columbia can help parents with understanding the Child Support Guidelines, preparing a separation agreement, and obtaining a support order in Family Court. Their services are free. Phone 604.660.2421 in the lower mainland, 250.387.6121 in Greater Victoria or toll-free 1.800.663.7867 elsewhere in BC, and ask to speak with a Family Justice Counsellor in the nearest Family Justice Centre nearest. Also see the Family Justice website at www.justicebc.ca/en/fam/ [4].
- For more information about the Child Support Guidelines, a Child Support Office is available in Vancouver, Surrey, Kelowna and Nanaimo. The contact numbers are 604.660.2084 and 604.501.3100 in the lower mainland or toll-free 1.800.578.8511 and 1.888.227.7734.
- See info about Child Support [5] from the federal Department of Justice website at www.canada.justice.gc.ca [3]. Select "Programs and Initiatives" and then the "child support" link.
- See the Child Support section of the wikibook *JP Boyd on Family Law*, from Courthouse Libraries BC.

[updated February 2015]

References

[1] http://laws.justice.gc.ca/eng/regulations/SOR-97-175/index.html
[2] http://www.justice.gc.ca/eng/fl-df/child-enfant/look-rech.asp
[3] http://www.canada.justice.gc.ca
[4] http://www.justicebc.ca/en/fam/
[5] http://www.justice.gc.ca/eng/fl-df/child-enfant/
[6] http://www.dialalaw.org

Spousal Support (Script 123)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses spousal support, sometimes called “maintenance” or “alimony”. This discussion applies equally to married spouses and unmarried spouses.

What is spousal support?

Spousal support is money paid by one spouse to the other when a relationship breaks down and the couple has separated. Spousal support isn’t paid just because a couple was in a married or unmarried spousal relationship; the spouse seeking spousal support must prove that he or she is entitled to receive it. The reasons why a spouse might be entitled to receive spousal support are discussed in more detail later on.

Who can claim spousal support?

Everyone who qualifies as a “spouse” can claim spousal support after separation. Spouses are people who:

- are married;
- people who have lived together in a “marriage-like relationship” for at least two years; and
- people who have lived together in a “marriage-like relationship” for less than two years and have a child together.

Whether a spouse is entitled to spousal support, and if so in what amount, depends on the specific circumstances of each couple.

How to get spousal support?

Arrangements for the payment of spousal support can be made in a separation agreement. If spouses can’t agree on the payment of spousal support, the court can make an order requiring the payment of spousal support.

Married spouses can ask for an order for spousal support under both the federal *Divorce Act* and the provincial *Family Law Act*. Unmarried spouses can only ask for spousal support under the *Family Law Act*. Claims for spousal support under the *Family Law Act* must be made within two years of an order for the divorce or nullity of a marriage for married spouses, or, for unmarried spouses, within two years of the date of separation.

Which court to go to?

Married spouses can apply for spousal support under both the *Divorce Act* and the *Family Law Act*. If they choose to apply for spousal support under the *Divorce Act*, or under both laws, they must make a claim in the Supreme Court. If they apply for support under the *Family Law Act*, they can make a claim in either the Supreme Court or the Provincial Court. Each court has its own forms, rules and procedures.

Unmarried spouses can only apply for spousal support under the *Family Law Act*. They can apply for spousal support in either the Supreme Court or the Provincial Court.

What are "interim" support orders and "final" support orders?

After a couple separates, either spouse may begin a court proceeding asking for an order for spousal support, and for other orders such as for divorce, if they are married, or about the parenting of the child. In between the beginning of the court case and its end, spouses often need to ask the court for "interim" orders for spousal support. It can often take a year or more to bring a court case to a trial or a settlement. Interim orders for spousal support are meant to be temporary and only last until another interim order is made or until the court case ends.

Final orders are made by a judge following trial, or with the agreement of the parties following settlement. Final orders are meant to be permanent.

How does the court decide if spousal support should be ordered?

The court considers several factors. These include:

- the length of the relationship
- any advantages or disadvantages to the spouses as a result of their relationship or its breakdown
- the functions performed by each spouse during their relationship
- any financial consequences arising from the care of the child
- the financial circumstances of each spouse, both during the relationship and after separation
- the ability of each spouse to support him or herself

Generally, if one spouse supported the other during their relationship, that spouse will be expected to continue to contribute to the support of the other spouse after the relationship breaks down. On the other hand, if both spouses were financially independent when together or are capable of being financially independent after separation, then in general, neither will be entitled to receive financial support after separation.

In some cases, though, a spouse may be entitled to support even if they were not financially dependent on the other spouse. This kind of support is called "compensatory spousal support" and is sometimes ordered where a spouse has suffered a financial loss as a result of decisions made during the relationship, such as a decision to leave the workforce to raise the child to leave a job in order to move with the family to a new town.

Does a spouse's behaviour affect whether support is paid?

The conduct of the spouses is usually irrelevant when deciding support. For example, a spouse won't be denied support because he or she had an affair or because he or she was violent or suffered violence.

Under the *Family Law Act*, however, the court can consider behaviour that:

- unreasonably causes or prolongs a need for spousal support; or
- unreasonably affects a spouse's ability to pay spousal support

How is the amount of spousal support determined?

Once it's been decided that a spouse should receive spousal support, the amount payable is usually determined using the Spousal Support Advisory Guidelines, whether the amount is being determined by the court or negotiated by the parties. The Advisory Guidelines use a number of mathematical formulas to calculate ranges for the amount of spousal support and the length of time for which it should be paid.

The formulas used to determine these ranges can be very complicated, especially if a child is involved, and it's usually necessary to use a computer program. Lawyers have access to sophisticated software like this. Alternatively, the simplified calculator is available for free at www.mysupportcalculator.ca [1].

Do spouses have to disclose all their finances when someone is asking for spousal support?

Full financial disclosure is required of both spouses when making decisions about spousal support, whether the spouses are in court or are trying to negotiate a resolution outside of court. Spouses often complete and exchange financial statements (Form F8 in the Supreme Court and Form 4 in the Provincial Court), even when they're not in court.

Financial statements help to give the spouses a complete picture of their property and debts, income and liabilities, and are usually provided along with important documents like income tax returns and tax assessments. However, these forms can be complicated; thus, the help of a lawyer may be needed.

What are the tax consequences of spousal support?

Spousal support is taxable income in the hands of the spouse who receives it and deductible from the taxable income of the spouse who pays it. The person receiving support must report the income to Revenue Canada and pay tax on it, just like employment income. The person paying support is allowed to claim the payments as a tax deduction, just like RRSP contributions.

Only spousal support payments that are paid on a periodic basis, once a month or once every two weeks for example; are actually paid; and, are paid because of a written agreement or a court order are taxable and deductible. Other kinds of support payments, such as payments made in one or more lump sums, payments to third parties (like a landlord) or payments in services, may not be taxable or deductible. It may be necessary to speak to a lawyer to confirm the tax status of spousal support payments.

The tax consequences of support payments should be taken into account when determining the amount of support that should be paid. For more information on this, see script 133 on the "Income Tax Implications of Support Payments".

How long is spousal support paid for?

The law expects each spouse to make reasonable efforts to become self-supporting if at all possible. To encourage this, the court may limit the support payments to a certain length of time. For example, if a spouse needs to get job training before returning to work, the court may limit payments to the period of time needed to complete that training. On the other hand, the court may order that payments go on indefinitely, or until the paying spouse retires. In cases where it's uncertain how much time a partner will need to become self-supporting, the court can make a support order that is reviewable after a certain length of time or upon a certain event, like a spouse's retirement.

The length of the spouses' relationship is often a significant factor in determining how long spousal support should be paid. The courts recognize that the older the person is, the harder it generally is to get a job. As a result, the longer the relationship is, the less likely it is that a stay-at-home spouse will have to look for work and the more likely it is that

spousal support will have to be paid indefinitely.

What happens if circumstances change?

Financial disclosure may have to be made again if there's a significant change in the financial circumstances of either spouse after spousal support has been ordered. Even after a final support order has been made, the amount of support can be changed if either spouse's income or other financial circumstances change. Generally, the change must be significant and must not have been foreseeable when the support order or agreement was made.

What to do if the spouse won't pay the support?

If the spouse doesn't pay spousal support as ordered or agreed, the Family Maintenance Enforcement Program (FMEP) can help free of charge. FMEP will help to collect support payments that are owed and monitor a support order to make sure payments continue to be made. For more information, refer to script 132 on "Enforcing Orders and Agreements for Support".

What happens if the recipient is on social assistance?

If the recipient of spousal support is applying for or receiving social assistance, she or he will be required to sign a form that assigns any rights she or he may have to apply for or receive spousal support to the Ministry. This allows the Ministry to take whatever steps it considers necessary to collect spousal support on the recipient's behalf, and to keep some or all of the support it collects. The Family Maintenance Program (which is different from the Family Maintenance Enforcement Program) is the program that collects spousal support on behalf of people receiving social assistance and may apply for an order for spousal support on its own initiative.

More information

- Family Justice Counsellors in Family Justice Centres throughout BC can help couples with understanding spousal support, preparing a separation agreement, and obtaining a support order in Provincial Court (but not Supreme Court). Their services are free. Call 604.660.2421 in the lower mainland, 250.387.6121 in Greater Victoria or toll-free 1.800.663.7867 elsewhere in BC, and ask to speak with a Family Justice Counsellor in the nearest Family Justice Centre.
- See the Family Justice website at www.ag.gov.bc.ca/family-justice [2].
- The laws referred in this script are available at www.bclaws.ca [3] or http://laws-lois.justice.gc.ca.
- See the Spousal Support section of the wikibook *JP Boyd on Family Law*, published by Courthouse Libraries BC.

[updated February 2015]

References

[1] http://www.mysupportcalculator.ca
[2] http://www.ag.gov.bc.ca/family-justice
[3] http://www.bclaws.ca
[4] http://www.dialalaw.org

Enforcing Orders and Agreements for Support (Script 132)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains the enforcement of court orders and separation agreements that require spousal or child support to be paid.

The references to “spouse” in this script apply to married spouses and unmarried spouses, and to former spouses.

The references to “parent” in this script refer to anyone who is the parent of a child, including married spouses and unmarried spouses, as well as people who were never in a spousal relationship at all.

Support

This script talks about child support, which is money paid by spouses and parents, and about spousal support, sometimes called maintenance or alimony, which is money paid by spouses. In this script, a “payor” is someone who is required to pay child support or spousal support as a result of a court order or a separation agreement; a “recipient” is someone who is entitled to receive child support or spousal support from a payor.

A payor may fail to pay support

A spouse or parent may have to pay support because of a court order or separation agreement, but may not pay the support as required. When the payor stops paying all or some of the required support payments, a debt begins to accumulate to the person who is supposed to get the payments—the recipient. The money owed is called the payor’s “arrears” or “arrears of support”.

Court orders and separation agreements are different

A court order for the payment of support is a mandatory direction of the court, and the recipient can take steps to enforce a court order right away, whether the payor has missed any payments or not. A separation agreement, on the other hand, is a private contract between the spouses. To enforce a separation agreement, it must be first filed in either the Provincial Court or the Supreme Court. Once an agreement has been filed, it can be enforced in the same ways a court order can be enforced, and the recipient can take steps to enforce it right away.

How to collect arrears of support?

There are two ways:

- get help from the Family Maintenance Enforcement Program; or
- enforce the order or agreement in courts.

What is the Family Maintenance Enforcement Program?

The Family Maintenance Enforcement Program (FMEP) is a *free* service provided by the provincial government. It monitors support payments and enforces court orders and filed separation agreements where support is to be paid. There's no cost to the recipient for the services of this program.

How to enroll in FMEP?

Anyone who has a support order or separation agreement filed in court can enroll. The application form and information about the program is available online https://www.fmep.gov.bc.ca/contact-us/ [1] or by phone 604.678.5670 in the lower mainland or 250.220.4040 in the Greater Victoria area. These and other FMEP numbers are also listed in the Government of British Columbia blue pages section of the phone directory under "Family Maintenance Enforcement Program".

FMEP assumes responsibility for enforcing the order or agreement

FMEP will begin to enforce the order or agreement within about four months of the enrollment date. FMEP manages its enforcement procedures with little or no involvement on the recipient's part. After enrolment, the recipient can take steps to enforcement the order or agreement independently, however he or she must get the FMEP's permission first.

It is often best to let FMEP handle the matter after enrollment. The program can take all legal actions that the recipient could take, as well as a lot of other actions that the recipient cannot, like suspending the payor's driver's licence or taking away his or her passport.

How does FMEP enforce an order or agreement?

Once the recipient has enrolled in FMEP, all support payments must be sent to the program. FMEP will then send the payments on to the recipient. FMEP will track when payments are due, and when and how much gets paid. There are several steps the FMEP can take when arrears begin to accumulate:

- **Garnishment:** If a payment isn't made, the program can seize the wages owed to the payor to cover the support owed. This is normally the FMEP's first step.
- **Notice of Attachment:** The program can issue a Notice of Attachment against any person or institution that owes money to the payor, so that the program will receive this money instead. The institutions that can be attached include employers, banks and the Workers' Compensation Board. Payments from the Government of Canada, like tax refunds, Employment Insurance payments and other federal payments or rebates, can also be attached.
- **Property liens:** The program can file support orders against property owned by the payor, so that the property cannot be sold or re-mortgaged without the arrears being dealt with first.
- **Jail:** Ultimately, if the payor still doesn't pay, the FMEP can ask the court to send him or her to jail.

How successful is FMEP in collecting arrears?

Sometimes the kinds of steps available to FMEP aren't practical or won't be successful, for example garnishing wages if the payor is self-employed or is unemployed. In cases like these, lawyers for FMEP usually have a hearing in Provincial Court, called a default hearing, to see how the payor can meet his or her support obligation and begin to pay down the arrears.

It is necessary to act promptly

The recipient should register the support order or separation agreement as soon as the payor first misses a payment or doesn't pay the full amount owing. It can take about four months to be fully registered with FMEP. Collecting on old court orders or separation agreements can be difficult; thus, the recipient should talk to a lawyer and discuss the options available to collect arrears.

In general, it's best to let FMEP deal with arrears

FMEP is free and can do all the things the recipient can do to enforce a support obligation and more. The recipient can independently take certain steps to collect the arrears, but those steps can be complicated. If the recipient is enrolled in FMEP, he or she must get permission from FMEP to try to collect the arrears independently.

What steps can the recipient take?

If the recipient decides not to use FMEP, court orders and filed separation agreements for support can be enforced under the *Family Law Act*, the *Family Maintenance Enforcement Act* and through certain provisions of the Supreme Court Family Rules. The recipient can, among other things:

- apply to garnish the payor's wages;
- apply for an order that some of the payor's property be sold to pay the arrears; and
- apply for an order to seize certain kinds of bank accounts and RRSP accounts.

There are also a number of ways the recipient can force the payor to provide information about his or her finances. This may help to figure out how to best collect the arrears. For example, the recipient can require the payor to:

- attend a default hearing before a judge and produce a statement of his or her finances; or
- attend a hearing in the Supreme Court called an Examination in Aid of Execution to be questioned under oath about his or her finances.

In order to proceed with any of the steps, the recipient will have to make a court application and explain to a judge why a particular order should be granted. Because the court application process can be complicated, it's a good idea to speak to a lawyer first.

More information

- For more information about the Family Maintenance Enforcement Program, see their website at www.fmep.gov.bc.ca [2]. Or call FMEP at 604.678.5670 in the lower mainland, 250.220.4040 in Victoria or toll-free 1.800.663.3455 elsewhere in BC.
- You can also see the pages in the wikibook *JP Boyd on Family Law*, provided by Courthouse Libraries BC, on Child Support Arrears and Spousal Support Arrears.
- The laws referred in this script are available at www.bclaws.ca [3].

[updated February 2015]

References

[1] https://www.fmep.gov.bc.ca/contact-us/
[2] http://www.fmep.gov.bc.ca
[3] http://www.bclaws.ca
[4] http://www.dialalaw.org

Income Tax Implications of Support Payments (Script 133)

This script discusses the income tax implications of spousal support (sometimes called maintenance or alimony) and child support. For information about getting or paying spousal support, refer to script 123; for information about getting or paying child support, refer to script 117.

The references to “spouse” apply to everyone who is an unmarried spouse or married spouse, sometimes called a common-law spouse, and includes ex-spouses. The references to “parent” apply to everyone who is a parent, including married and unmarried spouses, to stepparents, and to people who were never in a married or unmarried relationship but have a child together.

The *Income Tax Act* has complex rules for support payments

It’s a good idea to have legal advice and even to talk to an accountant about how the tax rules may apply before signing any agreement about spousal or child support.

The *Income Tax Act* refers to spousal support as “support amount” and “maintenance”, and to child support as “child support amount”. The terms “spousal support” and “child support” will be used in this script.

Different tax rules apply to spousal support and child support

Spousal support is generally deductible for the payor and taxable for the recipient, while child support is generally *not* deductible or taxable.

Spousal support is usually deductible and taxable

The general rule is this: spousal support is taxable income in the hands of the spouse receiving it and is a tax deduction for the spouse paying it. In other words, the spouse receiving support must report the support payments as income, in the same way that income from a job is taxable, and pay income tax on the support he or she receives. The spouse who pays the support can claim it as a deduction from his or her taxable income in the same way that RRSP contributions are deductible.

Spousal support payments must be paid on a periodic basis if they are to be taxable for the recipient and deductible for the payor, and the requirement to pay must be set out in a written agreement or a court order.

Spousal support paid as a lump sum is not taxable or deductible. For example if everyone agreed that the payor would pay all of his or her payments right away in a single lump sum payment. Spousal support that is paid indirectly, such as by paying the mortgage or by providing services in kind, may not be taxable or deductible. Deciding how spousal support will be paid has serious tax consequences for both spouses. Make sure to consult with a lawyer or tax advisor.

To be tax deductible and taxable, the spousal support must actually be paid

It is important to keep a record of every support payment. For instance, if support payment is paid by cheque, electronic money transfer, bank draft or money order, the payor should keep copies of the receipts and cancelled cheques. Also, the payor should not have someone else make the spousal support payments on his or her behalf or pay it out of a joint account. To assist with record keeping for tax purposes, write “spousal support” on the front of cheques as well as the month and year the payment is for.

Problems can happen if spousal support is offset by another payment

Say, for example, that the payor must pay $600 a month as spousal support, but the recipient of spousal support must pay $100 a month to the payor for child support. While it would be easier to just pay $500, it can be difficult to prove to the Canada Revenue Agency that $600 in spousal support was really paid, and the CRA may only allow a $500 deduction. It’s best to just pay the whole $600 and actually get the $100 back.

There must be a written agreement or a court order

For spousal support payments to be taxable and deductible, there has to be a written agreement or a court order for the payment of spousal support. If a couple simply separate and agree between themselves that spousal support will be paid, the support may be paid but it will be paid with no deduction for the payor and no tax payable by the recipient. As a result, a spouse who agrees to pay support will sometimes go to court and ask a judge to make a support order to get the benefit of the tax deduction.

In the case of a written separation agreement, the agreement must state the date of separation, as well as the terms of any support payments to be made, such as the date the support payments will begin, when the payments are due and the exact amount payable. The details and wording of separation agreements are very important.

There are ways to allow for the deduction of certain payments made before spouses get their court order or separation agreement, but this can be difficult. Thus, it is critical to get advice from a lawyer first.

Support payments can only be made to the spouse, not to someone else

Generally speaking, support payments are only taxable and deductible if they are made to a spouse or former spouse, and they’re not usually deductible if they’re paid to someone else. A spouse might, for example, agree to pay a smaller amount of spousal support but also pay the mortgage on the family home. This kind of payment arrangement can be very tricky, and again, it is important to get the advice of a lawyer or accountant to be sure that the payments will be treated by the Canada Revenue Agency in a particular way.

People sometimes disagree about whether a payment was actually made

This happens frequently when payments are made in cash. One spouse might claim to have made a payment or the other spouse might deny receiving it. As a result, it's a good idea to make any support payments in such a way that there is proof of payment, for example, paying by cheque, electronic money transfer, bank draft or money order. If payment is made in cash, it is important to get a receipt from the spouse clearly stating the amount, the date and the purpose of the payment.

Child support payments are usually not deductible or taxable

Child support is not taxable or deductible unless it is being paid as a result of a written agreement or court order made before May 1, 1997. All agreements or court orders made on or after May 1, 1997 automatically follow the new rules. After that date, the payor can't deduct child support, and the receiver of child support does not have to pay tax on the child support payment.

Parents with old orders and agreements can agree to change the deductibility of child support

Parents can agree between themselves that child support payments made under an agreement or order made before May 1, 1997 will follow the new tax rules by filing a form with the CRA. Once they do this, however, they cannot go back to the old rules.

The written agreement or court order must say what kind of support is being paid

Because spousal support is generally tax deductible and child support generally isn't, an agreement or order must say what amount is being paid for spousal support and what is paid for child support. If the agreement or order sets out a single sum to be paid for both spousal support and child support, without stating how much is for what, the CRA will treat the whole amount as child support and the payor will get no deduction, even if a part of the amount paid is supposed to be for spousal support.

Some legal fees and expenses are tax deductible

The cost of obtaining or enforcing a spousal support or child support order, including an order for the payment of arrears, is deductible for the person receiving support. The cost of defending a claim for support or for the payment of arrears of support is *not* deductible.

The *Income Tax Ac*t permits the deduction of legal fees, but determining how much of the lawyer's bill went to the support claim may be difficult. While it's possible to ask the lawyer for a letter estimating how much of their time went to the support claim, it's usually easiest for the lawyer to keep track of their time from the beginning. Thus, in order to avoid uncertainties, inform the lawyer right from the outset.

Additional information about the deduction of lawyer's fees [1] is available from the Canada Revenue Agency at www.cra-arc.gc.ca [2]. Search for "Line 232 - Legal fees".

[updated February 2015]

References

[1] http://www.cra-arc.gc.ca/tx/ndvdls/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns206-236/232/lgl-eng.html
[2] http://www.cra-arc.gc.ca
[3] http://www.dialalaw.org

Small Claims Court

What is Small Claims Court? (Script 165)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is Small Claims Court?

If you're suing someone for $25,000 or less, Small Claims Court is for you. Small Claims Court is meant for ordinary people to handle their cases with or without a lawyer. The court forms include directions about how to make a claim and have it heard by a judge, and the rules and procedures are less formal and simpler than those found in Supreme Court.

What is the dollar limit for Small Claims Court?

Small Claims Court only takes cases where the value of the claim, not including interest and court costs, is $25,000 or less. If your claim is for more than $25,000, you can still sue in Small Claims Court if you give up the extra amount. For example, if someone owes you $27,000, you can decide just to sue for $25,000 in Small Claims Court, but you must give up the other $2,000 of your claim. You may get interest and court costs on top of the $25,000 claim limit.

It's important to remember that once your case has been tried in Small Claims Court, you cannot later sue for the part of the claim you gave up. But if you decide after all that you want to sue for the full amount, you can apply to have your claim transferred to Supreme Court. Then you can sue for the entire amount. It's also possible to claim legal costs if your claim is transferred to Supreme Court and you get a judgment in excess of $25,000.

Where do you "file" your lawsuit?

You have a choice. You can "file" or start your lawsuit in the Small Claims Court registry that is either:

- nearest to where the person you are suing lives or has a business, or
- nearest to where the event happened that resulted in your claim.

For example, say you're suing another driver for injuries received in a car accident. He lives in Surrey, but the accident took place in Vancouver. You could sue in either Surrey or Vancouver.

Where will your claim be tried?

You'll find a Small Claims Court in all major cities and most smaller towns in British Columbia. Look in the blue pages of your telephone directory under the heading "Government of BC, Court Services," or check with your nearest Provincial Court. Or call Inquiry BC at 604.660.2421 in Vancouver, 250.387.6121 in Victoria or 1.800.663.7867 elsewhere in BC. Court locations are also posted on the Internet at www.ag.gov.bc.ca/courts/overview/locations/ [1].

What types of claims can be tried in Small Claims Court?

There are two main types:

- claims for debts
- claims for damages

Depending on the claim, different deadlines—known as "limitation periods"—apply. So don't delay making your claim.

What is the limitation period for debt claims?

This type of claim is a claim to get back a debt or specific amount of money that someone owes you. Limitation periods set limits on how long you can wit before starting a claim.

On June 1, 2013, a new *Limitation Act* came into effect in British Columbia. Under this Act, most claims are now subject to a two-year basic limitation period. In other words, if the cause of action arose on or after June 1, 2013, the new *Limitation Act* will apply, and you will have two years from the day a claim is "discovered" to start a claim.

If a cause of action arose before June 1, 2013, the old *Limitation Act* will apply. Under the old Act, the claim must be started within six years from the time the debt arose, or within six years from the time the debtor last acknowledged the debt.

The best thing is to start your lawsuit as soon as it's clear that the person or company can't or won't pay you what they owe.

If your limitation period is not clear to you, you should consult a lawyer. If your limitation period expires before you file a claim, your opportunity to file the claim may be lost.

What are "damages"?

"Damages" means an amount of money to compensate you for a loss you've suffered. It could be for an injury you've suffered, or for loss or damage to your personal property, or for some other financial loss such as when someone breaks a contract with you. It differs from debt as damages are assessed by the Court whereas debt is usually already a defined amount owing for services.

What other cases may be brought in Small Claims Court?

Small Claims Court also hears other less common cases. For example, you can sue to get back personal property wrongfully taken from you. Or you might want to sue to cancel a contract. Or perhaps someone hasn't done something they agreed to do, and you want the court to order them to do it.

Are there claims that cannot be tried in Small Claims Court?

Yes. You can't sue in Small Claims Court for libel, slander or malicious prosecution. You also can't sue over ownership of land, and you can't sue the federal or provincial government in Small Claims Court. Further, most residential tenancy claims, some claims concerning the estate of someone who has died, and most builders lien actions can't go to Small Claims Court.

How much does it cost to go to Small Claims Court?

Because you can go to court yourself and handle your own Small Claims Court trial, you don't have to pay any legal fees to a lawyer. But you will have to pay various small charges for filing your claim, delivering the documents to the defendant, and so on. For example, the Small Claims Court fee for starting a claim is $100 for claims up to $3,000 and $156 for claims over $3,000. On the whole, you'll find the procedures simple and relatively inexpensive.

Can you appeal a Small Claims Court judgment?

A Small Claims Court judgment may be appealed to the Supreme Court, but the appeal must be started within 40 days after the Small Claims Court order was made. If you are late filing the notice of appeal, you may apply to the Supreme Court to extend the time, but there's no guarantee that you will receive an extension as certain criteria must be shown.

The appeal is not a new trial and the Supreme Court judge will only determine if the Small Claims Court judge made an error in law. An order of the Supreme Court cannot be appealed.

If you want to appeal a Small Claims Court judgment, you should probably consult with a lawyer right away.

Summary

You can sue in Small Claims Court if your claim is for $25,000 or less, though some types of claims aren't allowed. Typical claims that go to Small Claims Court are for recovery of money owed or for damages for personal injury, property loss or breaking a contract. Depending on the claim, there are different deadlines for making a claim, so if you want to sue, you should start your lawsuit as soon as possible.

Where can you get help or more information?

- Before you start your claim, you may want to get some advice from a lawyer or talk to the Small Claims Court staff for help with procedures.
- Read the booklets on Small Claims Court available at the Small Claims Court registry and at your local public library. These booklets and other information are also found on the Attorney General's website at www.ag.gov.bc.ca/courts/small_claims/ [2] or www.smallclaimsbc.ca [3].
- For a convenient means of completing the Small Claims Court forms online, go to https://eservice.ag.gov.bc.ca/FilingAssistant/ [4].
- Refer to the other Dial-A-Law scripts in this Small Claims Court series.

[updated August 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [5].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.ag.gov.bc.ca/courts/overview/locations/
[2] http://www.ag.gov.bc.ca/courts/small_claims/
[3] http://www.smallclaimsbc.ca
[4] https://eservice.ag.gov.bc.ca/FilingAssistant/
[5] http://www.dialalaw.org

Suing Someone in Small Claims Court (Script 166)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

How do you start an action in Small Claims Court?

You must complete a Notice of Claim. You can complete the form a number of ways:

- You can get the form by going to the Small Claims Court registry and asking for one, or you can telephone or write and ask them to send you one. The main phone number is 250.356.1478.
- You can download the form from the Ministry of Attorney General's Small Claims Court website at www.ag.gov.bc.ca/courts/small_claims/ [1].
- You can complete this and other Small Claims Court forms online at https://eservice.ag.gov.bc.ca/FilingAssistant/ [2] and then print the form.

In your Notice of Claim, you must describe what happened leading to the lawsuit and where it happened, and state how much money you're seeking or what other remedy you're asking for.

You are called the "claimant." The person or company you are suing is called the "defendant." Be careful to name the defendant properly. If it's not done exactly right, you might not be able to get your money.

What if the defendant is a company?

If you're suing a company, you must use the legal name of that company. To find the correct name of a company, you have to obtain a company search from the Corporate Registry, located at 940 Blanshard Street in Victoria. The mailing address is PO Box 9431, Station Provincial Government, Victoria, BC, V8W 9V3. Phone the Corporate Registry at 250.387.5101 for more details. Your local government agent's office or a private title search company can also conduct a company search. Also see the Corporate Registry's website at www.bcregistryservices.gov.bc.ca/bcreg/corppg/index.page [3] for conducting an online search through Corporate Online.

Where do you file your Notice of Claim?

You must "file" your Notice of Claim in the proper Small Claims Court registry. To "file" the claim means to submit it to the court registry and enter it in the court records. If the defendant is a company, you also need to file a copy of your company search. For information about the location of the proper court registry for filing your claim, refer to script 165 on "What is Small Claims Court?" You also have to pay a filing fee, which you'll get back from the defendant if you win.

How do you notify the defendant of your claim?

The next step is to "serve" the Notice of Claim (and blank Reply form) on the defendant. To "serve" a document means getting it to the defendant. There are different ways to serve a defendant, depending on whether the defendant is a person, a company or an unincorporated business or partnership. For example, if the defendant is a person, you can serve them by personally giving the Notice of Claim to them, having someone else give it to them, or sending it to them by registered mail. See the Small Claims Rules for the proper way to serve the defendant you are suing.

After the defendant has been served, you must complete a Certificate of Service to prove that the defendant has been properly served.

How long do you have to serve your Notice of Claim?

After you've filed your Notice of Claim, you have 12 months to serve it on the defendant. If your 12 months are just about up, you can apply to the court to renew your Notice of Claim and extend the time allowed for serving the defendant. (Once the 12 months have gone by, your Notice of Claims expires, but you can still apply to the court to try and renew it.)

When does the defendant have to respond to your claim?

After the defendant has been served, the defendant must file a Reply. The defendant has 14 days to file a Reply if they live in BC. A defendant who is out of province has 30 days.

How can the defendant respond?

There are several ways. The defendant may:

- agree to pay all of your claim but not right away, or
- oppose all or part of the claim, or
- make a claim against you, called a Counterclaim.

How do you proceed if the defendant agrees to pay your claim?

In this case, you can file a Payment Order. If you don't agree with the timing of when the defendant agrees to pay, you can ask for a payment hearing after filing your Payment Order so the court can set a Payment Schedule.

What happens if the defendant opposes your claim?

The defendant may file a Reply disputing all or part of your claim. The Small Claims Court registry will send you a copy. Refer to script 167 on "Being Sued in Small Claims Court" for more on what the defendant has to do.

The registry then usually sets a date for a 45-minute meeting called a "settlement conference," which a judge also attends. The purpose of the settlement conference is to try to resolve some or all of the issues between you and the defendant before going to trial. The judge will give their opinion of the case.

In some registries – namely, Surrey, North Vancouver, Victoria, Nanaimo and Vancouver Robson Square – you and the defendant may have to attend a free session of mediation before the settlement conference. (The Small Claims Rules tell you whether mediation is mandatory or optional, depending on the type and amount of claim.) The mediator will try to help you and the defendant to come to an agreement about some or all of the disputed matters.

If the issues aren't fully resolved at the settlement conference or mediation, then the matter will be set for trial.

The procedure is different for very small claims up to $5,000 (other than personal injury claims) filed in the Vancouver Robson Square and Richmond registries. These claims go straight to a simplified one-hour trial before an experienced lawyer who is a justice of the peace (also called an "adjudicator"). There is no pre-trial settlement conference or mediation. And all financial debt claims in these two registries, where the claimant is in the business of lending money, go straight to a half-hour trial.

What should you do if the defendant makes a Counterclaim against you?

You must file a Reply to the Counterclaim. If you live in BC, you have 14 days after getting the Counterclaim to file your Reply to it.

Can the defendant offer to resolve the claim directly with you?

In some cases, the defendant may contact you directly and offer to pay you or try to settle your claim in some way. If that happens, you're free to come to whatever arrangement you like. If you're happy with the defendant's offer, you don't have to continue with your lawsuit. You can file a Consent Order or Payment Order, and that ends the action.

What happens if the defendant doesn't respond in time?

If the defendant doesn't file a Reply within the specified time limits or contact you to resolve the claim, you can file a form asking the court for a Default Order. If the claim is for a debt, the Default Order may be made without you having to go to a hearing. But if the claim isn't for a debt, the Small Claims Court registry must schedule a default hearing date so a judge can determine the amount you're entitled to get.

Summary

To sue someone in Small Claims Court, you must file a Notice of Claim and serve it on them. The defendant may then contact you and offer to pay your claim. If the defendant doesn't, the defendant has 14 days to file a Reply. After a Reply is filed, many Small Claims Court registries set a date for a settlement conference (and in some cases, mediation) to see if your claim can be resolved without going to trial. Some registries have simplified trial procedures for really small and certain financial claims, where you go straight to a short trial. If the defendant doesn't respond to your claim or file a Reply within 14 days, you can get a default judgment against the defendant by asking for a Default Order or a default hearing date.

Where can you get more information?

- Most of the instructions you need are on the forms found at the Small Claims Court registry or on the Small Claims Court website, which is www.ag.gov.bc.ca/courts/small_claims/ [1].
- If you have any questions, talk to the Small Claims Court staff or read over one of the Small Claims Court booklets available at the registry, at your local public library, and on the Small Claims Court website.
- Also see the other Dial-A-Law scripts in this Small Claims Court series.

[updated November 2013]

References

[1] http://www.ag.gov.bc.ca/courts/small_claims/
[2] https://eservice.ag.gov.bc.ca/FilingAssistant/
[3] http://www.bcregistryservices.gov.bc.ca/bcreg/corppg/index.page
[4] http://www.dialalaw.org

Being Sued in Small Claims Court (Script 167)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

I will discuss being sued in Small Claims Court.

Don’t ignore a Notice of Claim

If you receive a Notice of Claim from Small Claims Court showing you as a “defendant,” this means that some other person, called the “claimant,” is suing you.

A Notice of Claim may be handed to you personally by the claimant or any adult person, or it can be sent to you by registered mail. If you’re difficult to locate, the court may order that you be notified through an ad in the newspaper or a notice posted to the front door of yor home address. Whatever the case, you cannot avoid the lawsuit simply by ignoring the Notice of Claim. You must respond to it – within 14 days of receiving the Notice of Claim if you live in BC, or within 30 days if you live outside of BC.

How do you reply?

There are several ways to respond to a Notice of Claim, but the main ones are:

1. you agree you owe the claim
2. you admit you owe the claim, but don’t have enough money to pay it off
3. you deny responsibility for all or part of the claim

You may want to get legal advice before you make any admissions.

What should you do if you agree you owe the claim?

If you agree you owe the amount claimed in the Notice of Claim, you can contact the claimant directly and offer to pay the claim. You must also pay the claimant’s expenses, such as the fees to “file” or enter the claim in the court records and to deliver the documents to you. You should get a receipt and have the claimant sign a form called a Notice of Withdrawal, which you can obtain from the Small Claims Court registry. You should then take this form to the registry to discontinue the court action against you.

Alternatively, you and the claimant might reach some other satisfactory agreement, in which case you can both sign a Consent Order and file it with the Small Claims Court registry. Or the claimant may file a Payment Order with the registry. If you follow the Consent Order or Payment Order, that also ends the lawsuit.

What should you do if you admit the claim, but don't have enough money to pay it off?

Then you should fill out the Reply form attached to the Notice of Claim you received. If you didn't get a blank Reply form with the Notice of Claim, you can go to any Small Claims Court registry to pick one up, or you can download the form from the Ministry of Attorney General's website (web address provided at the end of this script). In the space provided, list the amounts you plan to pay and the dates you can make those payments.

Then file your Reply with the Small Claims Court registry shown on the Notice of Claim. The registry will send a copy to the claimant, who'll decide whether to accept your proposed payment plan.

If the claimant accepts, you'll receive a Consent Order to sign, which will end the lawsuit. If the claimant doesn't accept, you can ask for a payment hearing, or the claimant may summons you to a payment hearing, so the court can set a Payment Schedule.

What should you do if you deny all or part of the claim?

If you admit the claim, but disagree with part of what is claimed, indicate what you disagree with on the Reply form, and again go to the Small Claims Court registry to file your Reply. In this case, you'll have to pay a filing fee for the Reply.

If you deny the whole claim, again, complete a Reply, this time indicating why you deny it. You don't need to tell everything about your case, as you'll get a chance to present your case later, but you must list all your reasons.

What's the risk if you dispute the claim and lose?

You'll have to pay the amount of the judgment plus the claimant's fees and costs for getting the court documents to you. The judge can also order you to pay an additional 10% of the amount claimed if you file a Reply and go to trial when you had no reasonable chance of success. Also, if you refuse to resolve or "settle" the claim (for an amount offered by the claimant) and the trial judgement is more than or equal to the claimant's offer, you may have to pay a penalty of up to 20% of the amount of the offer.

How long do you have to file a Reply?

If you live in BC, you have 14 days after you receive the Notice of Claim. If you live outside BC, you have 30 days.

What if you ignore a claim or don't file a Reply in time?

It's very important to file a Reply – and to file it in time. If you don't, the claimant can get a Default Order against you without you having the opportunity to dispute their claim.

There are also other ways to respond to a claim

For example, you may think that the claimant shouldn't be suing you, but that you should be suing the claimant. In this case, you can file a Counterclaim, and the judge would later decide who was at fault.

Or you may admit that you owe money, but believe the claimant also owes you money for some other reason. In this case, you can file a Counterclaim claiming a "set-off." You'd be setting off the money you owe against the money owed to you.

Or you may think another person should pay all or part of the claim against you, in which case you'd file a Third Party Notice.

All of these options require you to pay an additional filing fee.

What happens if the lawsuit proceeds?

After you've filed your Reply (and maybe a Counterclaim or Third Party Notice), the registry will send a copy to the claimant.

For most disputed claims, a "settlement conference" will be scheduled. The registry will notify you of the date and time for this meeting, which is attended by the claimant, the judge and you. The purpose of the settlement conference is to try and resolve some or all of the issues between you and the claimant before going to trial. If the claim can't be resolved, there will be a trial.

You may also receive notification regarding a court "mediation" for the dispute, where a neutral mediator will attempt to resolve the dispute.

You must attend the settlement conference or mediation, or you risk having a payment order made against you for the full amount of the claim. If you cannot attend, you must notify the scheduler immediately and seek an adjournment or postponement of the scheduled date.

The most important thing to remember is that you must respond

If you get a Notice of Claim, you must file a Reply within 14 days (if you live in BC).

Where can you get help or more information?

- Talk to the Small Claims Court staff, or read over one of the Small Claims Court booklets available at the registry, at your local public library and on the Attorney General's website at www.ag.gov.bc.ca/courts/small_claims/ [1].
- Also refer to the other Dial-A-Law scripts in this Small Claims Court series.

[updated March 2013]

References

[1] http://www.ag.gov.bc.ca/courts/small_claims/
[2] http://www.dialalaw.org

Going to Trial in Small Claims Court (Script 168)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses preparing for and attending your trial in Small Claims Court. Small Claims Court deals with claims of up to $25,000. Most trials in the Small Claims Court follow the same set of rules except that in Vancouver, if the claim is for financial debt, the trial will be a "summary trial" and also in Vancouver and Richmond, if the claim is for less than $5,000 and does not involve personal injuries, the trial will be a ‘simplified trial’. The procedures for each of these types of trials will be discussed near the end of this script.

Before the trial

There are three procedures that you may need to deal with before the trial. They are mediation, settlement conferences, and trial conferences. Sometimes these processes are mandatory and sometimes they are optional. This script will describe each process in turn.

Mediation

Mediation is a process that involves having a mediator (who is a neutral unbiased person) listen to both sides and attempt to persuade the parties to resolve the dispute. The mediator does not have the power to make a decision like a judge.

Mediation is mandatory in some cases. In other cases, one of the parties can decide that a mediation should be conducted.

In Vancouver, most claims more than $5,000 and all personal injury cases have to be mediated. In all other court locations, mediation is available for claims over $10,000 but it is optional. However if one of the parties chooses to file a Notice to Mediate, the other party must attend the mediation.

In Surrey, North Vancouver, Nanaimo and Victoria, some claims for less than $10,000 are automatically referred to mediation.

You don’t have to pay for the mediator if the mediation is held under the Court Mediation Program for claims up to $10,000. Otherwise, the expense of the mediator is shared between the parties.

Much more information about mediations in Small Claims Court is available on the Small Claims Court website.

Before a trial, most cases have a “settlement conference”

The next process you should know about is the settlement conference. Unless your case is in Vancouver, both the parties to the claim must attend a settlement conference prior to trial. There may be an exception if your claim is related to a motor vehicle accident. A judge also attends the settlement conference, but this judge isn’t usually the same judge who presides over the trial if the case goes that far. The purpose of the settlement conference is to try to resolve or “settle” some or all of the issues between you, and if settlement isn’t possible, to help you prepare your case for trial.

If your claim is for personal injuries, within 6 months of filing the claim and before the settlement conference is scheduled, you must file and deliver to the defendant a certificate of readiness attaching all medical reports and records of expenses you intend to use at the trial to prove your side of the case.

What happens at the settlement conference?

You must bring all the documents and reports you plan to use at trial to prove your side of the case. If you're having trouble getting copies of the other side's documents, the judge can order that copies of these documents be exchanged. The judge will discuss the claim with you and see if the claim can be settled. If it can't, the judge can make orders concerning the collection and presentation of evidence needed for the trial. The judge can also dismiss the claim if he or she thinks it's groundless.

Trial conference

The third pre-trial process only applies if your case is commenced in Vancouver. This is the trial conference, where a judge will determine the amount of time needed for trial, make orders concerning evidence and other matters. You will have to complete a Trial Statement summarizing your case and file it with the Court at least 14 days before the conference.

Written offer of settlement One final item you should consider before going to trial is a written offer of settlement. Within 30 days after a mediation, settlement conference, or trial conference, whichever occurs first, but before the trial, you may "file" a written offer of settlement with (i.e., submit it to) the Small Claims Court, then present it to the other side. The other side will have 28 days to accept it. If they don't, and if the outcome at trial is much the same as your offer, the judge can order them to pay an additional penalty of up to 20% of your offer.

What if you have to go to trial?

You'll likely be the main witness for your case. But you'll also want to think about what other witnesses and what expert witnesses and/or reports you'll need to support your case.

Ordinary witnesses can testify about facts that they personally know about For example, they can testify about what they saw. But they can't talk about what they heard one person say to another – that's considered "hearsay" evidence and isn't usually allowed to prove the truth of those statements.

What about expert witnesses and/or reports?

Expert witnesses are the only witnesses who can give evidence about an opinion. If you intend to have an expert testify at the trial – such as a doctor for a personal injury claim – you must give the other side a summary of the expert's evidence at least 30 days before the expert testifies. If you just want to use a letter or written report from the expert, you have to give the other side a copy of that report, together with a statement of the expert's qualifications, at least 30 days before the trial. Then if the other side wants to "cross-examine" or ask questions of that expert at trial, they must let you know at least 14 days before the trial, and your expert must attend the trial in person.

Repair estimates and estimates of the value of property aren't considered expert evidence. But copies must still be given to the other side at least 14 days before the trial.

You must make the arrangements for your witnesses to attend the trial

If a witness refuses to come voluntarily or you're not sure they'll attend, you can pick up a form called a Summons to Witness from the Small Claims Court registry. (You can also download this form from the Small Claims Court website.) The form tells you how to deliver the summons to the witness, who must receive it at least seven days before the trial.

Expect to pay your witness's fees and expenses

You have to offer to pay a witness's reasonable travel expenses to attend the trial. You should also expect to pay your expert witness's fees and expenses – you'll want to determine that in advance before deciding whether or not to require the expert's attendance at trial. You may be able to avoid the expense of having your expert personally testify at the trial by providing the expert's opinion in writing to the other side well before trial, but if the other side wants to question your expert, you'll have to produce your expert in person.

Once the trial begins, how do you present your case to the judge? In Small Claims Court, you don't have to follow the strict rules of evidence followed in Supreme Court, and the judge will decide what rules or procedures to follow. However, everyone that testifies will have to swear an oath or affirm to tell the truth. You will also be expected to have all of the documents you intend to use to prove your case and all of your witnesses present at the trial. Remember to bring the original, plus at least two copies of any documents you use.

How do you proceed if you're the claimant?

As the claimant, you will speak first. You might want to start with an "opening statement" and tell the judge briefly what your case is about. Then you can give your evidence. You'll tell your story and produce any documents that help to prove your case. After, the defendant has a chance to cross-examine or question you on what you've said.

You'll then call your other witnesses and question them, so they can give their evidence to support your claim. You should ask open-ended questions like "What colour was the traffic light?" not leading questions like "Was the light red?" The defendant is then allowed to cross-examine your witnesses.

How do you proceed if you're the defendant?

You should make written notes while the claimant is testifying. When the claimant has finished, you'll get to cross-examine them. Your objective will be to get the claimant to admit things that help your case, or to weaken the claimant's testimony by showing that the claimant has a poor memory, is mistaken, or is lying. Don't expect the claimant to admit that they are exaggerating or lying – what matters is that you have put your version to them fully and fairly.

After the claimant and the claimant's witnesses have finished, you get to tell your side of the story and call your own witnesses to testify. The claimant may then cross-examine you and your witnesses. The judge often asks questions too.

What happens after the evidence is presented?

When all the evidence is finished, the claimant and defendant are usually allowed a final opportunity to tell the judge why he or she should decide the case in their favour.

Finally, the judge announces the decision or judgment

In most cases, after listening to both parties and the witnesses and reviewing the documents, the judge will make a decision and tell you what it is. Sometimes however, the judge will postpone telling you his or her decision to a later date.

If the judge decides the claimant wins, then the defendant will have to pay the full amount of their claim. If the judge decides that the defendant wins, then the defendant will not have to pay the claim amount. Further, the losing party usually has to pay the winning party costs for things such as filing fees, delivering documents and witness costs. In circumstances where the judge thinks that a party started or defended a claim without a reasonable prospect of success, they can order that the losing party pay a penalty amounting to 10% of the claim value. The amount the judge orders the losing party to pay may be due immediately, or the judge can make a payment order setting out a payment schedule.

There is a simplified trial process for Vancouver and Richmond In Richmond and Vancouver, if the claim is not for personal injury or a debt claim by a financial institution and is for less than $5,000, a simplified trial will be scheduled that will last one hour. Before the trial, each party will have to prepare and file a Trial Statement summarizing your case. The Trial Statement must be filed with the Court Registry at least 14 days before the simplified trial and you must give the other party a copy at least 7 days before the simplified trial. At a simplified trial, the parties and witnesses will give oral evidence and documents can be presented. The trial may be conducted by either a judge or an adjudicator appointed by the Court.

Vancouver Summary Trial

In Vancouver, a claim for a financial debt will be heard as a summary trial. If you have documents to support your claim, you must file them with the Court Registry at least 14 days before the summary trial and give a copy to the other party at least 7 days before. At a summary trial, the parties can give evidence and call witnesses but the trial is expected to last only 30 minutes.

Where can you get more information?

- Talk to the Small Claims Court staff.
- Read one of the Small Claims Court guides available at the registry and on the Small Claims Court website at www.ag.gov.bc.ca/courts/small_claims/ [1].

[updated September 2013]

Association, British Columbia Branch.

References

[1] http://www.ag.gov.bc.ca/courts/small_claims/
[2] http://www.dialalaw.org

Getting Your Judgment Paid (Script 169)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Obtaining a Small Claims Court judgment – whether at the end of a trial or settlement conference, or by default – is one thing. But getting it paid is something else. What can you do if the person you sued refuses to pay your judgment? Let's call that person the debtor, and call you the creditor.

"File" your court judgment

If the debtor has defended your claim, then after the judge has made a Payment Order at the end of your trial or settlement conference, you must go to the Small Claims Court registry and fill in a Payment Order form (Form 10). It will be signed by the appropriate person and "filed" or entered in the court records.

If the debtor hasn't responded to your claim, then you must complete an Application for Default Order (Form 5) instead.

A Small Claims Court judgment is valid for 10 years, so any action you take to get your judgment paid must be completed within that time period. A Small Claims Court judgment cannot be renewed beyond the 10-year period, but it can be extended for another 10 years:

- If the debtor confirms the cause of action, or
- If you start a new court action based on the previous judgment before the original 10 years are up

Write and ask the debtor to pay you

After filing your Payment Order or Default Order, you might want to send a copy to the debtor with a letter asking the debtor to pay you. The letter should be brief and informative, warning that further action will be taken if payment isn't received by a certain date. Set a reasonable deadline (for example, within 14 days from the date of your letter), and be sure to include the address where the payment can be made. It's a good idea to send the letter by registered mail.

What is the procedure for a Payment Schedule?

A Payment Order might include a Payment Schedule, which tells how often and how much the debtor must pay you to pay off the order. As long as the debtor makes the payments according to the schedule, you can't take any steps to collect the full amount right away. But if there's no payment schedule included in the Order, or if the debtor doesn't pay according to the schedule, the debtor will owe you the whole amount immediately and you can take steps to collect it.

What is the procedure for a Default Order?

If the Default Order is for a debt in a specific, easily calculable amount, you can go ahead and take steps to collect it immediately. The Default Order will order the debtor to pay the amount claimed plus interest and expenses. If your claim is not for a debt in a specific amount, a hearing before a judge will first be set to determine how much your judgment should be. Be aware that a Default Order isn't automatic, and you must be prepared to give evidence and show supporting documents to prove the amount owing.

What can you do if the debtor doesn't pay?

If the debtor doesn't pay your Payment Order or Default Order, you have five options:

One option is a payment hearing

Go to the Small Claims Court registry or write and tell them you want a payment hearing. The purpose of the hearing is to find out information about the debtor's financial situation. For the hearing, the debtor can be required to bring income tax returns, recent pay stubs and other documents that show the debtor's assets, income and debts. At the payment hearing, the judge considers the debtor's ability to pay the Payment Order (and whether a Payment Schedule should be included), so go prepared to question the debtor about his or her employment, bank accounts and so on. You can use the information gained at the payment hearing to help you try to collect on your judgment (i.e., by garnishing bank accounts or employment income). The costs of your application for the payment hearing will be added onto the amount the debtor has to pay you.

If the debtor doesn't attend the payment hearing, you can ask the judge to issue an arrest warrant.

A second option is seizure and sale of goods

You can apply for an Order for Seizure and Sale. This allows a court bailiff to take and sell the debtor's goods or property. You may decide to go this route if the debtor doesn't appear to have any cash income, but has valuable assets, like a good car or boat or worthwhile company shares.

Before proceeding, however, note that the *Court Order Enforcement Act* of BC allows a debtor to keep:

- $4,000 of household furnishings and appliances,
- A vehicle worth up to $5,000, and
- $10,000 worth of tools and other personal property that the debtor uses to earn income for work.

Also, the bailiff gets paid first from the sale of the goods. So you'll want to make sure that the debtor has goods worth taking and selling at a court-ordered auction.

To help with this, you might be able to give a copy of the Payment Order or Default Order to the Insurance Corporation of British Columbia (ICBC) or do a search at the BC Manufactured Home Registry or the Personal Property Registry to see if the debtor is the registered owner of any personal property that could be seized and sold if their value is more than the above exclusions.

If you decide to go ahead, ask the Small Claims Court registry for the forms to complete for an Order for Seizure and Sale. You'll have to pay a deposit to cover the bailiff's estimated time and costs.

An Order for Seizure and Sale is valid for one year.

A related option is to ask a bailiff to do a search of their records to see if any other creditors are trying to recover against the same debtor. If there are active collection efforts underway by other creditors, you may be able to share in some of

the recovery from the debtor.

A third option is garnishment

Assume you have a Payment Order for $1,000, and you know where the debtor works or has a bank account. You can go to the Small Claims Court registry and apply for a Garnishing Order. You then present the Garnishing Order to the debtor's employer or the branch of the bank where the debtor has an account, whichever you are going after, and the wages owed or bank money belonging to the debtor will be paid to the court instead. Once the court receives the money, you can apply to have it paid out to you. This process is called garnishing the debtor's wages or bank accounts.

Note that generally only 30% of a debtor's wages can be garnished. There are also some fairly technical rules and the steps have to be followed properly, so discuss the procedure with the registry staff right at the beginning.

For more information on garnishment, refer to Dial-A-Law script 251.

A fourth option is a default hearing

If a Payment Schedule was made after the trial or settlement conference or following a payment hearing, and the debtor hasn't paid you as required, you can ask for a default hearing. You are responsible for setting out what items the debtor must bring to the default hearing, such as banking records, tax returns, utility bills and credit card statements. If you don't include any of these items when you apply for a default hearing, the debtor isn't obligated to bring anything to the hearing.

At the hearing, the debtor must explain to a judge why he or she hasn't obeyed the Payment Schedule. After listening to the debtor, the judge can either confirm the original Payment Schedule or change the terms. If the judge decides that the debtor's explanation for not paying shows contempt of court, the judge can send the debtor to jail for up to 20 days, and the debtor must still pay the money.

If the debtor doesn't attend the default hearing, you can ask the judge to issue an arrest warrant.

A fifth option is registration against land

You can register your Payment Order against any land owned by the debtor in British Columbia. This will make it very difficult for the debtor to sell or mortgage the land unless he or she pays your judgment first. What this means is that you might not get paid immediately, but the Payment Order can stay registered against the land for some time, then when the debtor sells or mortgages the land, your judgment will have to be paid. To find out if the debtor owns land in the province, you can conduct a name search at the Land Title Office through BC OnLine at www.bconline.gov.bc.ca [1].

To register your Payment Order, you must get a Certificate of Judgment from the Small Claims Court registry. Then you take it to the Land Titles Office where the debtor owns the land, and register your judgment against the title to the debtor's land. The registration is good for two years, and can be renewed every two years up to a maximum of ten years.

You can also ask the Supreme Court to force a sale of the property, but this is an expensive and complicated procedure and not often used to enforce a Small Claims Court judgment.

Summary

Once you have a filed Payment Order or Default Order, you have five options for getting your judgment paid. Depending on what the debtor owns and his or her income, you can take some or all of these steps:

- A payment hearing is useful to find out more about the debtor's financial situation and to get the information you'll need for pursuing other options.
- Obtaining an Order for Seizure and Sale is useful if the debtor owns valuable goods such as an expensive car.
- Garnishing the debtor's wages or bank accounts can be useful if the debtor works or has money in an account.
- A default hearing can be used if there's already a Payment Schedule and the debtor isn't paying as scheduled.
- And if the debtor owns land, registering your order against the land is likely to get you money eventually.

Where can you get more information?

- Most of the instructions you need for getting your judgment paid can be found on the forms available at the Small Claims Court registry. If you have any questions, talk to the Small Claims Court staff or read over one of the Small Claims Court booklets available at the registry, at your local public library and on the Attorney General's website at www.ag.gov.bc.ca/courts/small_claims [2].
- Also refer to the other Dial-A-Law scripts in this Small Claims Court series.

[updated December 2013]

References

[1] http://www.bconline.gov.bc.ca
[2] http://www.ag.gov.bc.ca/courts/small_claims
[3] http://www.dialalaw.org

Wills and Estates

Making a Will and Estate Planning (Script 176)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is a will?

A will is a document which states what you want done with the assets that you own when you die. These assets typically consist of real estate, money, investments, and personal or household belongings that you own. You can change your will at any time and it has no legal effect until you die.

A will doesn't deal with certain assets

A will generally doesn't cover assets that you don't own at your death. For example, a joint bank account or a house owned in joint tenancy has a "right of survivorship" and will be owned by the joint survivor when you die. Also, a will does not apply to assets like life insurance, RRSPs, RRIFs and TFSAs, where you have already designated a beneficiary.

A will is only one part of an overall estate plan

There are opportunities to transfer assets to beneficiaries outside of a will, without tax and other cost consequences. This is called "estate planning" – discussed at the end of this script.

In a will, you name a person or company to be the "executor"

The executor is responsible for:

- safeguarding the estate
- gathering up your assets
- paying your debts (including income taxes)
- dividing what remains of your estate among the "beneficiaries" (the people named in your will to receive a share of your estate)

How should you choose an executor?

Choose an executor you trust and who will likely still be alive when you die. He or she may be a trusted family member or friend; it helps if he or she is also a good book keeper and communicator. Most important, the person must be willing to take on the duties of executor.

If you like, you can appoint more than one executor who can act together as co-executors. You should also appoint an alternate executor if the first executor isn't able to act. If you have a complex estate or investments or need someone to take over the operation of a company, you should name a professional executor who may be a lawyer, accountant or other professional. Trust companies also accept executor appointments if the estate is big enough.

If you have minor children, appoint a guardian in your will

If you're a guardian of a minor child, the new *Family Law Act* (which came into effect in March, 2013) allows you to appoint someone else to be the child's guardian in your will. Also, if you are terminally ill or facing a permanent mental incapacity, you can appoint a "standby guardian" who will continue to be the child's guardian after your death (unless you state differently).

It's especially important that you name a guardian if you're a single parent. For separated parents, it's best to reach an agreement on the choice of a guardian if one or both of you die. Where that's not possible, it's important to consider the parenting responsibilities you have (through either a court order or separation agreement) and ensure that you include those responsibilities as part of the guardian appointment in your will.

Although your choice of guardian is important, the court doesn't have to follow your wishes and may appoint a different guardian if this would be in the child's best interests. And the court will consider the wishes of any child 12 or older. You should therefore check with an older child about their wishes before deciding on the appointment of the guardian in your will.

The guardian's job is to look after your minor children, and he or she may in turn appoint a replacement guardian. But the guardian generally doesn't have any rights to look after a minor child's property – the guardian can only receive and hold a minor child's property or money if it's worth less than $10,000. You should therefore appoint a trustee to manage a minor child's inheritance.

What happens if you don't make a will?

When there's no will, your net estate is distributed to your next of kin according to rules in BC's statutes.

For a death before March 31, 2014, the rules in Part 10 of the Estate *Administration Act* apply. If you die after March 31, 2014, the rules in Part 3 of the *Wills, Estates and Succession Act* apply.

For more information, refer to script 177 on "What Happens When You Die without a Will?"

It's important to make a will properly

You should have your will professionally prepared, as a will is a complex legal document. To make an effective will requires a good understanding of property ownership rules and the law about wills. There are rules and formalities that must be followed, no matter how simple the will, otherwise the will may not be valid. And the words used must be chosen carefully so the will is clear and unambiguous. If the formalities are ignored or the terms of the will are unclear, there will be extra legal costs taken from your estate to get court orders to fix the problems, and the court may not be able to remedy all problems.

Your will can be changed after you die

If your will doesn't properly provide for your spouse or children, they can make a claim to have your will varied or changed by the BC Supreme Court. Until March 31, 2014, this claim is made under the *Wills Variation Act*. After March 31, 2014, the claim is made under the *Wills, Estates and Succession Act*. A "spouse" under both statutes includes both a married spouse and a person with whom you have lived in a marriage-like relationship for two years before your death.

The case law is clear that you have both a legal and moral obligation to provide for a spouse or child in your will. So if you're thinking of disinheriting a spouse or child (even a self-sufficient adult child), or leaving them less in your will than they might reasonably expect, be sure to consult with a lawyer about the situation before finalizing your will.

Your estate may have to pay "probate" filing fees

Probate is the process by which the executor must apply to the BC Supreme Court to confirm that a will is legally valid. Probate filing fees are the fees that must be paid to the province to do this. These fees are as follows:

- If the estate is worth less than $25,000 – no fee.
- If the estate is worth over $25,000 – basic fee of $208.
- If the estate is worth between $25,000 and $50,000 – basic fee of $208 plus $6 per $1,000 (for a total of $358 for the first $50,000).
- If the estate is worth over $50,000 – $358 plus $14 per $1,000 of estate value over $50,000.

The Probate Registry of the Supreme Court determines the estate value based on documents filed by the executor. Probate fees can often be avoided or reduced by estate planning outside of a will, and you may wish to see a lawyer to explore such planning.

Taxes may also have to be paid

When a person dies, the law assumes that they sold their assets on the **date immediately before their death**. If the assets have increased in value over time, a capital gains tax will have to be paid in the person's year of death. There are some exceptions, such as gifts to spouses and principal residences. But if you own assets that will attract capital gains tax on your death, you should speak to a lawyer or an accountant to see how to deal with this tax.

What are some aspects of estate planning?

With estate planning, you may be able to reduce the amount of probate fees and taxes that your estate would otherwise pay. Consider, for example the following:

- **Joint Assets**: The owners of joint assets, such as a joint bank account that two or more people own, or a house owned by two or more people as joint tenants, have a "right of survivorship." This means that when one person dies, the other joint owners are entitled to own the asset. So if you and another person own a house as joint tenants, the surviving joint owner will get the house when you die. The house is an asset that passes outside your will. No probate fees will have to be paid by your estate regarding the house, and if the house is your principal residence, no tax will be paid by your estate.

    However, note that several recent court rulings have returned a jointly-owned asset to the estate. If your joint asset is not with your spouse or a minor child, but instead is with an adult child or other adult, then that joint holder may in fact own the asset in trust for you. This can be avoided by clear documentation showing your intent to give the property to the surviving joint owner when he or she becomes the joint owner. So, if you add an adult son to your bank account as a joint holder, and you want the account to belong to him when you die, you should sign a deed of

gift. Otherwise, it may be presumed that your son holds the bank account in trust for your estate, and the money will be paid out according to the terms of your will.

- **RRSPs, RRIFs and TFSAs**: A Registered Retirement Savings Plan(RRSP), Registered Retirement Income Fund (RRIF) and Tax Free Savings Account (TFSA) all allow you to designate a beneficiary to get the proceeds when you die. If you name a beneficiary and he or she survives you by at least five days, the proceeds pass outside your will to that beneficiary. So, for example, an RRSP beneficiary will get the money in the RRSP directly from the company holding the RRSP, and not from the estate.
- **Life Insurance Policies**: Life insurance policies allow you to designate a beneficiary to receive money at your death. Again, this money passes outside your will.
- **Trusts**: Depending on the size of your estate, you might want to establish a trust, which protects against a wills variation claim.
- **Charitable Gifts**: You can reduce the income tax liability arising on the deemed disposition of your assets on your death by making charitable gifts in your will.

You should hire a lawyer to help you

An experienced lawyer will know about the rules that apply to wills and can help with estate planning so as to save money for your beneficiaries. And you'll have the peace of mind of knowing that your will is properly drafted and valid, and that your estate will be paid out according to your wishes.

How much does a will cost?

The cost depends on how complex your situation is. Most lawyers charge a fee that reflects the time, skill and responsibility involved. Discuss the fees with your lawyer when you call to arrange a meeting.

You can minimize the legal fees by being well prepared

It helps if you have the following information ready before you meet with your lawyer:

- A list of everyone in your immediate family with their full names and contact information, their relationship to you and the ages of all your children, including stepchildren.
- The names and addresses of any other people or organizations to whom you want to give gifts.
- A list of all your assets and values, such as your home, car, investments and any personal items of significant value. It's important to describe how you own any property (for example, whether you own it alone or together with someone else).
- A document that shows whose name is on the title of any real estate or house you own.
- Details of any insurance policies you own, and, specifically, who the beneficiary is.
- Details of any pensions, RRSPs, RRIFs and TFSAs, and the beneficiary of these.
- Information about the structure of any business you operate (for example, a company or partnership).
- Any separation agreements or court orders requiring you to make support payments or dealing with guardianship of any minor children.
- Your choice for your executor(s) and guardian.

It's important to update your estate plan

A well-drafted will anticipates different scenarios and plans for these (for example, what happens if an adult child or grandchild dies before you). But you should still think about changing your will whenever your financial or personal circumstances change or if there's a change in the beneficiaries. For example, if you made a will when your children were young and named your parents as guardian and executor, when your children become adults, you'll no longer need the guardian clause and you might want your children or a sibling to be executor instead. It's a good practice to review your will every three to five years to ensure that it still reflects your current wishes.

Also make sure to review your will after any change in your marital status

If you marry before March 31, 2014, your will is automatically revoked unless the will says that it was made in contemplation of your new marriage. On or after March 31, 2014, a marriage will not revoke a will.

If you divorce before March 31, 2014, the portions of your will that appoint your ex-spouse as an executor and make a gift to him or her will not be valid. On or after March 31, 2014, the appointment or gift won't be valid:

- If you've lived separate and apart for at least two years before your death (and one or both of you intended to live separately and apart permanently).
- If, before you die, an event occurs that causes an interest in family property to arise (within the meaning of the *Family Law Act*).
- If, in the case of a marriage-like relationship, one or both of you end the relationship before you die.

Consider registering a "wills notice"

You can file a wills notice with the Vital Statistics Agency at www.vs.gov.bc.ca/wills [1]. A wills notice sets out who made the will and where it can be found. This is a voluntary registration and has a small filing fee. The Vital Statistics Agency doesn't take a copy of your will; rather, you fill out a standard form of information, including information as to where your will is being kept.

Where should you keep your will?

You should store your original will with your lawyer or in a safety deposit box at your bank so that you have a permanent, safe and fireproof location. Your original will is what your executor will need to present to the Probate Registry in future, not a copy. It's recommended that you let your executor know where you keep your will and other important documents, so your executor has what he or she requires when the time comes.

What is LEAVE A LEGACY™?

LEAVE A LEGACY™ is a public awareness program of the Canadian Association of Gift Planners. (See www.cagp-acpdp.org [2]). Its objective is to promote, through the media and educational sessions for the public, the importance of preparing a will. It also raises awareness about leaving a gift for charity in the will.

[updated December 2013]

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [3].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.vs.gov.bc.ca/wills
[2] http://www.cagp-acpdp.org
[3] http://www.dialalaw.org

What Happens When You Die Without a Will? (Script 177)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses why you should have a will, and if you don't, who looks after your estate and how it is divided if you die without one.

Why should you make a will?

Every adult who owns assets or has a spouse or young children should have a will. Surprisingly, many people don't have one. The few hours that you spend with a lawyer planning your estate could save your spouse, children and other beneficiaries much time, effort and money. By not having a will, you lose control over who gets how much of your estate and when. You also give up the right to appoint a guardian of your choice for any young children you have. And the costs to administer your estate will be drastically increased.

How will your estate be divided if you die without a will?

If you die without a will, BC's new *Wills, Estates and Succession Act* (WESA) dictates how your estate will be divided. It sets out the following rules:

- If you have a spouse and no children, your estate passes to your spouse.
- If you have a spouse and children, then what passes depends on whether the children are also your spouse's children. If so, your spouse gets the first $300,000 value of your estate. If not, your spouse gets the first $150,000 value of your estate. Then one half of the balance of your estate goes to your spouse. The other half is divided among your children. Your spouse has the right to acquire the family home from your estate as part of his/her share.
- If you have more than one spouse (which is possible under WESA), they share the spouse's share equally (unless they agree or a court decides differently).
- If you have no spouse, then your estate is divided among your children.

- If you have no spouse and no children, then your estate goes to your parents. If your parents aren't alive, it goes to your brothers and sisters.
- There are further rules if you have no spouse or children, and your parents and siblings aren't alive.

Does a "spouse" include a common-law spouse?

The definition of "spouse" in the WESA includes a person who has lived with you for at least two years in a marriage-like relationship immediately before your death. It can be a common-law gay or lesbian relationship. This means that more than one person could be your "spouse" for the purpose of sharing your estate.

When would the children get their share?

Without a will, the Public Guardian and Trustee becomes the trustee and holds the child's shares in trust for them until they're 19 years old. The child's parent or guardian would have to apply to the Public Guardian and Trustee for any money needed for things like living expenses or education. This can be a hardship if the child is quite young and the parent or guardian needs the money for day-to-day expenses. When the child turns 19, they can demand all of their money no matter how much it is, regardless of their maturity or financial responsibility. By contrast, if you have a will, you appoint the executor and trustee for the share going to a child under 19, and you can direct that the share be used for the child's benefit, including support and higher education, without government involvement.

Who takes control of your estate if you die without a will?

In a will, you can name an executor to manage your estate when you die. The executor is often a relative, friend or other trusted person. You can also name a guardian to look after any infant children. But if you die without a will, someone must be appointed by the court to manage your estate. This person is called an administrator. The court will also appoint a guardian if you have children under 19 and the other parent isn't alive.

Who can apply to administer and handle your estate?

Your spouse is the first person who can apply. If you have no spouse or if your spouse is unwilling or unable to be the administrator, then a relative can apply. If there are no relatives willing or able to do this, then any other eligible person could apply to be the administrator. This may include a friend of yours, or a professional such as a lawyer or accountant. The Public Guardian and Trustee – as Official Administrator for the province of BC – might also apply to administer your estate, if for example, no one else is willing to take on the task.

Certain conditions may apply to the appointment of an administrator

If you have debts when you die, the person who applies to be the administrator must get your creditors to agree to the application. Also, the person who applies may have to get the agreement from other people who could be appointed administrator. In addition, the friend or professional may have to deposit money with the court (called a bond), as a way to ensure they do the work honestly and competently.

What does the administrator do?

The following are some of the things the administrator must do:

- Make funeral arrangements, if required.
- Locate all the estate assets and make sure that they're secure; for example, ensure that a car or building is insured, and that valuable documents are in a safe place.
- Advertise in a local newspaper for creditors.
- Sell assets that need to be sold. This includes listing and selling real estate after having it appraised; selling stocks, bonds and other securities; and valuing and disposing of other personal belongings. Sometimes, instead of being sold, assets may be given a certain value and transferred to an heir as part of their share of the estate.
- Locate all family members who may be heirs to the estate. In some cases, this involves searches throughout the world.
- File all necessary income tax returns and obtain an Income Tax Clearance from the federal tax department, confirming that all income tax has been paid.
- Put all money in an estate account and use it to pay the estate's debts, income taxes, legal and accounting expenses, and possibly an administration fee.
- Pay any money left over to the heirs.
- Finally, make a report to the relatives listing all money received, debts and expenses paid, fees charged, and details of how the estate was distributed.

Estate planning and making a will is very important

Making a will involves much more than just signing a document. It involves reviewing your potential estate and planning to minimize the costs of probating and administering your estate. As between spouses, and to some extent children, there are many legal ways to avoid paying substantial probate costs, administration costs, Public Guardian and Trustee expenses, and income taxes.

Where can you get help or find more information?

- You may call the office of The Public Guardian and Trustee at 604.660.4444 in Vancouver. Also check their website at www.trustee.bc.ca [1].
- For estate planning and to prepare a will, consult a lawyer.
- For more information on wills and estates, refer to Dial-A-Law scripts 176, 178, 179, and 180.

[updated June 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [2].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.trustee.bc.ca
[2] http://www.dialalaw.org

Your Duties As Executor (Script 178)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses your duties as an executor under a will and what you have to do to probate an estate.

What does it mean to probate an estate?

Probate is the process of getting the court to rule that a will is legally valid. With some exceptions, the estate consists of any land, house, money, investments, personal items and other assets that the deceased owned. The person who died and made the will is called the “testator”.

What is an executor, and what does the executor do?

The executor is named in a will. In general, the executor gathers up the estate assets, pays the deceased’s debts, and divides what remains of the deceased’s estate among the beneficiaries.

How do you confirm that you were named as the executor?

You need to get the original version of the will to check this. If it's not at the deceased testator’s home, the will may be in a safety deposit box, at the office of the lawyer who drafted the will, or it may be found by a search with the Vital Statistics Agency.

To look in the safety deposit box, phone the bank and make an appointment. Take the key, a death certificate and your own identification. If the will is there and names you as executor, the bank will let you take the will. You and a bank employee will then list the contents of the safety deposit box. You need to keep a copy of that list.

The other thing you can do is search for a wills notice at the Vital Statistics Agency. The testator or the testator's lawyer may have registered a wills notice with Vital Statistics. This notice tells where the testator planned to keep the original will. If a wills notice was registered, you'll be able to locate and obtain the original version of the will and confirm that you were named as the executor. For the Vital Statistics Agency office closest to you, call 250.952.2681 or check the Vital Statistics website at www.vs.gov.bc.ca [1].

Decide if you want to be the executor

If you haven't yet dealt with any of the estate assets, you cannot be made to act as the executor. Acting as an executor can be very challenging, and you should only take on this responsibility knowing that the task will be time-consuming and stressful. Once you begin the process of dealing with the estate assets, you're legally bound to complete the job, and you can only be relieved of your responsibility by a court order.

Consider hiring a lawyer

If you decide to act as the executor, consider whether to hire a lawyer to do the paperwork and advise you of your obligations. If you do, the estate pays the lawyer's fees. Ask the lawyer how the legal fees will be calculated, whether as a percentage of the estate or on an hourly basis. But because unexpected matters often arise in estates, it may not be possible to get an exact estimate of the fees. It's a good idea to hire a lawyer for any estate involving the distribution of assets through a will, where a grant of probate is required. For most estates, it's also a good idea to also hire an accountant to help with the several tax returns that need to be filed, as proper filing of returns and payment of taxes is one of the executor's responsibilities.

Your first decision as executor may be about funeral arrangements

The funeral is your responsibility, although you'll want to consider the wishes of the deceased person and their relatives. The funeral parlor will ordinarily order you copies of the death certificate. You may take the funeral bills to the bank where the deceased kept an account. If there's enough money in the account, the bank will give you a cheque from that account to pay the expenses.

You must also confirm that the will is the deceased's last will

You can confirm this by checking with the Vital Statistics Agency at the office closest to you. Most lawyers send a wills notice to Vital Statistics for every will they prepare. Vital Statistics will then send you a *Certificate of Wills Search*. This tells you if there's a record of the will and where the will is kept. You need this certificate when you apply to the court for probate. If you can't find the original will, the search results may help you locate it.

Cancel charge cards and protect the estate

You should cancel all the deceased person's charge accounts and subscriptions. Also ensure that the estate is protected. Make sure valuables are safe and that sufficient insurance is in place. You should immediately change the locks on the apartment or house, and put any valuable things into storage. As for insurance, most insurance policies are cancelled automatically if a house is vacant for more than 30 days, so ask the insurance agent about a "vacancy permit."

All potential beneficiaries must be notified

The Supreme Court Civil Rules and the new *Wills, Estates and Succession Act (WESA)* require that all beneficiaries (as well as certain family members who would be heirs if there was no will, or who are eligible to apply to the court to change the will) must be given a written notice, plus a copy of the will. This is generally done by the estate's lawyer.

The next step is to prepare and submit the necessary probate documents

The probate documents are submitted to court to get probate. Usually, you must get probate of the will to handle the deceased's estate. You'll also have to pay the probate fees as assessed by the court registry. The deceased's bank will usually allow you to take these funds out of the deceased's account.

Be aware that you don't always have to apply for probate

It depends on the type of assets in the estate. Certain assets can be passed down without requiring probate. Land owned in joint tenancy with another person doesn't require probate. If the deceased person owned land or a house in joint tenancy with another person, you only have to file an application in the Land Titles Office along with the death certificate. This will register the land in the name of the surviving joint tenant.

Also, probate isn't required for joint bank accounts or vehicles owned jointly. Again, the death certificate is usually sufficient to transfer these to the surviving joint owner.

In addition, RRSPs and insurance policies, which typically name a beneficiary to receive the proceeds in case of the person's death, aren't considered part of the estate, and therefore don't require probate. You should give the death certificate to any insurance companies and RRSP administrators that the deceased person had plans with. They'll want the death certificate before paying money to a beneficiary.

What about stocks and bonds?

If the estate includes securities, such as stocks and bonds, you may have to apply for probate in order to transfer them. You should check with the financial institution or transfer agent involved for each security in the estate because they'll have different requirements.

Also deal with any pensions the deceased had

If the deceased paid into the Canada Pension Plan, immediately apply to your local CPP office to tell them of the death and obtain any death, survivor or orphan benefits. Most funeral directors can provide you with information and forms regarding CPP death benefits. You should also check with the deceased person's employer about any benefits available there. If the deceased was receiving an old age security pension or other pensions, you also need to tell those pension offices of the death. Note that any CPP or old age security cheques for the month after the month in which the person died must be returned uncashed.

Certain income tax returns must be filed, and income tax may have to be paid

You need to file tax returns for any years for which the deceased didn't file a return. If the estate made any income after the date of death (such as rental income or interest on bank accounts), then tax returns will have to be filed for the estate for each year after death, until the estate is wound up or paid out. The estate must pay taxes and obtain a Clearance Certificate from Revenue Canada before the estate can be distributed to the beneficiaries. This certificate confirms that all income taxes or fees of the estate are paid. This is an important step because the tax department can potentially impose taxes that you don't know about.

Now you can pay the estate's debts

Depending on the circumstances, you may want to advertise for possible creditors so you can make sure all legitimate debts are paid. This is to protect yourself against creditor claims that arise after you distribute the estate. As the executor, you could be personally liable if you don't pay the deceased's debts, includig any taxes owed, before you distribute the estate. You should talk to a lawyer about this.

Be aware of the *Wills Variation Act*

The Wills Variation Act allows any child or spouse of the deceased to apply to the court to vary or change the terms of the will. This Act has a six-month deadline (starting from the granting of probate). You should wait for six months to distribute the assets or obtain releases from each potential claimant. Remember that you are responsible if you distribute the assets to the wrong people and could be sued.

Get tax clearance

It's wise to obtain a tax clearance certificate from the Canada Revenue Agency. This certificate confirms that all income taxes or fees of the estate are paid. This is an important step because the tax department can potentially impose taxes that you don't know about.

=Finally, you're ready to distribute the estate to the beneficiaries

But before distributing the assets as directed in the will, you should submit a full accounting of the estate's financial activities and obtain a release from each beneficiary. Your accounting will usually include a claim for reimbursement of expenses you've paid yourself. You'll have to decide if you also want to claim a fee for acting as executor. This fee can be up to 5% of the estate and is taxable income. If you want to claim a fee, the amount you claim should be included in the accounting that you send to the beneficiaries.

Where can you find more information?

- See the booklet “Being an Executor” produced by the People’s Law School, available online through Clicklaw at www.clicklaw.bc.ca/resource/1022 [2].
- Also see the BC Ministry of Justice’s website on wills and estates at www.ag.gov.bc.ca/courts/other/wills_estates.htm [3].

[updated April 2014]

References

[1] http://www.vs.gov.bc.ca
[2] http://www.clicklaw.bc.ca/resource/1022
[3] http://www.ag.gov.bc.ca/courts/other/wills_estates.htm
[4] http://www.dialalaw.org

The Disappointed Beneficiary (Script 179)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What can you do if you're disappointed as a beneficiary?

A beneficiary is sometimes unhappy with their share of what they receive under a will. A spouse or child may feel that what they've received is less than fair, or they may not receive anything at all.

This script explains your rights and remedies in the following circumstances:

- A will appears to be unfair toward a spouse or child.
- The person making the will may not have had the necessary mental capacity to do so.
- There may have been undue influence or coercion on the person making the will.
- The person died without making a will.

Occasionally someone else, perhaps a friend or other relative (who isn't a spouse or child), may be disappointed with what they have or haven't received under a will. They may have a claim in "unjust enrichment" against the estate. A lawyer will need to be consulted. The remainder of this script just deals with a disappointed spouse or child.

First, is the will unfair?

If the testator (i.e., the person who died) has been unfair or unreasonable toward a spouse or child, the court may change the will, even if the will is technically valid. The new *Wills, Estates and Succession Act (WESA)* gives the court the power to change a will that doesn't adequately provide for the maintenance and support of the deceased person's spouse or children.

Does "spouse" include a common-law spouse?

Yes, "spouse" includes a common-law spouse. But to be considered as a spouse, you must have lived with the testator in a marriage-like relationship for at least two years immediately before the testator's death. Marriage-like relationships between people of the same sex are included, so a gay or lesbian partner can make a claim as a spouse of the deceased if they lived together in a marriage-like relationship for at least two years just before the testator died.

What does the definition of “children” include?

"Children" entitled to inherit from their parent’s estate includes biological children of any age, born either within or outside of a marriage, and legally adopted children. But stepchildren, or children who have been adopted by someone else, aren’t entitled to inherit from their parent’s estate.

What does the court consider?

The court considers many things to see if the will adequately provides for the spouse or children, including:

- the value and nature of the assets of the estate (i.e., the money and property owned by the testator)
- the financial circumstances of the applicant (i.e., the spouse or child asking the court to change the will)
- the financial circumstance of the other beneficiaries
- the character and conduct of the applicant towards the deceased person

The court’s main consideration will be whether the applicant spouse or child was financially dependent on the deceased), and if so, to what extent.

How does the court decide to change the will?

After considering the circumstances, the court may decide to change the will. The court will consider what a reasonable testator or deceased person would have done. If the will reflects irrational anger or favoritism or without good reason ignores the genuine needs of the testator’s spouse or children, the court will probably change the will to correct the situation. The court has the power to order that the estate provide for the spouse or children in a way that is “adequate, just and equitable” in the circumstances.

Next, consider a testator’s lack of mental capacity

Even where a will appears to meet the technical requirements of the law, a court may change the will if it finds that the deceased person lacked the necessary mental capacity to make a will. A person can be eccentric or suffer from a mental disorder and still be able to make a will. But they must have the capacity to:

- understand that they’re making a will
- understand the effect of the will
- appreciate the amount of the property they’re distributing with the will
- understand and appreciate that their will should, if possible, look after their spouse and children and not unfairly disentitle them

What happens to the estate if the testator lacked mental capacity?

If a court finds that the deceased person lacked capacity with respect to any of these elements when they made their will, then the court may decide the will isn’t valid. If the deceased doesn’t have a previous will, this would mean the deceased has no will at all, and their estate will be divided according to *WESA*. If the deceased person has another will, made at an earlier time when they had testamentary capacity, then this earlier will is the will.

Note, however, *WESA* now allows the court to look at any record, document, email or text message to see if it accurately reflects the deceased’s testamentary intentions. It can order that the administrator of the estate act according to how the deceased wanted their estate to be distributed, set out in that written recording (effectively making that recording the deceased’s will). It is unclear how the courts will interpret this new provision, but they will probably take a cautious approach. Still, if the deceased made a written record of how they wanted their estate to be handled – at a time when they

had testamentary capacity – the court can look at this.

What about undue influence or coercion?

Sometimes a will seems so unreasonable or surprising that it's suspicious. While there's nothing illegal in suggesting to someone that they remember you in their will, the court will take away any gift or inheritance in a will that was made because of undue influence or pressure applied to the person who made the will. Undue influence or pressure can range from improper persuasion to a threat of violence.

What will the court do if there has been undue influence or coercion?

The court will cancel the will if it finds undue influence. If it's established that a person was in a position where they potentially could have dominated the will maker or made the testator dependent on them, then that person has the burden of proving that they didn't unduly influence the testator.

What happens if the person dies without a will?

The *Wills, Estates and Succession Act* applies and may provide an inheritance for a child, spouse or other relative of a person who dies without a will. Refer to script 177 on "What Happens When You Die without a Will?"

You should contact a lawyer

If you have a problem like the ones described here, you should see a lawyer. There are "limitation periods" or deadlines that must be met, which can prevent you from enforcing your right if you delay in acting. For example, if a spouse or child feels that the will doesn't adequately provide for their maintenance and support, they must start their court action within 180 days from the date of the grant of probate (i.e., when the will is accepted by the court).

[updated June 2014]

References

[1] http://www.dialalaw.org

Power of Attorney and Representation Agreements (Script 180)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses powers of attorney, enduring powers of attorney and representation agreements, starting with powers of attorney.

What is a power of attorney?

A power of attorney is a document that appoints another person, called an "attorney," to deal with your business and property and to make financial and legal decisions for you.

BC has a new *Power of Attorney Act*

A new *Power of Attorney Act* came into effect in BC on September 1, 2011. It brought in many new changes relating to "enduring powers of attorney" (discussed later in this script). Powers of attorney signed before September 1, 2011 will generally still be valid. But since the new *Power of Attorney Act* brought in many changes, it's a good idea to have a lawyer review your power(s) of attorney to ensure they are still valid and will do what you need them to do. Any powers of attorney signed on or after September 1, 2011 must follow all the new laws.

A power of attorney can be very specific

For example, you may give your daughter a power of attorney just to cash your old age security pension cheques for you. In fact, you can get power of attorney forms for cashing these cheques at your local federal Service Canada office. Your bank can also give you a form if you need a power of attorney for a specific bank account.

A power of attorney can also be very general

If you wish, you can give your attorney very wide powers to deal with all of your assets.

There are specific rules for powers of attorney dealing with real estate

The *Land Title Act* requires the attorney to do certain things and follow certain procedures, and there are certain rules that apply. For example, a power of attorney dealing with real estate is only valid for three years from the date of signing, unless otherwise specified, or unless it is an enduring power of attorney as described in the *Power of Attorney Act*, which has been filed in the Land Title registry in accordance with the *Land Title Act*. You can get a copy of the *Land Title Act* at your local library or find it on the government's legislation website at www.bclaws.ca [1]. Because real estate involves large amounts of money, you should consult a lawyer for real estate transactions rather than trying to do it yourself.

Who should you appoint as your attorney?

Consider carefully who to appoint as your attorney and the powers you want to give. You cannot appoint anyone who is paid to provide you with personal or health care or who works at a facility through which you receive personal or health care, unless that person is your child, parent or spouse. It's important that you trust the person's honesty and judgment. If you have no family member or friend that you can or want to appoint, you can appoint a respected professional such as your lawyer, accountant or trust company. As a power of attorney gives your attorney very broad power, it can cause you a lot of harm if misused.

Can you appoint more than one attorney?

You can appoint more than one person as your attorney, either in the same document or in different documents. If you appoint more than one attorney in the same document, the document should specify how the attorneys must act (for example, must act unanimously or by majority decision). If one or more attorney(s) is unable or unwilling to act, the remaining attorney(s) can continue to act. If you don't want the remaining attorney(s) to be able to continue to act, you should specifically state this in the document(s).

Does the person you appoint have to act as your attorney?

No. Merely granting a power of attorney to someone (and even delivering the written document to them) doesn't mean that this person has to act as your attorney if they don't want to. The attorney doesn't have to take any specific steps to say "no," or to later decline to act if they no longer wish to be the attorney.

How do you end a power of attorney?

The most effective way to terminate a power of attorney is to give your attorney a written notice saying that their power has ended, and preferably also to destroy all originals or duplicates of the document (to prevent misuse by the terminated attorney). To cancel or revoke a power of attorney dealing with land, you must file a document called a "Notice of Revocation" in the Land Title Office where the land is registered. The court can also terminate a power of attorney – this might happen if your attorney abuses their power. It's also possible to put an end-date, or include circumstances in which the power of attorney will end, in the document itself.

A power of attorney automatically ends in certain circumstances

It automatically ends when you die or if you become bankrupt. It also ends if you become mentally incompetent, unless you say that the power should continue, and then you've made an "enduring power of attorney."

What is an enduring power of attorney?

An enduring power of attorney allows your attorney to make the necessary financial and legal decisions for you if you become mentally incapable because of age, accident or illness. To make a valid enduring power of attorney, the document must specify whether the attorney can exercise authority only while you are capable or only while you are incapable (or both). The document must also state that your attorney's authority will continue even if you're no longer able to make decisions for yourself.

There are different rules for enduring powers of attorney than for non-enduring ones

For example, for enduring powers of attorney, if you appoint more than one attorney in different documents, the appointed attorneys must act together unanimously, unless the documents describe when the attorneys don't have to act unanimously or set out how a conflict between the attorneys is to be resolved.

Also, if your attorney has signed the enduring power of attorney and the attorney no longer wishes to be the attorney, the attorney must give written notice of their resignation to you and any other attorneys named in the document. If you are mentally incapable at that time, the attorney must also give written notice of their resignation to your spouse, near relative or close friend.

How do you end an enduring power of attorney?

To terminate or change an enduring power of attorney, you must give written notice of the termination or change to your attorney(s). It's also important to give written notice of the termination to any financial institutions or other third parties where your attorney may have previously used the enduring power of attorney to act on your behalf.

Also, the *Power of Attorney Act* sets out additional circumstances under which an enduring power of attorney automatically ends, such as:

- if the attorney becomes bankrupt
- if the attorney is your spouse (either married or common-law) and your marriage or marriage-like relationship ends, unless the document specifically says that the power of attorney will continue to be in effect if your marriage or marriage-like relationship ends
- if the attorney is a corporation and the corporation is dissolved or winded up
- if the attorney is convicted of an offence described in the *Power of Attorney Act* or an offence where you were the victim

There are specific new rules for signing an enduring power of attorney

An enduring power of attorney must be signed and dated by you in front of two adult witnesses at the same time (only one witness is needed if the witness is a lawyer or notary public). Neither your appointed attorney nor the spouse, child, parent or an employee/agent of the appointed attorney can act as a witness.

Also, before an appointed attorney can start to exercise any authority granted to them under an enduring power of attorney, the appointed person must sign and date the document in front of two witnesses (only one is required if the witness is a lawyer or notary public). The attorney doesn't need to sign in front of you or any other appointed attorneys (if more than one attorney is appointed). But the same witness rules for your signing apply to the attorney's signing.

When is an enduring power of attorney useful?

An enduring power of attorney may help avoid having the court appoint a "committee" of one or more people to look after your legal and financial affairs in the event that you become mentally incompetent. A committee appointment is much more expensive than making an enduring power of attorney. See script 426 on "Committeeship" for more information on this.

What are the duties of an attorney under an enduring power of attorney?

Before a person agrees to act as an attorney under an enduring power of attorney, the person should be aware of the duties and obligations that they will have as an attorney. All of the duties and obligations are described in the *Power of Attorney Act*. These include the duty:

- to act honestly and in good faith
- to act in your best interests, taking into account your current wishes, known beliefs and values and any directions that are set out in the document
- to not dispose of any property that the attorney knows is specifically gifted in your Will
- to keep your assets separate from the attorney's assets
- to keep proper records, including creating and maintaining a list of your property and liabilities

What decisions can be delegated with a power of attorney?

A power of attorney is used to delegate financial and most legal decisions. This is true for both a power of attorney and an enduring power of attorney. But your attorney cannot make medical or health care decisions for you, such as consenting to surgery or dental work for you. For these decisions, you need to make what's called a "representation agreement." In the event that there is a conflict between your enduring power of attorney and your representation agreement, the provisions of your enduring power of attorney will prevail.

What is a representation agreement?

The *Representation Agreement Act* allows you to appoint someone as your legal representative to handle your financial, legal, personal care and health care decisions, if you're unable to make them on your own. You cannot appoint any person who is paid to provide you with personal or health care or who is an employee of a facility through which you receive personal or health care, unless that person is your child, parent or spouse. The document is called a representation agreement and it creates a contract between you and your representative.

There are new changes to the *Representation Agreement Act*

Changes to BC's *Representation Agreement Act* came into effect on September 1, 2011. Representation agreements signed before then will generally still be valid. But any representation agreements signed on or after September 1, 2011 must follow all the new laws.

Your representative has certain duties they must follow

Before a person agrees to act as a representative, that person should review and be aware of the duties and obligations that they will have as a representative. For example, your representative must consult with you, as much as is reasonable, to determine your wishes. Some of the other duties of representatives include the duty:

- to act honestly and in good faith
- to take into account your current wishes, and if you're unable to express your wishes at that time, to take into account any wishes or instructions you may have given while you were capable of doing so
- to act within the authority granted by the representation agreement
- to keep your assets separate from the representative's assets
- to keep proper records including creating and maintaining a list of your property and liabilities

The agreement should name a monitor

Generally speaking, unless your representative is your spouse, the representation agreement must name another person as a "monitor" to help ensure that the representative lives up to their duties, or the agreement must state that a monitor isn't required.

Are there different types of representation agreements? There are two types:

- Section 7 limited agreement – to cover straightforward, everyday decisions
- Section 9 general agreement – to deal with complex personal care and health care matters

A Section 9 agreement is needed for your representative to make such decisions as refusing life support if you become terminally ill.

There are strict rules for signing a representation agreement

Two witnesses are needed when you sign a representation agreement (unless one of the witnesses is a lawyer, in which case you only need the signature of that lawyer witness). There are also certain restrictions on who can be a witness.

Do you need a lawyer to make a representation agreement?

The law doesn't require you to consult a lawyer to make a representation agreement. But you should actually see a lawyer if you want to make an agreement. A lawyer can help you to understand the wide range of issues that arise with a representation agreement.

Can you register these documents somewhere?

At the Nidus Personal Planning Resource Centre & Registry, you can register both enduring powers of attorney and representation agreements. Hospitals, banks and government services can search there to find out who your attorney or representative is if they need to. See www.nidus.ca [2].

Summary

A power of attorney is a document that allows you to give another person, called the attorney, the authority to act for you in financial and legal matters. The power can be as specific or as general as you wish. But unless you use an enduring power of attorney, it will automatically end if you become mentally incompetent. A representation agreement, on the other hand, can cover personal care and health care decisions, as well as certain financial and legal decisions, if you're unable to make them on your own.

Where can you find more information?

- The Public Guardian and Trustee of British Columbia has detailed information on powers of attorney, representation agreements and court orders appointing a committee to look after the affairs of a person who is mentally incapable. Their phone number is 604.660.4444 in Vancouver and their website is www.trustee.bc.ca [3].
- The Nidus Personal Planning Resource Centre & Registry provides detailed information on representation agreements. Their phone number is 604.408.7414, and their website is www.nidus.ca [2].
- See the provincial government's website on incapacity planning and the forms that can be used at www.ag.gov.bc.ca/incapacity-planning [4].
- Refer to script 426 on "Committeeship".

[updated October 2013]

References

[1] http://www.bclaws.ca
[2] http://www.nidus.ca
[3] http://www.trustee.bc.ca
[4] http://www.ag.gov.bc.ca/incapacity-planning
[5] http://www.dialalaw.org

Automobiles

Insurance Benefits and Compensation for Accident Victims (Script 185)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains motor vehicle insurance from the Insurance Corporation of British Columbia (called ICBC), plus insurance benefits and other payments for people injured in a motor vehicle accident. For information on insurance payments for vehicle damage, check script 186 on "Making a Vehicle Damage Claim".

Types of insurance

ICBC vehicle insurance is mandatory

Everyone who owns a motor vehicle in BC must have basic vehicle insurance, called Autoplan, from ICBC. You can buy more insurance than Autoplan's basic insurance—from ICBC or a private insurance company. Autoplan agents can give you the options.

Autoplan includes basic third-party legal liability insurance of $200,000

If you injure someone or damage their vehicle in an accident, your third-party legal liability insurance will pay their claim up to the limit of your insurance. The minimum third-party legal liability insurance you must have is $200,000. This insurance will also pay for most of the legal and investigative costs.

You can buy more than the basic $200,000 insurance

Courts often award much more money (called compensation or damages) than $200,000 – sometimes $1 million or more – especially if the victim was seriously injured. You can buy much more insurance than $200,000—up to several million dollars and most people do. You can buy this extra insurance from ICBC or from a private insurance company. Buying more than the basic insurance is even more important if you drive to the United States because accident costs (especially medical) can be much higher there.

If you have only the basic $200,000 insurance, and someone you injure sues you for more, you may have to pay the rest. That can be a financial disaster for you.

Autoplan includes under-insured motorist protection

Basic Autoplan includes under-insured motorist insurance up to $1 million. For example, you are hurt in an accident that is the other driver's fault, and the other driver has only the basic $200,000 insurance. But ICBC decides your claim is worth $800,000. What happens? ICBC will pay your full $800,000 claim through your under-insured motorist protection.

You can increase the under-insured motorist protection with ICBC from $1 million to $2 million.

Autoplan includes protection against hit-and-run accidents

All BC residents—even if they do not own a vehicle—are insured up to $200,000 by Autoplan if a hit-and-run driver kills or injures them.

You can lose your insurance if you break the law

Be careful not to lose your insurance by driving while you're prohibited or your license is suspended or committing a crime while driving. In these cases, your third-party legal liability insurance may not cover you, and you may have to pay for any damage or injury you cause in an accident.

Benefits (compensation) if you're hurt in a motor vehicle accident

There are two main types of benefits:

1. no-fault accident benefits
2. damages (payment) for losses caused by someone's negligence

1. No-fault accident benefits

When can you get them?

ICBC pays no-fault accident benefits to all injured drivers and passengers of any vehicle licensed and insured in BC, as long as those people have met the insurance conditions. It doesn't matter who caused the accident. You can apply for benefits if the accident occurred in BC, elsewhere in Canada or in the United States. You may also get benefits if the vehicle wasn't insured in BC: for example, if you were hurt as a passenger in an out-of-province vehicle, but you had a BC driver's license.

If you are a BC resident who is hurt in an accident in Canada as a pedestrian or cyclist, you can get accident benefits if you have basic ICBC insurance or a BC driver's license, or if you live with someone who has basic ICBC insurance or a BC driver's license.

You have to meet the conditions of the insurance to get accident benefits. For example, if you were injured while driving without a valid driver's license, or crashing your car in a suicide attempt, or racing or in a speed test, ICBC will not pay you any accident benefits.

What no-fault accident benefits can you receive?

Accident benefits include the following amounts:

- funeral expenses up to $2,500 and some death benefits.
- rehabilitation and reasonable medical expenses (including chiropractic expenses and nursing attendant care) up to $150,000.
- income replacement payments.
- homemaker benefits.

How much are the income replacement and homemaker benefits?

Income replacement benefits—you can receive weekly disability payments if you were employed (working) before the accident, but have been totally disabled and unable to work since. You get 75% of your gross weekly earnings (minus any weekly total wage loss payments from other sources) or $300 a week, whichever is less. ICBC considers you employed if you worked any 6 of the 12 months before the accident.

Homemaker benefits—if you stayed home and looked after your family and home, you can get up to $145 a week in homemaker benefits. But your injury must substantially or continuously stop you from regularly performing most household tasks.

Income replacement and homemaker benefits aren't paid for the first week. They start on the eighth day after the accident. They continue for as long as your disability lasts or until you turn 65, whichever is first. But ICBC can review your eligibility for these benefits each year.

You must apply for other benefits first

If you have other benefits like employment insurance, workers compensation or a private disability plan through your job, you must apply for these other benefits first. And ICBC will subtract these other benefits from the accident benefits it pays you.

Accident benefits are limited

Accident benefits only provide limited coverage. They're not designed to pay you for all the losses you may suffer from an accident, especially if you were seriously injured. So you may also be entitled to payment or damages for losses caused by the negligence of others, explained in the next section.

2. Damages for losses caused by someone's negligence

If someone else was legally at fault for the accident—even partly—then you can be paid for at least some of your losses from the accident. For example, you could get payment for the clothes you were wearing that were ruined in the accident. You could also get fully paid for the loss of your future earnings if you can't work because of the accident. Also, you may be paid compensation for the pain and suffering the accident caused you.

You cannot collect twice for the same accident

Because you cannot collect twice for the same loss, ICBC will subtract the accident benefits you receive from any damages (or compensation) that you receive for someone's negligence. On the other hand, employment insurance and private disability benefits are not normally subtracted from damages, except in hit-and-run cases and some other situations.

Summary

Basic Autoplan insurance will pay for motor vehicle claims against you up to $200,000. But it's a good idea to buy more insurance—for both third-party legal liability and under-insured motorist protection. If you're hurt in an accident, you may be entitled to certain ICBC accident benefits. If your injuries were caused by another person's negligence, you may also be paid for all your expenses directly related to the accident, plus damages for your other losses. But ICBC will subtract the accident benefits from the total damages you receive.

More information

- Check the ICBC website at www.icbc.com [1].
- Check script 188, called "Making a Personal Injury Claim".

[updated June 2014]

References

[1] http://www.icbc.com
[2] http://www.dialalaw.org

Making a Vehicle Damage Claim (Script 186)

This script explains how you make an insurance claim with the Insurance Corporation of British Columbia ("ICBC") if your vehicle is damaged in an accident. It also explains what happens if you damage another vehicle, and how accidents affect your insurance rates.

Is vehicle insurance compulsory in BC?

Basic vehicle insurance is compulsory. Everyone who owns a motor vehicle in BC must have basic vehicle insurance, called Autoplan, from ICBC. If you cause or are at fault for an accident that damages someone else's vehicle, Autoplan will pay that other person for the damage. This insurance is called "third-party legal liability" coverage.

You may also buy optional "collision insurance" from ICBC or a private insurance company. It pays for damage to your vehicle – whether or not you were at fault – minus the deductible amount. Your insurance may also pay if your parked vehicle is hit by an unknown driver.

What should you do if you're in a vehicle accident?

Report the accident to ICBC as soon as you can. In the Lower Mainland, call ICBC's Dial-A-Claim Centre at 604.520.8222. Elsewhere, call 1.800.910.4222. You can also report the accident online at www.icbc.com [1]. If you bought your collision insurance from a private insurance company, report your accident to them too.

Should you call the police?

If someone was injured in the accident or the damage is likely to be $2,000 or more, you must report the accident to the police.

Who will assess the vehicle damage?

Many vehicle damage claims are settled without having to visit an ICBC claim centre. If your claim qualifies, you can go directly to a c.a.r. VALET repair shop for a vehicle damage estimate, and get the repairs done at the same convenient location (There are more than 400 c.a.r. bodyshops in BC. ICBC will let you know if your claim qualifies for this service when you report your claim.

Other times, even if you can still drive your vehicle, Dial-A-Claim may give you an appointment to take it to the nearest claim centre, where an estimator will look at it. They fill in a form listing the repairs needed. Then you take your vehicle, with the estimator's form, to a repair shop you choose.

If you can't drive your vehicle after the accident and it has been towed to a storage lot, ICBC will arrange to have it towed directly to a claim centre. In the Greater Vancouver area, it may be towed to ICBC's Central Estimating Facility first, and then to a body shop for the repairs.

Who decides who caused an accident?

An ICBC adjuster decides who was at fault after reviewing the details of the accident. Often, you may not actually meet the adjuster and, instead, may deal with them by phone.

Who pays for the repairs?

It depends on who caused the accident and whether you have collision insurance. If the accident wasn't your fault, ICBC may pay the whole repair bill. If you caused the accident, but you have collision insurance with ICBC, you'll have to pay the deductible, and ICBC will pay the rest. If you don't have collision insurance and you caused the accident, you will have to pay for your own vehicle damage. If you don't have collision insurance and ICBC hasn't decided whether you were at fault, you may have to pay the repair shop, then try to get ICBC to pay you back later, when it decides who caused the accident.

What happens if your vehicle is too badly damaged to repair?

If you vehicle is wrecked, it's called a write-off or a total loss. If the cost of repairs is more than the current market value of your vehicle, ICBC will calculate the value based on its market value before the accident. The value depends on several things, including your vehicle's make, model, age, condition, upgrades and similar things. Then, if the other driver was at fault or you have collision coverage, ICBC will pay you that amount. But if you still owe money to a bank (or someone else), and they had registered a lien against your vehicle, ICBC will pay the bank what you owe them and then pay the rest to you.

Do you have to accept the amount ICBC offers?

No. If you're not happy with the offer, you can ask the material damage manager at the centre handling your claim to review it.

If you're still not satisfied, the *Insurance (Vehicle) Regulation* allows you to refer your dispute for arbitration. If you and ICBC can't agree on the choice of an arbitrator, the British Columbia Arbitration and Mediation Institute can appoint an arbitrator. The arbitrator must promptly meet or communicate with both you and ICBC, gather relevant information, and set a date for a decision. The arbitrator's written decision with full reasons will be sent to you by registered mail. The costs of the arbitration are shared equally between you and ICBC. Note that if you want to submit your dispute for arbitration, you must do so within two years after the loss or damage to your vehicle occurred.

What should you do if you disagree with ICBC's decision about who is at fault?

You have two choices:

- Ask ICBC to review its decision.
- Sue in court.

What if you ask ICBC to review the decision?

If you don't think you should have been found fully or partly at fault, you can ask a claim manager to review your case. If you're still not satisfied, you can apply for a Claims Assessment Review, known as a CAR. You have 60 days after ICBC tells you its decision on who was at fault in the accident to apply for a review, and it will cost you $50. ICBC will refund that money to you if you win the review. See the ICBC website at

www.icbc.com/claims/feedback/appealfault/pages/claims-assessment-review.aspx [2] for more detail on the CAR program – it's not always available.

What if you sue in court?

You can sue the other driver in Small Claims Court, or Supreme Court if your claim is for more than the $25,000 limit in Small Claims Court. You may want to sue for any deductible you had to pay on your collision coverage or, if you had no collision coverage, to recover the cost of your vehicle repairs or the write-off value of your vehicle.

Will your insurance premiums go up?

If ICBC decides that you were more than 25% at fault for an accident that results in a claim – either by you or the other driver – ICBC will usually increase your insurance premium the next year. If you have another claim, the increase will be even greater. Also, if ICBC finds you at least 50% at fault in three crashes within three years, and they all result in claims, you'll have to pay an additional "multiple crash premium" of $1,000. And for each additional at-fault crash within the three years, you'll have to pay an additional fee of $500.

Can you pay for the damage yourself without involving ICBC?

If you cause a small accident, you may choose to pay for any damage to your vehicle and/or the other vehicle yourself to avoid higher insurance premiums. But you should discuss this with the ICBC adjuster for your file, as the increase in your insurance cost may be small if you're an ICBC Roadstar customer.

What should you do if you have a complaint with ICBC?

If you have a complaint about how ICBC handles your claim, you can contact their Customer Relations department at 604.982.6210 in the Lower Mainland or toll-free 1.800.445.9981 elsewhere. A Customer Relations Advisor will help you. If this doesn't work and you still feel you haven't been treated fairly, you may be eligible to proceed to the Fairness Commissioner.

Will your insurance cover you if you were drinking and driving?

If you were drinking and driving or under the influence of drugs when you had your accident, or you're convicted of a *Criminal Code* offence related to motor vehicles, you'll have problems claiming insurance because you may have broken the rules of your insurance contract. If you're charged with any criminal offence relating to a vehicle accident, you should consult a lawyer. If you have any questions about your insurance, ask the adjuster or your lawyer. Also refer to script 190 on "Drinking and Driving".

Where can you find more information?

- See the ICBC website at www.icbc.com [1].
- If you've been injured in an accident, refer to scripts 185 on "Insurance Benefits and Compensation for Accident Victims" and 188 on "Making a Personal Injury Claim".

[updated June 2014]

References

[1] http://www.icbc.com
[2] http://www.icbc.com/claims/feedback/appealfault/pages/claims-assessment-review.aspx
[3] http://www.dialalaw.org

The Points System and ICBC (Script 187)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains driver penalty points and how they relate to the new driver risk premiums charged by the Insurance Corporation of British Columbia (called ICBC).

What are driver penalty points?

When you receive a traffic or violation ticket for speeding or some other driving offence under the BC *Motor Vehicle Act*, you normally get points on your driver's record. You also get points for certain *Criminal Code* offences like impaired driving, criminal negligence, and failure to remain at the scene of an accident. Driver penalty points are like black marks on your driving record.

When are points added to your record?

Points are added to your record if you plead guilty to a driving offence or if a court convicts you of the offence. If you pay a traffic ticket, you're admitting that you are guilty, so if you don't agree with a ticket, you must fight (or dispute) it. You have 30 days from the date of the ticket to dispute it. If you don't do so, the offence and points are automatically added to your driving record. Check script 194 called "Traffic Tickets" for more information on how to fight a traffic

ticket.

How many points do you get?

It depends on what the ticket is for. Most traffic tickets are for 2 or 3 points. All speeding tickets are worth 3 points.

What is the driver penalty point (DPP) premium?

Each year, ICBC looks at your record of driver penalty points and bills you a driver penalty point (or **DPP**) premium. The bill is sent 4 weeks before your birthday. The DPP premium depends on the total number of points you get in a 12-month period, called the assessment period. ICBC reviews your driver's record for this period, which starts about 17 months before your birthday and ends a year later, 5 months before your birthday. For example, if you have 4 points, the annual DPP premium is $175. It's $230 for 5 points, $300 for 6 points, and so on. If you have 50 points or more, you get the maximum DPP premium of $24,000.

How are you billed for DPP premiums?

ICBC bills you for a DPP premium only if you've had 4 or more penalty points added to your driving record in the assessment period. So if you get only an occasional minor traffic ticket, you won't be charged any extra premium. Also, you don't get points for parking tickets and other minor violations of city bylaws.

ICBC uses the points just once to calculate the premium and bill you. Once the points go on your record, they aren't used again for billing, but ICBC keeps a record of each motor vehicle violation and point.

What are driver risk premiums (DRPs)?

Driver risk premiums (**DRPs**) started in 2009. They will eventually replace DPP premiums. But there's no date set for the replacement. And until then, both programs operate together. Under this new DRP program, ICBC reviews your driving record for offences for the previous 3 years. You will have to pay a DRP if, during the previous 3 years, you have:

- one or more driving-related *Criminal Code* convictions (such as, impaired driving)
- one or more *Motor Vehicle Act* convictions worth 10 points or more (such as driving while suspended)
- one or more excessive speeding convictions
- two or more roadside suspensions or prohibitions

The DRP (like the DPP premium) is in addition to the usual ICBC insurance premium that you pay for any vehicle you own. And it differs from the fine you have to pay for the traffic or violation ticket. It also differs from any insurance cost increase or surcharge you have to pay if you are in an accident that was your fault. You are billed even if you don't own or insure a vehicle.

How much are DRPs?

The amount depends on the number of convictions you get. For example, the DRP for one excessive speeding offence is $320. It's $905 for one *Criminal Code* conviction like impaired driving. And it's $3,760 for two *Criminal Code* convictions.

How are you billed for a DRP?

You will get only one DRP bill a year. But because the assessment period is 3 years, one conviction during this period means you have to pay the DRP each year for 3 years. For example, if you have one excessive speeding conviction, then you'll have to pay $320 each year for 3 years, for a total of $960.

Can you be billed for both a DPP premium and a DRP?

No, both the DRP and the DPP premium will operate until the DRP replaces the DPP. Until then, you will be billed only one premium, whichever is highest.

How long do you have to pay?

You get a DPP or DRP bill once a year. You have to pay the bill within 30 days of the invoice date. You can pay it with online banking or in person at any bank, at Autoplan insurance brokers, ICBC claim centres, and driver licensing office. You can mail a cheque to ICBC at ICBC Revenue Accounting, 151 West Esplanade, North Vancouver, BC, V7M 3H9.

What if you can't or don't pay?

If you don't pay the bill within 30 days, ICBC will charge you interest. ICBC can also refuse to renew your vehicle insurance until you pay. Also, you won't be able to renew your driver's licence if you don't pay a DPP bill or a DRP.

You can avoid paying a DPP or DRP bill if you're willing not to drive for a year. If you give up your driver's licence to an ICBC driver licensing office for the whole one-year billing period, you won't have to pay the bill.

Or you can reduce a DPP or DRP bill by giving up your licence for 30 days or more during the billing period. When you want your license back, go to a driver licensing office and pay the reduced bill, plus any extra license fees. But this works only if you do not have to take a driver re-examination and don't have any outstanding prohibitions.

If you do this, be sure to actually take your licence in person to the driver licensing office and get a receipt for it. If you just put your licence away and decide not to drive, you'll still owe the same money as before, plus interest, because there would be no proof that you gave up your right to drive.

You may be able to reduce a DPP or DRP bill in other cases too

ICBC will reduce a DPP or DRP bill if you've been prohibited or legally banned from driving for 60 days or more in the billing period. It usually does this automatically, but you may have to ask it to do so and to prove your situation. Also, you can apply to ICBC Customer Service for a refund or reduction if, for at least 30 days in a row during the billing period, any of the following cases apply:

- you lived in another province and legally held a driver's license there
- you were not in Canada or the US
- you were in jail
- you had medical reasons for not driving

Again, you may have to prove your case to ICBC.

Multiple crash premium

If you are 50% (or more) at fault for 3 crashes in 3 years, you have to pay a multiple crash premium of $1,000. For each additional crash within 3 years, you would pay an extra $500.

Where can you find more information?

- Check the ICBC website at www.icbc.com [1]. It has information on both the DPP and DRP at www.icbc.com/driver-licensing/tickets/Pages/default.aspx [2].
- Call ICBC Customer Contact at 604.661.2800 in the lower mainland, or 1.800.663.3051 (toll-free) elsewhere in BC.
- The *Motor Vehicle Act* is at www.bclaws.ca [3] and the *Criminal Code* is at http://laws-lois.justice.gc.ca/eng/.

[updated June 2014]

References

[1] http://www.icbc.com
[2] http://www.icbc.com/driver-*licensing/tickets/Pages/default.aspx
[3] http://www.bclaws.ca
[4] http://www.dialalaw.org

Making a Personal Injury Claim (Script 188)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script describes making a personal injury claim, going to court, and dealing with the Insurance Corporation of British Columbia, called ICBC.

Accident victims may be entitled to compensation

If you're hurt in a motor vehicle accident, you may be able to receive two types of compensation:

1. **No-Fault Accident Benefits:** Everyone in BC who owns a vehicle must buy basic insurance from the Insurance Corporation of British Columbia, or ICBC. This insurance pays money, called "accident benefits," to people injured in a vehicle accident. Even if you caused the accident, ICBC will pay you these no-fault accident benefits, as long as you've met the conditions of this insurance. Generally, these benefits include temporary total disability benefits (i.e., disability benefits for lost income to a maximum of $300 per week while you are disabled due to your injuries) and medical and rehabilitation benefits.
2. **Damages:** If the accident wasn't your fault (or only partly your fault), you also have the right to "damages" for your pain and suffering, lost past and future wages, future care, out-of-pocket expenses and other losses. This is called a "tort" claim. These damages aim to put an injured person, who didn't cause the accident, in the same position they would have been in had the accident not happened (as far as money can do this).

How do you make a claim?

You make a claim for accident benefits and/or damages through ICBC. Report the accident by calling ICBC's Dial-A-Claim at 604.520.8222 within the lower mainland or 1.800.910.4222 elsewhere in BC. An ICBC adjuster will then meet with you. The adjuster will investigate the accident and decide who caused it. The adjuster will also review your medical information and expenses, so keep all your receipts.

See your doctor

If you're injured, see your doctor as soon as possible, as your doctor is in the best position to prescribe treatment, such as medication and physiotherapy. ICBC will then consider funding the cost of that treatment.

Report the accident promptly

You have to promptly notify ICBC of the accident and give a written report or statement to ICBC no later than 30 days after the accident. The report or statement sets out the accident circumstances and details of your injury or injuries. Some people prefer to see a lawyer before talking with ICBC. If you do that, your lawyer can report the claim to ICBC for you.

When must you submit your claim for no-fault accident benefits?

To claim accident benefits, you must submit a completed accident benefits claim form to ICBC within 90 days after the accident. If you're entitled to accident benefits, you should start to receive payments soon after that.

What about getting damages?

If someone else was fully or partly to blame for the accident – meaning you're entitled to tort damages – ICBC will typically offer you money to settle or resolve your claim. Normally you won't want to settle a personal injury claim until your medical condition is stable and your doctor can say when your injury will probably be resolved and whether you will have any lasting effects. Then, if you agree with ICBC's offer, you can settle your claim. You won't be able to make any further claims later, even if you suffer new and other consequences as a result of your injuries which you hadn't anticipated. You will also have to sign a "full and final release of all claims" before receiving the settlement money.

What if you disagree with ICBC?

If you don't agree with ICBC's offer or its decision about who is at fault, or if you don't know if the offer is fair, you can see a lawyer for advice. If you or your lawyer can't reach an agreement with ICBC, you may sue in court. ICBC's decision as to who is at fault or what amount is fair for tort damages isn't binding on a court, and the judge will decide the matter without any reference to what ICBC decided. ICBC has a "Fairness Process" that you can also use if you're not satisfied.

There are three situations where you may have to sue in court

1. **Refusal to pay accident benefits:** If ICBC refuses to pay any accident benefits, or it pays less than you think is fair, you can see a lawyer for legal advice. If you decide to sue, you have to start your lawsuit within 2 years after the accident (or within 2 years from the date of the last no-fault benefits payment, if you received some benefits).
2. **Decision that you're at fault:** ICBC may decide that you're totally or partly at fault for the accident. To claim damages or compensation for your injuries in addition to no-fault accident benefits, you would have to sue the owner and driver of the other vehicle in the accident. This must be done within 2 years of the date of the accident.
3. **Refusal to pay damages:** ICBC may not want to pay as much damages as you think you should get for your pain and suffering, wage loss, business loss or other losses. This may happen even though ICBC decides that you were not at fault. In this case, you'd have to start a lawsuit within 2 years of the accident.

What deadlines are there for suing in court?

Any court action must be started within 2 years from the accident date, or you lose all right to recovery. In some cases, you also have to give notice of your claim sooner (for example, if a municipality is involved, you must give the municipality notice of your claim within 6 months of the accident).

Where do you sue?

1. **Small Claims Court:** Sue in Small Claims Court if you are suing for $25,000 or less. You don't need a lawyer in Small Claims Court, but you can have one. Check scripts 165 to 169 on Small Claims Court.
2. **Supreme Court:** Sue in BC Supreme Court if you are seeking more than the $25,000 limit in Small Claims Court. You should have a lawyer if you choose Supreme Court because the procedures are more complicated.

How much will it cost?

If you're suing for damages, you have to pay your own lawyer. Most lawyers practicing in this area accept cases on the basis of a "contingency fee agreement." This means that you only pay your lawyer's fees when and if you recover damages at the end of your legal action, based on a percentage of what you recover. Discuss this with your lawyer when you first see him or her. ICBC pays the lawyer for the people you are suing. If you win your lawsuit, the court may order the other side to pay some of your legal fees.

Lawsuits in Supreme Court don't usually go to trial because both sides settle or resolve the matter before trial, but this isn't always the case. Sometimes, cases go to mediation and an independent, unbiased person acts as a mediator to help you and the other side reach a settlement agreement.

Can ICBC sue you?

Yes, ICBC can sue you in some cases. For example, if you drive while drunk and cause an accident that injures a person, that person may sue you. ICBC can pay the injured person and then demand that you pay it back. The various situations in which ICBC can collect that money from you are quite complex. So if you're involved in such a situation, you should get legal advice.

Caution

You should consult a lawyer before you proceed with a personal injury claim. It's critical that you know all your rights and are prepared. Insurance companies, however fair, are in a conflict of interest about what to do with your claim.

Summary

If you're injured in a motor vehicle accident, you can claim accident benefits from ICBC. If the accident wasn't your fault, you can also claim damages for pain and suffering and other losses. The ICBC adjuster can settle your claim if you agree. Because that agreement will be binding, you may want to see a lawyer before you agree to a settlement to find out if the offer is fair. If you can't agree on the value of your claim, or who is responsible for the accident, a lawsuit and a trial may be necessary. There are strict time limits for when a lawsuit must be started, and if you miss the time limit, you lose your right to sue. So you should see a lawyer as soon as possible after an accident for legal advice.

Where can you find more information?

- For more information on accident benefits and damages for accident victims, refer to script 185 on “Insurance Benefits and Compensation for Accident Victims”.
- See the ICBC website at www.icbc.com [1].

[updated January 2013]

References

[1] http://www.icbc.com
[2] http://www.dialalaw.org

Drinking and Driving (Script 190)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

==BC and Canada both have laws against drinking and driving==

This script explains what can happen if you drink and drive. Both BC and the federal government have laws against drinking and driving. Usually, only the BC law applies. Sometimes, federal law applies instead of—or in addition to—BC law. Drinking and driving is a very complicated area of law with serious consequences.

It's not a crime to drive with some alcohol in your body, but it is a criminal offence to drive if your ability to drive is even slightly impaired due to alcohol. The prohibited blood alcohol level for drivers starts at 0.05 in BC. The best action if you have been drinking is not to drive—take a taxi or bus or call a friend for a ride.

1. If the police stop you, what tests must you take?

If the police stop you while you are driving a vehicle, or while you have care or control of a vehicle even if you're not driving it, you must take the following tests. Care or control of a vehicle means you were in the driver's seat and had access to the ignition key, even if you were parked.

a. Blow into an approved roadside-screening device or ASD

If the police reasonably suspect that you have alcohol in your body, they may legally require, or demand, that you immediately give a breath sample by blowing into a hand-held breathalyzer, called an Approved Screening Device or **ASD**. If the police don't do this right away, they may not be able to use your ASD results in a criminal trial (section 3 discusses criminal charges below). But a delay in requiring you to blow into an ASD does not affect a Warn or Fail reading on the ASD, which may lead to an immediate roadside prohibition, or **IRP** (section 2 discusses IRPs below). The police can use your ASD results to issue an IRP or to hold you for further investigation.

The police are trained not to tell you that you have a *Charter* right, under section 10(b), to call a lawyer before they require you to blow into the ASD. And you don't have the right to speak to a lawyer before you decide whether to blow or refuse—you have to decide right away whether you will blow. Refusing to blow or to provide a sample suitable for the ASD can lead to an IRP or a criminal charge.

ASD settings account for inaccuracy—the ASD tests for alcohol in your body. The model currently used in BC shows the estimated blood-alcohol concentration figure when the sample has under 60 milligrams in 100 milliliters of blood. It shows "Warn" for blood-alcohol levels between 60 and 100 milligrams of alcohol in 100 milliliters of blood (the legal range for Warn is 50 to 80). And it shows "Fail" for 100 milligrams or higher (the legal limit for Fail is 80). In other words, the ASD allows more than the legal limits to reduce the risk that inaccurate readings will penalize drivers who are at or near the limits.

The legal limit under the *Criminal Code* is 80 milligrams, called .08. The legal limit under the BC *Motor Vehicle Act* is 50 milligrams, called .05. But if the ASD shows a blood-alcohol concentration below 60 (rather than 50), the police will probably let you leave. If the ASD shows Warn, the police will probably give you an IRP. If the ASD shows Fail, the police may give you an IRP. Or they demand you take an evidentiary breathalyzer test as part of a criminal investigation.

b. Take an evidentiary breathalyzer test

An evidentiary breathalyzer is an instrument that measures the alcohol in your breath to see if you have more than the legal limit of .08. In Canadian law, it is called an **Approved Instrument**. The next page explains how it works.

The police may demand you take an evidentiary breathalyzer test using an Approved Instrument only if they have reasonable and probable grounds to believe that you are:

- operating a vehicle, or have care or control of it, while your ability is impaired by alcohol, or
- committing, or have committed in the previous 3 hours, the offence of alcohol impaired driving.

This means the police must have good reason to believe your ability to drive is impaired by alcohol. The police may use a Fail on the ASD to form reasonable and probable grounds to demand an evidentiary breathalyzer test. If the police make this demand, you must:

- go with the police to where the Approved Instrument is located (usually, the local police station), and
- give breath samples (at least two for legally valid tests) so your blood-alcohol level can be analyzed.

Because you are legally held, or detained, the police must tell you of your right to a lawyer—and other *Charter* rights—before you provide breath samples. They must also give you a chance to contact a lawyer you choose—a private lawyer or a Legal Aid Duty Counsel—before you give breath samples. The police must stop trying to get samples or

other evidence from you until you have had the chance to talk with a lawyer in private. For more on *Charter* rights, check scripts 200 and 230.

If you cannot give a breath sample because of your physical condition, the police may require you to let a qualified medical practitioner or designated police officer take samples of your blood for analysis. You have the right to speak to a lawyer before giving a blood sample.

If you are unconscious, you can't agree to give a sample. So the police must get a warrant to take samples, which they can get by phoning a justice of the peace.

Things you don't have to do and should probably never do

You don't have to tell the police whether you drank or how much you drank. You should not discuss with the police what you were doing before they stopped you. You should not speak to the police about your case. Later, at your trial, the court cannot use your refusal to speak with the police as evidence against you. You have a right to be silent.

Summary of what you must do

If the police demand it, you must:

a. blow into an ASD.
b. go with the police and take an evidentiary breathalyzer test.

You must do these things unless you have a reasonable excuse not to. If you refuse to do them, you are committing an offence.

What is a reasonable excuse to refuse to blow into an ASD, or give breath or blood samples?

Generally, it is better to genuinely try to provide proper breath samples if the police demand you do so. You have a legal duty to make genuine attempts to provide suitable breath samples. And making genuine attempts to blow that do not work is not an offence. Courts are strict about what a reasonable excuse is. For example, you may have a reasonable excuse to refuse an evidentiary breathalyzer demand if the police don't let you speak privately to a lawyer first. But you must assert or claim your right to a lawyer. This means that when the police tell you your rights under the *Charter*, you must say you want to use, or exercise, those rights and speak to a lawyer. The legal issues are complicated and the best suggestion is this: if the police demand you take a breathalyzer test, talk to a lawyer before doing so. Then, follow the lawyer's advice.

How does an Approved Instrument (an evidentiary breathalyzer) work?

The Approved Instrument most commonly used in BC is an evidentiary breathalyzer. The procedures for using Approved Instruments are designed to obtain scientifically and legally valid breath tests. Approved Instruments used in Canada test themselves before and after each breath test. They produce a printout of the estimated blood alcohol concentration to be used as evidence in court. In BC, Approved Instruments are usually located only in designated rooms in police stations.

An Approved Instrument captures a tiny bit of breath toward the end of the blowing sequence to measure the concentration of alcohol in your breath. Alcohol in the breath sample condenses on a small metal surface. The alcohol generates an electrical current, which a computer in the breathalyzer measures. The computer calculates an estimated blood-alcohol concentration based on the estimated breath-alcohol concentration. It reports the results in milligrams per 100 milliliters. If you have over 80 milligrams (called "over .08") you are legally too drunk to drive, and can be convicted of a criminal offence.

The technician who operates the Approved Instrument will ask you to breathe deeply into a plastic mouthpiece connected to the breath tube attached to the side of the instrument. It can take several minutes to analyze the sample. The technician

will wait at least 15 minutes and then usually ask you to do it again. When the test is finished, a police officer will give you a Certificate of Qualified Technician Who Took Breath Samples, describing the test results. Keep this document in its original condition. Don't write on it or damage it. Just give it to your lawyer.

2. What can happen under BC law if you drink and drive?

a. An *Immediate Roadside Prohibition* (IRP)

You may be prohibited from driving and lose your vehicle immediately—under section 215 of the BC *Motor Vehicle Act* (available at www.bclaws.ca [1]). This can happen if you blow into an ASD and it shows a prohibited level of alcohol in your breath (a **Warn** or **Fail**, shown in the table below). In that case, the police will issue an **IRP**.

How long do you lose your license and vehicle under an IRP—it depends on the ASD reading, as this table shows. If you are in the Warn range, then it will depend on your driving record, as the table also shows. You must also pay penalties and fees and participate in the Responsible Driver Program course and Ignition Interlock Program.

If your blood alcohol concentration (BAC) is	**This is what happens**
0.05 to 0.08 (a **Warn**) – 1st offence (although the Warn range is .05 to .08, the ASD is set to give a Warn only from .06 to .10. Under .06, the ASD will show the numeric value. So if the ASD shows .055, the police should not issue an IRP—see section 1(a) for more on this.)	• 3-day driving prohibition • 3-day impoundment of vehicle • Impound and towing fees about $150 • $200 penalty • $250 license reinstatement fee
0.05 to 0.08 (a **Warn**) – 2nd offense, within 5 years	• 7-day driving prohibition • 7-day impoundment of vehicle • Impound and towing fees about $230 • $300 penalty • $250 license reinstatement fee
0.05 to 0.08 (a **Warn**) – 3rd offence, within 5 years	• 30-day driving prohibition • 30-day impoundment of vehicle • Impound and towing fees about $680 • $400 penalty • $250 license reinstatement fee • Responsible Driver Program (about $880 plus tax) • Ignition interlock program (about $1730)

Over 0.08 (a **Fail**) or refusal, or fail to provide a breath sample (although a Fail starts at over .08, the ASD is set to give a Fail only at .10 and higher - see section 1(a) for more on this).	• 90-day driving prohibition • 30-day impoundment of vehicle • Impound and towing fees about $700 • $500 penalty • $250 license reinstatement fee • Responsible Driver Program (about $880 plus tax) • Ignition Interlock Program (about $1730)

An ignition interlock device requires drivers to provide a breath sample before they can start the vehicle. It also requires them to periodically give more breath samples during longer trips (about 10 to 12 samples a day). The BC government estimates costs to a driver that include fees to enroll in the program, install the device in their vehicle, have monthly monitoring, and remove the device from their vehicle.

Process the police must follow to issue an IRP—the police must require you to provide a breath sample by blowing into an ASD. If you refuse to blow or do not provide a sample that is suitable for the ASD, the officer must issue a 90-day IRP, the same as if you blew and showed a Fail. If the ASD shows a Warn, the officer must review your driving record and issue the appropriate IRP, as the table above shows. If the ASD shows a Fail, the officer must issue a 90-day IRP. When you blow, the officer must tell you that you have a right to blow again into a different ASD. You get the benefit of the lower of the 2 readings and the police have to tell you this.

The officer must make a sworn report (a report that they swear is true) to the Superintendent for every IRP they issue. They also have to submit a Certificate of Qualified ASD Calibrator showing when the ASD was last calibrated (checked for accuracy), when the calibration expires, and when the ASD is next due for annual service.

Review process to contest an IRP—if the police give you an IRP, you can apply for a review by going to ICBC Driver Services and paying the required fee within 7 days of when the police give you the Notice of Prohibition. The review hearing is held before an adjudicator in the Office of the Superintendent of Motor Vehicles. This office is also called the OSMV and RoadSafetyBC.

You should see a lawyer before applying for a review. Many defences to IRPs are not written in the *Motor Vehicle Act* or described in ICBC or RoadSafetyBC documents.

The Driver Services Application for Review allows a review in any of the following cases:

- You were not the driver or did not have care or control of the vehicle.
- The police did not give you a breath test but you asked for one.
- The police didn't tell you of your right to a second test on an ASD.
- You asked for a second test but the police didn't do one.
- The police didn't use a different ASD to do the second test.
- The IRP was not based on the lowest reading.
- The ASD test results were not reliable.
- The ASD did not register a **warn** reading.
- The ASD registered a **warn**, but your blood alcohol content was less than 0.05.
- The ASD did not register a **fail** reading.
- The ASD registered a **fail**, but your blood alcohol content was less than 0.08.

- Your 7- or 30-day prohibition should be reduced because you did not have the required number of previous IRPs to justify it.
- You did not refuse or fail to comply with a demand to provide a breath sample, or you had a reasonable excuse for refusing or failing to comply with a demand.

For 3- and 7-day IRPs, only written reviews are available. For 30- and 90-day IRPs, you can choose a written or an oral review. It costs $100 for a written review and $200 for an oral review. You cannot drive while you wait for the review because the driving prohibition is in place then.

All IRPs are listed on your driving record unless they are revoked (cancelled) on review. Driving prohibitions are not removed from your driving record after 5 years. It is very important to quickly investigate the steps you can take to challenge your IRP so that you can meet the 7-day deadline to file for a review. Over 20% of IRPs are revoked on review.

An IRP is not a criminal conviction—it does not give you a criminal record. But you could be charged with a criminal offence from the same police investigation. An IRP goes on your driving record, as do tickets, other driving prohibitions, and other driving offences. ICBC keeps a record of your entire driving history. But it issues only a 5-year driving record. You can get a copy of it, called a driver's abstract [2], from ICBC.

If you are charged with a criminal driving offence, or a serious offence under the *Motor Vehicle Act*, ICBC will give your entire driving history to the police or prosecutor. And *Criminal Code* convictions remain on your driving record even if you get a pardon.&

Effect of IRP on travel to the United States—although an IRP is not a criminal conviction, US border officials could see it as evidence of discreditable conduct. And they can refuse entry to the US to foreigners without any reason. But there are no reported cases of a person being refused entry to the US only because of an IRP.

b. 24-hour driving prohibition and vehicle impoundment

Instead of issuing an IRP, police can prohibit you from driving for 24 hours and impound your vehicle if they have reasonable and probable grounds to believe your ability to operate a vehicle is affected by alcohol, drugs, or both. They do not have to test your blood-alcohol level. If you disagree, you can ask for a breath test on an ASD. But police can use the ASD results to issue an IRP or to hold you for a criminal investigation.

This prohibition goes on your driving record. You cannot appeal the impoundment. But you can ask for a review to have the driving prohibition removed from your driving record in 2 cases: if the police failed to do a breath test when you asked or you were not the driver or did not have care or control of the vehicle. You have 7 days from the prohibition to apply for the review. The Superintendent cannot review a 24-hour prohibition for drug impairment. The only possible review of that is by a petition to BC Supreme Court.

24-hour driving prohibition is not a criminal conviction—it does not give you a criminal record. But you could be charged with a criminal offence from the same police investigation. A 24-hour prohibition goes on your driving record, as do tickets, other driving prohibitions, and other driving offences. ICBC keeps a record of your entire driving history. But it issues only a 5-year driving record. You can get a copy of it, called a driver's abstract [2], from ICBC.

If you are charged with a criminal driving offence, or a serious offence under the *Motor Vehicle Act*, ICBC will give your entire driving history to the police or prosecutor. And *Criminal Code* convictions remain on your driving record even if you get a pardon.

Effect of 24-hour driving prohibition on travel to the United States—although a 24-hour prohibition is not a criminal conviction, US border officials could see it as evidence of discreditable conduct. And they can refuse entry to the US to foreigners without any reason. But there are no reported cases of a person being refused entry to the US only because of

a 24-hour driving prohibition.

c. Different rules for new drivers

In BC's graduated licensing program, new drivers (both Learners and Novices) get a 12-hour suspension if a breath test with an ASD shows that they have any alcohol in their body—or if they refuse to blow. They also have to start their stage (12-month L or 24-month N) over again. There is no review of this suspension. And if they are over 0.05, they face the same, more serious results as other drivers, not just a 12-hour suspension. Plus they must start their stage over again.

d. Responsible Driver Program course and Ignition Interlock Program referrals

The BC government refers drivers to these 2 programs if any of the following 3 situations apply to them (these are separate from the IRP requirements for the 2 programs—see the table in section 2(a) above):

- They have a criminal conviction for drinking and driving—see section 3 below, on the *Criminal Code*.
- They have had three 24-hour roadside suspensions in 5 years—see section 2(b) above.
- They have received a 90-day Administrative Driving Prohibition (**ADP**)—see section 3 below, on the *Criminal Code*.

e. Higher insurance costs

Prohibitions and convictions under the BC *Motor Vehicle Act* mean you have much higher vehicle insurance costs. The website of the Insurance Corporation of BC (ICBC) has more on this at www.icbc.com/driver-licensing/tickets/Pages/Driver-Risk-Premium.aspx [3].

3. What can happen under the Canadian *Criminal Code* if you drink and drive?

If the police do not issue an IRP under the BC *Motor Vehicle Act*, they may charge you with any of the following 3 serious criminal charges under the *Criminal Code* of Canada (available at http://laws-lois.justice.gc.ca/eng/:

- impaired driving (caused by alcohol or drugs—both legal prescription drugs and illegal ones).
- driving with a blood-alcohol concentration over 80 milligrams in 100 milliliters of your blood (called “over .08”).
- failing or refusing to provide breath or blood samples on demand (called “refusal” or “refusing to blow”).

These charges apply if you’re driving a car, boat, plane, or other motor vehicle or vessel. They can apply even if you weren’t driving and didn’t move the vehicle—as long as you had care or control of it. Care or control of a vehicle means you were in the driver’s seat and had access to the ignition key, even if you were parked.

If your test results are over .08 or you refuse to blow

Criminal charges—if your results are over .08, you will normally be charged under the *Criminal Code* with over .08. If you fail to give a breath or blood sample, you will be charged with refusing to blow. In either case, you will also normally be charged with impaired driving—a criminal offence.

Two driving prohibitions—the investigating police officer will issue you:

- **an immediate 24-hour driving prohibition**. The officer may also impound your vehicle.
- **a 90-day Administrative Driving Prohibition** (**ADP**). This driving prohibition starts 21 days after the police give you a copy of the Notice of Prohibition. The ADP is separate from any *Criminal Code* penalties and procedure. The ADP Notice of Prohibition is your temporary license until the ADP starts—21 days after the Notice is served on you. You have 7 days to ask for a review of an ADP, by applying for a review at ICBC Driver Services. An oral review costs $200 and a written review costs $100. An adjudicator at the Office of the Superintendent of Motor Vehicles hears your review and decides whether to confirm or cancel the ADP.

There are many technical defences to ADPs. As well, the Application for Review says you can apply for a review if you:

- were not operating or did not have care or control of a motor vehicle,
- did not have a blood alcohol level over .08 within 3 hours of driving,
- did not fail or refuse to provide a breath sample, or
- had a reasonable excuse for failing to comply with a demand for a breath or blood alcohol test.

If you apply for a review of the ADP, the driving prohibition doesn't start until the review decision is made. But most decisions are made before the 21-day waiting period ends.

What happens in court?

If you are charged with any of the 3 *Criminal Code* offences, you or your agent will have to go to court. There are legal defences to the 3 charges, but they are very technical and you need legal advice. You should get at least some initial advice from a lawyer, even if you decide not to have one in court.

The prosecutor must prove beyond a reasonable doubt that you committed the offence. For impaireddriving, the prosecutor must prove your ability to drive a motor vehicle was impaired by alcohol or a drug. The prosecutor does not have to prove you were drunk.

For over .08, the prosecutor must prove your blood-alcohol concentration was over 80 milligrams. The prosecutor must show that the evidence of your blood-alcohol concentration was legally obtained. If you want to argue that your Charter rights were violated, you must prove it to the court.

For failing to blow, the prosecutor must prove that you failed to give samples—without a reasonable excuse.

The prosecutor normally calls as witnesses the police officer who stopped you, and any other people who saw you. The witnesses would tell the judge how you acted, whether you refused to give samples, and what signs of impairment they noticed. Common signs of impairment include bad driving, the smell of liquor on the breath or body, bloodshot eyes, poor balance, slurred speech, flushed face, and any other abnormal behaviour.

You have the right to testify (tell the court your side) and you may want to, if you can explain what the witnesses said and raise a reasonable doubt whether you were impaired. For example, perhaps you had an ear infection that affected your balance, or some physical problem that caused you to slur your speech. Whether to testify is a decision you normally make with your lawyer.

What are the penalties under the *Criminal Code*

For a first offence of over.08, impaired driving, or refusing to blow, the mandatory minimum sentence is a $1000 fine and a driving prohibition between 1 and 3 years. That is the usual sentence, unless the judge considers your case more serious because of aggravating facts such as high breathalyzer readings or an accident. This minimum sentence means you get a criminal record. A judge cannot give you a discharge.

Previous drinking and driving convictions mean higher penalties—usually at least 30 days in jail for a second offence, and at least 120 days in jail for each offence after that. Plus, in BC, driving prohibitions are longer: between 3 and 5 years for a second conviction and a lifetime prohibition for a third or later conviction. If you have an accident, you may be personally responsible for all the costs ICBC pays. And if you kill or injure someone by drinking and driving, you risk being sued for a lot of money and your insurance company will not cover you. The penalty for killing someone while impaired or over .08 is always a jail term. It's the same for refusing to blow if it was reasonable to assume that the driving caused death or bodily harm.

Convictions for criminal driving offences stay on your driving record forever, even if you eventually get a pardon for the offence. ADP driving prohibitions remain on your driving record unless the prohibition is revoked when you apply for

review.

Convictions under the *Criminal Code* also mean you have much higher vehicle insurance costs. The website of the Insurance Corporation of BC (ICBC) has more on this at www.icbc.com/driver-licensing/tickets/Pages/Driver-Risk-Premium.aspx [3]. And you may be refused entry to the US.

4. If you are facing a drinking and driving case

Drinking and driving law is one of the most complex areas of the law because the cases involve law, science, alcohol-testing equipment, and public policy. More people are found not guilty of drinking and driving offences in Canada than of any other type of criminal charges. This means that more innocent people are charged with drinking and driving offences than with other offences.

The police and prosecution must follow demanding procedures. Police officers have extensive training in doing drinking and driving investigations. If they do not follow the procedure correctly or if they violate your rights, you may be not guilty.

All driving prohibitions in BC are 24-hours-a-day until they expire. You cannot get a driver's license only for work. You cannot get a license that will let you drive for any purpose if you are prohibited from driving due to a drinking and driving offence. The ignition interlock requirement after the prohibition ends restricts you from driving any vehicle that doesn't have a functioning interlock installed.

You should use your right to contact a lawyer and get legal advice right away if you have a drinking and driving case. Legal advice is crucial in these cases.

More information from the BC government

- Ministry of Justice information on driving while affected by drugs or alcohol
  www.pssg.gov.bc.ca/osmv/road-safety/impaired-driving.htm [4]
- Fact sheet on IRPs
  www.pssg.gov.bc.ca/osmv/shareddocs/Immediate_Roadside_Prohibition_Fact_Sheet.pdf [5]
- Fact sheet on IRP penalties
  www.pssg.gov.bc.ca/osmv/shareddocs/immediate-roadside-prohibition-penalties.pdf [6]
- Application guide for IRP reviews
  www.pssg.gov.bc.ca/osmv/shareddocs/IRP_review_guide.pdf [7]
- IRP review guide for applicants
  www.pssg.gov.bc.ca/osmv/shareddocs/IRP_review_Q_A.pdf [8]
- Fact sheet on 24-hour prohibitions
  www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-24hour-prohibition.pdf [9]
- Fact sheet on ADPs
  www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-admindriving-prohibition.pdf [10]
- Ministry of Justice list of related factsheets and publications
  www.pssg.gov.bc.ca/osmv/publications/index.htm [11]
- Ministry of Justice information on alcohol and drug related prohibitions and suspensions
  www.pssg.gov.bc.ca/osmv/prohibitions/impaired-driving.htm [12]
- Office of the Superintendent of Motor Vehicles information
  www.pssg.gov.bc.ca/osmv/about/index.htm [13]

- Responsible Driver Program
  www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-responsible-driver.pdf [14]
- Ignition Interlock Program
  www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-ignition-interlock.pdf [15]
- ICBC information on insurance costs and drinking and driving convictions
  www.icbc.com/driver-licensing/tickets/Pages/Driver-Risk-Premium.aspx [3]

[updated July 2014]

References

[1] http://www.bclaws.ca
[2] http://www.icbc.com/driver-licensing/getting-licensed/pages/your-driving-record.aspx
[3] http://www.icbc.com/driver-licensing/tickets/Pages/Driver-Risk-Premium.aspx
[4] http://www.pssg.gov.bc.ca/osmv/road-safety/impaired-driving.htm
[5] http://www.pssg.gov.bc.ca/osmv/shareddocs/Immediate_Roadside_Prohibition_Fact_Sheet.pdf
[6] http://www.pssg.gov.bc.ca/osmv/shareddocs/immediate-roadside-prohibition-penalties.pdf
[7] http://www.pssg.gov.bc.ca/osmv/shareddocs/IRP_review_guide.pdf
[8] http://www.pssg.gov.bc.ca/osmv/shareddocs/IRP_review_Q_A.pdf
[9] http://www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-24hour-prohibition.pdf
[10] http://www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-admindriving-prohibition.pdf
[11] http://www.pssg.gov.bc.ca/osmv/publications/index.htm
[12] http://www.pssg.gov.bc.ca/osmv/prohibitions/impaired-driving.htm
[13] http://www.pssg.gov.bc.ca/osmv/about/index.htm
[14] http://www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-responsible-driver.pdf
[15] http://www.pssg.gov.bc.ca/osmv/shareddocs/factsheet-ignition-interlock.pdf
[16] http://www.dialalaw.org

Driving While Prohibited (Script 192)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains 6 types of driving prohibitions in BC. Then it explains what can happen if you are charged with driving a motor vehicle while prohibited from driving under the BC *Motor Vehicle Act* and the penalties if you are convicted.

Six types of driving prohibitions

1. BC Superintendent of Motor Vehicles prohibition for poor driving record

The BC Superintendent of Motor Vehicles can prohibit you from driving in any of the following cases:

- the Superintendent considers it in the public interest – for example, if you have a bad driving record.
- your driver's license was suspended in anther province or state.
- you don't pay money, called damages, that a court orders for a vehicle accident in which you were the driver or vehicle owner.
- you don't take a medical exam that the Superintendent orders.

2. 24-hour prohibition

If you have care or control of a vehicle and the police have reasonable grounds to believe that your ability to drive is affected by alcohol or drugs, they may:

- require you to remove your vehicle from the road.
- require you to give them your driver's licence.
- give you notice of a 24-hour prohibition. The notice is a document.
- impound your vehicle (have it towed) to prevent you from driving during the 24-hour prohibition.

If the police give you this prohibition without testing your breath, you can ask them to test your breath with an approved roadside-screening device (ASD). If your blood-alcohol level is not over 50 milligrams per 100 milliliters of blood, the police have to cancel the prohibition. But if your blood-alcohol level is over 50 milligrams, you face much more than a 24-hour prohibition – check script 190, called "Drinking and Driving".

If the prohibition is because of alcohol, you can ask the Superintendent to review the prohibition. You have to do that in writing, within 7 days of getting the notice. The Superintendent can cancel the prohibition only in 2 cases: if you were not the driver or you did not have care or control of the vehicle or if the police failed to test your blood alcohol when you asked.

3. 12-hour roadside suspension

A 12-hour suspension applies only to new drivers in the Graduated Licensing Program. As a driver in this program (as a Learner or Novice), if you have care or control of a motor vehicle and an ASD test shows you have any alcohol in your body, you receive an immediate 12-hour driving suspension. You also have to go back to the start of your 12-month (L) or 24-month (N) stage. And the Superintendent will automatically review your driving record and can give you more driving prohibitions if your record is unsatisfactory.

If your blood-alcohol level is over 0.05, you face the same consequences as other drivers, plus go back to the start of your 12-month (L) or 24-month (N) stage. There is no review of a 12-hour roadside suspension.

4. Immediate roadside prohibition (IRP)

If you have care or control of a motor vehicle and the police reasonably suspect that you have alcohol or drugs in your body, they may demand that you blow into a hand-held breath-testing device at the side of the road. (Script 190 has more on this.)

If the device shows a "warn", the police will:

- take your driver's licence and give you a notice that you are prohibited from driving.
- impound your vehicle for 3 clear days (not including weekends).
- immediately prohibit you from driving for 3 clear days (longer for later incidents).

For a second offense within 5 years, the driving prohibition and vehicle impoundment increase to 7 days. For a third offense within 5 years, the driving prohibition and vehicle impoundment increase to 30 days.

In all 3 cases, you also have to pay penalties and fees to get your license back, or reinstated. And in the third case, you have to enroll in a responsible driver program and install an ignition interlock device in your vehicle. Both these things cost a lot more.

If the device shows a "fail" or if you refuse to provide a breath sample, the police will:

- take your driver's licence.
- prohibit you from driving for 90 days.
- impound your vehicle for 30 days.

And you also have to pay a penalty and a license reinstatement fee, enroll in a responsible driver program and install an ignition interlock device in your vehicle. Both these things cost a lot more. The police may also arrest you and take you to the police station for further breath testing.

You can ask for a review of the prohibitions within 7 days. But the grounds for disputing the prohibition are very limited and most prohibitions are upheld. And usually, the prohibition will be over before the review is held.

5. Administrative Driving Prohibition (ADP)

If your blood alcohol content is over 0.08, or if you refuse to give a breath sample, police may give you a 90-day driving prohibition and charge you under the *Criminal Code* with impaired driving – if they don't give you an IRP (see item 4 above).

6. Driving prohibition for *Criminal Code* conviction (court ordered)

You lose the right to drive if you are convicted of a *Criminal Code* offense related to motor vehicles. For example, if you are convicted of impaired driving, dangerous driving, or hit and run, you are prohibited from driving for 1 to 3 years. This is the penalty for a first offense – unless a judge orders a longer prohibition. For a second conviction, you will be prohibited from driving for 2 to 5 years. For third and later convictions, you will be prohibited from driving for 3 years to lifetime.

Starting June 15, 2005, if you are convicted of a *Criminal Code* offense relating to motor vehicles, you have to complete a user-pay rehabilitation program. This type of program may also be required if you apply for a driver's licence and you have received:

- two 90-day administrative driving prohibitions within 5 years,
- three 24-hour driving prohibitions within 5 years, or
- a combined total of three 24-hour prohibitions or 90-day prohibitions within 5 years.

If you are convicted of 3 of more alcohol-related *Criminal Code* offences, you can re-apply for a driver's license after 5 years if you successfully complete the rehabilitation program.

If you are charged with driving while prohibited

To convict you of this offense, the prosecutor must usually prove beyond a reasonable doubt that you:

- were driving, and
- were prohibited from driving, and
- knew you were prohibited from driving.

The prosecutor will normally use several documents to show these things. You should carefully review these documents with a lawyer before deciding how to proceed. For more on defending yourself, check script 211, called "Defending Yourself Against a Criminal Charge".

Penalties for driving while prohibited

a. Fine, jail, or both

For a first offence, a judge must fine you at least $500 and up to $2000. But the judge does not have to send you to jail, and usually doesn't.

For a second or further offense, a judge will fine you at least $500 but not more than $2000 and must send you to jail for at least 14 days up to one year.

b. Driving prohibition of 12 months or longer

In addition to a fine and jail term, if you're convicted of driving while prohibited, even if it's your first offence, you will be prohibited from driving for at least 12 months. The judge can consider your driving record and impose a longer prohibition, in addition to the automatic 12-month prohibition.

c. Vehicle impoundment

There are other penalties too. If the police catch you driving while prohibited, they will impound, or take away, your vehicle. It will also be impounded if you are suspended from driving for *Criminal Code* convictions related to motor vehicles or if you are prohibited from driving because you are medically unfit.

The impoundment lasts 7 days for a first incident and 30 days for a second incident and 60 days for a third incident. You have to pay all costs of the impoundment before you get your vehicle back. You can ask the Superintendent to review the impoundment within 30 days of the date of the notice of impoundment. The impoundment notice explains how to apply for a review.

Summary

Driving while prohibited is a complex offence with severe penalties. If you are charged, you should at least talk to a lawyer and get some advice. Then you can decide whether you want to hire a lawyer to represent you in court.

More information

- Check the ICBC website at www.icbc.com/driver-licensing/tickets/Pages/default.aspx [1].
- Check script 190, called "Drinking and Driving" and script 211, called "Defending Yourself Against a Criminal Charge".
- The *Motor Vehicle Act* is at www.bclaws.ca [2] and the *Criminal Code* is at http://laws-lois.justice.gc.ca/eng.
- Ministry of Justice information on prohibitions and suspensions is at www.pssg.gov.bc.ca/osmv/prohibitions/index.htm [3].

- Check RoadSafetyBC (called the Office of the Superintendent of Motor Vehicles before May 2014) at www.pssg.gov.bc.ca/osmv/about/index.htm [4].

[updated June 2014]

References

[1] http://www.icbc.com/driver-licensing/tickets/Pages/default.aspx
[2] http://www.bclaws.ca
[3] http://www.pssg.gov.bc.ca/osmv/prohibitions/index.htm
[4] http://www.pssg.gov.bc.ca/osmv/about/index.htm
[5] http://www.dialalaw.org

Driving Without Insurance (Script 193)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains what may happen if you drive a motor vehicle without insurance.

Violation Ticket, Appearance Notice, or Summons

If you are charged with driving without insurance, the police will give you a traffic ticket. There are three types: a Violation Ticket, an Appearance Notice, and a Summons. Usually, police give a Violation Ticket. But if you have a bad driving record or previous driving offences, you may get an Appearance Notice or a Summons.

The ticket tells you exactly what offense you're charged with, the penalties for it, and whether you must appear in court. For a Violation Ticket, you don't have to appear in court – you just have to pay the fine shown on the ticket. But for an Appearance Notice and a Summons, you must go to court on the date shown on the notice or summons.

Three possible offences

Generally, if you're unable to show your insurance document to a police officer when asked, you may be charged with any, or all, of the following three offences:

- driving without insurance
- failing to produce an insurance document (less serious)
- failing to display a decal on your license plate

The ticket will show which offences the police charged you with. This script deals mainly with Violation Tickets for any of these three offences.

If you get a Violation Ticket

- **The usual penalties**
  - driving without insurance: $598 – consisting of a fine of $520 plus a victim surcharge of $78.
  - failing to produce an insurance document: a fine of $81 – consisting of a fine of $70 plus a victim surcharge of $11.
  - failing to display a decal on your licence plate: a fine of $109 – consisting of a fine of $95 plus a victim surcharge of $14.

    In all 3 cases, the fine is reduced by $25 if you pay it within 30 days. The police usually write the penalty amount on the ticket. If you go to court to fight the ticket or the amount, the fine can be different – see below for more on this.
- **Pleading guilty**

  If you want to plead guilty, which means you admit you committed the offence, you can pay your fine by mail or in person. Make sure your payment reaches the court within the 30 days allowed to pay – then you pay the reduced amount explained above. Once you pay the fine, your driving record shows a conviction for the offence.
- **Pleading not guilty, or fighting the amount of the fine**

  If you want to plead not guilty or dispute the amount of the fine, you must deliver a Notice of Dispute to the court within 30 days. You can personally deliver the notice to the court or mail it to the address shown on the ticket. Then you will get a hearing date. It could be weeks or even months until the hearing, depending on the court's schedule.

  At your hearing, the police officer who stopped you will testify (tell the court what happened). You get a chance to question the officer and then you may give your evidence (tell the court what happened). You may also call other witnesses to testify for you. The judge or justice of the peace will decide whether you're guilty and if you are, fine you and possibly prohibit you from driving. You don't need a lawyer to represent you at your hearing, but you can hire one.

  If you go to court on the charge of driving without insurance, the court can fine you any amount from $300 to $2,000 (instead of the usual $598). Although a judge could send you to jail, it would be extremely rare and only if you had multiple convictions for the same offence. If you have a good driving record, tell the judge, because this may help you get a lower penalty.
- **If you had insurance when stopped**

  If you had vehicle insurance when the police stopped you, but just didn't have your documents with you or didn't have a decal on your license plate, you should take both the documents and decal to court. Explain that you want to plead not guilty to the charge of driving without insurance. In most cases, if you can prove that the vehicle was

insured, the charge will be withdrawn. But you'll still have to deal with the other charges of failing to produce the insurance document and failing to display the decal. The fact that the vehicle was actually insured doesn't matter for these charges. You'll have to choose whether to plead guilty and pay the fine, or plead not guilty and ask for a hearing date.

- **If you ignore or forget a Violation Ticket**

  If you ignore a ticket and don't pay the fine or dispute the ticket within 30 days, you will be automatically convicted. But if you had planned to dispute the ticket, but were not able to do so (and that wasn't your fault), you can go to the provincial court registry and apply to have your case go ahead.

If you get an Appearance Notice or a Summons

If you get an Appearance Notice or a Summons for driving without insurance, you must go to court on the date shown on the notice or summons. If you're found guilty, the penalty is the same: a fine ranging from $300 to $2,000 and possibly jail time up to 6 months. Further, the court may prohibit you from driving for a certain time. If you don't go to court, a warrant can be issued for your arrest.

More information

Check ICBC's website at www.icbc.com [1] and the following scripts:

- script 194, called "Traffic Tickets".
- script 210, called "If you receive an Appearance Notice or Summons".
- script 185, called "Insurance Benefits and Compensation for Accident Victims".

[updated June 2014]

References

[1] http://www.icbc.com
[2] http://www.dialalaw.org

Traffic Tickets (Script 194)

Traffic tickets can be serious. If you're convicted, you may get a large fine or points against your driver's licence (called driver penalty points). These points can increase your cost of driving. If you don't pay the fine, the government may take the money from your bank account or paycheck. It may also refuse to renew your driver's licence and car insurance. And your car insurance may cost a lot more. So if you get a traffic ticket, take some time to decide whether to fight it.

Two ways you can be charged with a traffic offence

1. Summons or Appearance Notice for more serious offences

If you are charged with a more serious traffic offence, such as careless driving or hit and run, you will get written notice of the offence in the form of a Summons or an Appearance Notice. A Summons is mailed to you or personally delivered to you. An Appearance Notice is given to you by a police officer at the time of offence. These documents describe the offences you are charged with. They also tell you when you have to appear in court. If you receive a Summons or Appearance Notice, you should talk to a lawyer for some initial advice. Then decide whether you want to hire a lawyer.

First court appearance

At your first appearance in court, you will be asked to plead guilty or not guilty, or if you need more time to decide what to do. Ask the crown prosecutor for a copy of the police report before deciding what to do. If you plead guilty, the judge will ask for the facts of the case from both the crown prosecutor and you. If you plead not guilty, you will get a trial date. At the trial, witnesses and police officers will tell the judge what they think happened. You will get a chance to do the same, by giving evidence. The judge will then decide whether you are guilty.

You must attend the court hearing. If the Summons or Appearance Notice was personally given to you and you don't attend the hearing, the court will issue a bench warrant for your arrest.

Penalties

If you plead guilty, or the judge finds you guilty at trial, the judge can fine you up to $2,000, order you not to drive (for as long as the judge considers appropriate), and send you to jail for up to 6 months. Penalties are stronger for more serious offences.

2. Violation Ticket for less serious offences

The police will give you a Violation Ticket (an ordinary traffic ticket) for less serious offences. It is used for many provincial offences, including overtime parking, driving without insurance, and several offences under the *Motor Vehicle Act*. Read the ticket carefully, because it should show the offence you are charged with. The ticket will normally show a penalty beside each offence.

If you don’t want to fight the ticket

If you don't want to fight the Violation Ticket, you can pay the fine as described below. If you pay the fine, you don't have to go to court, but you are convicted of the offence. If the fine is over $50, it is reduced by $25 if you pay it within 30 days.

If you don’t fight the ticket within 30 days, you will be automatically convicted. You may receive penalty points against your driver’s licence and not be allowed to drive for a certain time. You won’t be able to renew your car insurance or your driver's license until you pay the fine.

If you want to fight the ticket

If you want to fight the Violation Ticket, tell the government office shown on the ticket in person or by mail, before the due date on the ticket. Say that you want to have a trial. You will be notified by mail of the trial date and location, and can fight the ticket at trial.

Trial

At the trial, witnesses and police officers will tell the judge what they think happened, and you can do the same, by giving evidence. The judge will then decide whether you are guilty.

Penalties

If the judge finds you guilty, the judge will normally fine you the same amount that is shown on the ticket. In some cases, the judge may increase the fine – for example, if you have a poor driving record. If you can show real financial hardship, the judge may reduce the fine unless the *Motor Vehicle Act* sets a minimum fine for that offence. You might also receive penalty points against your driver’s licence. If you are guilty, penalty points are automatic – you can’t fight them in court. You may also not be allowed to drive for a certain time.

Fines

You can pay fines in person at banks, other financial institutions, most Autoplan brokers, driver licensing offices, ICBC claim centers, government agent offices, and courts. You can pay by cash, certified check, money order, and credit or debit card. You can also pay online at many bank and financial institution websites. Or you can mail payment (by certified check or money order, but not cash), as follows:

For red-light camera ticket payments:
Ticket Payment Processing
Bag Service 6300 STN Terminal
Vancouver BC V6B 6G6

For all other payments:
Ticket Payment Processing
PO Box 3505
Victoria BC V8W 3N9

If you don’t pay a fine, the government can use a collection agency. This could hurt your credit rating. Money to pay the fine can be taken out of your paycheck or bank account. Also, you won’t be able to renew your driver's licence and car insurance until you pay the fine.

If you want to fight just the amount of the fine, or ask for time to pay

You can do this without going to court. Fill out the following two forms available at any court registry:

- “Violation Ticket Notice of Dispute”
- “Violation Ticket Statement and Written Reasons”

Fill in both forms and file them at the court registry. By doing this, you admit you are guilty of the offense on the Violation Ticket. A judge will look at your forms and make one of the following decisions, which is mailed to you:

- Not approve your request (then you must pay the fine immediately).
- Reduce your fine (then you must pay the reduced fine immediately).
- Give you time to pay.
- Reduce your fine and give you time to pay.

For more information

Check script 187, called “The Points System and ICBC” and the following 2 websites:

- ICBC, at www.icbc.com/driver-licensing/tickets/Pages/default.aspx [1]. It *explains how to dispute and pay fines. It also has a chart showing fines and penalty points for different offences.
- The Ministry of Attorney General, at www.ag.gov.bc.ca/courts/tickets/index.htm [2].

[updated June 2014]

References

[1] http://www.icbc.com/driver-licensing/tickets/Pages/default.aspx
[2] http://www.ag.gov.bc.ca/courts/tickets/index.htm
[3] http://www.dialalaw.org

Leasing a Car (Script 196)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains leasing a car in BC for personal or family use (consumer leases). It does not cover business leases. Cars are expensive machines. Before you lease one, you should compare leasing with buying to see which is best for you.

What is a lease?

A lease is an agreement to rent, or use someone else's property, in this case, a car. A lease is usually long term. It can last from several months to several years. At the start of a lease, you make a first, or initial, payment on the lease. You may also have to pay a security deposit. After that, you make monthly lease payments.

Leasing is an alternative to buying—both have advantages and disadvantages. If you lease, you don't own the car. And you have different rights and responsibilities than if you buy.

Leasing often means a lower first (initial) payment and monthly payments compared to buying. Leasing may also mean lower taxes because taxes are based on the monthly payments, not on the total purchase price. Many drivers can afford a more expensive car, or one with more options, if they lease.

On the other hand, you pay interest on a lease. So it may cost more, in total, to lease than to buy a car without financing. And when you lease, the dealer or lease company still owns the car and may control who drives it and the maintenance schedule you have to pay for—even though you drive and insure the car, and make monthly lease payments for it.

What types of car leases are there?

- a **straight lease**—with this, you return the car when the lease ends and owe nothing more. This is only used rarely now.
- a **lease with an option to purchase**—this comes in two forms: open and closed
  - **closed**—you pay the agreed-on amount if you decide to buy the car at the end of the lease.
  - **open**—you may have to pay an extra amount at the end of the lease. How much more you have to pay is set in the lease contract. Before signing a lease, a dealer estimates what a car will be worth at the end of the lease (the residual value) and then calculates the monthly payments based on that estimate. If the car is worth less at the end of the lease, you have to pay more to make up the difference. You may also have to pay extra if you drove more than the lease allowed or if the car has more than normal wear.

What must a lease agreement tell you?

A lease agreement is a legally binding contract, so make sure you understand it before you sign it. Section 30 of the BC *Motor Dealer Act* Regulation (available at www.bclaws.ca [1]) requires a lease agreement to have the following information:

- a summary of costs and credits for any extended warranty due when you sign the lease.
- all express warranties and guarantees for the vehicle made by the manufacturer or motor dealer.
- who is responsible for maintaining and servicing the vehicle.
- a description of any insurance, including types and amounts of coverage, that you must provide and pay for.
- any limit on your use and enjoyment of the vehicle, including who can drive it and any requirement to get permission to take the vehicle outside of BC.
- the amount of tax in each periodic payment you must make under the agreement, based on the tax rate at the time of disclosure.
- the cooling-off period (described in the next section).

Section 101 of the *Business Practices and Consumer Protection Act* (available at www.bclaws.ca [1]) requires the dealer to give you a Lease Disclosure Statement before you sign the lease. Read it carefully. It has all the key terms and details of the lease.

What is a cooling-off period?

You get one business day after you sign the lease to cancel it – this is the cooling-off period. During this time, the law requires the car to stay with the leasing company. If you change your mind in that time, you can cancel the lease and get your money back without penalty. While you have the whole day to cancel, it's better to tell the dealer during business hours in writing. Some days that do not count in the cooling-off period: statutory holidays, Sundays, and any day the dealership is closed do not count. So if you sign a lease on a Saturday, Monday is the cooling-off day when you can cancel the contract.

You can waive (give up) the cooling-off period. If you want to do that, you must do it in writing. Read the lease documents carefully because they may include a waiver.

What can happen if you have trouble paying a lease?

If you default on a consumer lease (stop paying it), the dealer or creditor may be able to take the car back (seize it) or sue you for all remaining lease payments. Depending on the type of lease (a security lease or a true lease), they may be able to do both. You would need legal advice on that and on whether the "seize or sue" rule and the "two-thirds rule" apply. Business leases are different—a dealer or creditor may be able to sue you and seize the car. Generally, your rights and responsibilities depend on whether you sign a lease or a secured lease agreement. You can talk to a lawyer before you lease to find out what type of agreement you are signing. As well, check script number 246, called "Buying Goods on Credit, Credit Cards & Credit Bureaus".

What are the differences between consumer and business leases?

You don't normally get a tax deduction for a consumer lease, only for a business lease. Check with Canada Revenue Agency for details (www.cra-arc.gc.ca [2]).

For a business lease, you don't get the protection of 3 laws: the *Business Practices and Consumer Protection Act*, the *Personal Property Security Act* or the *Motor Dealer Act*. So if there's a mechanical problem with the car, you still have to continue paying the lease. The Sale of Goods Act still give you some protection that the car is suitable for its purpose—but only if you lease the car mainly for personal, family, or household purposes. If you want to lease for business purposes, you should first get legal and accounting advice—before you lease. All these laws are available at www.bclaws.ca [1].

What happens when a lease ends?

You may still owe money when the lease ends. The car goes back to the dealer, or you may have an option to buy it for a certain price. Whether you owe money depends on the type of lease you signed (types of leases are explained earlier in this script).

With a straight lease, you return the car and owe nothing more. With a closed lease with an option to purchase, you pay just the agreed-on amount if you decide to buy the car. But with an open lease with an option to purchase, you may have to pay an extra amount. You may also have to pay extra if you drove more than the lease allowed or if the car has more than normal wear. And dealers may want to charge other fees at the buy-out time. So before you sign a lease, ask about any fees that the dealer will charge at the time of buy-out. Discuss them with the dealer and get them in writing—before you sign the lease agreement.

If you buy a vehicle at the end of the lease, it's a new transaction. So motor dealers and salespeople must make all their required declarations, especially the declaration that the vehicle meets the safety requirements of the *Motor Vehicle Act* when they sell it. The declarations are listed in the Vehicle Sales Authority of BC glossary at www.mvsabc.com/glossary-of-terms [3].

How a dealer ensures that a vehicle meets the *Motor Vehicle Act* is a business decision—the Act does not say how. Generally, a dealer will do an inspection to ensure the vehicle meets the Act's requirements. Depending on the original lease, the dealer may charge you for the inspection. Discuss it with the dealer before you agree to lease a vehicle.

Summary

Leasing a car is quite different from buying one. If you decide to lease, you have less protection than if you buy. Leases are usually long term and normally help the dealer more than you, the consumer. Read the lease agreement carefully and consider taking it to a lawyer before you sign.

For more information on leasing a car, check the article titled "Is Leasing a Vehicle for me? [4]" on the website of the Vehicle Sales Authority of BC. It has information on consumer help and complaints. This website also describes the Motor Dealer Customer Compensation Fund [5] (which may cover financial losses from leasing a vehicle if the dealer is no longer in business).

[updated July 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [6].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.bclaws.ca
[2] http://www.cra-arc.gc.ca
[3] http://www.mvsabc.com/glossary-of-terms
[4] http://www.mvsabc.com/consumers/is-leasing-a-vehicle-for-me
[5] http://www.mvsabc.com/consumers/compensation-fund
[6] http://www.dialalaw.org

Buying a Used Car (Script 197)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains buying a used car in BC. Used cars are often expensive. Before you sign an agreement to buy a used car, read it carefully and make sure you understand it. There is no cooling-off period to change your mind and cancel the agreement.

Whom can you buy a used car from?

You can buy a used car from a dealer or a private seller. A dealer is anyone who sells or exchanges motor vehicles to earn money. Dealers must be licensed by the Vehicle Sales Authority of BC (VSA) and follow certain laws.

Don't buy from a "curber"—a person without a licence who is selling motor vehicles to earn money. Item 2 below, in the section called "What should you always check and do before you buy?" has more on this. To see if a person or business is a licensed dealer, check the VSA website at www.mvsabc.com [1] under the link called "Search for Dealers and Salespeople [2]". You can narrow the search to just your area.

What information must a dealer give you?

The *Motor Dealer Act* and the *Business Practices and Consumer Protection Act* require vehicles for sale to meet minimum safety requirements. Vehicles that do not meet the minimum safety requirements can be sold as long as they are marked "not suitable for transportation". (Both laws are available at www.bclaws.ca [3].)

A dealer must give you the following information about the car, in writing:

- whether the car has had damages that, in total, cost over $2000 to repair
- whether it came from another province or state just to be sold here (because then it may have salt damage) or if it has been registered outside BC, and where, if known
- whether it was ever used as a taxi, police car, emergency vehicle, a lease or rental vehicle, or in organized racing
- whether the odometer accurately records the true distance the car has traveled
- accurate mileage and model year

A dealer must also give you the following information, in writing, about all charges connected with buying a car:

- dealer preparation costs
- documentation and administrative fees
- sales tax
- license and insurance fees (separate from ICBC charges)
- interest costs if the dealer arranges financing for you
- costs of any repairs
- costs of any options
- your total cost

What should you always check and do before you buy?

1. See if the car has been in an accident—that can reduce its value and safety. The Insurance Corporation of BC (ICBC) may have this information. See its website at www.icbc.com [4] or call 604.661.2233 in Vancouver and 1.800.464.5050 elsewhere in BC. You'll need the vehicle identification number (VIN), the make, model, and year. Many vehicles are in the ICBC database, but not all of them. If a vehicle was ever insured and registered outside of BC, the ICBC report will not show the vehicle history outside of BC. Consider getting a comprehensive vehicle history report such as the Verified BC report from CarProof (see item 4 below).
2. Avoid “curbers”—people who sell vehicles for profit, but without a motor dealer licence. By law, anyone selling motor vehicles as a business in BC must have a dealer licence from the Vehicle Sales Authority. Curbers operate illegally. They can cheat people by doing things such as turning back the odometer to make it look like a vehicle has lower mileage than it really has. Curbers get vehicles from BC and elsewhere in Canada and the US. They may hide prior damage and lie about a vehicle’s history, including its mileage and where it came from. And they may charge extremely high and illegal interest rates and ask you to lie about the price for tax purposes. There are many types of curbers. Some are mechanics who have repair facilities and also sell vehicles. Some curbers have several cars parked on their front lawn with “for sale” signs. To learn how to spot a curber, watch the videos at www.mvsabc.com [1]. Click on “Consumer Resources” and then on “Buying Privately [5]”. You can also see a list of known curbers. In “Consumer Resources,” click on “Known Unlicensed Dealers [6]”. It’s risky to buy from a curber. You may lose your money and get an unsafe vehicle. You can sue, but that’s expensive and often futile. The VSA can investigate the curber, but it can’t help you get your money back.
3. Check if there are any liens (claims for money owed) on the car. Check the car's serial number with the Personal Property Registry at www.bcregistryservices.gov.bc.ca [7]. CarProof [8] can do a Canada-wide lien search for a fee.

4. Buy a vehicle history report from ICBC [9] or CarProof [8]. Find out if the car has been in an accident.
5. Get a written agreement whether you're buying from a dealer or a private person—put in the terms and conditions you want.

What can you do if you have a complaint with a dealer?

Try to solve it with the dealer first. If that doesn't work, you have the following options:

1. Complain to the VSA. Go to www.mvsabc.com [1] and click on "Consumer Resources" and then on "Consumer Complaints". You can also email the VSA at consumer.services@mvsabc.com [10] or phone 604.575.7255 or toll free 1.877.294.9889. The VSA also runs the Motor Dealer Customer Compensation Fund. It reimburses people who have lost money because a motor dealer has gone out of business or failed to meet its legal obligations. The money in the Fund comes from contributions from all licensed motor dealers in BC. For more on the Fund, go to www.mvsabc.com [1]. Click on "Consumer Resources" and then on "Compensation Fund [11]". This website explains who can apply for compensation, what losses the Fund covers, and how to file a claim.
2. Contact a lawyer for legal advice about your situation.
3. Contact the Automotive Retailers Association (604.432.7987, www.ara.bc.ca [12]). Only some dealers belong to this voluntary organization. If you bought an RV (recreational vehicle) you can contact the Recreation Vehicle Dealers Association of Canada, a national, voluntary organization. Its website is www.rvda.ca [13]. If you bought a used vehicle from a franchise dealer, contact the New Car Dealers Association of BC—its website is www.newcardealers.ca [14].
4. Contact the Better Business Bureau at www.bbb.org [15].

Summary and more information

Buying a used car can involve a lot of money and high risk. Investigate before you buy. For more information, see the following websites:

- The Insurance Corporation of BC at www.icbc.com [4]. Click on "Vehicle registration", and then on "Buying a used vehicle [16]".
- The VSA at www.mvsabc.com [1]. Click on "Consumers Resources" and then on "Vehicle Buying Tips [17]".

[updated July 2014]

References

[1] http://www.mvsabc.com
[2] http://publicregistry.mvsabc.com/Pages/en_US/Forms/Public/Register/Default.aspx?ReturnUrl=%2f
[3] http://www.bclaws.ca
[4] http://www.icbc.com
[5] http://www.mvsabc.com/consumers/buying-privately
[6] http://www.mvsabc.com/known-unlicensed-dealers/consumers/known-unlicensed-dealers
[7] http://www.bcregistryservices.gov.bc.ca
[8] http://www.carproof.com/
[9] http://www.icbc.com/vehicle-registration/buy-vehicle/buy-a-used-vehicle/Pages/Vehicle-history-reports.aspx
[10] mailto:consumer.services@mvsabc.com
[11] http://www.mvsabc.com/consumers/compensation-fund
[12] http://www.ara.bc.ca
[13] http://www.rvda.ca
[14] http://www.newcardealers.ca
[15] http://www.bbb.org
[16] http://www.icbc.com/vehicle-registration/buy-vehicle/buy-a-used-vehicle/Pages/Default.aspx
[17] http://www.mvsabc.com/consumers/vehicle-buying-tips
[18] http://www.dialalaw.org

Car Repairs (Script 198)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Cars are complex, expensive machines. You can avoid or minimize many problems with car repairs if you follow the steps below.

What can you do before a repair?

1. Shop around for a reliable mechanic and compare price estimates from various repair shops. Ask friends for names of reliable mechanics. Check any repair shop you might use with the Better Business Bureau (www.bbb.org [1]) to see if there have been any complaints against the shop.
2. When you decide on a repair shop, let the mechanic figure out what to repair. Describe the problem as clearly as possible, but don't try to guess what's wrong. If you do, you may end up getting something you don't need. Go for a road test with the mechanic to point out the problem.
3. Ask for a written estimate of the repair cost and the time that repairs will take. Tell the mechanic not to proceed if the repair is going to cost more than the estimate—until the repair shop calls you and only if you then approve the higher cost.
4. Give the mechanic a phone number to reach you in case of problems or questions.
5. Allow enough time for the repair—if you rush the mechanic, the repair may not be done well.
6. Remove all valuables from your car and leave only the ignition key with the mechanic. You don't know who works at the repair shop—protect yourself against theft or someone copying your keys or losing them.
7. Ask the mechanic to return all replaced parts to you. You may need them in court if there's a problem with the repair. You may have to pay a charge for some replaced parts (like starter motors). That is because manufacturers put "core" charges or deposits on some parts. The repair shop has to return the old part to the manufacturer or pay the core

charge. If you want to keep these types of parts, you may have to pay that "core" charge to the repair shop.

What can you do after a repair?

1. Report unsolved or new problems to the mechanic right away. For example, if you got a tune-up, but the car still doesn't run well, tell the mechanic immediately.
2. If you have a problem with the work, or the cost of it, talk to the mechanic or the owner of the repair shop and try to solve it.
3. If you can't solve the problem, pay for the work - if you don't, the repair shop can register a lien (claim) against the car and eventually seize and sell it.
4. Contact the Better Business Bureau (www.bbb.org [1]); it may be able to help even if the repair shop is not a member.
5. The BC Automobile Association (BCAA) (www.bcaa.com [2]) has an Approved Auto Repair Services program for its members to ensure they get quality service at a fair price. BCAA inspects repair shops in the program to verify the quality of their equipment and service. If you're a BCAA member and you use a mechanic approved by BCAA, you can ask BCAA for help if you have a problem. Otherwise, you should ask to see a mechanic's licence—to ensure they passed the exam to a licensed mechanic.
6. Contact the Automotive Retailers Association (604.432.7987, www.ara.bc.ca [3]). Only some repair shops and dealers belong to this voluntary organization.
7. Contact Consumer Protection BC, a not-for-profit organization independent of government (www.consumerprotectionbc.ca [4]). It administers the *Business Practices and Consumer Protection Act*, available at www.bclaws.ca [5]. This law covers deceptive acts and practices and it may apply if a car repair shop has:
   - given you an estimate of the repair cost that is much less than the actual repair price - unless you agreed to the higher price before the repairs were done
   - said the vehicle needed a certain part or repair that was actually not required
   - taken advantage of a consumer's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the language
   - charged a price for the repair that grossly exceeds the price other repair shops charge for similar parts or services

   If one of these cases describes your situation, you may be able to sue the repair shop—item 8 below has more on this. To see if Consumer Protection BC can help, call 604.320.1667 or toll free 1.888.564.9963.
8. Lastly, you can see a lawyer for legal advice, or take the case yourself to Small Claims Court—or to Supreme Court if your claim is for more than the $25,000 limit in Small Claims Court. Check scripts 165 to 169 on Small Claims Court. You should have a lawyer if you choose Supreme Court because the procedures are more complicated.

[updated July 2014]

References

[1] http://www.bbb.org
[2] http://www.bcaa.com
[3] http://www.ara.bc.ca
[4] http://www.consumerprotectionbc.ca
[5] http://www.bclaws.ca
[6] http://www.dialalaw.org

Criminal Law

Possession of Marijuana (Script 201)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Is possession of marijuana a criminal offense?

Yes. Possession of marijuana is a criminal offense under the *Controlled Drugs and Substances Act* (available at laws.justice.gc.ca [1] - click on "English", then on "Consolidated Acts", then on letter "C", and then scroll down to the Act). You don't have to own the marijuana – you just have to have, or possess, it. There are medical exceptions. If you are charged with possession of marijuana, you should speak to a lawyer.

What must the prosecutor prove to convict you? What can you do?

In court, the prosecutor, also called the crown counsel (Crown), must prove – beyond a reasonable doubt – that you:

- had control of the marijuana – for example, the police found it on you or in an area you controlled, such as a car, suitcase, or bedroom, and
- knew the marijuana was there.

If the Crown proves both these things, the judge will convict you. To prove these things, the Crown will have witnesses – normally the police officer who arrested you – tell the court (or testify) about the situation when they found the marijuana on you. Witnesses testify under oath, meaning they promise to tell the truth. You can question, or cross-examine, each witness the Crown uses.

After the Crown finishes, you – and your witnesses, if you have any – can tell the court what happened. To do this, you have to take an oath promising to tell the truth, and then give evidence as a witness. If you have any witnesses who saw what happened and who can support your story, you can call them to testify, or give evidence. They also have to promise to tell the truth. You then question them about what they know. When you and your witnesses finish giving evidence, the Crown can question, or cross-examine, you and them.

Lastly, you and the Crown summarize your positions by making "submissions" to the court. For more information, check script 211, called "Defending Yourself Against a Criminal Charge", and script 212, called "Pleading Guilty to a Criminal Charge".

Is the amount of marijuana important?

Yes – a small amount is less serious. The more you have, the greater the chance that you may be charged with possession for the purpose of trafficking, a more serious offense with more serious penalties. The way the marijuana is packaged is also important.

What are the penalties?

For a first conviction, if you had less than 30 grams of marijuana, the maximum penalties are a fine of $1000 or 6 months in jail, or both. But the penalty for a first offense is usually much less.

You may also get a criminal record. That can prevent you from traveling to other countries, getting certain jobs, being bonded (which some jobs require), and applying for citizenship. Check script 205, called "Criminal Records and Applying for a Record Suspension", for more information.

If it is your first offence, ask the judge for a discharge or ask the Crown for diversion (or alternative measures). If you meet the conditions of the discharge or if you complete the alternative measures, you will not get a criminal record. For more on discharges, check script 203, called "Conditional Sentences, Probation and Discharges". For more on diversion, check script 212, called "Pleading Guilty to a Criminal Charge".

The legal issues for this crime can be complex and a conviction can seriously harm you. If you are charged with this crime, you should talk to a lawyer.

[updated January 2014]

References

[1] http://laws.justice.gc.ca
[2] http://www.dialalaw.org

Shoplifting (Script 202)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is shoplifting?

Shoplifting is stealing something from a store, which is a criminal offense. You shoplift if you intend to take something that doesn't belong to you from a store without paying for it, and you do so, or try to.

If you shoplift, a store security officer may stop you and call the police. You may be arrested, taken to the police station, and charged with a crime. The actual charge depends on the value of what you stole. If it's $5000 or less, the charge is "Theft under $5000". If the value is over $5000, the charge is "Theft over $5000". The police will search, fingerprint, and photograph you. And they will give you a date when you must go to court.

What must the prosecutor prove to convict you? What can you do?

In court, the prosecutor, also called the Crown Counsel (Crown), must prove beyond a reasonable doubt where and when the shoplifting happened. The Crown must also prove that you:

- are the person who committed the crime,
- intended to take the item without paying for it, and
- took the item, or tried to take it.

If the Crown proves all these things, the judge will convict you. To prove them, the Crown will have witnesses – normally the store security officer and the police officer that arrested you – tell the court (or testify) about what they saw you do. They testify under oath, which means they promise to tell the truth. You can question, or cross-examine, each witness.

After the Crown finishes, you – and your witnesses, if you have any – can tell the court what happened. To do this, you have to take an oath promising to tell the truth, and then give evidence as a witness. For example, perhaps you paid for the item and the store security officer didn't see you pay. In that case, you could show the court your receipt. Or perhaps you got distracted and forgot you had the item when you left the store. If you have any witnesses who saw what happened and who can support your story, you can call them to testify, or give evidence. They also have to promise to tell the truth. You then question them about what they know. When you and your witnesses finish giving evidence, the Crown can question, or cross-examine, you and them.

Lastly, you and the Crown summarize your positions by making "submissions" to the court. For more information, check script 211, called "Defending Yourself Against a Criminal Charge", and script 212, called "Pleading Guilty to a Criminal Charge".

What are the penalties?

If a judge convicts you, penalties for this offence can include one or more of the following things:

- Probation (you have to follow certain conditions for a set time).
- An absolute or conditional discharge – a penalty that gives first offenders a second chance with probation-like conditions.
- Diversion or alternative measures (you can avoid a record – if it's your first offence, you admit the offence, and you pay your debt to the community by, for example, doing community service for a number of hours or writing letters of apology or both). In certain circumstances, the Crown may stay or drop the charge.
- Restitution (you have to pay for the item).
- A fine, plus an automatic victim surcharge; you can ask the judge to waive the surcharge if you have no money.
- A conditional sentence – like a jail term, but you serve it in the community with probation-like conditions.
- A jail term.

For details on penalties, check script 203, called "Conditional Sentences, Probation and Discharges".

Under Section 334(b) of the *Criminal Code*, for a theft where the value does not exceed $5,000, the maximum fine is $2000, and the maximum jail term is 2 years. As well, you have to pay a victim surcharge, which is 15% of your fine (if you get a fine) or $50 – or a higher amount if the judge orders it. If the item is worth $5000 or more, the fine, jail term and victim surcharge are higher. The *Criminal Code* is available at laws.justice.gc.ca [1]. Click on "English" and then on "*Criminal Code*".

For a first conviction, a judge will usually fine you several hundred dollars and put you on probation that forbids you from going back to the same store for a year.

You may also get a criminal record. That can prevent you from traveling to other countries, getting certain jobs, being bonded (which some jobs require), and applying for citizenship. Check script 205, called "Criminal Records and Applying for a Record Suspension", for more information.

If it is your first offence and the value of the item is small, ask the judge for a discharge or ask the Crown for diversion (or alternative measures). If you meet the conditions of the discharge or if you complete the alternative measures, you will not get a criminal record. For more on discharges, check script 203, called "Conditional Sentences, Probation and Discharges". For more on diversion, check script 212, called "Pleading Guilty to a Criminal Charge".

The legal issues for this offense can be complex and a conviction can seriously harm you. If you are charged with this offense, you should talk to a lawyer.

Shoplifting and scary notices

Shoplifting is a civil offense—as well as a crime. Stores are normally open to the public, but they are also private places. Store owners can stop anyone they want from entering their store (as long as they don't violate the BC *Human Rights Code*). For example, a store owner can stop people who have stolen from the store from entering the store again.

If store security catches you shoplifting, they may not call police right away. Instead, they may give you a "Notice Prohibiting Entry". They may make you sign this notice. Then they will release you. They may also tell the police what happened.

The notice will say you cannot enter the store for a certain time (usually a year). It warns that if you do enter the store, you may be arrested without warrant, charged with an offence, and fined under the *Trespass Act*. But that's not likely. Normally, security will just stop you from entering the store or remove you from the store. Still, if you get this type of notice, you should stay away from the store for the time the notice says.

Store security may also give you a “Notice of Intended Legal Action”. It will say that the store will sue you for various expenses. You may also get a demand letter in the mail. Sometimes this comes after criminal court case is finished. The letter will demand that you pay a certain amount, about $500, for the store's investigative and administrative costs.

A store can sue a shoplifter, but the amount of money a court would order in most cases is so low that it would almost never make sense to sue. It would cost the store much more to sue than what it could recover. So you can normally ignore these notices and demand letters. Whether you pay the amount the store demands does not affect whether the Crown charges you with shoplifting. Nor does your payment normally affect the sentence (penalty) a judge could give you, though a judge could consider it.

Help for women

The Elizabeth Fry Society has counselors to meet with women in a confidential session to assess what is best for them. Individual sessions, group therapy, and workshops are available. The counselor can also provide written reports for courts. In the lower mainland, call 604.520.1166 and elsewhere in BC, call 1.888.879.9593. The Society's website is www.elizabethfry.com [2]. Other services it offers are volunteer support, information seminars, and referral services. Some services are free; others have a fee on a sliding scale.

[updated March 2015]

References

[1] http://laws.justice.gc.ca
[2] http://www.elizabethfry.com
[3] http://www.dialalaw.org

Conditional Sentences, Probation and Discharges (Script 203)

This script explains the following three penalties, called "sentences," that a court can give if it convicts you of a crime under the Canadian *Criminal Code or Controlled Drugs and Substances Act*:

- a conditional sentence.
- a probation order.
- a discharge.

Both the *Criminal Code* and the *Controlled Drugs and Substances Act* are available at laws.justice.gc.ca [1]. Click on "English" and then on "Consolidated Acts". Then scroll down to the name of the law.

The script does not:

- discuss sentences under other federal laws (for example, the *Fisheries Act*) or provincial laws (for example, the *Motor Vehicle Act*); in those cases, the possible penalties are different and probation works differently.
- explain other possible sentences – fines, jail, or licence suspensions.
- apply to anyone under 18 years old; for information about young people and criminal law, check scripts 225, called "Young People and Criminal Law" and 226, called "Youth Justice Court Trials".

If you're charged with a criminal offense, talk to a criminal defense lawyer before you plead guilty or admit anything to the police or prosecutor (also called Crown Counsel or Crown). A lawyer can tell you if you have a defense to the charge, or if the Crown can prove the case against you. Then you can decide what to do. Also, check scripts:

- 211, called "Defending Yourself Against a Criminal Charge"
- 212, called "Pleading Guilty to a Criminal Charge"
- 205, called "Criminal Records and Applying for a Record Suspension"

What is a conditional sentence?

A conditional sentence is a jail sentence that you serve in the community, instead of in jail. Judges will use a conditional sentence only if they are satisfied that you won't be a danger to the community and you don't have a history of failing to obey court orders. A judge can't give you a conditional sentence if the sentence is longer than 2 years, if the law sets a minimum jail term, or if the *Criminal Code* lists the crime as a violent offense. A conditional sentence usually has strict conditions, including a curfew. If you disobey the conditions, a judge can send you to jail for the rest of the time left on your sentence.

What is a probation order?

A probation order is a sentence that requires you to follow certain conditions for a set time that can last up to 3 years. During that time, you must follow the terms of the probation order. Usually, that means you must keep the peace, be of good behaviour, report regularly to a probation officer, and keep the probation officer informed of your current address. Depending on the offence, you may also have to report to a probation officer periodically, avoid certain people, avoid

using alcohol and drugs, attend counseling, pay back damages you caused to the victim, or perform community service. The judge still convicts you of the offense, but then suspends the sentence and releases you on probation.

Probation may be the only penalty, or it can be combined with other penalties, including a fine, a discharge, or a jail term less than 2 years. But a judge can't give a person all three penalties of jail, a fine, and probation. You could get the following combinations: a fine and probation, or jail and probation, or jail and a fine. The judge may also order you to perform up to 240 community service hours and receive counseling.

If you don't follow the terms of your probation, you can be charged with breach of probation. If you're convicted of breach of probation, the court can cancel your probation and sentence you for both the original offense and breach of probation. The usual penalty for breach of probation is a jail term.

What is a discharge?

A discharge means that the judge finds you guilty, but then discharges you instead of convicting you. A discharge is usually only available for more minor offences and if you have no history of similar offences. You have to convince the judge that a discharge is appropriate. The judge considers your character and whether a discharge is against public policy.

There are two types of discharge: **absolute** and **conditional**. Most discharges are conditional.

A conditional discharge means you're on probation with conditions (described above). If you obey the conditions until the end of the probation, then the law treats you as if you had not been convicted of a crime. But if you don't obey the conditions, or you don't finish the probation, you can be charged with breach of probation.

An absolute discharge means that you immediately have no criminal record.

Discharge records stay on file

The police and courts keep records of discharges under the *Criminal Records Act*. If you're convicted of a criminal offense later, the court can consider your earlier discharge. And if the police check your record, they might see your discharge.

Removing discharge records

The RCMP removes from its records absolute discharges 1 year after the date of the sentence and conditional discharges 3 years after the date of the sentence. But for all discharges before July 24, 1992, you have to make a written request to remove the discharge.

If you want to ensure the RCMP remove your discharge, get more information from their website at www.rcmp-grc.gc.ca [2]. Click on "English", then on "Criminal Records Check" and then on "Pardon and Purge Services". You can also go to the website index to find the section on pardons and purges. Also, check script 205, called "Criminal Records and Applying for a Record Suspension", for more information. A "pardon" is now called a "record suspension". But the RCMP website still uses the term "pardon" as well as record suspension.

What other orders can a judge make?

If you get a conditional sentence, probation, or a conditional discharge, the judge can also:

- make a “no go order” (or “no contact order”) to ensure you have no contact with a particular person or place.
- prohibit you from having any firearms or other weapons, like knives.
- order you to give a sample of your DNA for the DNA National Data Bank if the Crown asks for this.
- make a compensation order allowing a person whose property you damaged to sue you in civil court.

Victim surcharge

The judge must also order you to pay a victim surcharge, which is 30% of any fine you got. If you didn’t get a fine, the surcharge is $100 for a summary offense (minor offense) and $200 for an indictable offense (more serious offense). The judge can also give you a higher surcharge. This surcharge is in addition to any other fine you get.

Even if you do not have money to pay the surcharge, the judge must still order it. But the judge can give you a long time (many years) to pay it. Or the judge can immediately find you in default for not paying the surcharge and give you a 1-day jail sentence. But you don’t have to go to jail because the judge can also find that you already served the jail time.

[updated March 2014]

References

[1] http://laws.justice.gc.ca
[2] http://www.rcmp-grc.gc.ca
[3] http://www.dialalaw.org

Criminal Records and Applying for a Record Suspension (Script 205)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Who receives a criminal record?

Anyone in BC who is 18 or older and convicted of a criminal offense has a criminal record. A criminal record doesn't include convictions under provincial laws, like the *Motor Vehicle Act*. Criminal records are not public, but police, prosecutors, customs officers, and other officials can still see them.

What is a record suspension and who can apply for one?

A record suspension (previously called a "pardon") is a decision by the Parole Board of Canada to keep a person's criminal record separate from the criminal records of people who have not received a record suspension.

If you have a criminal record, and you have finished serving your sentence (penalty) and can show that you now obey the law, you can apply for a record suspension.

But people convicted of sexual offences against minors (with some exceptions) and people convicted of more than 3 indictable offences, each with a sentence of 2 years or more, cannot get a record suspension.

What does a record suspension do?

If you get a record suspension, your criminal record will be kept separate from the criminal records of people who have not got record suspensions. And no one regulated by federal law can give out information about your criminal record or record suspension without permission from the Canadian Minister of Public Safety. But other parties not regulated by federal law (like a municipal police force or private citizen) can still give out such information. A record suspension does not cancel your conviction. And a record suspension does not guarantee you can enter another country or get a visa to enter another country. For example, the US does not recognize Canadian record suspensions.

When can you apply for a record suspension?

Before you apply for a record suspension, you must serve your sentence and then wait for a certain time. The wait time depends on the type of conviction: 5 years for a summary conviction (a less serious offence) and 10 years for an indictable conviction (a more serious offence). This time starts running only when you finish serving your sentence. And that means you must have served your jail time (including parole and statutory release); paid all fines, surcharges, costs, and orders for restitution or compensation; and satisfied your probation order.

If you received **only** an absolute or conditional discharge, you don't need to apply for a record suspension because the record of your discharge is automatically removed from the Canadian Police Information Centre computer system. That happens 1 year after the date of the sentence for an absolute discharge and 3 years after the date of the sentence for a conditional discharge. But for discharges before July 24, 1992, you have to make a written request to remove your discharge. Check script 203, called "Conditional Sentences, Probation and Discharges", for more on this.

How do you apply for a record suspension?

Apply to the Parole Board of Canada. It costs $631. You may also have to pay other fees for local police record checks and copies of records, documents, and fingerprints.

The Board will give you a Record Suspension Application Guide that explains what to do – there are several steps. The Board website (www.npb-cnlc.gc.ca [1]) has both the guide and a fact sheet on record suspensions. You can also call the Board for information at 1.800.874.2652.

You don't need a lawyer to apply, but it is a complicated process with several stages. It can take a year or longer. The Clemency and Records Suspension Division offers free help. Its number is 1.800.874.2652.

What happens after you apply?

The Board will examine your application to see if you are a law-abiding citizen. If the Board is going to reject your application, it must first tell you that you can make a submission about your conduct and ask for an oral hearing. The Board must then consider your submission before it decides.

Can you appeal a Board decision?

No, you cannot appeal a Board decision. But if the Board rejects your application, you can reapply after 1 year.

Can the Board cancel a record suspension?

Yes. If you are convicted of an offense after you get a record suspension, the Board can revoke, or cancel it. The Board can also do that if you lied on your application for a record suspension, or if you are no longer of good conduct.

[updated March 2014]

References

[1] http://www.npb-cnlc.gc.ca
[2] http://www.dialalaw.org

Stalking, Criminal Harassment and Cyberbullying (Script 206)

The script explains what stalking, criminal harassment, and cyberbullying are and how to stop them. Refer also to scripts:

- 217, called "Applying for a peace bond and filing assault charges"
- 215, called "Charging someone with a criminal offense"

What is stalking?

Stalking is behaviour that may – in some cases – be criminal harassment under section 264 of the *Criminal Code* of Canada (available at http://laws-lois.justice.gc.ca/eng/acts/c-46/).Stalking is criminal harassment if a person does any of the following things, knowing that it causes you to reasonably fear for your safety or the safety of anyone you know:

- repeatedly follow you, or anyone you know.
- repeatedly communicate with you, or anyone you know, directly or indirectly.
- repeatedly watch you, or anyone you know, or lurk around your home, workplace, or any other place you happen to be
- engage in any threatening conduct directed at you or a member of your family

Even if the person doing these things has not been told or doesn't know that you fear for your safety or the safety of anyone you know, if they should have known, then these behaviours may still be criminal harassment.

A person can be stalking even if they don't physically hurt anyone or damage any property. The law is designed to protect psychological, emotional, and physical safety.

Stalking may start with conduct that seems more annoying than dangerous. Often, the conduct is legal and even socially acceptable, if it's just an isolated incident. But when it's repeated, it may scare the victim. Conduct such as following someone, or sending gifts or letters, may become intimidating if done continually and against the person's wishes.

What is cyberbullying?

Cyberbullying is a type of harassment using new technology. Whether it is criminal harassment depends on the facts of a case. Cyberbullies use social media (such as *Facebook, Twitter, and YouTube*), blogs, texting, instant messaging, and other internet avenues to engage in deliberate, repeated, and hostile behaviour intended to harm, embarrass, or slander someone. Although their work is public, cyberbullies are often anonymous and it is often harder to identify and stop them.

Cyberbullying may also be defamation. The *Criminal Code* (section 300) outlaws publishing a defamatory libel – material published, without lawful justification or excuse, likely to injure the reputation of any person by exposing them to hatred, contempt or ridicule, or designed to insult the person. But criminal defamation is rare. More common is civil defamation – communication about a person that tends to hurt their reputation. Script 240, called "Defamation: Libel and Slander", has more on this.

What can you do if someone is stalking, harassing, or cyberbullying you?

1. First, if the harassment is attempted communication with you, tell the person to stop. Otherwise, they may not know that they are harassing you. Never reply to harassing messages – except to tell the person to stop.
2. Call the police to report the problem. Record the details of every incident, including time, date, place, who was involved, and what was said and done. Keep letters, notes, voicemail messages, emails, texts, instant messages, and social media and internet posts. Give them to the police.
3. If the harassment happens at school, report it to the school authorities, as well as to the police. If it happens at work, report it to your boss, plus the police.
4. Report cyberbullying or other harassing communication to your internet or cell phone company. Most companies have policies on acceptable use of their services, and can cancel the service of a customer who violates those policies. The company can also help police find a cyberbully who is using their network.
5. If you get a harassing phone call on a landline, dial *57 immediately when the call ends. The phone company will record the phone number that made the call, so the police can get it. If you receive harassing calls on your cell phone, call the phone company for help in tracking the calls.
6. You can also seek a civil restraining order in court. But to do this, you need legal advice.

What happens after you report the problem?

If a person is charged with criminal harassment, crown counsel (the prosecutor) makes the case against (or prosecutes) them. The prosecutor may proceed by indictment for serious cases, and then the maximum penalty is 10 years in jail. Or the prosecutor may proceed by summary conviction for less serious cases, and then the maximum penalty is either a fine or 6 months in jail, or both.

The first stage of any criminal proceeding is generally an application by the accused person for judicial interim release, also known as bail. If the court grants bail to a person, it will usually order them not to contact you directly or through another person, or go anywhere near your home, school, or place of work. If the person disobeys those terms, the court may revoke, or cancel, their bail. Then they may be charged with a separate offence of breaching their bail conditions. If the person is denied bail and is sent to jail until a trial or a guilty plea, the prosecutor may ask the court to order that the person have no contact with you from jail. Again, if the person charged disobeys this order, they may be charged with a separate offence.

If a court finds a person guilty, of criminal harassment, after a guilty plea or trial, it can impose many different sentences. The court will choose a sentence based on the person's criminal record and the severity of their crime. If the person is not sent to jail, they will usually be ordered to obey certain conditions similar to the conditions imposed at the bail stage. For example, a court will normally order a person convicted of criminal harassment to have no contact with you directly or indirectly, to stay away from your home and workplace, and to not own or carry any weapons. A court may also order a convicted person to take counseling, if it might help.

More information

Learn more about what to do from the following sources:

- The Victim LinkLine at 1.800.563.0808, available 24 hours a day. The website is www.victimlinkbc.ca [1]].
- The BC Ministry of Justice: search for “stalking” at www.gov.bc.ca/justice [2].
- The Cyberbullying resource page at www.cyberbullying.ca [3].
- Web Aware at www.bewebaware.ca [4]. Click on “cyberbullying”.
- The Canada Safety Council at www.safety-council.org [5]. Search for “cyber bullying”.

[updated February 2013]

References

[1] http://www.victimlinkbc.ca
[2] http://www.gov.bc.ca/justice
[3] http://www.cyberbullying.ca
[4] http://www.bewebaware.ca
[5] http://www.safety-council.org
[6] http://www.dialalaw.org

If You Receive an Appearance Notice or Summons (Script 210)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains what an appearance notice and a summons are and what to do if you get one of them. Also, check the following related scripts:

- 211, called “Defending Yourself Against a Criminal Charge”
- 212, called “Pleading Guilty to a Criminal Charge”

What is an appearance notice? What is a summons?

Both an appearance notice and a summons are official notices telling a person that they have to appear in court at a specific time and place to answer (or respond to) a criminal charge. Usually, a police officer gives you an appearance notice. You may receive a summons in the mail. If you are personally served with either document, but then you (or your representative) do not come to court when the document requires, a warrant may be issued for your arrest. And you could be charged with failing to appear.

When are these documents used?

They are used when the law doesn’t require the person to be arrested. For example, the police will arrest a person suspected of a crime (a suspect) if the person is likely to leave the area and not appear in court. Or the police may need to arrest a suspect to establish the person’s identity, or to prevent an offence from happening again. The police may also have to arrest a suspect to preserve evidence or to have a judge impose conditions on the person. But if there’s no reason to arrest a suspect, the person is simply notified (or told) – by an appearance notice or summons – that they must come to court.

What’s the difference between an appearance notice and a summons?

An appearance notice is given to a person before they are charged with an offence. A summons is given to a person once they have been charged with an offence.

For example, say that security guards stop you in a store because they believe you have shoplifted something. They call the police. The police give you an appearance notice that requires you to appear in court at a certain time and place to answer to the charge of theft. But the prosecutor (also called Crown Counsel or Crown) may decide not to approve the charge. If that happens, when you go to Court, your name will not be on the Court list. So when you first go to court you should check with the Court Registry to see if you have been charged.

On the other hand, say you were driving home one night, hit a parked car, and just kept on going. A witness saw you and reported the accident to the police. In this case, the police would investigate and recommend that the Crown charge you with an offence. If you are charged, the police may have a summons delivered to you.

What do an appearance notice and a summons tell you?

They tell you the date when you have to go to court (see the next section), the location of the court, and the type of offence you are charged with. There are two types of offences: "summary conviction offences" and "indictable offences." Summary conviction offences are more minor offences, such as causing a disturbance and shoplifting. Indictable offences are more serious. Examples are murder, sexual assault, and breaking and entering.

The appearance notice or summons will usually have paragraph number 2 filled out. This paragraph says you must go to the local police station on a certain date to have your fingerprints and photograph taken. That date will be some time before your first court appearance. No discussion of the offence takes place at this time, and you don't need a lawyer. If you don't go for fingerprinting, you can be arrested and charged with the criminal offence of failing to appear (as long as the original charge against you has been filed in the court registry).

If paragraph 2 on the appearance notice or summons isn't filled out, you can ignore it.

What is the date on your appearance notice or summons?

The date on the document is just a "first appearance" date when you can tell the court what you plan to do about the charge against you. It's not a trial date. At your first appearance in court, the Crown gives you information about the charge against you, called the "particulars." The Crown may also give you his or her position on the sentence, or penalty, that the judge should give you. Usually, the judge will set another date a couple of weeks later, so you and your lawyer have time to receive and review file materials.

What should you do if you get an appearance notice or a summons?

Get legal advice – speak to a lawyer right away, before you do anything else.

Summary

If you get an appearance notice or summons, you have to go to court on the date and time shown to answer a criminal charge. If you don't go, a warrant may be issued for your arrest and you could be charged with failing to appear in court. If the second paragraph has been filled in on the appearance notice or summons, you'll also have to go to the police station to be fingerprinted and photographed. If you don't go, a warrant may be issued for your arrest and you could be charged with failing to attend for fingerprints. Speak to a lawyer if you get an appearance notice or a summons.

[updated January 2014]

References

[1] http://www.dialalaw.org

Defending Yourself Against a Criminal Charge (Script 211)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

If you are charged with a criminal offence, you may not be able to afford a lawyer or get legal aid. In that case, you may have to defend yourself. This script explains how to do so. You should defend yourself only as a last resort – the laws and the process can be complicated. To find out if you can get legal aid contact the Legal Services Society (LSS). To find a legal aid location [1] near you, go to LSS's website at www.legalaid.bc.ca [2] and under "Legal aid," click "Legal aid locations". Or call the LSS province-wide Call Centre at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (call no charge, elsewhere in BC).

Also, check the website of the Legal Services Society at www.legalaid.bc.ca [2]– details are in the Summary section at the end of this script. As well, check the following scripts:

- 210, called "If You Receive an Appearance Notice or Summons"
- 212, called "Pleading Guilty to a Criminal Charge"

If you defend yourself in a trial, you should be clear about the following three basic legal principles:

1. The law presumes you are innocent, even though you are charged with a criminal offence. As you walk into the court, the judge should be thinking, "I presume that this person is innocent."
2. The Crown, called Crown Counsel (Crown), has to prove that you are guilty. Generally, you don't have to prove anything.
3. A judge can find you guilty only if the Crown proves the charge beyond a reasonable doubt. So if the judge has a reasonable doubt about whether you are guilty, you cannot be convicted.

There are some exceptions to these principles, which a lawyer can explain to you.

What are the steps in a trial?

This script describes a criminal trial in provincial court. If you are charged with a serious criminal offence, you may have a choice of which level of court will hold your trial. If you decide to defend yourself without a lawyer, it is extremely important to bring to the trial any documents or physical evidence that you intend to use at the trial.

First appearance

Your first appearance date is not the trial date. The first time you appear in court is the date you receive documents called "particulars" or "disclosure" from the Crown. Disclosure lists the allegations against you, and what the Crown will rely on to prove you are guilty.

Make sure you arrive at the time listed in any document that tells you the first date you must be at court. If you do not have a lawyer, tell the Sherriff that you are present and wait until your name is called. When your name is called, stand

up in front of the judge or justice of the peace and ask the Crown for your disclosure. At this point, ask to adjourn your case (put it on hold) for as long as you need (or the court will allow) to read the disclosure, consult a lawyer, and decide whether to plead guilty or go to trial.

There may be a big difference between what the disclosure says (what the police say you did) and what you believe actually occurred. There may also be things missing from the disclosure that you believe are important to your case. If so, you can ask the Crown to give them to you.

Your next appearance in court will be an “arraignment hearing” where you will plead “not guilty” or “guilty”.

How do you plead?

Before the trial, at an “arraignment hearing”, the court may ask you how you plead – guilty or not guilty. This is called *entering a plea*. If you don't do so, the court will enter a plea of “not guilty” for you. Pleading “not guilty” does not mean that you deny you committed the offence. It means that you are making the Crown prove the case against you, if they can. If you plead not guilty, the judge presumes you are innocent unless the Crown proves that you are guilty.

What happens if you plead not guilty?

You will be asked to see the judicial case manager in the courthouse. They will give you a trial date, which can be anywhere from a few months to over a year away, depending on the type of charge. You will get two dates from the judicial case manager: a Trial Confirmation Hearing (TCH) date and a trial date. The TCH is usually 6 weeks before your trial. You must attend court on the TCH date to tell them you are ready to proceed on the trial date.

The trial

The trial starts with the formal charge being read to you. The judge will confirm that you pleaded not guilty and then ask the Crown to proceed. The Crown will try to prove you are guilty by calling its witnesses and questioning them. They will tell the court (testify) about what they saw or heard about the case. You have the right to question (cross-examine) each witness the Crown uses. You would question them to weaken their testimony by showing that they have a poor memory, or are mistaken or lying.

Should you make a “no-evidence motion”?

When the last witness for the Crown has finished testifying, you may want to make a “no-evidence motion”. It depends on whether the Crown has proven all the parts of the offence. For example, if you are charged with possession of marijuana, the Crown must prove several things. First, that you were the person who had it; second, where and when you had it; third, that you had knowledge and control of the marijuana; and fourth, that it really was marijuana. If the witnesses cannot identify you as the person who possessed the marijuana, there is no evidence on the first thing, your identity. So you would stand up and tell the judge that there is no evidence that you possessed the marijuana. If the judge agrees, the charge must be dismissed.

Should you use witnesses?

If you don't make a no-evidence motion, or you do, but lose it, then you have to decide whether to call any witnesses – either yourself or someone else – to tell your side of what happened. If you want to use a defense, such as self-defense, you would normally testify yourself, and then call other witnesses who could testify to support what you say. "Testify" means tell the judge, under oath, what happened. This means you promise (or swear or affirm) that what you say is the truth. No one can force you to testify – you decide. But if you don't testify, the judge cannot consider any explanation you give. If you choose to testify, you are a witness and the Crown can question (cross examine) you – just as you can cross examine the Crown's witnesses. You must answer all the questions, if they are about the charge against you.

Often, if you plead not guilty, you do so because you say that you did not commit the offence. In that case, you would explain this to the judge.

If you decide to call witnesses, you question them first, and then the Crown may cross-examine them.

What submission should you make?

The next step in the trial is called "submissions". After all the Crown's witnesses have testified, and after you have either called your witnesses or have decided not to call any, both you and the Crown can summarize your cases. The Crown can explain to the judge why you are guilty, and you can explain why you are not guilty. All you have to do is raise a reasonable doubt in the judge's mind. If you do, the judge has to find you not guilty.

What happens when the judge announces the verdict?

After the Crown and you finish your submissions, the judge announces the decision, or verdict. You are either acquitted or convicted. If you are acquitted, the charge is dismissed, and you are free to go. If you are convicted, the judge will penalize (sentence) you. The judge may sentence you then, or later. Depending on the offence and your background, the sentence could be a discharge, a fine, probation, or jail. Check script 203, called "Conditional Sentences, Probation and Discharges" for details on those types of sentences.

The judge will want to know something about you before deciding what sentence to give you. Key information includes your age, whether you are married, how many people you support, if you are working, your income, your plans, and why you committed the offence. So be prepared with this information in case the judge asks for it.

If you can get letters about your character from people, such as an employer, clergyman, or doctor, or even from your family and friends, ask the judge for an adjournment for time to get these letters. Then give them to the judge before you receive your sentence.

Summary

Defending yourself is very difficult, and you should do it only as a last resort. At least try to talk to a lawyer and get some initial advice. Then you will be in a better position to decide whether you want to hire a lawyer to represent you in court.

If you have to defend yourself and you do not understand something during the trial, ask the judge to explain it to you.

Also, check the criminal law publications [3] on the Legal Services Society website, at www.legalaid.bc.ca [2]. Click "Our publications" and then "Criminal law". They explain what to do if you are charged with a crime, how to represent yourself in a criminal trial, and how to speak to the judge before you are sentenced. Other publications explain what to do if you are charged with several specific offences.

[updated January 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [4].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.legalaid.bc.ca/legal_aid/legalAidOffices.asp
[2] http://www.legalaid.bc.ca
[3] http://www.legalaid.bc.ca/publications/subject.php?sub=9
[4] http://www.dialalaw.org

Pleading Guilty to a Criminal Charge (Script 212)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

No one likes going to court. Some people are terrified at the thought of it. And if charged, they plan to go in, plead guilty, and get out as fast as possible. That's a normal reaction. But it may also be a big mistake, because a conviction can seriously affect the rest of your life. This script explains what to do before pleading guilty and what happens if you plead guilty. You should also check the following scripts:

- 203, called “Conditional Sentences, Probation and Discharges”
- 205, called “Criminal Records and Applying for a Record Suspension”
- 210, called “If You Receive an Appearance Notice or Summons”
- 211, called “Defending Yourself Against a Criminal Charge”

The script does not apply to anyone under 18 years old. People under 18 are automatically entitled to a lawyer at no cost. And they need a parent or guardian to be with them in court at their first court appearance. For information about young people and criminal law, check scripts 225, called “Young People and Criminal Law” and 226, called “Youth Justice Court Trials”.

What should you do before deciding how to plead?

At your first court appearance, find the prosecutor, also known as the Crown Counsel (the Crown). Identify yourself and ask the Crown for two things:

1. **the particulars** (the written reports by the police officers and witnesses); and
2. **the initial sentencing position** (what the Crown suggests for the sentence if you plead guilty). Review this material, with a lawyer if possible. There is usually a lawyer available at the courthouse known has duty counsel, who may be able to assist you at no cost and review the particulars with you. You may also wish to hire a lawyer for that purpose.

If you are charged with a criminal offence, your first reaction may be to plead guilty and get it over with. If you plead guilty, you will have a criminal record and a penalty (sentence). Both these can seriously affect you. A criminal record can prevent you from traveling to other countries, getting certain jobs, being bonded (which some jobs require), and applying for citizenship. Check script 205, called "Criminal Records and Applying for a Record Suspension", for more information.

Even if you believe you are guilty, it's still all right to plead not guilty, and make the Crown prove the case. The law presumes that you are innocent, and the Crown must prove that you are guilty. On the other hand, if you know that you are guilty and that the Crown can prove it, you may want to plead guilty and avoid an unnecessary trial. You should discuss your case with a lawyer before deciding what to do.

Important considerations

1. You may think you're guilty when in fact you're not, because there is a legal defence to the charge that you don't know about. That is why it is very important that you review the particulars with a lawyer to help you decide what to do. If you think you might be financially eligible for legal aid, and the Crown is asking for jail in the initial sentencing position, then you should apply for legal aid.
2. If you have a legal defence, you would plead not guilty and a trial date would be set. At the trial, the Crown must prove the allegations of the offence. If you schedule a trial, you will need to retain a lawyer, or else represent yourself. On the other hand, if you do not have a defence and you admit the allegations, your option is to talk to the Crown about diversion, or else plead guilty.
3. If you have a previous criminal record, even for an unrelated type of offence, you may be facing a stiffer penalty, possibly jail.
4. Some offences may have a minimum fine or a minimum jail time. For example, if you are charged with impaired driving and are found guilty, your driver's license will be automatically suspended, even for a first offence.
5. You may be eligible for diversion. If so, the criminal charge is dropped, or dismissed.

What is diversion?

If the charge against you is a relatively minor one and especially if it is your first offence, and you regret what you did, you may be eligible for **alternative measures** (also known as **diversion**). Alternative measures programs are managed by a probation office, which deals with charges outside the court system. If the Crown agrees to recommend you for alternative measures and the probation office accepts you for this option, you have to carry out the conditions of an alternative measures contract. This could include community service work or counseling. In return, you will not get criminal penalties or a criminal record and the charge will be dropped.

How do you plead guilty?

If after reviewing the particulars you decide to plead guilty, it's fairly straightforward. You get an official document telling you when you have to appear in court for the sentencing. On that date, dress neatly and go to court, at least 30 minutes early. You may want to speak to Duty Counsel before you plead guilty. Duty Counsel can speak on your behalf during the sentencing if you wish. If you want to plead guilty, then find the Crown and tell them what you want to do.

During the sentencing hearing, the Crown will tell the judge about the facts of the offence, usually reading from the police report and witness statements. Listen carefully, because if you disagree with anything, you can say so later. In fact, you can plead guilty only if you agree with all the important facts. For example, if you agree that you hit your spouse, you could plead guilty to an assault charge. But if you hit your spouse only after your spouse punched and kicked you first, and that part is not in the police report, then the judge may not accept a guilty plea. Instead, he or she may order a trial. Or the particulars may say you punched someone, but you say you only pushed them. In these types of cases, you have to tell the court what happened and explain that you disagree with what the Crown said. The Crown and the judge have to decide whether to accept your version of the events.

If you have any previous convictions, the Crown may ask you if you admit them. If you don't admit them, the Crown will get an opportunity to prove them.

The Crown will suggest to the judge what sentence should be imposed. For example, the Crown may suggest you have counseling or no contact with someone. You don't have to agree and judge does not have to follow the Crown's suggestions – even if you agree with them. The judge can give you a different sentence.

Once the Crown is finished making their submissions, it is your turn to speak to the judge.

What will the judge do?

The judge may ask you questions, such as whether you disagree with anything the Crown said. You might agree that you are guilty but disagree with some of the circumstances. The judge may ask you why you committed the offence. Sometimes that's hard to answer because you may not know. If that's the case, say so. If you feel bad about what you did, tell the judge, even though you are embarrassed. If the judge believes that you are sincere, and remorseful, that will help.

The judge will want to know some things about you, such as your age, your marital status, how many people you support, if you are working and your plans. It's important to give the judge any important information about these things. For example, if you don't have any money to pay a fine, or if a criminal record would ruin your plans for joining the armed forces, explain those things to the judge.

The judge may ask and you may discuss whether there were any problems that contributed such as addictions, anger problems, and financial problems and whether these things are still a problem and whether counseling or treatment is necessary.

Try to get a letter from your employer or family friend that knows about your situation. If they can say something good about you, it may help the judge have a good opinion of you. For example, if you were unemployed when you committed the offense and that was partly why you did it, but you now have a steady job, it will show the court you are working to improve your behavior.

If alcohol or drugs contributed to your actions, but you can show the court a letter from the local Alcoholic Anonymous or Narcotics Anonymous group saying that you have been attending regular sessions, it will help when the judge decides what penalty to give you.

After everything is said, the judge will give you a sentence, or penalty. Depending on the offence and your background, it could be a discharge, a fine, probation, or jail. Check script 203, called "Conditional Sentences, Probation and

Discharges", for details on sentences.

If you are fined, you may ask for time to pay. Depending on the amount of the fine, the judge may give you a long time to pay.

If you do not understand something, ask the judge to explain it to you.

More information

Legal Services Society has three useful publications on this topic:

- If You Are Charged with a Crime [1]
- Representing Yourself in a Criminal Trial [2]
- Speaking to the Judge Before You Are Sentenced [3]

To view them, go to www.legalaid.bc.ca [4]. Click "Our publications", and then under "I want to find a publication by subject," click "Crimes and offences".

Summary

A criminal conviction can seriously affect you for the rest of your life. You should only plead guilty after thinking carefully about your situation. You should talk to a lawyer and get some initial advice before you plead guilty. Then you can decide whether you want to hire a lawyer to represent you in court and whether to plead guilty or not guilty.

[updated January 2014]

References

[1] http://www.legalaid.bc.ca/publications/pub.php?pub=25
[2] http://www.legalaid.bc.ca/publications/pub.php?pub=98
[3] http://www.legalaid.bc.ca/publications/pub.php?pub=110
[4] http://www.legalaid.bc.ca
[5] http://www.dialalaw.org

Charging Someone with a Criminal Offense (Script 215)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Procedure in Vancouver: other places may differ

The procedure for charging someone with a criminal offence or making a report to the police varies slightly from place to place in BC. This script describes the procedure in Vancouver. If you live elsewhere in BC, contact the Justice of the Peace at your local provincial courthouse or the local police station for the procedure there.

What is the purpose of the criminal justice system?

The main purpose of the criminal justice system is to bring to justice a person who has committed a criminal offence. It is not to compensate people financially for something wrong done to them. So you should not say or allege, that someone committed an assault, for example, if you just want him to pay you for your broken glasses. Instead, you should consider suing him civilly in small claims court.

Where do you start if you want someone to be charged with an offence?

Go to the police station, speak to an officer on duty, and file a police report or make a statement with your allegations. Make a note of the police officer's name and number and, if possible, the police report number. An police officer will investigate your case and report to you.

If the officer thinks that the person should be charged, they will write a report to the **prosecutor** (also called **Crown Counsel**) with the suggested charges. Follow up on your report by contacting the officer who took the complaint if you want an update on it.

If the officer thinks the person should not be charged, they will tell you so. And they won't send a report to the prosecutor. If this happens and you disagree, you can ask to speak to the officer's boss. You can also file a complaint with either the Police Complaint Commissioner (check script 221) or the Commission for Public Complaints Against the RCMP (check script 220). It depends on whether your complaint is against a municipal police force or the RCMP. You can also charge the person yourself, as explained below.

What is a prosecutor and what do they do?

Prosecutors are lawyers employed by the government to prosecute, or present, criminal cases in court. A prosecutor will review the police report and may charge the person with an offence. You may have to testify as a witness (tell the court what you know) if the case goes to court. If you suffered financial loss, you may be able to get compensation, so you should give this information to the police or prosecutor. If you don't hear whether the person has been charged, you should contact the police officer who took the report.

What if the prosecutor won't charge the person?

Talk with the prosecutor—if the police send a report to the prosecutor, who decides not to charge the person, you can call the prosecutor, who may speak with you. Listen carefully to the prosecutor because they are experts in criminal law. If you have new information, the prosecutor may send you back to the police. In that case, what happens next will depend on what the police do. If you disagree with the police decision at this point, you can follow the police complaint process described above.

Charge the person yourself—if the police won't investigate or the prosecutor won't charge the person and you still disagree with their decisions, you can ask a Justice of the Peace (a JP) to charge the person based on a "private information". If the offence is in the *Criminal Code*, a JP has to accept the charge. Even if the JP accepts the charge, in a typical case, unless there is strong evidence of a criminal offence, the prosecutor will likely end it (or "**stay** the prosecution"). That's because a prosecutor has to meet a higher standard of proof than a JP needs to accept a charge.

If the prosecutor does not stay the charge, you still have to convince a Provincial Court judge to order the person charged to come to court. The judge can issue an arrest warrant or a summons to do this. You have to convince the judge there is evidence to prove the crime. But if you do that, the prosecutor may ask the judge to wait (adjourn or postpone the case) before issuing a warrant or a summons so the police can investigate the case. After the police investigate, if the prosecutor decides there is strong evidence of a criminal offence, the prosecutor will take over. If the prosecutor decides the case lacks merit and stays it, you can call the Crown Counsel office and speak to the prosecutor's boss.

Summary

The first step in charging someone with a criminal offence is to file a police report. If the police decide to proceed, they will send a report to the prosecutor, who may charge the person with an offence (after reading the police report and witness statements).

If the police do not send a report to the prosecutor, you can discuss it with the police and file a complaint if you still disagree. Or you can try charging the person yourself before a Justice of the Peace.

If the prosecutor decides not to prosecute the person, you can call the prosecutor. If that doesn't work, you can try charging the person yourself, before a justice of the peace. Lastly, you can ask to speak to the prosecutor's boss.

[updated August 2014]

References

[1] http://www.dialalaw.org

Being a Witness (Script 216)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is your role as a witness?

A witness helps our legal system by giving important information (called evidence) to a court. A witness “testifies” or tells the court what they know. Information from witnesses helps the court make the right decision. If you receive a document that says you have to be a witness in a trial, it’s because you have important information about a case. Either side in a court case can ask you to be a witness. If they do, you will receive a document called a "subpoena" or "summons to witness.” Read it carefully because it may require you to bring documents with you to court. It may be against the law to disobey this document.

What if you can’t go to court when the trial takes place?

On the subpoena or summons to witness is the name of the lawyer who is calling you to court. Phone the lawyer to find out why they want you as a witness and what documents you have to bring to court. Ask exactly when you have to go to court, and if necessary, try to arrange a better time.

What if you think you should not be a witness?

If you have a good reason not to be a witness, you can ask a judge to cancel the subpoena or summons. For example, if you have been called to small claims court, a judge can cancel the summons if you are not really needed as a witness or if it would be a hardship to you to go to court. For other courts, you can call the court registry and explain that you want to ask a judge to cancel a subpoena.

If the subpoena or summons is not cancelled and you do not make other arrangements with the lawyer on when to give your testimony, then you must go to court. If you don't go, the lawyer can ask the judge to have you arrested and brought to court. A court can issue a “material witness” warrant for your arrest.

Many people don’t want to be a witness because they are afraid to answer certain questions. They think, based on American TV shows, that they can refuse to answer by “pleading the fifth amendment”. That’s wrong. Witnesses have to testify, or tell the court what they know, by answering questions from either side or the judge. If a witness refuses to answer a question, the judge can find them in contempt of court and jail them. But there are limits on how their information, called evidence, can be used. Generally, it cannot be used against them at a later hearing if they are charged with a crime.

You may want to get independent legal advice before going to court if you are worried about testifying about certain things.

Who are the people involved in court cases?

A civil case usually involves the private interests – such as property or money claims – of a person or company. The side making the claim, or suing, is the “plaintiff.” The side responding to the claim, or defending, is the "defendant.” The notice you receive to be a witness in a civil case will show the names of both sides: the plaintiff and the defendant.

In a criminal case, the notice will list Regina and the name of the accused person. Regina means Queen in Latin and because the Queen is Canada's head of state, her name represents the community in a criminal trial. Crown Counsel, also called the prosecutor, is the lawyer acting for the community to make – or prosecute – the case against the accused person. Defense Counsel is the lawyer for the accused person.

How do you prepare for court?

It’s not hard to be a witness, but you have to prepare as follows:

- Think about the event or events you saw. What happened first? What happened next? Try to remember details like dates, times, descriptions, actions, and exact words.
- Keep any notes and documents you have about the case.
- Bring your notes and documents with you if you speak to a lawyer before the court date, and when you go to court. The Judge may let you look at your notes during the trial.
- Go to the courthouse to watch what happens in court before your court date. Most trials are open to the public.

What do you do on the day of the trial?

- Check the list of trials in the lobby of the courthouse to find your courtroom.
- Wait outside the courtroom until you are called to go in. Do not discuss your evidence with other witnesses.
- If you are a witness in a criminal trial, go to the Crown Counsel Office and tell them you are there. The subpoena will usually tell you to go to the Crown Counsel Office 30 minutes before the trial starts.
- Be prepared to wait a while. A long wait can be inconvenient, but delays happen. You may want to ask a friend or relative to wait with you, or have a book or magazine to read.
- Dress appropriately and treat everyone in the courtroom respectfully.

What happens in the courtroom?

- Someone will call you when it is your turn to testify or give evidence. You then go to the witness box at the front of the courtroom.
- Usually, the court clerk will read out the oath and ask you to swear (promise) to tell the truth on a Bible. You don't have to swear on the Bible. There are other oaths for other religions. If you are not religious, tell the court that you want to affirm, which means you'll promise to tell the truth.
- Next, you will be asked to say your name and spell it. Witnesses are not usually asked to state their addresses, but it can happen. If you are asked but don't want to give your address in public, tell the judge.
- The lawyer who called you as a witness will question you. Then the lawyer for the other side will "cross-examine" you by asking more questions. The Judge may also ask you questions. You have to answer the questions by giving evidence or testifying – see the next section for more detail.
- You can call the judge "Sir" or "Madam.” "My Lord" or “My Lady” are the formal titles in Supreme Court. “Your Honour” is the title in Provincial Court.

What about when you actually give evidence, or testify?

- As a witness, you have a right to speak in a language you know well. If you find it hard to speak or understand English, tell the lawyer or court staff before the trial. They will arrange for an interpreter.
- Think about each question before you answer.
- When you answer, speak to the judge, not to the person who asked the question.
- If you do not understand a question, ask the person to repeat or explain it.
- Take your time so you can give a complete answer.
- Do not guess. If you are not sure about an answer, just say so. It's okay to say: "I don't know" or "I don't remember."
- Explain what you saw or did or said yourself. Do not repeat the words someone else told you unless you are asked to tell what you heard.
- Do not speak at the same time as anyone else or interrupt the judge or lawyers.
- Speak clearly and loudly, so that people in court can hear you and write down what you say. The microphone in front of you usually only records your voice – it does not make it louder.
- After you give your evidence and the court excuses you, you can leave. You can also stay in the court and listen to the case if you like.

For help

- **Justice Education Society –** Call 604.660.9870 in Vancouver or look in the white pages of the phone book for addresses and phone numbers of offices close to you. Or visit www.justiceeducation.ca [1].
- **Court Services –** Look in the blue pages under Government of British Columbia, Court Services, for the address and phone numbers of your local courthouse.

[updated November 2014]

References

[1] http://www.justiceeducation.ca
[2] http://www.dialalaw.org

Applying for a Peace Bond and Filing Assault Charges (Script 217)

This script explains what to do if someone threatens or assaults you. You have two choices:

- apply for a peace bond against a person who has threatened to hurt you or damage your property, or
- file assault charges against a person who has hurt or threatened you.

Also, check scripts:

- 215, called “Charging Someone with a Criminal Offense”
- 206, called “Stalking, Criminal Harassment and Cyberbullying”

What is a peace bond?

A peace bond is a court order designed to prevent an assault. A peace bond orders a person to be of good behaviour and obey conditions the judge orders, for up to a year. One condition may be that the person must not go to your home or work or contact you (by phone, email, text message, through another person, or any other way).

How do you apply for a peace bond?

You can apply to court for a peace bond against anyone who has seriously threatened to hurt you or damage your property. It could be a stranger, a spouse, or a family member. You have to show the court that you fear the person, that you have good reason for your fear, and that the person has seriously threatened you. If that’s your case, you should file a report with the police. The police will then decide whether to ask a court to issue a peace bond. Give the police as many details of the threat as possible. If the threat continues, keep a record of every time it happens and every voicemail, email, text message, social media post, and other record the person used, with the exact words used in the threat.

If the police don’t ask the court for a peace bond, you may apply for one yourself. Go to a Provincial Court, criminal division, and ask a justice of the peace about how to apply for a peace bond. If the person who threatened you is under 18, go to youth court instead of adult criminal division.

To begin the process, you will need to complete a document, called an “information”, naming the person who threatened to hurt you or damage your property. It is a sworn document that you will complete with the Justice of the Peace. This just starts the paperwork for a hearing before a judge who can issue the peace bond. You don’t need a lawyer at the hearing because the prosecutor (also called Crown Counsel or Crown), will ask the judge for the peace bond.

Depending on the details you give to the Justice of the Peace, the justice of the peace may issue a warrant so the police can arrest the person before the hearing. If the police arrest the person, the court may release them with conditions – if they promise not to contact you or go to your home or work before the final hearing.

If the judge issues a peace bond, make a copy of it and keep it with you. If the person disobeys the peace bond, call the police immediately. They can arrest the person and charge them with a criminal offense. That could lead to a fine and up to 6 months in jail. If the peace bond includes your children, give a copy to the principal at their school or daycare, and to sports coaches and recreation instructors, etc.

How do you file assault charges?

If a person hurts you, or threatens to hurt you, you can ask the police to charge the person with assault under the *Criminal Code*. If the police won't charge the person, you can ask the Crown, to do it. If the Crown also refuses to charge the person, you can still do other things; check script 215, called "Charging Someone with a Criminal Offense". The *Criminal Code* is available at laws.justice.gc.ca [1]. Click on "English" and then on "*Criminal Code*".

If the Crown charges the person, the police will arrest the person. You don't need a lawyer because the Crown makes the case against the person. The person can apply to court for bail to get out of jail. One condition of bail will probably be a "no contact order" to ensure the person doesn't contact you.

There are two types of assault. **Common assault** is less serious – for example, a person hits you or threatens to hit you, but you don't need medical treatment. Penalties include fines and jail terms up to 6 months. **Assault causing bodily harm** is more serious – for example, a person uses a weapon to attack you or you need medical treatment for your injuries. Penalties include jail terms up to 10 years.

[updated March 2014]

References

[1] http://laws.justice.gc.ca
[2] http://www.dialalaw.org

Firearms and Firearms Act (Script 242)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Canada's main gun control law is the *Firearms Act* (the "Act"). It applies to everyone who possesses, uses, or acquires guns (called firearms in this script). So it applies to anyone who borrows, buys, or inherits any firearms. The Act is run by the RCMP Firearms Program and is available at http://laws-lois.justice.gc.ca/eng/acts/f-11.6/.

The Act relies on **licensing** and **registration** (similar to driving laws that require drivers to be licensed and cars to be registered). People must have a valid firearms licence to possess or acquire firearms, or to get ammunition. If they want to renew their licence, they must do so before it expires—for as long as they possess firearms. People must also register all restricted and prohibited firearms. In April 2012, the *Ending the Long-gun Registry Act* became law. Under it, non-restricted firearms no longer have to be registered.

What licence do you need?

- **Possession and Acquisition Licence**, or PAL, for short – if you are 18 or older and do not have a firearms licence, this is the only licence you can get. To get a PAL, first you have to pass the Canadian Firearms Safety Course or the Canadian Restricted Firearms Safety Course. Then you have to apply to the RCMP Canadian Firearms Program and pay an application fee. The RCMP may contact the references listed in your application, spouses, ex-spouses, or other people you have lived with and ask them if they have any safety concerns about you owning a firearm.
- **Possession Only Licence** or POL, for short – if you have this licence, you may renew it, but only if you do so before it expires and only if you have at least one restricted or prohibited firearm registered in your name or you possess at least one non-restricted firearm. Until May 16, 2015, some people with expired POLs can apply for a new one if they meet certain requirements—the Program website, at www.rcmp-grc.gc.ca/cfp [1], has more on this. A Possession-Only Licence lets you use firearms already registered to you. It also lets you borrow firearms of the same class as the ones you own—the next section describes the 3 classes of firearms. But if you want to acquire another firearm, or if you no longer own firearms but want to borrow one, you must upgrade your Possession-Only Licence to a Possession-and-Acquisition Licence.
- **Minor's Licence**—people at least 12 years old but under 18 with a Minor's licence can borrow non-restricted firearms for hunting, target shooting, organized shooting competitions, and instructions in firearms use. But people under 18 cannot own or acquire firearms.

All businesses and organizations that produce, sell, possess, handle, display or store firearms or ammunition are required to have a valid firearms business licence. For more information, contact the Canadian Firearm Program.

What classes of firearms are there?

The *Criminal Code* lists three classes of firearms: non-restricted, restricted, and prohibited. A licence says what class of firearm you can possess and acquire.

- **Non-restricted firearms** include ordinary shotguns and rifles, such as those commonly used for hunting. But some military type rifles and shotguns are prohibited – see "Prohibited firearms" below.
- **Restricted firearms** include certain handguns and some semi-automatic long guns (not all semi-automatic long guns are restricted or prohibited). Rifles that can be fired when telescoped or folded to shorter than 660 millimeters, or 26 inches, are also restricted. You can only have restricted firearms for a purpose that the *Firearms Act* allows, such as gun collecting or target shooting. You must also pass the Canadian Restricted Firearms Safety Course.
- **Prohibited firearms** include most 32 and 25 caliber handguns and handguns with a barrel length of 105 mm or shorter. Fully automatic firearms, converted automatics, firearms with a sawed-off barrel, and some military rifles like the AK 47 are also prohibited.

How much does a licence cost and how long does it last?

A PAL costs $60 if it is only for non-restricted firearms or $80 for any combination of non-restricted, restricted and prohibited firearms. The fee payable by an individual for the issuance or renewal of a POL is $60. Firearms licences are generally valid for 5 years, and must be renewed before they expire.

A Minor's Licence costs $10 for up to one year; $20 for up to two years, and $30 for more than two years. You have to pay for a PAL if you upgrade from a Minor's Licence when you turn 18.

How do you register firearms?

To register a restricted or prohibited firearm, you must be at least 18 and have a licence authorizing you to possess that class of firearm. You may also need to get your firearm verified by an approved verifier before you register it. Call the Program at 1.800.731.4000 for information on having a firearm verified. There is no fee to register a firearm.

You can register restricted and prohibited firearms in 2 ways:

1. Online, at the Canadian Firearms Program website at www.rcmp-grc.gc.ca/cfp [1].
2. With a paper application form – call 1.800.731.4000 to get a form or get it from the Program website.

Registering prohibited firearms

A Possession and Acquisition Licence (PAL) allows a person to acquire prohibited firearms only in the same categories as the ones they already have registered, and only if the firearms they want to acquire were registered in Canada on December 1, 1998. A PAL indicates what prohibited firearms the person is licensed to acquire by showing the section of the *Firearms Act* that "grandfathers" them. Grandfathered status lets a person acquire and possess prohibited firearms already registered in Canada—but not import prohibited firearms into Canada.

To stay grandfathered for a category of prohibited firearm, a person must have continuously held a registration certificate for a firearm in that category from December 1, 1998, onward. To get a registration certificate for a firearm, a person needs a licence to possess that class of firearm. And any renewal of a firearms licence must be done before it expires.

Transferring registration to a new owner

Any time a registered restricted or prohibited firearm is sold or given to someone, it must be deregistered from the first owner and registered to the new owner. This is called a transfer. Transferring and registering a firearm to a new owner differ from registering a firearm that has never been registered. There are three ways to do a transfer:

1. Call 1.800.731.4000 to transfer by phone.
2. If either the buyer or the seller is a licensed business, they can do the transfer online. The business will need to start the process on the Program website at www.rcmp-grc.gc.ca/cfp [1].
3. Call 1.800.731.4000 to get a paper transfer form or get it from the website at www.rcmp-grc.gc.ca/cfp [1].

Storing and disposing of firearms

All firearms must be stored unloaded and locked up, for safety.

If you have firearms that you no longer want, or can no longer legally own, you can dispose of them in any of the following ways:

- Sell or give them to a person or business licensed to acquire them, including a museum.
- Have them permanently deactivated in an approved way.
- Export them to a country that allows them.
- Turn them in to police or a firearms officer for disposal.

When you dispose of a registered firearm, you have to tell the Program. You may also have to provide proof that you disposed of it, such as a receipt from police if you turn it in, an import or shipping document if you send it to another country, or a completed deactivation notice.

Firearms-related penalties in the *Criminal Code*

If you have a firearm without a license (and registration certificate for restricted or prohibited firearms), you risk penalties up to 14 years in jail. The *Tackling Violent Crime Act* broadened the definition of firearms-related crimes and increased penalties for them.

If you change your address

If you have a licence (POL or PAL) and you move, you must tell the Program your new address within 30 days. You can change your address through the website or by calling 1.800.731.4000. Keeping your address current ensures you get important information, such as notices reminding you to renew your licence. But even if you don't get a notice to renew, you are still responsible to renew it before it expires.

For more information

Call the Canadian Firearms Program at 1.800.731.4000 or check its website at www.rcmp-grc.gc.ca/cfp [1] for detailed information, including fact sheets on several topics. You can get licence and registration application forms from the website or by calling 1.800.731.4000. For more information refer to the *Criminal Code* (http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html) and the *Firearms Act* (http://laws-lois.justice.gc.ca/eng/acts/F-11.6/) and their corresponding regulations.

Summary

To possess or acquire a firearm, you must have a licence. Your licence tells you what class of firearm you're allowed to have: non-restricted, restricted, or prohibited. If you have a restricted or prohibited firearm, you must register it. Grandfathered privileges for prohibited firearms are valid only if you continue to hold a valid licence and registration certificate for a firearm in that category of prohibited firearms.

[updated January 2015]

References

[1] http://www.rcmp-grc.gc.ca/cfp
[2] http://www.dialalaw.org

Complaints Against the RCMP (Script 220)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains how to make a complaint against the Royal Canadian Mounted Police (RCMP). The RCMP serves most BC municipalities, towns, districts, and outlying areas. But the following 11 cities have their own police force: Vancouver, Victoria (including Esquimalt), New Westminster, West Vancouver, Delta, Port Moody, Central Saanich, Abbotsford, Nelson, Oak Bay, and Saanich. If you have a complaint about the police in any of these places, or against the Organized Crime Agency of BC or the Stl'atl'imx Tribal Police, check script 221, called "Complaints Against Municipal Police".

Who can make a complaint?

Anyone, including a non-citizen, concerned about the conduct of an RCMP member can make a complaint against that member. You do not have to be directly involved in an incident – you can make a complaint for someone else, or if you witness an incident.

How do you make a complaint against the RCMP?

You make a complaint through the National Intake Office of the Commission for Public Complaints against the RCMP (the Commission), or at an RCMP office. The Commission is an independent federal agency that handles complaints about the conduct of RCMP members in performing their duties. The Commission is not part of the RCMP. It is neutral and does not take sides in a dispute. The Commission works in English and French. It also has interpretation services for other languages.

You can make a complaint by phone, in writing, or in person. The Commission phone number is 604.501.4080; its toll-free number is 1.800.665.6878. And its TTY toll-free number is 1.866.432.5837.The office is open Monday to Friday from 8:00 a.m. to 4:00 p.m. Pacific time. To complain in writing, you can use the form on the Commission website (www.cpc-cpp.gc.ca [1]) and email it to complaints@cpc-cpp.gc.ca [2]. Or you can fax it to 604.501.4095. You can also mail the completed form, or your own letter with details of your complaint, to the Commission, at PO Box 88689, Surrey BC, V3W 0X1. If you want to complain in person, phone the office first to make an appointment.

You should make your complaint as soon as possible after an incident, while memories are fresh and evidence is still available.

Normally, the Commission sends a complaint to the RCMP for investigation. You can ask for early resolution of your complaint. In this case, a Commission analyst tries to help you and the RCMP agree on a solution. Even if you don't ask, the RCMP may try to resolve the complaint informally (an "informal disposition"). Both you and the RCMP member have to agree to the solution for this to work. If the RCMP resolves your complaint informally, it makes a summary of the complaint and the solution, and then asks you to sign it.

If the RCMP formally investigates your complaint, it reports the results to you, the RCMP member, and the Commission.

What if you are not satisfied with the RCMP report on your complaint?

You can ask the Commission for an independent civilian review of your complaint. The Commission will review the RCMP investigation report and may then investigate further, or ask the RCMP to do a further investigation of your complaint.

After the review, if the Commission is satisfied with how the RCMP handled your complaint, it sends you a report with its reasons. It also sends its report to the Minister of Public Safety Canada (the Minister) and the RCMP Commissioner.

If the Commission is not satisfied with how the RCMP handled the complaint, it sends an interim report, with its concerns, to the RCMP Commissioner and the Minister. The RCMP Commissioner considers the interim report and informs the Commission Chair and the Minister of any action the RCMP will take in response to the Commission's interim report. Alternatively, the Commissioner explains why the RCMP won't take any further action. The Commission then prepares a final report, including the RCMP Commissioner's response and the Commission's final recommendations. This final report goes to you, the Minister, the RCMP Commissioner, and the RCMP member involved.

Public hearings

The Commission Chair can hold a public hearing at any time and issue a report based on the results. The report may recommend how to improve operations or correct deficiencies that led to a complaint. The report goes to the Minister and the RCMP Commissioner, as well as to you and any other people involved. The RCMP Commissioner has to respond to the report and then the Chair will issue a final report.

Two other possibilities – besides filing a complaint with the Commission

Suing the police

If an RCMP officer injured you, caused you property damage, or violated your rights, you may be able to sue the officer or the RCMP (or both) in civil court. Normally actions are commenced in the BC Supreme Court. You should get legal advice promptly in this case – there will probably be a time limit for suing.

Criminal charges

If you say that an RCMP officer committed a crime or broke a law, the RCMP will investigate. The result of the investigation may go to the Regional Crown Counsel – the senior prosecutor for the area – to decide whether to charge the officer with a crime. If the police don't send a report to the prosecutor, or the prosecutor decides not to charge the officer, you can still go to a Justice of the Peace and ask that the officer be charged. For more information, check script 215, called "Charging Someone with a Criminal Offense".

[updated October 2013]

References

[1] http://www.cpc-cpp.gc.ca
[2] mailto:complaints@cpc-cpp.gc.ca
[3] http://www.dialalaw.org

Complaints Against Municipal Police (Script 221)

This script explains how to make a complaint against the following 11 municipal police forces and 3 police agencies:

1. Vancouver
2. New Westminster
3. West Vancouver
4. Delta
5. Port Moody
6. Abbotsford
7. Victoria (also serves Esquimalt)
8. Oak Bay
9. Saanich
10. Central Saanich
11. Nelson
12. Organized Crime Agency of BC
13. Stl'atl'imx Tribal Police
14. SCBCTAPS (Skytrain Police)

The RCMP supplies police services to the rest of BC. The complaint process against municipal police forces and RCMP are significantly different. So if your complaint is against the RCMP, check script 220, titled "Complaints Against the RCMP".

The British Columbia *Police Act* (the "Act", available at www.bclaws.ca [1]) sets out how to make a complaint against a municipal police force. If you have a complaint against the police, you have the right to give your side of the story and have it dealt with, as explained below.

How to make a complaint against municipal police – the first step

If you have a complaint against the police, you have to fill out a complaint form. The form is available on the website (www.opcc.bc.ca [2]) of the Office of the Police Complaint Commissioner (the "Office"). You can also get the form from any of the police departments listed above. Or you can call the Office (located at 947 Fort Street, Victoria) at 250.356.7458 or toll free at 1.877.999.8707.

You have one year after the incident to make the complaint with the Office. You can hire a lawyer to represent you, but you don't have to. Your complaint could be about any of several things, for example, a police officer using abusive language or excessive force, failing to perform duties, or something else. There are three types of complaints, as this script will explain.

After you file a complaint – is it admissible?

The Office will review the complaint and decide if it is admissible under Division 3 of the Act. To be admissible, a complaint must describe conduct that, if proven, would be misconduct as the Act defines it. It must also involve an incident that occurred in the last 12 months and it must not be frivolous or vexatious.

If the Office finds that the complaint is not admissible, it will close the file and explain why to you. That decision is final – you cannot appeal it.

If a complaint is not admissible – but it concerns a police department's services or policies – the police department's board must deal with it, under Division 5 of the Act.

If the complaint is admissible

The Office will give the complaint to the police department involved for investigation. Then, one of three things will happen: informal settlement, professional mediation, or investigation by a professional standards officer.

1. Informal settlement

In some cases, the police will try to settle a complaint informally. Sometimes, a meeting or phone call can clear up a misunderstanding and lead to a settlement.

2. Professional mediation

In some cases, a professional mediator may meet with you and the police officer to solve the complaint.

3. Investigation by professional standards officer

If neither informal settlement nor mediation work, the police department complained about, or another police department, will investigate the complaint. They must finish investigating within 6 months, but the Police Complaint Commissioner can extend that time. An analyst from the Office monitors the investigation.

Complaint reviewed by Police Complaint Commissioner

If you're not satisfied with the police investigation, you can ask the BC Police Complaint Commissioner to do one of the following things:

- Appoint a retired judge to review the decision if the complaint was not substantiated.
- Arrange for a review on the record following a discipline proceeding.
- Arrange for a public hearing before a retired judge, called an adjudicator.

The Commissioner is an Officer of the BC Legislature, independent of government and the police. The Commissioner must consider the following things when deciding what to do about your request:

1. How serious is the complaint?
2. How serious is the harm suffered?
3. Is a public hearing needed to discover the truth?
4. Did the police make a mistake when they investigated the complaint?
5. Is a public hearing, or a review on the record, needed to restore or preserve public confidence in the complaint process and in the police?

The Commissioner will approve or deny your request. The Commissioner may also ask the Solicitor General to order a broader public inquiry under the *Inquiry Act*.

Three types of complaints

A complaint can be against a municipal constable, a Chief Constable or Deputy Chief Constable, or a municipal police department. There are 3 types of complaints:

- **Public trust complaints against a constable**, chief constable or deputy chief constable
- **Internal discipline complaints against a constable**, chief constable or deputy chief constable
- **Service or policy complaints** against a police department

A "discipline authority" deals with all complaints. The Chief Constable is the discipline authority for complaints against a municipal constable. The Chair of the Police Board is the discipline authority for complaints against a Deputy Chief Constable or Chief Constable. The Police Board is responsible for complaints against a police department.

Public trust complaints (Division 3 of the Act)

This type of complaint involves an officer's conduct when dealing with a member of the public. The *Code of Professional Conduct Regulation* says that police officers must deliver fair, impartial, and effective services to their community and are accountable to the public. The Act lists the following types of misconduct:

- discreditable conduct
- discourtesy
- neglect of duty
- deceit
- improper disclosure of information
- corrupt practice
- abuse of authority
- improper use or care of firearms
- damage to police property
- damage to property of others
- misuse of intoxicants
- conduct constituting an offence
- accessory to misconduct
- improper off-duty conduct

Internal discipline complaints (Division 6 of the Act)

This type of complaint involves conduct problems between an officer and their department that don't affect the public. It is made by a superior or fellow officer – not a member of the public. Labour law principles apply to investigations of these complaints.

Service or policy complaints (Division 5 of the Act)

This type of complaint against a municipal police department claims that the operation of the department is inadequate in terms of:

- policies

- procedures
- standing orders
- supervision and management controls
- training programs and resources
- staffing
- resource allocation
- procedures or resources that permit the department to respond to requests for assistance
- any other internal operational or procedural matter

Two other possibilities

Suing the police

If a police officer injured you, caused you property damage, or violated your rights, you may be able to sue the officer or the officer's employer (or both) in civil court. You should get legal advice promptly in this case – there will probably be a time limit for suing.

Criminal charges

If you say that a police officer committed a crime or broke a law, the local police force will investigate. The result of the investigation may go to the Regional Crown Counsel – the senior prosecutor for the area – to decide whether to charge the officer with a crime. If the police don't send a report to the prosecutor, or that person decides not to charge the officer, you can still go to a Justice of the Peace and ask that the officer be charged. For more information, check script 215, called "Charging Someone with a Criminal Offense".

Independent Investigation Office

In 2011, BC set up the Independent Investigation Office to investigate on- and off-duty police related incidents of death and serious harm. The *Police Act* requires police to notify the Office of such incidents. The Office investigates incidents involving both municipal police and the RCMP. This is a separate process from making a complaint against the police. More details are available at on the Ministry of Justice website at www.gov.bc.ca/justice [3]. Click on "Policing in BC" and then on "Independent Investigation Office".

[updated January 2015]

References

[1] http://www.bclaws.ca
[2] http://www.opcc.bc.ca
[3] http://www.gov.bc.ca/justice
[4] http://www.dialalaw.org

Young People and Criminal Law (Script 225)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

The *Youth Criminal Justice Act* ("Act") is the law that controls how criminal law, which is federal, applies to young people accused of breaking a federal law. It is available at http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html.
The Act deals only with young people who have had their 12th birthday but have not yet had their 18th birthday. The Act does not apply to children under 12. Nor does it apply to people over 17 – the *Criminal Code* of Canada applies to everyone over 17. It is available at http://laws-lois.justice.gc.ca/eng/acts/C-46/.

The *Youth Criminal Justice Act* explains how police, courts, and the correctional system must treat young people who are arrested, charged, or convicted of a crime under federal laws.

The most important federal criminal law is the *Criminal Code*. It covers common crimes like shoplifting, breaking and entering, car theft, and assault. It also covers the most serious crimes, like murder. Other federal laws deal with things like possessing and selling (or trafficking) illegal drugs.

Provincial laws, not the *Youth Criminal Justice Act*, cover many other crimes, such as drinking under age, trespassing, and breaking traffic laws.

Your rights if the police stop you and question you

The *Canadian Charter of Rights and Freedoms* guarantees basic rights to everyone – including teenagers. One important protection is the right to legal advice if police arrest or detain you. You have the right to call a lawyer as soon as possible, if the police arrest you. You can use the phone book to find the number of the Lawyer Referral Service, Legal Aid, or a lawyer.

You also have the right to remain silent. If the police question you, you don't have to say anything that they could use against you. Anything you do say can be used against you in court. If the police ask you to say anything, you have the right to speak to your parent or another adult.

Although you have the right to be silent, in some cases, the law requires you to answer some questions the police ask. For example, if the police stop you when you are driving a vehicle, you must give them your name and address and show them your driver's license, vehicle registration, and proof of insurance.

In other situations, if the police just want to know what's going on, they might ask for your name, address, and date of birth. You may want to give this information to avoid problems.

If the police charge you with an offence, you must give them your name and address, but that’s all.

If you are arrested

When police arrest you, they must tell you what offence they think you committed. They can't take you into custody unless they arrest you. The police must give you a chance to call a lawyer as soon as reasonably possible after they arrest you.

If the police arrest you, they must immediately tell you that:

- you do not have to say anything or answer any questions
- anything you do say can be used against you as evidence in court
- you have the right to speak to a lawyer and a parent or other adult before you say anything
- the lawyer or an adult must be with you when you make a statement to police, unless you choose not to have that adult with you

If you are arrested, you should speak to a lawyer before deciding whether you want to give a statement to the police.

If you are charged with an offense but not arrested

The police can recommend that you be charged with an offence without arresting you. In that case, they give you an Appearance Notice that orders you to go to court to speak to a judge on a certain day. Or, the police can get a court order called a Summons, and have it delivered to you at home. Like an Appearance Notice, a Summons will tell you when and where you have to go to see a judge.

You may also have to go to the police station at a specific time to get fingerprinted and photographed. The police have the right to take pictures and fingerprints only for certain offences. Talk to a lawyer before you go to the police station for pictures and fingerprints, to see if you must go.

Legal help

If you do not have a lawyer for a proceeding under the *Youth Criminal Justice Act*, you will be able to get a lawyer through Legal Aid. The telephone numbers for Lawyer Referral, Legal Aid, and individual lawyers are in the telephone book.

If you are in police custody, you can call a 24-hour emergency number for legal advice. In Vancouver and the lower mainland, call 1.866.458.5500. Elsewhere in BC, call 1.866.458.3300. Usually, a lawyer will answer your call right away. If you cannot get through at that number, call 1.250.882.9451 and leave a message. A lawyer will try to phone you back within 30 minutes.

All the laws mentioned in this script are available on the Canadian Department of Justice website at http://laws-lois.justice.gc.ca/eng.

For more information, check script 226, called "Youth Justice Court Trials".

[updated January 2015]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [1].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.dialalaw.org

Youth Justice Court Trials (Script 226)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Trials in Youth Justice Court

A Youth Justice Court trial is open to the public unless the judge decides that the public should not hear some information. Then the judge can order that only certain people can be in the court. They would usually be you, your parents, your lawyer, the prosecutor (or Crown Counsel), and the youth worker.

The identity of a young person in youth justice court is normally protected. Information that identifies them can be published only in limited cases. This is called a publication ban. Judges can lift a publication ban if a youth receives a youth sentence for a violent offence. The judge considers whether the youth may commit another violent offence and whether lifting the publication ban will protect the public.

You have the right to a lawyer to represent you in Youth Justice Court. Anytime you are in court without a lawyer, you can tell the judge that you want a lawyer and the judge will make sure that you get one. If you cannot afford a lawyer, the judge will refer you to Legal Aid. It is best to speak with a lawyer before you go to court the first time. The numbers to call are at the end of this script.

If you are charged with a crime, the court considers you innocent until the prosecutor proves you guilty, beyond a reasonable doubt.

Before the trial

Young people who are charged with serious offences, or who have a history of charges or convictions, may be held in custody before the trial. A serious offence is any indictable offence with a maximum punishment of imprisonment for 5 years or more for an adult. It includes violent offences, some property offences (for example, theft over $5,000, auto theft), and offences that could endanger the public (for example, dangerous driving, public mischief, unauthorized possession of a firearm, murder).

Penalties if you're guilty

The penalty you get is called a sentence. If a judge decides you are guilty, the judge may ask a youth court worker to prepare a pre-sentence report. The report will tell the judge all about you, including whether you've been in trouble before.

Here are some of the sentences a judge can give, alone or in combination:

- an absolute discharge – the judge finds you guilty but gives you another chance; your record will be destroyed after one year
- a fine of up to $1,000
- an order to:
  - pay the victim of your crime compensation for loss (called restitution)
  - do up to 240 hours of community service
  - report to a probation officer regularly for up to 2 years
  - put you in custody at a Youth Custody Facility

For most offences, the maximum time in custody is 16 months in a facility, plus 8 months of supervision after release from the facility. A court can consider a youth's pattern of criminal activity—not just whether they are guilty in the case—in deciding whether to put a youth in custody.

A judge can give you an adult sentence

The *Youth Criminal Justice Act* (the "Act") requires the prosecutor to consider applying to the Court for an adult sentence for youth 14 and older who are charged with serious violent offences including murder, attempted murder, manslaughter, or aggravated sexual assault. The prosecutor must tell the court if they are not seeking an adult sentence in these cases. Each province and territory can set the age, 14 to 16 years, when these requirements apply to the prosecutor.

A judge can give you the same sentence an adult would get if you are at least 14 years old and charged with a serious offence. Young people between 14 and 17 can be in custody for life and not eligible for parole for up to 7 years for second-degree murder and 10 years for first-degree murder. But no young person will serve their sentence in an adult prison or penitentiary—even if they receive an adult sentence. When the person turns 18 they may be moved to an adult facility.

Criminal and other records

Both the police and Youth Justice Court keep records of convictions. These are usually kept private and destroyed after a certain time. Until then, the judge can look at them when sentencing a young person. Sometimes, for the safety of others, the law allows the records to be given to certain people, like a victim, police officer, and director of a corrections institution. You should ask a lawyer about how the rules on Youth Justice Court records apply to your situation and when your records will be destroyed.

The Act requires police to keep records of extrajudicial measures so they can identify patterns of criminal activity. Extrajudicial measures include warnings, cautions, and referrals to community agencies.

Alternatives to trial

The *Youth Criminal Justice Act* [1] (available at http://laws-lois.justice.gc.ca) is a law that controls how criminal law applies to young people accused of breaking a federal law. The Act deals only with young people who are at least 12 years old and not yet 18. For some types of offences, the Act has a procedure called “extrajudicial measures” or “diversion” because offenders are diverted (or taken) out of the youth criminal justice system. Instead of going to court where a judge decides if you are guilty, you can take responsibility for your actions and avoid a trial.

Your lawyer can apply to the prosecutor for you to take part in a diversion program. Usually, you have to admit in writing that you are guilty and then pay for your crime by doing community service and apologizing to the victim. Often, you apologize by writing a letter to the victim.

Legal help

If you do not have a lawyer for a proceeding under the *Youth Criminal Justice Act*, you will be able to get a lawyer through Legal Aid. The telephone numbers for the Lawyer Referral Service, Legal Aid, and individual lawyers are in the telephone book.

If you are in police custody, you can call a 24-hour emergency number for legal advice. In Vancouver and the lower mainland, call 1.866.458.5500. Elsewhere in BC, call 1.866.458.3300. Usually, a lawyer will answer your call right away. If you cannot get through at that number, call 1.250.882.9451 and leave a message. A lawyer will try to phone you back within 30 minutes.

For more information, check script 225, called “Young People and Criminal Law”.

[updated November 2014]

References

[1] http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html
[2] http://www.dialalaw.org

Housing

Selling Your House (Script 405)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Selling your home is one of the biggest financial transactions of your life. You should know several things before the "For Sale" sign goes up on your lawn.

Before you sell: what is your home worth and what should it sell for in today's market?

One way to find out is to get a professional appraisal. This will give you a value for your home based on what comparable homes in your area have sold for and on what it would cost to replace your home. The charge will vary with the appraiser between $200 and $750.

Another way to learn the value of your home is to contact several reputable real estate agents who do business in your area. They will look at your house and, for no charge, tell you what price they would list the house for and what they'd expect it to sell for. But realtors are not professional appraisers, so there are limits on how you can use their reports.

Do you need a realtor?

You may decide to try selling your house yourself but, especially in a difficult market, most people prefer to have a professional do the job. If you decide to use a realtor, pick someone you trust and are comfortable with.

Should you have a lawyer?

Selling and buying a house is complicated. The potential for disaster is great – one mistake could cost a lot. As well, there are risks in real estate, and when selling or buying, you should be careful. There are many possible types of real estate fraud. To protect yourself, you should use a lawyer, instead of trying to do it yourself. Consult a lawyer before you sign a listing agreement with a realtor.

What is a listing agreement?

It is the contract between you and your real estate agent with the terms for selling your house. Today, most listing agreements for residential sales are standard forms from the local real estate board and are multiple listing agreements. A multiple listing agreement means your agent can advertise and show your home to realtors in their own agency plus realtors with other agencies. This allows many potential buyers to learn about your home. Many agents prefer that the agreement continue for a 3-month term, but you might want to list your home for a shorter time. If your house doesn't sell within that time, you can always extend the term of the listing agreement or change agents.

What do you pay the agent?

The listing agreement sets the amount of the agent's pay, or commission. In BC, commissions can vary widely, so it's a good idea to shop around. Some agents charge a flat fee. Others charge a percentage. For example, they could charge 7% on the first $100,000 of the sale price, plus 2.5% on the rest. In this case, if your home sells for $400,000, the commission would be $14,500. You pay this commission to your agent, who shares it with the buyer's agent.

Do you have to pay the commission even if the agent doesn't sell your house?

Normally, your agent is entitled to a commission when a buyer – who is ready, willing, and able to buy your house – signs an offer to purchase, and you accept it. Sometimes, even if the transaction falls through, depending on the listing agreement, you may still have to pay a commission. You may also have to pay the commission if you sell the house yourself while the listing agreement is active, or even after the listing agreement has expired – if the agent had previously shown the house to the buyer or was the effective cause of the sale.

Do you have a mortgage on your house?

If you have a mortgage on your home, you will have to contact the bank or credit union that holds the mortgage – before you sign a listing agreement with a realtor – to find out certain information, such as:

- How much do you owe on your mortgage?
- Can the buyer assume (or take over) the mortgage? If so, will the buyer need to have a certain income to qualify?
- Can you pay off the mortgage? If so, is there a prepayment penalty? Sometimes a lending institution will waive the penalty if the buyer takes out a new mortgage with them, or if you take out a new mortgage with them.

Get the answers to these questions in writing to avoid any unpleasant surprises later on.

What happens after you sign the listing agreement?

If someone offers to buy your home, your agent will bring you an offer to buy. It is usually written on a standard form provided by the local real estate board. Read all the fine print. Every word is important. You should have your lawyer check the offer before you sign it. Once you and the buyer sign the offer, it is a binding contract of purchase and sale.

Before you sign an offer, discuss with your agent anything in it that you don't like and write in your own terms instead. It then goes back to the potential buyer as your counteroffer (it's actually a new offer) and becomes the contract of purchase and sale if the buyer accepts your counteroffer.

What things in the house are included in the sale?

When someone buys your house, all the things that are "fixtures" go along with it, unless you and the buyer agree otherwise. The definition of a fixture can be tricky. But generally, a fixture is anything that's attached to the house so that its removal would damage the house or require some repair. The bathroom sink is an obvious example. So is the crystal chandelier in the dining room, so if you want to take it with you, make sure the contract with the buyer makes that clear. Better yet, before you put the house up for sale, replace the chandelier with a simple, inexpensive fixture. The washer, dryer, fridge, and stove aren't fixtures, but you may be able to use them as bargaining tools if the buyer wants them.

What are “subject to” clauses?

They are conditions that have to be met before the deal to buy your house proceeds. Common ones include the buyer getting financing and the house passing an engineering inspection. If you get an offer that is subject to the buyer getting financing or any other condition, make sure the buyer has only a short time to remove the condition. Your home may be off the market for the time it takes the buyer to remove the condition, so you want to keep it short.

As well, the “subject to” clause should be very specific. Don’t accept a clause that says just “subject to buyer obtaining satisfactory financing.” If the buyer changes their mind, all they have to do to get out of the deal is to say they couldn’t get satisfactory financing. Instead, put details in the clause about the interest rate, the principal amount, monthly payments and so on, as well as the deadline for when the buyer must remove the clause.

Summary

First, get a realistic idea of your home’s market value. Then choose a realtor you trust. Read the fine print of your listing agreement and the offer to purchase very carefully. If you have any doubt, especially about the offer to purchase, have a lawyer check it over before you sign.

More information

For more information on house mortgages and financing, check script 408, called “Mortgages and Financing a House Purchase”. For more information about the contract of purchase and sale, check script 406, called “Buying a House”.

As well, read the booklet called “Selling a Home in BC Information Booklet [1]” prepared by the Real Estate Council of British Columbia. For a free copy, call 604.683.9664 in Vancouver or toll-free 1.877.683.9664 elsewhere in BC. Or go to their website at www.recbc.ca [2] and click on “Consumer Info” and then “Publications”.

[updated February 2013]

References

[1] http://www.recbc.ca/consumer/sellinghome.html
[2] http://www.recbc.ca
[3] http://www.dialalaw.org

Buying a House (Script 406)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script covers buying a house. If you're buying a condominium or townhouse, also check script 407, called "Buying a Condominium".

Should you have a lawyer?

A house is probably the most expensive thing you'll ever buy. And buying a house is complicated. The potential for disaster is great – one mistake could cost a lot. As well, there are risks in real estate, and when buying or selling, you should be careful. For example, people can:

1. use a false identity to pretend they are the true owner of a property and sign documents fraudulently.
2. flip the same property through back-to-back transactions to falsely inflate the asking price of the property.

These are just two examples of many possible types of real estate fraud. To protect yourself, you should use a lawyer, instead of trying to do it yourself.

Be careful – there are many other costs besides the purchase price

There are many extra costs when you buy a house. One is the property purchase tax (or PPT), though you may not have to pay this tax if this is your first home. For more information, call the Property Transfer Tax office of the BC government in Victoria, at 250.387.0604. Outside Victoria, call Enquiry BC at 604.660.2421 in Vancouver and 1.800.663.7867 elsewhere in BC and ask for the Property Transfer Tax office. Or check the website, at www.gov.bc.ca/sbr [1]. Click on "Individuals", then on "Property Taxes" and finally on "Property Transfer Tax".

Another cost is the 12% Harmonized Sales Tax (or HST). It applies to the legal fees and some of the other costs you pay. It also applies to the whole purchase price if you're buying a new house or one that's been substantially renovated. You may be able to get an HST rebate if you're buying a new home. There are also registration fees in the Land Title Office, and usually legal fees to prepare and register the conveyance (the transfer of title) and the mortgage.

So you may have to pay several thousand dollars more than the purchase price. Before you make an offer to buy a house, decide if you can afford both the purchase price plus all the other costs.

Do you need a realtor? Who pays the realtor?

You may decide to look for a house yourself or you may use a professional to help you. If you decide to use an agent, pick one that you trust and who you're comfortable with. The seller pays both real estate agents, the one for the seller and the one for the buyer. If there's no sale, there's usually no commission paid to the agent. If you don't use an agent, good places to start looking for houses are local newspapers and the multiple listing website at www.mls.ca [2].

You have to make a written offer

If you find a house you want to buy, you have to make a written offer to buy it. Oral agreements for land may not be valid. The realtor provides the form, usually from the local real estate board. It's called a contract of purchase and sale. Read it carefully, because this contract is legally binding. If there's anything in it that you don't like or doesn't apply, cross it out. Then initial the change and get the seller to initial the change too.

What should you include in the offer?

1. Give the seller a time limit to accept your offer – normally a day or so. If the seller doesn't accept it by then, your offer expires.
2. If there are things in the house you want the seller to include in the price – such as appliances, curtains, mirrors or chandeliers – add a sentence that the purchase price includes these items and make sure each item is listed.
3. You might want to make your offer conditional on the house passing an inspection by a professional building inspector. Use a "subject to" clause to do this – a real estate agent or a lawyer can help you with the wording. While the seller usually gives you a "Disclosure Statement" listing any potential problems the seller knows about, you might still want your own inspector.
4. If you have to sell your own home before you can buy the new one, make your offer conditional on selling your current house by a date that you set.
5. If you need a mortgage, make your offer "subject to" (or conditional on) getting satisfactory financing, even if the bank has already "pre-approved" a mortgage amount.
6. Include a statement saying the offer is "subject to" your lawyer's approval, so your lawyer can check the offer before it becomes a binding contract.

How much should you pay as a deposit?

When you make an offer, you'll have to make a deposit, which you'll want to keep as low as possible. The normal deposit is 5% to 10% of the purchase price, which should be paid to the realtor in trust, not the seller.

What if the seller makes a counteroffer?

The seller may accept your offer, or may cross out some of your terms and add new ones. Once the seller changes your offer in any way, it becomes a counteroffer, or a new offer, by the seller. That cancels (or revokes) your original offer. Then you must decide if you want to accept the new offer or make another counteroffer of your own. You do not have to accept a new offer or a counteroffer.

What do you need to get a mortgage?

As soon as you and the seller have signed an offer or counter-offer, you should start to get a mortgage. Shop around to get the best terms, and promptly give the mortgage company any documents and information it needs. Usually, a mortgage company will need an appraisal of the house (that you have to pay for) before it promises to give you the mortgage. And it may need a survey certificate showing that the house is within the property boundaries, or "title insurance", before the completion date (when the property transfers from the seller to you and you become the owner).

Once you've arranged your financing, ask the mortgage company to give you a written commitment letter promising to give you the mortgage. The lawyer doing the mortgage can often do your legal work for the purchase too.

What about title searches and insurance?

Your lawyer will do a title search. It shows the registered owner of the property and any charges, such as mortgages, liens, or easements, registered against it. Any existing mortgages and liens will have to be paid off by the seller before you buy the house.

Also, talk to your lawyer about when you should get fire and liability insurance on the house and how much you should get. The mortgage company will require proof of this insurance.

When do you remove the "subject-to" clauses?

When you're satisfied with the results of the subject-to clauses or conditions – for example, the house inspection is fine and you've arranged a satisfactory mortgage – you should give written notice to the seller that you're removing the conditions. Once you do this, the offer or counter-offer becomes a legally binding contract. If you can't meet the conditions and don't remove them, the contract ends and you don't have to buy the house.

What is the "statement of adjustments"? Before the completion date, your lawyer will give you a document called the statement of adjustments. This document shows all money coming in and going out. It covers things that you and the seller share, like property tax. The most important figure for you is the amount you need by the completion date. This is the money you have to pay, in addition to your mortgage.

How do you finish the purchase?

Normally, your lawyer prepares the transfer documents and sends them to the seller's lawyer. The seller signs the documents and the seller's lawyer returns them to your lawyer. Then, when your lawyer has your cash and the promise of the mortgage money, your lawyer registers the transfer documents and the mortgage with the Land Title Office. When the Land Title Office confirms the registration, and the mortgage company has given your lawyer the mortgage money, your lawyer gives the money to the seller's lawyer. The realtor usually gives you the keys to the house once the registration is finished.

More information

Read the booklet called “Buying a Home in BC Information Booklet [3]” prepared by the Real Estate Council of British Columbia. For a free copy, call them in Vancouver at 604.683.9664 or toll-free 1.877.683.9664 elsewhere in BC. Or go to their website at www.recbc.ca [4] and click on “Consumer Info” and then “Publications”. For more information on mortgages, check script 408, called “Mortgages and Financing a House Purchase”.

[updated February 2013]

References

[1] http://www.gov.bc.ca/sbr
[2] http://www.mls.ca
[3] http://www.recbc.ca/consumer/buyinghome.html
[4] http://www.recbc.ca
[5] http://www.dialalaw.org

Buying a Condominium (Script 407)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script provides general information about buying a condominium unit (or strata lot). This script assumes that you have already reviewed script 406 “Buying a House”, and the general provisions about buying property in that script.

For information on owning a strata lot, check script 401, called “Owning a Condominium”.

What is a condominium?

The word Condominium is used in other provinces to refer to a building or complex of buildings containing some number of individually owner apartments or houses. In British Columbia the word condominium is used informally.

In British Columbia, a condominium unit is called a “strata lot”, and can be an apartment, townhouse, commercial space, a freestanding house, a duplex unit, a bare lot of land containing a home, or some other configuration provided that the strata lot is shown as a strata lot on a properly registered strata plan.

In British Columbia, a condominium complex or development is called a Strata Corporation. A Strata Corporation allows for individual ownership of strata lots in a single parcel of land, and is created by a strata plan which is a series of drawings and notations registered in the Land Title Office. That strata plan is the document which shows the boundaries of each strata lot and the common property.

Owners of the strata lots are members of the Strata Corporation, and collectively own the common property, pay for the common expenses of the Strata Corporation, and vote on matters of common interest.

Bare land Strata Corporations are unique in that the strata plans show only a top down view of the property parcel, and each strata lot, which is a bare lot of land usually containing a home which belongs entirely to the strata lot owner.

More typical forms of strata corporations are conventional apartment buildings and townhouse complexes.

It’s not the size or shape of a development that makes it a condominium project. Instead, it’s the legal nature of it. If the development is legally created by a strata plan, it’s a strata corporation—whether it’s a 300-unit high-rise apartment, a 50-lot bare land strata recreational development, or a 2-unit strata duplex.

It is very important to realize that some condominium complexes in British Columbia are not Strata Corporations and are not governed by the *Strata Property Act*. Some apartments, townhouses and duplexes are configured under various different legal frameworks such as housing societies, privately owned rental buildings or others. This also occurs on first nations reserve lands where provincial property law doesn’t apply normally. Legal Advice is strongly recommended to ensure that you know what you are offering to buy.

For more details on condominiums, check script 401, called “Owning a Condominium”. It explains several topics including common property, limited common property, the strata plan, the strata corporation, the strata council and insurance.

What should you consider before making an offer to buy a condo?

Typically a prospective purchaser of a strata lot should expect to request and receive documents which will allow them to make an informed decision about whether or not to buy the strata lot. At a minimum, the purchaser should obtain and carefully review:

A. Form B Information Certificate which sets out prescribed facts about the current general status of the Strata Corporation and the strata lot being sold. The Form should include the financial obligations in relation to that strata lot, any parking and storage facilities assigned to the strata lot, and other useful facts. The Form B should have attached documents such as the current budget, rental disclosures statement (if any), rules and the depreciation report for the Strata Corporation (if any).

The Form B Information Certificate also shows if the strata corporation has adopted any new bylaws which will take effect but haven't yet been filed at the Land Title Office, and whether the strata corporation is involved in any lawsuits or arbitration.

You should always review a current Information Certificate before making an offer to buy a strata lot. Or you should make your offer subject to reviewing a current Information Certificate.

The strata corporation may charge a fee plus the cost of photocopying or other reproduction for providing the Form B Information Certificate.

B. Depreciation Report—every strata corporation with 5 or more strata lots must obtain a depreciation report unless the owners have regularly voted by ¾ vote resolution to defer the report. If a depreciation report has been prepared, a copy of it must be attached to the Form B Information Certificate. The depreciation report must have financial forecasting and an inventory and evaluation of the common property and common assets and any other property that the strata corporation has a duty to maintain. A depreciation report helps the owners anticipate and budget for future common expenses and special assessments.

If a depreciation report has not been obtained, take especial care in evaluating the condition of the property as a whole.

C. Title to the strata lot—This document will list any covenants, easements and other encumbrances on title. With your lawyer review the documents registered against title, and confirm that there are no registered documents which are a problem, or which affect the value or usability of the strata lot.

D. The Strata Plan which shows the boundaries of the strata lot you are thinking of purchasing. The Strata Plan, or associated schedules will show the unit entitlement which determines the strata lot's proportionate share of contributions, and the schedule of voting rights which will show the voting rights for the strata corporation. Compare your obligations to those of other strata lots to ensure that they are as expected.

E. The Bylaws of the Strata Corporation, which will set out the specific rights and obligations which an owner has, and give you a good sense of how rigidly the Strata Corporation governs the owners.

F. Obtain and review the **Land Title Office's *Strata Plan General Index*** for other documents registered in the Land Title Office, such as limited common property designations, or other important documents, such as a rare unanimous section 100 resolution which changes the default division of expenses.

G. Several years of **minutes of meetings** of the Strata Council, and general meetings of the owners, including minutes of any section will give you a sense of how active the Strata Corporation's government is, and what issues the Strata Corporation has been contending with in recent years. Request no less than two years of minutes, and review them carefully. Request minutes for a longer time period if possible.

H. For new developments, the Owner-Developer is obliged to provide prospective first purchasers a copy of the up-to-date **Disclosure Statement** including any amendments as filed with the Superintendent of Real Estate. That document discloses the intentions of the Owner-Developer, and contains marketing representations, as well as disclosure of legal encumbrances and other important information.

Although the Developer's Disclosure Statement itself doesn't bind the Strata Corporation as a governing document, it will include schedules which are binding, and it can indicate the Developer's intentions for the development, and plans for future phases, which may be important to you.

For older developments, it may be possible to obtain a copy from the vendor, or they can request a copy from the Strata Council.

Referring to those documents, a savvy purchaser or their lawyer should be able to get a reasonable and current sense of the strata corporation and the strata lot, and any other documents which should be reviewed. Particular attention should be given to issues of importance to you, and to the following:

1. **Financial Obligations—**Make sure that you can afford to be an owner.

   a. Monthly strata fees—all strata lot owners must pay towards the common expenses of the Strata Corporation by paying strata fees for their strata lot. The strata fees are normally based on the strata corporation's annual budget divided by the unit entitlement which sets out the share for each strata lot. Check the current budget and the Form B Information Certificate for the current strata fees. Compare the strata fees to other similar developments.

   i.If the strata fees seem high, consider whether there are expensive recreational facilities or other features, or budgeted items which you will have to help pay for—whether they benefit you or not.

   ii.If the strata fees seem low, consider whether the budget is adequate to sustain the Strata Corporation, and be realistic with respect to likely strata fee increases.

   b. Other assessments—There are other payments that a strata lot owner may need to pay, including but not limited to:

   i.**Special Levies—**A Strata Lot owner also needs to pay their share of any special levy for extraordinary expenditures which is assessed against all strata lot owners

   ii.**User Fees—**there may be user fees to use parking or other facilities.

   iii.**Fines and costs of bylaw enforcement** can be charged back to an owner who contravenes the bylaws or rules.

   iv.**Insurance Deductibles**. Many Strata Corporations will charge an owner for insurance deductibles or other charges arising from sources of damage originating within a strata lot.

   Consider reviewing the financial statements and budget of the strata corporation to assess the financial well-being of the Strata Corporation, where money is being spent, and the balance of the contingency reserve fund and other accounts. Review what special levies and other funds have been assessed and expended on major expenses such as repairs.

2. **The physical condition of the project—**The general rule is that every owner in a strata corporation must contribute to common expenses, such as repairs, unless an exception to the rule applies. If the development is in poor repair, you will have to pay your share of the cost to fix it, even if the repairs do not involve your strata lot or the part of the project where your unit is located. You may have to pay for special levies that have been previously approved, with future installments.

   Review the minutes of meetings to see if any major repairs have recently been made or are planned. If the strata lot is part of something called a **section**, you also need to check the minutes of general meetings of the section as well

as minutes of the meetings of the section's executive. In each case, ask for complete copies of the relevant minutes for at least the past 2 years.

Ask to see the Strata Corporation's depreciation report, and carefully review it for expensive replacements, repairs or upgrades which have been recommended, particularly those which are likely to be costly, required in the near future and for which no contingency reserve funds have been set aside.

3. **Is the community right for you?—**Review the minutes carefully for issues which might concern you. If you are on a fixed income, or borrowing heavily to purchase a strata lot, then watch for discussions which might indicate expenses, such as ongoing or threatened litigation, water ingress, building envelope, structural or major repair concerns.

   A careful review of the minutes can tell a great deal about the Strata Corporation. You might note noise complaints relating to an adjacent strata lot, or very strict enforcement of the bylaws, recurring disputes, the existence of factions or similar trends which may or may not concern you. Are the minutes a well-organized and well written record which transparently records decisions, or do they resemble a gossip column? Is there a licensed strata manager involved in meetings? Do they appear to have difficulty electing a full strata council? Does the Council meet monthly or infrequently?

4. **The type of ownership: freehold or leasehold—**our legal system distinguishes between freehold ownership and leasehold possession. In a lease, the landlord owns the property, but gives possession to the tenant for the term of the lease. In most condominium developments, people own their strata lots. These are called freehold developments—each owner holds "fee simple title".

   However, in a leasehold development, a landlord owns the entire property parcel, but grants a long-term lease to a developer (often, for 99 years) to build a strata development there. The developer is a long-term tenant who, with the landlord's permission, creates a strata development on the landlord's property, and then the developer sells leasehold interests in each strata lot to purchasers for a specified term.

   If a person is registered on title as the long-term tenant under a long-term lease in a leasehold strata development, the *Strata Property Act* treats that person as an owner. The long-term tenant must pay the monthly strata fees and any other contributions, such as special levies, and can sell their leasehold interest in their strata lot to the next leasehold buyer.

   Depending on the project, the developer may prepay all the rent due under the long-term lease, or ongoing head lease payments may form a part of the leasehold strata corporation's budget payable as part of the strata fees.

   Be sure that you understand the remaining term of the head-lease, the term of your own leasehold, and what happens when the terms expire. Normally, the long-term tenant must vacate, or leave, the strata lot, unless other arrangements are made. The landlord may have to pay an amount to the departing long-term tenant using a formula in the long-term lease or by government regulation. It is important to carefully read and fully understand the lease contracts and related documents. If you plan to buy the interest of a long-term tenant in a leasehold strata lot, you should make any offer subject to first reviewing the long-term lease and all related documents with your lawyer. Make sure that you understand what you are buying and that the leasehold is being valued correctly. The fair market value of a leasehold strata lot is usually much less than the value of a comparable freehold strata lot.

5. **Governing Bylaws and Rules**

   As an owner of a strata lot, you will be legally bound to comply with the bylaws and rules of the Strata Corporation, and you will be deemed to have knowledge of their requirements. Read them carefully before you buy.

   Collectively bylaws and rules set out rights and responsibilities of owners, tenants, occupants and visitors, and also set out special restrictions on the use of each strata lot, common property and common facilities.

Bylaws in particular can very broadly restrict what people can do in the development, including but not limited to:

- Restricting or prohibiting rental of a residential strata lot by the owner to a tenant.
- Restricting or prohibiting pets as specified in the bylaw or generally.
- Restricting the permitted age of occupants.
- Restricting or prohibiting smoking.
- Restricting the use of parking stalls or vehicle size.
- Restricting or prohibiting changes to the strata lots and common property.
- Restricting other uses which can be made of a strata lot, common property or common facilities.

Reading the bylaws and rules, and especially comparing them to the standard bylaws can provide some insight into how restrictive the Strata Corporation intends to be, and also provides some assurance that the priorities of the Strata Corporation match your own. Consider how you might wish to use your strata lot, and don't make any assumptions without carefully reviewing the bylaws and rules and satisfying yourself that you will be able to use the strata lot as you intend, and that your vehicle, pet, child and possessions will be able to move in with you.

Make sure that you also obtain a copy of any Rules. Although Rules apply only to the use and enjoyment of common property and common assets, they are not registered in the land title office, and can specifically restrict activities which might be important to you. For example, a rule may limit the size of vehicles that may park in a common-property parkade, or restrict the hours when a common-property fitness centre is open.

If you ask, a seller can obtain strata documents from the strata corporation for you to review, including a set of up-to-date, consolidated bylaws, as well as a complete copy of the rules.

Also, understand that the bylaws and rules can be changed, and some changes may dramatically affect how you can use your property.

6. **Other Restrictions—**Bylaws are not the only documents which can restrict how you may use a strata lot. Covenants, easements and other documents registered against title may limit the use of the strata lot or affect its value. For example, in a bare land strata development, the title of your strata lot may be encumbered with a building scheme that limits the size or other details of any house you want to build on your strata lot, or may restrict your use of the strata lot.

   Municipal Bylaws and Zoning may further restrict use of a strata lot.

   With your lawyer, review the results of a current title search for the strata lot, and the other legal documents and circumstances.

7. **Confirm what you are buying—**Check the location, dimensions and area of your strata lot.

   Balconies, parking stalls, storage units and other non-residential areas you may expect to have access to are sometimes configured in odd ways legally. For example parking spaces can be common property, limited common property, or part of your strata lot. Each of those configurations have differing legal implications and can change your repair obligations.

   If the parking stall or storage locker currently assigned to the strata lot is designated as common property, then the bylaws may authorize the strata corporation to allocate or reallocate the use of a stall or locker, and you need to confirm whether you will keep that assignment. The strata corporation may also use a short-term exclusive use agreement or special privilege to give an individual owner or tenant the use of a stall or locker. Alternatively, the developer may have arranged for an affiliated corporation to hold a long-term lease over the common property parking or storage area. In that case, to use a particular stall or locker, the owner may need to negotiate an assignment of the right to use that stall or locker under the long-term lease.

If the purchase of a strata lot includes the use of one or more parking stalls or storage units, you should confirm the nature of your right to use the parking stalls or storage units. Verify that any limited common property features like balconies, parking lots, and storage units are assigned to your strata lot in the manner, size and location which matches your expectations, are correctly noted on the registered documents and match the representations made in the Form B Information Certificate, the real estate listing and any vendor representations.

Strata corporations are now obliged to disclose the designation of parking and storage lockers, and how they are allocated to a strata lot in the Form B Information Certificate.

Put all your questions in writing and get written answers from the seller and, if possible, the strata council.

Using a lawyer is a good idea

Before making an offer to buy a condominium, have a lawyer review the critical documents, including the contract of purchase and sale, legal title to the strata lot, the strata plan and any amendments, limited common property designations and other resolutions affecting common property, the Form B Information Certificate, legal issues identified in the minutes, and the bylaws and rules.

If you can't see a lawyer before you make an offer, then add a sentence to your offer saying it is subject to your lawyer's review of the strata documents to confirm that no features reduce the use or value of the strata lot. Then take the offer to your lawyer before you remove any of the "subject to" clauses or the deadline for doing so expires. Strata lots are expensive and buying one is complicated. Mistakes can be costly. It makes sense to use a lawyer.

Be especially careful about rent-to-own, time share and other non-standard forms of acquiring a strata lot, and do not enter into any such agreement without comprehensive legal advice.

More information

- Check script 401, called "Owning a Condominium". Because buying a condo is very similar to buying a house, you should also check script 406, called "Buying a House". It outlines many important topics not covered here, including "subject to" clauses, title searches, fraud risks, property inspections, the statement of adjustments, and more.
- If you need financing, check script 408, called "Mortgages and Financing a House Purchase".
- Familiarize yourself with the *Strata Property Act* available at www.bclaws.ca [1]. Click on "Statutes and Regulations" and then on "S" in the alphabetical list; scroll down to the name of the Act and click on it. You can also get a copy of the Act from Crown Publications in Victoria at 250.387.6409 or toll free at 1.800.663.6105. Its website is www.crownpub.bc.ca [2]. Some libraries also have copies of BC laws. Make sure you also get a copy of any amendments to the Act and the Regulations.
- Study the bylaws and rules for any condo project you are interested in.
- The Financial Institutions Commission website www.fic.gov.bc.ca [3] has information on the Act: click on "Strata Property". But this information is not always up to date.
- Check the website of the Condominium Home Owners Association of BC at www.choa.bc.ca [4].
- The Condominium Manual [5] by Mike Mangan is available at public libraries.

[updated November 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [6].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

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[6] http://www.dialalaw.org

Mortgages and Financing a House Purchase (Script 408)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is a mortgage?

A mortgage is a common way of getting money to buy a house. It's a contract that gives a moneylender some assurance that a borrower will repay the borrowed money. When you get a mortgage to buy a house, you borrow money from a person or company and you promise to pay back that money, usually with interest and in regular payments. The lender makes sure you'll repay the loan with a "charge" against your house. That charge means that if you don't make your mortgage payments, the lender has the right, eventually, to take the property or to sue you for what you owe.

If your equity in the house is not more than what you owe, the lender may take the property. Equity is the amount that your house value exceeds your mortgage loan and any other debts, judgments, or liens registered against your house. This legal action is called foreclosure, and you can learn more about it in script 415, called "Foreclosure". Another way to finance a house purchase, called an agreement for sale, is described near the end of this script.

Who is the mortgagor and who is the mortgagee?

The person who borrows the money is the mortgagor. The person or company lending the money is the mortgagee. The lender may be a bank, a trust company, credit union, or a person, for example, the seller of the house.

What is the amortization period?

The amortization period is the total time it would take to pay off the mortgage if you made regular payments at the same interest rate. Most mortgages for a first home are amortized over 25 years, to keep the payments affordable, although this can vary. On the other hand, if you have a 3-year amortization period, the monthly payments are likely to be very high. The shorter the amortization period, the less total interest you pay in the long run.

What is the term of the mortgage?

The term is the time the mortgage lasts. Because interest rates are always changing, most lenders won't lend their money at the same interest rate for as long as the usual amortization period. Instead, lenders first calculate the regular payments as if they were lending the money for the full amortization period at the same interest rate. But then they lend you the money for a shorter time, or term. You can usually choose terms between 6 months and 10 years. Longer terms often have higher interest rates. At the end of the term, you have the pay the remaining amount of the mortgage to the lender. If there are no problems, you can normally do this by just renewing your mortgage for another term, at the current interest rate.

What if you want to pay your mortgage off quickly, before the term ends?

Many mortgages let you do this. It's called a prepayment privilege and there are many types. You may have the right to prepay any amount any time (an open mortgage), or the right to prepay only up to 10% of the mortgage loan each year (a closed mortgage). But if a mortgage does not have a prepayment privilege, many lenders charge a prepayment penalty if you want to fully pay it off before the mortgage term ends. Usually the penalty is 3 months' interest. This is an extra expense if you want to sell your house before your mortgage term ends. If this is your case, you should get a prepayment privilege in the mortgage when you get then mortgage (you can't add it later on).

If your mortgage lets you prepay, it's good to do so if you can. Over the whole term of the mortgage, you'll probably pay several times the principal amount of the mortgage. So anything you prepay to reduce the amount of the mortgage, called the principal, will save you a lot of money in the long run. That's especially true in the first years of the mortgage, when more of each payment goes to pay interest than to pay off the principal.

What is an assumable mortgage?

An assumable mortgage means that if you sell your house, a purchaser can take over your mortgage. If interest rates have gone up since you got your mortgage, the lower interest rate of your assumable mortgage will be a good selling point. If a mortgage can be assumed "with qualification", it means your lender must approve the purchaser before allowing the purchaser to assume the mortgage.

If the purchaser can assume your mortgage, it's very important to make sure that you won't still be responsible if the purchaser later stops paying the mortgage. Your name stays on the mortgage and you are still responsible, unless your mortgage lets you apply to the lender to approve a purchaser under Section 24 of the *Property Law Act*. Once the lender approves the purchaser under this section, you are no longer responsible for paying the mortgage.

What is a portable mortgage?

A portable mortgage is one that you can transfer to a new property. It is useful if you get a very good mortgage rate for a long term and move before the term ends. Then you can transfer the mortgage to the new property without a penalty. You should clarify that all of the parts of the mortgage are transferable with the current amount still owing.

What does cash to mortgage mean?

This means that you will assume, or take over, the seller's existing mortgage. You pay the seller the balance of the purchase price in cash, and then make the regular payments on the mortgage.

What is a vendor-take-back mortgage?

This means that the seller (or vendor) of the house is willing to lend you some of the purchase price. As security for the loan, you give the seller a mortgage on the property.

How do you get the best mortgage?

Shop around and compare, just as you do for other goods and services. Mortgage brokers and real estate agents can be helpful when you're looking for financing. They have useful contacts with mortgage companies and they know current interest rates and market trends. Banks and other mortgage companies are usually willing to give you a lower rate than they advertise, but you have to ask for it – they won't just offer it automatically. Mortgage brokers can also shop around and negotiate rates for you, but they usually charge a fee for their services.

Another way to finance a house purchase – an agreement for sale

An agreement for sale, also called a right to purchase, means that you make a down payment, and then make regular monthly payments to the seller. But the seller remains the registered owner of the property until you have paid the full purchase price. You protect your interest in the property by registering a "right to purchase" in the Land Title Office. Sometimes, an agreement for sale may be better than a mortgage, because banks and other mortgage companies have mortgage contracts that are to their advantage. But if you want to use an agreement for sale, you should negotiate the terms very carefully.

Using a lawyer is a good idea

Real estate sales and mortgages are complicated and important transactions, and there's too much money involved to risk mistakes. There are also tax issues that you need advice on. Sometimes there are problems with the way the real estate agent drafted the contract for sale and purchase, or other issues that need legal expertise. There are also fraud risks with real estate transactions. The Land Title Office also has very specific requirements about documents that it will accept for registration. For these reasons, you should see a lawyer when buying a house or getting a mortgage.

More information

Check script 406, called “Buying a House”. Also, check the booklet called “Buying a Home in BC Information Booklet [1]” prepared by the Real Estate Council of British Columbia. For a free copy, call them in Vancouver at 604.683.9664 or toll-free 1.877.683.9664 elsewhere in BC. Or go to their website at www.recbc.ca [2] and click on “Consumer Info” and then “Publications.”

[updated February 2013]

References

[1] http://www.recbc.ca/consumer/buyinghome.html
[2] http://www.recbc.ca
[3] http://www.dialalaw.org

Foreclosure (Script 415)

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Foreclosure scares people because it means they may lose their house. But if you face foreclosure, you may still be able to help yourself if you understand what it is and how it works.

What is foreclosure?

Foreclosure is a legal action that a moneylender can take if a person who borrowed money using a mortgage stops paying back the mortgage. Foreclosure allows the lender to take or sell the person's house by first getting a court's permission to do so.

What is a mortgage?

A mortgage is a contract between a borrower and a lender to repay a loan. It gives the lender some assurance that the borrower will pay back the borrowed money. When you get a mortgage to buy a house, you borrow money from a person or company and you promise to pay back that money, usually with interest and in regular payments. The lender makes sure you will repay the loan with a mortgage, or charge, against your house, registered at the Land Title Office. You may have the right to pay off the mortgage and get the charge on your house removed – some mortgages allow that. For more on mortgages, check script 408, called "Mortgages and Financing a House Purchase".

What happens if you miss a mortgage payment or make a late payment?

You do not automatically lose your house. Lenders don't want to foreclose if they don't have to because it is expensive and takes a lot of time. A lender will probably not start to foreclose until 2 or 3 months after you stop paying. Normally, a lender will first send letters demanding payment. Then, if you don't reply, the lender will usually start to foreclose and sue you at the same time.

If you have a short-term problem, like a temporary layoff, you may be able to make a deal with the lender to make smaller payments for a time, and add the amounts you fall behind to the total amount of your mortgage. Or you may be able to make smaller payments for a while and a larger catch-up payment later. Most lenders would rather make some sort of deal and keep the mortgage in good standing, instead of starting expensive foreclosure proceedings in court.

The law tries to help you if you have a good chance of paying what you owe and if you try to get your finances in order. Only in the worst case may you lose your house and any equity you've built up in it. Equity is the amount that your house value exceeds your mortgage loan and any other debts that other lenders have registered against your house.

If a lender starts to foreclose, what happens first?

If there's a Supreme Court Registry where your house is located, the lender has to start legal proceedings there. You will receive a document called a "petition for foreclosure", which is the lender's notice to you that they are asking the court to help them get back the money they loaned you.

What should you do if you receive a petition for foreclosure?

Get legal advice right away. And if you want to protect yourself and take part in the court proceedings, you must file a Response to Petition (with supporting affidavits) within 21 days of getting a petition for foreclosure. You must file the Response at the court address shown on the petition. You also have to deliver 2 copies of your Response to the lender. Once you do this, no one can take any steps in the foreclosure without notifying you. If you don't file a Response, the foreclosure will go ahead without you, and you won't be able to protect yourself. After you file the Response, you will get a document called a Notice of Hearing, which tells you when the lender will ask the judge for the order nisi to start the foreclosure.

What happens at the hearing?

The court will give the lender an order nisi, but in most cases, it will also give you time to redeem the mortgage by paying the full amount you owe, plus interest, costs and taxes. This time is called the redemption period and it's usually 6 months. But sometimes the lender will ask the court for a shorter redemption period. The court can make an order to sell your house at any time, including at the order nisi stage.

So one good reason to attend the court hearing is to ask the judge for as much time as possible to get the money to pay off the mortgage or sell the house. If you need more time, you can ask for an extension. If you ask for a long redemption period or an extension, the court will want to know what you have done to pay off the mortgage and what chance you have of paying the mortgage or selling the house on your own or through your own real estate agent. You should use a lawyer in this case because a lawyer can advise you on your options, including possible refinancing, even with another lender.

When the redemption period ends, the court can give the lender a final order of foreclosure – see the section called "The lender can apply to court for an order absolute" below. Or, the lender can ask the court for the right to have their own real estate agent list your house for sale. If there are other people or companies with a charge against your house, besides the lender who started to foreclose, they may ask for the right to sell your house. If the court gives the lender or anyone else the right to sell your house, it gives them conduct of sale. If this happens, you cannot sell the house yourself. If anyone asks the court for conduct of sale for your house, you should ask the court to give you exclusive conduct instead. This means that only you are in charge of selling it. Or you can ask the court to give you at least joint conduct with the other person or company, so you have some control.

You can do two things during the redemption period

1. You can pay off the lender that started to foreclose. To get the money for this, you can try to borrow from another lender or a relative, at a lower interest rate or over a longer repayment period. That would let you pay off the first mortgage and lower your monthly payments. But this may be hard, because most lenders look at your income to decide whether to give you a mortgage. And your income may be what stopped you from paying your current mortgage in the first place, which led to this situation.

2. You can try to sell the house, preferably using your own real estate agent. Invite several experienced real estate salespeople who do business in your area to look through your house and tell you what they think it would sell for. Be honest with them about your situation. Then choose the realtor you trust the most or feel most comfortable with. If you sell the house, you can use the money from the sale, first to pay any property tax you owe, and then to pay the mortgage and other charges registered against the title, including court costs. If there's any money left over (equity), you keep it. But if the money from selling your house doesn't completely pay off all of the lenders, you may have to pay them the difference. Meanwhile, if the lender or anyone else with a charge against your house gets an offer to buy your house, they can apply to court for an order authorizing that sale.

What if you have no equity in your home?

If you owe more than you can sell the house for, you will probably want to get out of the situation with as little expense and trouble as possible. But you should still take action instead of ignoring the problem. You may want to work with the lender to minimize costs by agreeing to the foreclosure. Normally, you would only do this if the lender will give you a full release from your mortgage, meaning you won't owe the lender any more money. If the lender won't agree to this, you can just let the foreclosure proceedings go ahead and use the time as a rent-free period to get your finances back in order. If any other people or companies with debts registered against your house are not paid from the money from selling your house in the foreclosure, you will still have to deal with them. Otherwise, they can sue you for any money you still owe them.

The lender can apply to court for an order absolute

The final order for foreclosure is called an order absolute, and it comes after the redemption period ends. If the lender applies for an order absolute and the court grants it, the house then belongs to the lender and you have to leave it. You lose all rights to the house. You will no longer owe the lender any money, but if anyone registered a debt against your house after the mortgage, you'll still owe that money. In exceptional cases, you can apply to the court for relief from losing your house if you can pay the balance in full. Then the court can order the lender to transfer the house back to you.

If the lender gets an order absolute

If the lender gets an order absolute, and registers title in its own name, it cannot make any further claims against you. It can sell the house, but if the sale does not produce enough money to pay off the mortgage, you do not have to pay the difference.

But lenders do not usually ask the court for an order absolute. Instead, they will usually sue you when they start to foreclose and ask the court for an order to sell your house to pay off the loan. If the money from selling your home doesn't completely pay off the mortgage loan, the lender can try to collect the difference from you.

What happens if you have a second mortgage or other charges registered against your house?

Any mortgages or charges registered before the lender's mortgage continue and are still valid. But any that were registered after the lender's mortgage are cancelled and the holders of those charges lose their security. For example, if you have two mortgages on your house, and the first lender forecloses, the second lender will have to pay off the first lender or lose its security. Then the second lender would have to try to get you to pay its loss.

Summary

A mortgage is a contract to repay a loan, secured with a charge on land. It's registered against your property in the Land Title Office. If you fail to pay the mortgage, for example, by falling behind in your mortgage payments, the lender may start to foreclose. Then if you can't pay the mortgage loan in full, either by selling your house or in some other way, the lender can take your property or sell it to pay off the loan.

If you receive a foreclosure petition, get legal advice right away. It doesn't cost much to have a first meeting with a lawyer. As well, you should see a lawyer if anyone asks you or your spouse to sign any new documents, because your spouse may not be liable under the original mortgage documents.

More information Check script 408, called "Mortgages and Financing a House Purchase"

[updated February 2013]

References

[1] http://www.dialalaw.org

Builders Liens (Script 268)

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What is a builders lien?

A builders lien is also known as a lien on land. It secures a claim for payment for work done on—or materials supplied to—a construction project or for repairs or renovations made to an existing structure. When a lien is registered in the Land Title Office, it becomes a charge against the title to the land or property involved.

Who can file a builders lien?

People and companies can claim a lien if they are:

1. workers on a construction project.
2. suppliers of materials (including renters of equipment) used on a project.
3. contractors hired by the landowner to work on the project.
4. subcontractors hired by the contractor or by other subcontractors to work on the project.
5. engineers and architects on the project.

However, a person who performs or provides work or supplies material to an architect, engineer or material supplier can't file a builders lien.

Why file a builders lien?

A lien claimant can file a builders lien to secure payment for work done on—or material supplied to—an improvement to land, such as a construction project. A large construction project is like a pyramid, with a developer (usually a landowner) at the top. The landowner may handle the construction personally, or hire a general contractor. The general contractor may hire several subcontractors such as a plumber, electrician, and so on. Those subcontractors may in turn hire workers and material suppliers. Somewhere in this chain of contracts, someone may not get paid.

The BC *Builders Lien Act* [1] (the Act) helps those who have worked on a construction project or supplied material to it, but haven't been paid. Under this law, they can file a charge against the property to secure payment of the money owed to them.

But a builders lien is not always good security. When a project fails, those who have filed liens often receive only a fraction of what they are owed. The right to file a builders lien is no substitute for careful credit-granting practices. And people on a construction project who have not been paid have other options to collect money owing to them. They can sue the company or person who hired them, or anyone who guaranteed the debts or contractual obligations of that company or person. They can also make a claim against any bond that a contractor or subcontractor provided for the project. And they can make a claim against anyone who breached the trust provisions of the Act. Script 250, called "Collection of Debts" has more on this. It's a complex area of law. For legal advice, consult a lawyer.

How does a lien claimant file a lien?

A claimant can file a lien personally or have a lawyer file it. The lien claimant must fill out a completed Claim of Lien (*Builders Lien Act* Form 5) and file it in the Land Title Office where the land is registered. It is important to complete the form accurately. The form is in the Regulations of the Act, available at some public libraries and at www.bclaws.ca [2]. Click on "Statutes and Regulations" and then on the letter "B" in the alphabetical list. Scroll down and click on "Builders Lien Forms Regulation."

To file a lien, you need the legal description of the project site—a street address is not enough. You can go to BC Assessment Authority's area office to get free information on the legal description on their self-serve Webfiche. Office locations are listed at www.bcassessment.ca [3]. Click on "About Us" and then on "Contact us". You can also access Webfiche online, for a charge. The BC Assessment website has information on that. Lawyers can also provide the legal address.

What are the time limits to file a lien?

Claimants must act quickly to file a lien. If they wait too long, they lose the right to do so. Generally, the deadline to file a lien is 45 days after the project is substantially completed, abandoned or ended. But it may be necessary to file sooner. Once a "certificate of completion" is issued for a contract or subcontract, then the deadline is 45 days from the date the certificate was issued. Condominium projects and mines and quarries have different deadlines. Because the deadlines are short and can be confusing, it's good to file the lien well before a deadline. The deadline is strict: a court cannot extend it.

Even if a claimant has not filed a lien within the time limit, they may still be able to file a lien against holdback funds that have not yet been distributed. This is often called a "Shimco" claim. To do this, the claimant must start a lawsuit in BC Supreme Court. The holdback fund is discussed below.

What must a claimant do after filing a lien?

A claimant must sue in BC Supreme Court to enforce the lien and prove it is valid. The lawsuit must be started in a Supreme Court Registry near the property. In other words, lawsuits to prove builder's liens may only be filed at the Supreme Court, and only in the same jurisdiction as the land on which the lien is to be placed. (A claimant should get legal advice from a lawyer if it's not clear which court registry is the right one.) The claimant must also file a "certificate of pending litigation" (CPL) against the property in the Land Title Office. The claimant must do both these things within a year of filing the lien or else the lien is no longer valid.

Because a builders lien is registered against the land, it can interfere with the landowner's ability to sell the property or maintain mortgage financing for the project. This may encourage the landowner to take steps to "clear" the lien, which may involve paying the lien or providing other security.

What can a landowner do to remove a lien?

A landowner may not want to pay off the lien if there is a dispute about whether it is valid. Or the landowner may not be the person in default—for example, the lien claimant supplied materials to a subcontractor who has not paid for them. But in either case, the landowner may not want the property tied up in a long court battle that interferes with their selling or mortgaging it. The Act lets the landowner pay money into court—either the full amount of the lien or a smaller amount linked to the holdback kept from the person who owes the money. The court can then order the lien and CPL to be removed from the property. Then the lien has no further effect on the property. The money paid into court is held as security for the lien—to be paid to the claimant if the lien is eventually proven.

Can the landowner—or others on the project—speed things up?

Yes, the landowner, or other people involved in the project, can give the lien claimant a written notice to speed up the process. If this happens, the claimant must start the lawsuit and file the CPL within **21 days**, instead of the usual year. If the claimant misses this time limit, the lien is removed. The court cannot extend the 21 days. But a claimant may still have a valid *Shimco* claim against the holdback fund, explained below. In other words, there is no specific time limit to bring a claim against the holdback monies provided they haven't been paid out.

What happens in court?

If the landowner doesn't pay the lien, and the court decides it is valid, the court may order the sale of the property and the use of the sale proceeds to pay the lien. But if the court decides the lien is not valid, it will remove the lien, and it may order the claimant to pay the landowner's costs resulting from the lien and the court case.

Sales of property to pay liens are actually quite rare. More often, if liens are proven, the amount of the holdback fund available to satisfy the liens is calculated. Then the parties negotiate and the lien claimants are paid their proportionate share of the available holdback funds.

How does the Act help claimants get money owed to them?

Sometimes, the landowner will properly pay its contractors (or its head contractor) but one or more of them won't pay its subcontractors or they won't pay their workers or suppliers. All the unpaid parties could then file liens and the landowner would have to pay all of them too. It wouldn't be fair to make the landowner pay twice, so the Act uses a system called the "holdback" to protect the landowner if the general contractor or a subcontractor defaults, or does not pay what they owe.

The landowner must hold back 10% of the contract price until 55 days after the general contract is substantially completed, abandoned, or otherwise ended. If the total project is over $100,000, the landowner must pay the 10% holdback into a holdback account at a bank or savings institution, administered jointly by the landowner and the contractor. After the 55 days are up, if no liens have been filed within the 45-day limit and no lawsuit making a *Shimco* claim has been started, the landowner can pay out the 10% holdback to the contractor. But if any liens have been filed, the holdback may be used to help pay these liens.

Often, the total of all liens filed by all claimants is greater than the holdback. The landowner does not have to pay lien claimants more than the holdback amount (plus any other money owed to the contractor and not needed to complete the contractor's work or fix deficient work by the contractor). So claimants may receive only part of their lien—it depends on the details of the case. The Act sets out how claimants share the holdback.

Are there other holdbacks?

BC has a "multiple" holdback system. So contractors and subcontractors must also hold back 10% from any subcontractors they hire. But no holdback can be kept from workers, material suppliers, architects, or engineers—they must be paid in full. The value of these holdbacks may limit the amount a lien claimant can recover under the Act.

How can a contractor or subcontractor speed things up?

Contractors or subcontractors who have finished their part of a project may not want to wait until the whole project is done to get the 10% held back from them. The Act allows a holdback to be released 55 days after a certificate of completion is issued for their work. If the architect issues a certificate of completion for their contract or subcontract, the person can get their holdback 55 days after the certificate is issued—unless any liens have been filed within the 45-day time limit or any Shimco lawsuits have been filed against the holdback.

What about the "trust fund"?

The Act says that all money received by a contractor or subcontractor is a "trust fund" for the benefit of the people or companies hired for the project by the contractor or subcontractor. Contractors or subcontractors must pay for everything they owe for work and materials supplied for the project *before* they can use the money for anything else. If they don't, they may be in breach of trust and their directors and officers may be personally liable.

Summary

Builders liens can be very complicated. You should get prompt legal advice if you are not sure of your position.

[updated August 2014]

References

[1] http://www.bclaws.ca/civix/document/id/complete/statreg/97045_01
[2] http://www.bclaws.ca
[3] http://www.bcassessment.ca
[4] http://www.dialalaw.org

Neighbour Law (Script 400)

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Many of us have had occasional problems with neighbours involving noise, untidy premises, dogs, fences, trees and hedges, secondhand smoke, water damage, or trespass. This script describes the laws that deal with these types of problems. In most cases, you can try talking to the person causing the problem. They may not be aware of the effect they're having on their neighbours and talking to them may solve the problem. But if that doesn't work, you have other options, which this script describes.

Noise

We've all had our peace and quiet disturbed by squealing tires, loud stereos, barking dogs, or noisy equipment. What can you do to stop it? First, try talking to the person causing the noise. They may not realize how irritating it is.

If that doesn't work, call your city hall and ask if there is a noise bylaw. If there is one, talk to the person who enforces it. For example, in Vancouver, you would call the Environmental Health Officers. Each municipality's noise bylaw is different, but most are quite broad. In Vancouver and many other municipalities, the bylaw covers noise from animals and birds, heavy-duty equipment, lawnmowers, loud parties, stereos and many other things. Usually, the municipality's enforcement officer will try to solve the problem informally. If they can't, they may prosecute the person in court for violating the bylaw.

If the noise is on a weekend or at night, and city hall is closed, you can call the police. And if a person is screaming, shouting, swearing or singing to the point they are creating a nuisance, they may be causing a common disturbance – an offence under the *Criminal Code*. In all these cases, call the police and report it. The *Criminal Code* is available at http://laws-lois.justice.gc.ca.

You can also sue the person causing the noise. You could sue for damages for nuisance or negligence, or ask the court to order the person to stop the noise.

Untidy premises

Most municipalities have bylaws to control things like garbage, junk, overgrown gardens, or abandoned vehicles. For example, in Vancouver, every property owner must keep their property in neat and tidy condition, in keeping with a reasonable standard of maintenance common in the neighbourhood. So, if talking to the neighbour doesn't help, your next step is the local government. Explain your situation to the person who enforces bylaws. They may investigate and if your complaint is valid, order the owner to clean up the property. If the owner doesn't, the municipality can clean it up and then bill the owner for the cost of the cleanup.

Dogs

If you own a dog, you should be familiar with your legal responsibilities. These are described in four places: local bylaws, provincial laws, the *Criminal Code*, and the common law, as explained below.

1. Local bylaws

Local bylaws cover licensing and may prohibit dogs from being in certain places. You can find a copy of local bylaws at your public library, courthouse library, or local government offices. Many local bylaws are also available on the municipality's website.

Many local governments have passed bylaws to prohibit dogs running loose. In Vancouver, for example, dogs cannot be on the street or in a public place unless they're on a leash not more than 8 feet long (2.5 meters) – except in off-leash parks. As well, female dogs must be kept confined and housed when they're in heat.

The Vancouver animal control bylaw also requires "aggressive" dogs – dogs with a known tendency to attack or bite, or dogs that have bitten another domestic animal or person without provocation – to be muzzled or kept indoors or in a pen. The city may seize and impound (for up to 3 weeks) a dog that has bitten someone. A dog found running loose, or unlicensed, will be taken to the Pound and, if it isn't claimed within three days, it may be put up for sale or destroyed. The owner could also be charged fees for impounding the dog, keeping it at the Pound, and any veterinarian services it needs. The owner may get a ticket for violating the bylaw.

Health bylaws in Vancouver and elsewhere prohibit dogs in restaurants and other places where food is kept or handled. The bylaws don't apply to private homes or prohibit "seeing-eye" or other types of service dogs.

Vancouver has a "pooper-scooper" bylaw, and your municipality may have one too. It requires you to pick up your dog's excrement if it's on property that is not yours. If you don't, you can be fined up to $2000. This law does not apply to "seeing-eye" dogs or service dogs working with people with disabilities.

Vancouver's animal control bylaw also regulates the noise of barking or howling dogs. For example, if your neighbours complain that your dog's barking unreasonably disturbs the peace and quiet of the neighbourhood, you could be fined up to $2,000. Other local governments also regulate dog barking in their noise-control bylaws.

2. Provincial laws

The BC *Livestock Act* protects farm animals from attacks by dogs. For example, anyone can kill a dog on the spot if it's seen running at large and attacking or viciously chasing cattle, goats, horses, sheep, swine, or game.

Under section 49 of the BC *Community Charter*, local governments may seize and impound some dangerous dogs. The local government may apply to provincial court for an order to destroy the dog. The local government does not need a specific local bylaw to exercise these powers.

Both these BC laws are available at www.bclaws.ca [1].

3. The *Criminal Code*

It's against the *Criminal Code* to willfully cause unnecessary pain or suffering or injury to any animal or to willfully neglect or fail to provide suitable and adequate food, water, shelter and care for it. If you don't take reasonable care of your dog, you could face a fine or jail term and a criminal record. And if you don't take reasonable care to avoid harming others, and your dog attacks and injures someone, you could be charged with criminal negligence. The *Criminal Code* is available at http://laws-lois.justice.gc.ca.

4. If your dog injures someone – common law

If your dog injures someone, that person may sue you under the common law in civil court. If they succeed, you'll have to pay them for the injuries your dog caused them. You should check with your insurance agent to find out if your house insurance would cover you in this case. Better yet, if you have a dog that is likely to bite or attack a person, always keep it under control or get rid of it.

Fences

Fences make good neighbours: that's the common saying. But they can also cause problems. Local bylaws often control how high a fence can be, both natural fences, such as hedges, and fences that you build. If your neighbour builds a fence higher than the bylaw allows, you can talk to them about it. You can also call the city, which can order the person to obey the law. Unless you do these things, the city does not normally check every fence.

A fence on the property boundary belongs to both property owners. People often share the cost of a fence, but they don't have to. Both are responsible to keep it in good shape and they have to get permission from the other one to take it down. The section below called "Trespass" has more on fences.

Trees and hedges

If your neighbour's tree branches hang over your property, you can cut them, but only up to the property line. You cannot go onto your neighbor's property or destroy the tree. The reverse case is also true.

If your tree damages your neighbour's property, for example, a branch falls on their roof during a storm, are you responsible? No, not unless you caused the damage intentionally or through negligence. Negligence means you did not take reasonable care or you were warned or knew the tree was damaged or diseased and may fall. But if your tree roots go under their property and damage their pipes, lawn, or foundation, you may be responsible under the common law principle of "nuisance". It depends on the facts of the case, but normally, courts will not allow use of a property that causes substantial discomfort to others or damages their property.

Secondhand smoke

If your neighbour's smoke comes into your house, as in all these cases, you can talk to them. If that doesn't work, what to do depends on the situation. Does the smoke come from a tenant? If so, does the lease prohibit smoking? If not, you still have the right to "quiet enjoyment" of your property. And the smoke may violate that right or be a nuisance under the common law. You would need legal advice on this.

Water damage

Normally, a neighbor is not responsible for damage caused by the natural conditions of land. In other words, if rain runs from a neighbour's yard onto your property and makes it soggy, the neighbour is not responsible. But if a neighbour changes their property and that causes more rainwater to come run onto your property, they may be responsible. They have a duty to be reasonable. If they are careless, for example, leaving a sprinkler running too long, which in turn floods your property, they may have to pay you for the damage. Again, you would need legal advice on this.

Trespass

If a neighbour comes onto your property without your permission, they are trespassing. If they don't leave when you ask them to, you should call the police. If a neighbour builds a fence or other structure, such as a shed, that encroaches on (comes onto) your property, this is also a trespass. Often the encroachment is unintentional and you can solve the problem by getting a proper survey. If talking with your neighbour and getting a survey don't solve the problem, you can sue them for trespassing. Usually, a court will order the neighbour to remove and relocate the fence or structure so it's off your property.

What if no bylaw, provincial law, or the *Criminal Code* deals with your problem?

You may have a problem that these laws do not cover. For example, your neighbour's property may be producing a terrible smell. In this case, you could try alternative dispute resolution. It may be the best and most cost-effective way to resolve neighbour disputes, because the relationship between you and your neighbour continues and you don't want to harm or destroy it. For information on alternative dispute resolution, see the website of the Dispute Resolution Office of the Ministry of Attorney General at www.ag.gov.bc.ca/dro [2].

Or you may decide to sue your neighbour. In that case, you should talk to a lawyer immediately because the laws may set a time limit for starting a lawsuit.

[updated October 2012]

References

[1] http://www.bclaws.ca
[2] http://www.ag.gov.bc.ca/dro
[3] http://www.dialalaw.org

Owning a Condominium (Script 401)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains several details about owning a condominium (or condo). For information on buying a condo, check script 407, called “Buying a Condominium”.

What is a condominium?

A condominium, or condo, is a strata lot in a strata development. A strata development is a building (or sometimes land) divided into separate parts, called **strata lots**. This allows for individual ownership of the strata lot. And all strata lot owners together own the common property in a development. Depending on the development, a strata lot may be a one-bedroom apartment, a townhouse, a retail store, a medical office, and so on. In a typical high-rise strata building, each unit is a separate strata lot. In this example, the strata scheme allows people or businesses to own their unit.

The words **strata** and **condominium** mean the same thing in British Columbia.

It’s not the size or shape of a development that makes it a condominium project. Instead, it’s the legal nature of it. If the development is legally created by a strata plan, it’s a condo project—whether it’s a 300-unit high-rise apartment, a 50-lot bare land strata recreational development, or a 2-unit strata duplex.

Common property and limited common property

Any property in the development that is not part of a strata lot is common property. In a condominium building, typical common property includes hallways, elevators, gardens, recreational amenities, garbage facilities, building security features, and the roof and exterior walls. In addition, some pipes, wires, cables and similar things that carry water and other services within the development may also be common property—even when they’re located in a strata lot. The strata corporation may make bylaws and rules to govern the use, safety and condition of the common property and common assets.

Strata lot owners automatically own a proportionate interest in the common property, together with all the other strata lot owners in the development. Under the *Strata Property Act*, strata lot owners own the common property in a type of co-ownership called tenancy in common. Each owner’s proportionate interest in the common property is set out in a table called the Schedule of Unit Entitlement (also called a Form V). Every owner can use the common property, as long as they follow the bylaws and rules of the strata development. For example, an owner may not use the common property or common assets in a way that causes a hazard to another person or is illegal.

Sometimes, common property may be set aside for the use of only certain people. The *Strata Property Act* allows a strata development to designate an area of common property for the exclusive use of one or more strata lots. This designation is called **limited common property** (or LCP). For example, in a high-rise strata apartment building, the strata plan may show that a strata lot’s balcony is LCP for that strata lot. This means that the balcony is common property, owned by all the strata lot owners as tenants in common. But the balcony is set aside for the exclusive use of that strata lot owner.

How a strata plan is created

To subdivide a building or land into strata lots and common property, a developer must file a document called a **strata plan** at the Land Title Office. Filing the strata plan also creates the **strata corporation**, whose members own the strata lots in the plan. Initially, the developer owns all the strata lots, but usually sells them to members of the public and other third parties.

Subdividing land instead of a building

The strata scheme may also subdivide land (instead of a building) into strata lots and common property. This is called a **bare land strata development** because it subdivided land instead of a building. Bare land strata subdivision is a very flexible tool. For example, a developer may create a recreational development where people build cottages on bare land strata lots. All the owners may use the common property in the project, including the roads, and recreational features such as hiking trails, tennis courts, and fitness facilities. Or, a developer may use a bare land strata development to create an industrial park or a manufactured home park or other similar developments.

What is a strata corporation and what does it do?

A **strata corporation** is automatically created when a developer files a strata plan at the Land Title Office. The strata corporation may buy services or goods, and sue or be sued. Also, the strata corporation oversees the common property and enforces the bylaws. The owners of the strata lots are the members of the strata corporation. The board of directors is called the strata council.

Only a strata corporation may assert a claim relating to the common elements and individual unit owners cannot sue anyone apart from the strata corporation in relation to common property.

The strata corporation must manage, repair, and maintain the common property and common assets. When a strata corporation itself owns an item, for example, a lawn mower, that item is a **common asset**.

There are detailed provisions regarding waiver of meetings, notice of mettings, agenda and resolutions at meetings, electronic attendance and voting. The strata corporation must hold at least one general meeting once a year, called the annual general meeting or AGM. At the AGM, members must approve an annual budget and elect a strata council, among other things.

Normally, if a strata development is entirely residential, each strata lot has one vote at a general meeting. In the rare case where the strata plan has been amended to subdivide a strata lot or to combine two or more strata lots, a strata lot may have a fraction of a vote or more than one vote. If so, a document called a schedule of voting rights (Form W) will be filed with the strata plan at the Land Title Office.

If a strata development is entirely non-residential, or it has both residential and non-residential strata lots, a Schedule of Voting Rights will set out the number of votes for each strata lot at a general meeting. Normally, each residential strata lot in that development will have one vote. Each non-residential strata lot may have a number of votes, depending on a formula in the law.

What is the strata council and what does it do?

The strata council is an elected group of strata owners or, in some cases, tenants. It is the board of directors of the strata corporation. Depending on a strata corporation's bylaws, the strata council usually has 3 to 7 members. The term of council members ends at the end of the annual general meeting at which the new council is elected, but a council member is eligible for re-election. The council members may be removed from office by a resolution passed by a 75% vote cast in favour of removal at a meeting of owners. The strata council manages the corporation on a daily basis. In larger developments, the strata council may hire a professional management company to help manage the corporation.

Owner

The *Strata Property Act* defines the term **owner**. Generally, an owner is the person registered on title to the strata lot in the Land Title Office. For example, if a husband and wife together buy a strata lot, but only the wife goes on title at the Land Title Office, then only she is an owner under the Act.

Strata fees and special levies

Each year, a strata corporation creates an annual budget. To pay for expenses, the corporation charges proportionate strata fees to each strata lot owner based on the Schedule of Unit Entitlement. To set aside savings for repairs or long-term improvements in the development (for example, a new roof) the strata fees typically include an amount for the contingency reserve fund (the CRF). This is a strata corporation's mandatory savings account to pay for unusual or extraordinary future expenses. Expenditures out of the reserve fund must be authorized by resolution except in emergencies.

A strata corporation may also raise funds at any time by passing a special levy if at least 3/4 of the owners approve it at a general meeting. If a special levy passes, each owner is responsible for paying a proportionate share of it.

If an owner does not pay monthly strata fees or special levies on time, the strata corporation may register a lien in the Land Title Office against their strata lot. Ultimately, the strata corporation may ask the court for an order to sell the owner's strata lot to pay the amount owing under the lien.

Insurance

The strata corporation must insure the common property, common assets, any buildings shown on the strata plan and certain fixtures. The strata corporation must also carry liability insurance for property damage and bodily injury.

Strata lot owners need their own insurance for their personal property, for improvements to their strata lot, and liability to others for injury. Owners should also consider taking out extra insurance to cover the strata corporations's deductibles, which can be large. It is not uncommon that a strata's deductible for a water damage is $25,000.00 or higher.

What law applies to condominiums?

The *Strata Property Act* controls strata developments in BC. In addition, each strata corporation must have **bylaws**. They set out strata lot owners' rights and responsibilities and control what the place will be like to live in. For example, bylaws may restrict the rental of residential strata lots. Bylaws may also restrict pets and certain age groups, such as children. Similarly, bylaws will likely require strata lot owners to get permission before making significant changes to their strata lot, such as moving walls or making plumbing or electrical changes.

A strata corporation may also have **rules**. Rules apply only to the use and enjoyment of common property and common assets. For example, a rule may limit the size of vehicles that may park in a common-property parkade, or restrict the

hours when residents can use a common-property fitness centre.

A strata corporation may change its bylaws by 3/4 vote of the owners at a general meeting. When a by-law is made, amended or repealed, the corporation must register a copy of the by-law, amendment or repeal together with a certificate in the Land Title Office (check script 407, called "Buying a Condominium"). Until the copy and certificate are registered, the by-law is ineffective. A strata council may pass rules at any time, but any new rules must be ratified by a marority of the owners before or at the next AGM, otherwise they cease to be effective.

Renting out a condominium

If you plan to live in your strata lot, you may want the other owners to live in their units too. If so, you may want a strata corporation with a rental-restriction bylaw. But if you are buying a residential strata lot as an investment to rent out, you will not want any rental restrictions. A strata corporation may pass a bylaw that prohibits all residential rentals or limits the number or percentage of residential rentals, so check the bylaws carefully. If you do rent out your residential unit, choose your tenant carefully. The strata corporation can hold you responsible if your tenant breaks a bylaw or rule.

Depending on the legal situation, an owner may be allowed to rent their residential strata lot, despite a rental restriction bylaw. For example, sometimes a document called a rental disclosure statement (Form J) may let an owner rent a residential strata lot despite a rental restriction bylaw. If you plan to rely on a rental disclosure statement to rent out a residential strata lot, first have a lawyer review the document. In some cases, a rental disclosure statement exempts only the first owner of the strata lot from a rental restriction bylaw.

More information

- Check script 407, called “Buying a Condominium”.
- Check the *Strata Property Act* available at www.bclaws.ca [1]. Click on “Statutes and Regulations” and then on “S” in the alphabetical list; scroll down to the name of the Act and click on it. You can also get a copy of the Act from Crown Publications in Victoria at 250.387.6409 or toll free at 1.800.663.6105. Its website is www.crownpub.bc.ca [2]. Some libraries also have copies of BC laws. Make sure you also get a copy of any amendments to the Act and the Regulations.
- Study the bylaws and rules for any condo project you are interested in.
- The Financial Institutions Commission website—www.fic.gov.bc.ca [3]—has information on the Act: click on “Strata Property”. But this information is not always up to date.
- Check the website of the Condominium Home Owners Association of BC at www.choa.bc.ca [4].
- The *Condominium Manual* by Mike Mangan is available at public libraries. It has a detailed explanation of condos. Its website (www.CondoManual.ca [5]) also has temporary free access.

[updated September 2014]

References

[1] http://www.bclaws.ca
[2] http://www.crownpub.bc.ca
[3] http://www.fic.gov.bc.ca
[4] http://www.choa.bc.ca
[5] http://www.CondoManual.ca
[6] http://www.dialalaw.org

Co-operative Housing: Members' Rights and Duties (Script 402)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is a housing co-operative?

A housing co-operative, or a co-op, for short, is an incorporated, non-profit association that owns housing for its members. The members are people who want to live in a mixed-income community where they have a voice and a vote in decisions affecting their housing. Co-op housing is a home, not an investment.

What law applies to housing co-ops?

A co-op's "occupancy agreement" is like a lease. It sets out members' rights and responsibilities as residents. The "rules of the association" set out the membership conditions. Both the agreement and the rules must be consistent with the BC *Cooperative Association Act* (the Act).

Who are members?

The people who own and live in a housing co-op are called "members." Normally, a member must be at least 19 years old (although a co-op may allow members as young as 16). A member must also own at least one common share in the association and live in one of the co-op housing units. Members are not tenants, so the BC *Residential Tenancy Act* does not apply to them and they don't pay rent. Instead, they pay a monthly housing charge for the mortgage, taxes, and operating expenses. Some members pay a housing charge based on their income – usually, about 30% of their gross household income. Other members pay a housing charge close to market rates. Together, the members own their housing jointly and control the governance and management of the housing co-op.

What rights do members have?

Members can:

1. attend, speak, and vote at general meetings where major decisions are made, such as changing policies and rules, setting housing charges, and electing directors.
2. elect the members of the board of directors, or run for election as one of the directors – if they want to be more involved in governing the co-op.
3. live permanently in their unit as long as they need the housing the co-op provides and accept membership responsibilities. But if the co-op ends a person's membership, the person must leave the co-op. If they don't, the co-op can apply to the BC Supreme Court for possession of the person's unit.
4. use services provided by the co-op, at as close as possible to the actual cost.
5. withdraw from the co-op or transfer their share in it to another person – with the consent of the co-op's directors.

What if members have a dispute?

Co-ops govern, or look after, themselves. The rules and policies of most co-ops have procedures to solve disputes between individual members and between the association and individual members. Members should follow those procedures to solve disputes. If that doesn't work, they can seek help through arbitration or a court. Arbitration is less formal than a court. A person with a dispute who is no longer a member has only 6 months after leaving the co-op to seek arbitration or go to court. An arbitration decision is final, unless the co-op rules allow a person to appeal to court. If a co-op ends a person's membership, the person cannot use arbitration to appeal that action – they have to go to court, as explained below.

What happens at co-op meetings?

Members of co-ops work together to govern and manage the co-op through an elected board of directors and various committees. The members themselves, as well as the committees and the board of directors, all hold meetings to deal with things like admitting new members, finance, policy-making, and major decisions for members. Co-ops also hire professional management services and contract for other services like bookkeeping and maintenance.

What do members have to do?

Members have to follow the co-op rules, which are made by members. That means members have to:

1. follow the rules on parking, maintenance of the housing, and participation in the co-op.
2. attend general meetings and meetings of any committee they belong to.
3. pay their housing charges and shares in full and on time. All money payable is a debt to the co-op. If a member does not pay, the co-op can put a lien (a charge) on their shares. The co-op can also end a person's membership for failure to pay.

What if two or more people are joint members of a co-op?

Only one of the joint members can be a director at one time and only the person whose name appears first on the share certificate can vote – unless the co-op's rules say otherwise. All joint members are responsible for paying any assessments, levies, dues, fees, payments and other charges relating to membership and the co-op can collect that money from any joint member.

When can a co-op end a person's membership?

A co-op can end (terminate) a person's membership in any of the following cases:

- if the person does not pay rent, occupancy charges, or other money they owe for the use of the premises.
- if the directors believe that the person violated a "material (important) condition" in the occupancy agreement.
- for conduct detrimental to the co-op.

The co-op must first give notice of the problem to the person and give them a chance to correct it. A motion to end a person's membership for one of these reasons needs approval by 75% of all directors in a meeting called for this purpose. The co-op has to give the person notice of the directors' meeting, and let them appear and speak at the meeting. A person whose membership is ended is entitled to a refund of what they paid for their shares, minus any money they owe to the co-op. When a co-op ends a person's membership, the person's occupancy agreement also ends, so they can no longer live in the co-op.

What if a person disagrees with the directors' decision to end their membership?

The person can appeal to the members at the next membership meeting and continue as a member until the appeal is heard. But first, they have to notify the directors that they plan to appeal. And they have to do this within 7 days of when they are notified of the directors' decision to end their membership.

If the members confirm the directors' decision, the person can apply to the BC Supreme Court to rule that the termination of their membership wasn't justified – because the co-op violated principles of natural justice or its decision was not reasonably supported by the facts or authorized under the Act.

There is a 30-day limit to apply to the Supreme Court. People need help from a lawyer before doing this.

When can a co-op end a person's occupancy agreement?

A co-op can end (terminate) a person's occupancy agreement for any breach of the occupancy agreement. The most common reason is non-payment of housing charges. The board must first demand in writing that the person correct the problem. If the person doesn't correct it, the board can pass a resolution by a simple majority to end the occupancy agreement.

When the occupancy agreement ends, the person's membership also ends and they must then leave the co-op. But first they have the appeal right the previous section (on appealing a membership termination) describes.

More information

Check the website of the Co-operative Housing Federation of BC at www.chf.bc.ca [1] or call them at 604.879.5111 in Vancouver and 1.866.879.5111, toll-free, elsewhere in BC. The Federation website has model rules and occupancy agreement, a guide to the model rules, and a guide to the Act. They are under the “Members Resources” link, which is under the “Education” link on the main page. This website also has a link to the Act.

As well, both the *Cooperative Association Act* and *Cooperative Association Regulation* are available at www.bclaws.ca [2] – click on “Statutes and Regulations” and then on “C” in the alphabetical list. Scroll down and click on the name of the Act and Regulation to view them. Some public libraries also have copies of BC laws and regulations.

Finally, check the website of the Community Legal Assistance Society at www.clasbc.net [3].

[updated October 2012]

References

[1] http://www.chf.bc.ca
[2] http://www.bclaws.ca
[3] http://www.clasbc.net
[4] http://www.dialalaw.org

Home Repair Contractors (Script 409)

If you own your own home, chances are that eventually you'll want to do some repairs or renovations. Unless you have the time and skill to do the job yourself, you'll be hiring someone to do it.

Find out if you need a building permit

Before you start any home repair project, check with your city or town hall to see if you need a building permit. Any work requiring a permit must be inspected by the city when the project is finished, so be sure you understand what standards of construction and safety you have to meet. If you live in a condominium, also check the bylaws of the strata corporation to find out if your intended project is allowed, whether you need the strata corporation's approval, and if there are any restrictions.

Get cost estimates

Get more than one estimate, and get them in writing. Most contractors will give a free estimate. You should also ask for each estimate to set out clearly the work to be done and the cost of materials and labour, so you know what you're getting for the money. Remember the 12% HST (Harmonized Sales Tax), and make sure the contractor includes the tax in the price.

How do you choose a contractor?

One thing to consider is the cost estimates that potential contractors give you. But that's not all you should consider. Don't automatically choose the lowest estimate – make sure you get the workmanship and quality of materials you want.

Ask friends if they can recommend a good contractor. Ask contractors for the names and phone numbers of people they've worked for in the past – and check them out. The Better Business Bureau (www.bbb.org [1]) can tell you if there have been any complaints about a contractor. Also, some trades must be licensed or certified by provincial or municipal authorities; others have voluntary organizations that set standards. So look in the phone book to find the appropriate authority or organization – or do an internet search – and then call and verify the status of the contractor you're considering. You should also ask the contractor to give you the names of any sub-trades that they may use on your project – plumbers, electricians, and others – and check them out too. Internet searches will often show user reviews of contractors, which may be helpful.

Get a written contract

Once you choose a contractor, put your agreement in writing. Don't be satisfied with an oral agreement and a handshake. While this kind of contract is legal, it's difficult to prove exactly what you both agreed to. A written contract will help you sort out any misunderstandings right from the start.

Make sure any promises or guarantees are in the written contract

If your contractor makes a promise or a guarantee, include it in your written contract. In some cases, the law will imply certain terms that aren't written down, for example, that the work will be done properly and that the materials used are the proper ones. But in every case, your best protection is a clear written contract.

What about the contract price and payment?

One of the terms in your contract will be the contract price and how you are going to pay it. Unless the job is small, you will likely want a definite price based on a written estimate, rather than an hourly rate that may add up to far more than you want to pay. Also, don't make a large deposit or pay a lot in advance. You don't want to end up paying more than the value of the work and materials you receive. Instead, it's a good idea to pay in installments, as the work progresses. The contract should say that you will make installment payments, and when you will make them. Do a title search of your property to make sure no builders liens have been filed against it by the contractor or any sub-trade or supplier – before you make the final payment.

What other things should be in the contract?

Be sure to clearly express any time deadlines your contractor must meet and what happens if they're not met. As for materials and supplies, remember to put in your contract that you'll pay only for materials used, not for all materials purchased – in case the contractor buys too much. The contractor should also agree to give you receipts for all materials bought.

What should you watch out for?

Be careful of home repair contractors who go door-to-door or ask for large amounts of money up front. If you think you've been unfairly pressured by a door-to-door salesperson or contractor, you may be able to get out of the contract if you act quickly. To learn more about this, check script 255, called "Door-to-Door Sales, Time Shares and Contracts You Can Cancel".

Also, if your contractor tries to charge much more than the estimate, they may be guilty of a deceptive trade practice under the *Trade Practices Act*. If this happens, check script 260, called "Dishonest Business Practices and Schemes". Of course, if you keep changing your mind about what you want done or what materials you want, you should expect to pay more than the original estimate.

What about builders lien holdbacks?

The provincial *Builders Lien Act* requires you to hold back 10% of the contract price, or 10% of each installment payment, for 55 days after the work has been substantially (or mostly) done. This is your protection against claims by subcontractors or suppliers who may not have received their share of the payments you made to the contractor. As long as you hold back 10%, you won't have to pay any more than that to subcontractors and suppliers. To find out more about builders liens, check script 268, called "Builders Liens".

What should you do if you're unhappy with the work?

Once the work has started, if you don't like what's being done, say so right away. The easiest and cheapest way to solve a problem is to talk it over with the contractor first – it could be a simple misunderstanding. If the work still isn't satisfactory, you may have to end the contract and order the contractor off the job. Then if you can't solve the problem by negotiations, you might have to sue.

What if you have to sue?

If your claim is for $25,000 or less, or you're willing to reduce your claim to $25,000, you can sue in Small Claims Court. To learn more about this, check scripts 165 to 169 on Small Claims Court. As well, check the following court websites for more information:

- www.ag.gov.bc.ca/courts [2]
- www.provincialcourt.bc.ca [3] – click on "About the Court" and then on "Small Claims Matters".

Generally, claims for more than $25,000 must be started in a higher court (BC Supreme Court), where you'll want a lawyer.

[updated February 2013]

References

[1] http://www.bbb.org
[2] http://www.ag.gov.bc.ca/courts
[3] http://www.provincialcourt.bc.ca
[4] http://www.dialalaw.org

Residential Tenancy (Script 410)

This script has information on residential tenancy. It does not cover every topic for all tenants and landlords. Instead, it gives other information sources, including the Residential Tenancy Branch – called the **Branch** in this script. This BC government agency administers the *Residential Tenancy Act*, (called the Act) – it's the main law in this area. Both the Act and the Residential Tenancy Regulation are available at www.bclaws.ca [1]. The Branch also provides several important services to tenants and landlords.

What are tenants responsible for?

- Paying rent and other fees in the tenancy agreement on time.
- Keeping the rental unit and common areas clean.
- Repairing any damage they or their guests cause, as soon as possible. This does not include reasonable wear and tear. Also, telling the landlord of any needed repairs or problems, such as mice, cockroaches, or bedbugs.
- Not disturbing other people living in the building or neighbouring property and not letting guests do so either.
- Not putting others in the building in danger and not letting guests do so either.

What are landlords responsible for?

- Making sure the rental unit and the building are reasonably safe, healthy, and suitable to live in.
- Providing a tenancy agreement, condition inspection reports, and giving receipts for rent or other fees paid in cash.
- Doing repairs and keeping the rental unit and building in good condition. If a landlord won't make a necessary repair, a tenant should first talk to the landlord and then make a written request to the landlord to make the repair. If that doesn't work, the tenant should then apply for dispute resolution (explained below). Tenants should not hold back rent or pay for the repairs, hoping that the landlord will pay them back – unless the landlord has agreed in writing to do so.
- Ensuring that the rental unit and building has proper heating, plumbing, electricity, locks, walls, floors, and ceilings (with no water leaks or holes). Maintaining anything included in the tenancy agreement, such as fridge, stove, laundry facilities, garages, and storage sheds. A landlord can take away a service (but not an essential service) if they give 30 days' written notice to the tenant and reduce the rent by the value of the cancelled service.
- Paying the utility bills if utilities are included in the rent.
- Investigating any complaints about a tenant disturbing other tenants.
- Not discriminating based on a person's race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, gender, sexual orientation, age or lawful source of income (this is from section 10 of the BC *Human Rights Code* – check script 236 for details).

What should tenants do before renting a unit?

1. Inspect the rental unit carefully, with the landlord, and make sure it's suitable.
2. Read the tenancy agreement before signing it.
3. Know who the landlord is and get the landlord's full name, address, and phone number (provided on the tenancy agreement).

Condition inspection reports

Landlords and tenants must do an inspection of the rental unit at the start of the tenancy, and then, both the landlord and tenant must complete and sign a Condition Inspection Report – a written record of the condition the rental unit is in. The report should show if the rental unit is not in good condition. For example, there may be stains on the rug or holes in the walls. The report can include photographs. This report can be useful if there is a disagreement later. The landlord must give the tenant a copy within 7 days of the move-in inspection.

At the end of the tenancy, the landlord and tenant must do another inspection and complete another Condition Inspection Report. The landlord must give the tenant a copy of the move-out report within 15 days after the tenant moves out or when they get the tenant's forwarding address – whichever is later. Landlords who don't do the report may lose the right to claim against the security deposit for any damages to the unit or building. Tenants who don't do the report may lose the right to get their security deposit back.

Written tenancy agreements

The Act requires landlords and tenants to use a written tenancy agreement covering several items, such as legal names of both landlord and tenant, address of the rental unit, amount of rent and when rent is due, what the rent includes, start date of the tenancy, and amount of the security deposit. Even if the tenancy agreement does not have a required term, the Act treats the agreement as if it has the term. The Branch website (www.rto.gov.bc.ca [2]) has a sample tenancy agreement.

Security deposits and pet damage deposits

Landlords can require a tenant to pay up to a half-month's rent as a security deposit. But they can't require another deposit if the rent goes up during the tenancy. Tenants should pay the deposit when they sign the tenancy agreement. They have to pay it within 30 days of moving in. If they don't, the landlord can give them a 1-Month Notice to End Tenancy. Tenants should always get a receipt for the security deposit. Landlords have to give a receipt if tenants pay with cash.

Landlords can also require a pet damage deposit of another half-month's rent – but only one deposit, no matter how many pets a tenant has.

Landlords must pay interest on security and pet damage deposits when returning the deposits to the tenant – at the rate the BC government sets each year. The Branch website has a rate calculator.

After a tenant moves out and gives a landlord a forwarding address in writing, the landlord has to do one of the following things within 15 days:

- Return the deposits with interest.
- Ask the tenant to agree in writing to any deductions the landlord wants to keep and then return the rest of the deposits.
- File a dispute resolution application asking to keep some or all of the deposits.

If the landlord does not do any of these things, the tenant may be able to get double the security deposit. If a tenant gives the landlord their written forwarding address within one year of moving out, but the landlord does not return the deposit,

the tenant has 2 years from the end of the tenancy to apply to the Branch for dispute resolution and an order that the landlord return double the deposit.

Fees: both refundable and non-refundable

Landlords can charge a refundable fee for keys and other access devices – but not if the key or access device is the tenant's only way to access the property. They have to repay the fee when the tenant returns the key or device. Section 6 of the Regulation (available at www.bclaws.ca [1]) covers refundable fees.

Landlords can charge a non-refundable fee for things like additional keys, access devices, and garage-door openers and to replace these things. They can also charge a non-refundable fee for certain other things, such as a service charge from a financial institution if a tenant's cheque is returned. Section 7 of the Regulation covers non-refundable fees.

In all cases, the fees can't be more than the actual cost of the items.

How landlords can end a tenancy

Landlords can give tenants a Notice to End Tenancy only for certain reasons – the forms for this are on the Branch website. The tenant can dispute the landlord's reasons. The most common reasons are as follows:

For failing to pay rent – tenants must pay all the rent, on time. If they don't, the landlord can give the tenant a "10-day notice to end tenancy" for non-payment of rent (available on the Branch website). Then the tenant has 5 days either to pay all the rent owing – which cancels the notice – or to apply for dispute resolution. Otherwise, the tenant must move out within 10 days after receiving the notice. If a tenant does neither, the landlord will likely apply to the Branch for an Order of Possession through the Dispute Resolution Process. The Branch may issue the Order of Possession without holding a hearing that the landlord or tenant participate in.

A landlord cannot take a tenant's personal property or lock the tenant out for failing to pay rent. But a landlord can apply for dispute resolution, asking the Branch for an order to get back possession of a rental unit. If a landlord takes a tenant's property, the tenant can apply for dispute resolution, asking the Branch to order the landlord to return the property or pay the tenant for it.

For cause – the landlord must give the tenant one month's notice in this case. The most common cause is repeated late payment of rent. Other common causes are disturbing other occupants; seriously damaging the rental unit or the building; having too many people living in the rental unit; taking part in illegal activity that harms – or is likely to harm – the landlord, building, or other occupants of the building; or breaking a rule in the tenancy agreement and ignoring a landlord's written notice.

For change of use – the landlord must give the tenant 2 month's notice of this. Usually, the landlord or the landlord's family wants to move in, or the landlord sells the rental unit and the new owner or the new owner's family wants to move in. Or the landlord may want to renovate or tear down the building or convert it to condominiums. The tenant is entitled to one month's rent when a landlord issues a 2-Month Notice for change of use.

Rent increases

Landlords can increase rent only once in a 12-month period and only by the amount the Act allows. The amount is listed on the Branch website. Before increasing rent, landlords must give tenants 3 full months' notice using the form called "Notice of Rent Increase – Residential Rental Units," on the Branch website. The landlord must also serve the notice on the tenant in the way the Act requires. The Act allows a landlord to mail the notice and, in that case, the notice is treated as received by the tenant on the 5th day after it is mailed.

Tenant's right to quiet enjoyment and privacy

A landlord can't enter a tenant's home, except in certain cases, such as an emergency, like a fire or flood. Landlords can also come in if they:

- give the tenant between 24 hours' and 30 days' written notice, saying what date and time they want to come in, and giving a good reason, such as doing repairs or showing the unit to potential tenants or purchasers.
- get an order from the Branch to enter the rental unit.
- want to inspect the rental unit; they can do this once a month – if they give proper notice.
- have the tenant's permission.

Except in an emergency, a landlord can come in only between 8 am and 9 pm – unless the tenant agrees to other times. Neither tenants nor landlords may change locks, except in an emergency, or if they both agree in writing.

A landlord can't interfere, or let other occupants or employees interfere, with a tenant's right to quiet enjoyment of their rental unit. Noise, sights, and smells can all interfere with quiet enjoyment. If tenants have noisy neighbours, they can call the police, as well as the landlord. The outcome depends on the municipal noise bylaw where the tenant lives. Some municipalities prohibit noise after a certain time at night.

Tenants can't withhold rent if their landlord or other tenants interfere with their privacy or quiet enjoyment. However, they can apply for dispute resolution and compensation. Tenants can have guests – they're not the landlord's business. But if it looks like the guests have moved in, the tenant may be breaking the tenancy agreement. The landlord may increase the rent – but only if the tenancy agreement allows for a rent increase if more people move into the rental unit. Or the landlord may try to end the tenancy because of an unreasonable number of occupants.

Dispute resolution

Dispute resolution is the process that the Act uses to solve residential tenancy problems. It involves a hearing, like a court hearing, but less formal. Hearings are usually by phone teleconference. Hearings are booked to last one hour. Both landlords and tenants can explain their side of the case and call witnesses to do the same. The time limits to apply for dispute resolution depend on what the type of dispute. The Branch website explains how to apply for dispute resolution, how to tell, or notify, the other side of the hearing, how to prepare for a hearing, and how to ask for review of a decision.

Apply for dispute resolution online or at a Branch office (listed on the Branch website), unless there isn't one near you. Then, apply at a Service BC office, listed at www.servicebc.gov.bc.ca [3]. It costs $50 to apply or $100 if you ask for more than $5000. You can ask the Branch to waive (cancel) the fee if you can't pay. You can also ask the Branch to make the other party (landlord or tenant) pay you back for the fee, if you win the dispute. If you apply for dispute resolution, you will receive an information package that you must serve on (give to) the other side, in person or by registered mail.

A group of tenants with the same problem with the same landlord can apply as a group.

Landlords and tenants can apply to the Branch to review the decision – but only if one or more of the following cases apply:

- they couldn't attend the hearing due to circumstances they couldn't foresee or control.
- they have new evidence not available at the time of the hearing (meaning it did not exist).
- they have evidence that the decision was obtained by fraud.

More information

The following 3 places have more information:

- The **BC Residential Tenancy Branch** at www.rto.gov.bc.ca [2]. Check its guide under “Publications” and then “Guides”. Or call the Branch at 604.660.1020 in the lower mainland, 250.387.1602 in Victoria, and 1.800.665.8779 elsewhere in BC.
- The **TRAC Tenant Resource and Advisory Centre** at www.tenants.bc.ca [4] has the *Tenant Survival Guide*, the *Landlord Guide*, and multilingual pamphlets. Call its tenant infoline Monday to Thursday from 9 am to 5 pm at 604.255.0546 in the lower mainland and 1.800.665.1185 elsewhere in BC.
- The **LandlordBC** at www.landlordbc.ca [5] represents more than 3,300 members who manage over 130,000 residential rental units throughout BC. It provides advice, answers to legal questions, and other services to its members, residential rental property owners, and property managers. You can reach it at 250.382.6324 in Victoria and elsewhere in BC at 1.888.330.6707.

[updated December 2014]

References

[1] http://www.bclaws.ca
[2] http://www.rto.gov.bc.ca
[3] http://www.servicebc.gov.bc.ca
[4] http://www.tenants.bc.ca
[5] http://www.landlordbc.ca
[6] http://www.dialalaw.org

Employment and Social Benefits

If You're Fired - Wrongful Dismissal (Script 241)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

If you have been fired, or dismissed from your job, you may have several important questions such as:

- Can your employer fire you?
- Were you entitled to advance notice that you were going to be dismissed?
- Can you get severance pay?
- Can you sue for wrongful dismissal?

This script answers these and other questions. You should also check script 280, called "Termination under the BC *Employment Standards Act*". It explains how the *Employment Standards Act* (the Act) protects employees who lose their jobs. You may have two separate types of rights: first, your rights under the Act; second, your rights under your employment contract. Your contract rights may be greater than your rights under the Act. But your contract rights to certain things (such as severance pay and notice of dismissal) cannot be less than the minimum standards the Act sets. If they are, you are still entitled to the minimum protections of the Act. And you may have rights under the Act, such as the right to overtime pay, that may not be available under your employment contract. This can be a complicated area and you should get legal advice about your case. The Act is available at www.bclaws.ca [1].

Were you an employee? Were you in a union?

The script applies only to non-union employees – not to partners, contractors, or employees in unions. If you belong to a union, the collective agreement between the union and the employer has rules about terminating employees. If you're a partner or contractor, your contract controls the situation. But many people called "contractors" or "partners" are actually employees under the law. The law focuses on the real relationship between you and the person or organization you worked for, not on what you were called. So, if a person or organization directed and controlled your work, provided the tools and equipment you needed to do your work, and paid you a wage, you were probably an employee under the law, even if you were called a partner or contractor.

Were you fired?

The script applies only if you were fired (dismissed), not if you quit (voluntarily resigned). Employers can fire employees in several ways. Your boss may say, "you're fired." Or your boss may fire you in a much more subtle way and the law recognizes this. Sometimes, even if you quit, the law will say that the employer forced you to quit and actually fired you. This is called "constructive dismissal". To prove it, you would have to show that you had no reasonable choice, other than quitting. That's hard to show. Constructive dismissal may apply if the employer has changed any important part of your job without your consent, such as your pay, your job duties, or your job title.

Were you laid off?

Your employer can lay you off temporarily if there is a work shortage and at least one of the following three situations exist:

- you have a written employment contract that allows for a layoff.
- you work in an industry where lay-offs are standard practice, such as the logging industry.
- you consent to the lay-off.

If neither (a) nor (b) apply to you, and your employer wants to lay you off, you should give the employer a note saying that you do not consent to a lay-off. If your employer still lays you off, it is the same as firing you without just cause (explained in the next section).

If an employer lays you off properly (meaning one of items a, b, or c applies) and does not call you back to work within 13 weeks of your first day off work, it is the same as if the employer fired you without just cause, starting your first day off work.

During a temporary layoff, you may look for another job, but you do not have to if you reasonably expect to be recalled. If your employer reduces your hours in a particular week so that you earn less than half of what you usually earn in a week, that is a week of layoff.

Were you fired for “just cause”?

In most cases, employers can fire employees for “just cause” – without notice, or without pay instead of notice (the next paragraph explains what “just cause” is). Generally, employers can also fire employees without just cause. But in this case, the employer must give the employee notice of the dismissal, or pay instead of notice. There are some exceptions described later in this script.

What is “just cause”?

“Just cause” means a good reason to fire you. It usually means that you did not perform your job duties or you did something seriously wrong, like stealing from your employer or unreasonably refusing to follow your supervisor’s directions. Your employer may have just cause to fire you if you:

- use drugs or alcohol that interfere with your job performance
- ignore a strict workplace rule
- intentionally disobey your boss
- consistently refuse to follow a clearly defined chain of authority
- are disloyal to your employer or put yourself in a conflict of interest; for example, you set up a business to compete directly with your employer
- ignore a clear workplace policy, procedure, or rule
- are dishonest about something important
- are incompetent; for example, if you got a job only because you said you could repair automatic transmissions, and it turns out you can't

These examples don’t cover all the possible cases of just cause.

As a general rule, an employer does not have just cause to fire you if the employer is simply dissatisfied with your job performance. An employer may have to warn you before firing you for just cause and may even have to offer you reasonable job training.

If you are fired without just cause, are you supposed to get notice or severance pay?

Yes. The following sections explain the details.

How much notice?

Your employment contract may say how much notice you get. If not, the contract has an implied term (oral or written) that the employer will give you reasonable notice of dismissal. Either way, an employer gives notice by telling you that your job will end on a particular date. Until that date, the employment contract continues – and so do your and your employer's obligations under the contract.

How much notice is reasonable? It depends on several things including the type of job, how long you had it, your age, whether similar jobs are available, and your experience, training and qualifications. If you had a fixed-term employment contract – for example, a two-year term – the contract controls how much notice you get. In this case, the contract may say the notice period goes to the end of the two-year term. Or it could set a shorter notice period.

You have a duty during the notice period to look for another comparable job. The employer may have a duty, during the notice period, to let you look for another job, so you won't be unemployed when your current job ends.

How much severance pay?

Employees who receive enough notice of their dismissal are not entitled to any pay instead of notice (sometimes called "severance pay"). However, employees who are fired without any, or enough, notice are entitled to severance pay. Severance pay is intended to put you in the same position you would have been in if you had received proper notice. Severance pay includes lost wages and vacation pay. It may also include other employment benefits (like bonuses) that would have been paid during the notice period. If you had a fixed-term employment contract, severance pay is based on the wages and benefits that you would have got until the end of the fixed term, unless there was an early termination clause. In that case, you would get severance pay only until the end of the earlier term. Again, you have a duty to look for other comparable work. If you find such work during the notice period, the employer may try to get some of the severance pay back from you – because you won't be unemployed for the whole notice period that the severance pay covers.

If the employer offers you your old job or a similar job

Your employer may offer you your old job, or a similar job at the same pay. If you refuse that offer, you have to have a very good reason. If not, you may not get severance pay after the date you refuse.

A guide to how much notice and pay

The *Employment Standards Act* (the Act) sets the following minimum amounts for notice (or pay instead of notice) that must be given to an employee dismissed without just cause. If you have worked less than 3 months in a row, the Act does not require any notice or pay. But if you have worked for at least:

- 3 months in a row, you get at least 1 week's notice or pay
- 12 months in a row, you get at least 2 weeks' notice or pay
- 3 years in a row, you get an additional week's notice or pay for each additional year of service, to a maximum of 8 weeks

Under the Act, an employer can give you notice or pay, or a combination of the two, as long as you get the right amount in total.

Can you sue for more?

Yes, you can sue for breach of contract but there's no guarantee you'll win. The notice and pay amounts under the Act are minimums and you may be entitled to more under the law of contract. For example, if you worked six years, you are entitled to six weeks' notice or pay under the Act, but you may be entitled to much more. Courts have awarded between 9 and 18 months of severance pay in many cases. Very senior and long-serving executives have received up to two years' severance pay.

If you are fired and your employer gave you notice or severance pay, you should immediately talk to a lawyer to find out if you got all you are legally entitled to.

If you want only the minimum amounts in the Act, you can contact the nearest office of the Employment Standards Branch at www.labour.gov.bc.ca/esb [2] and phone 1.800.663.3316. It's also listed in the blue pages of the telephone book. But if you file a complaint under the Act and settle your entire claim for "wrongful dismissal", you won't be able to sue for breach of contract.

Be careful about accepting a severance or termination package from your employer without first getting legal advice. You may be giving up important benefits.

Exception: when notice and pay are not required

If you were hired just to do one thing and you've done it, or just for a certain time and the time has ended, then your employment contract has finished and the employer doesn't have to give you notice or pay.

If you think you have been wrongfully fired or dismissed

1. Get legal advice before accepting a demotion or transfer that you think is not fair.
2. Get legal advice before accepting a payment from your employer as full and final settlement if you think you are entitled to more. If you settle your claim with your employer, a court may say you gave up your right to sue. You can take a reasonable time to think things over and get proper advice.
3. Start looking for another job immediately. Even if you later sue your employer and win, you still have a duty to seek new and comparable employment right away. Keep an accurate record of your job-search, including copies of your application letters and e-mails, plus any replies you get.
4. If you think you were fired because of your age, gender, religion, or some other personal characteristic, you may have a separate claim under human rights law. In that case, contact the BC Human Rights Tribunal at 604.775.2000 in Vancouver and 1.888.440.8844 elsewhere in BC. See the Tribunal's website, at www.bchrt.bc.ca [3], for more information. If you worked for the federal government or in an industry regulated by the federal government, like banks, airlines, railways, phone and cable companies, contact the Canadian Human Rights Commission at 1.888.214.1090. The Commission's website is www.chrc-ccdp.ca [4]. For more information, check scripts 270 "Protection Against Job Discrimination" and 236 "Human Rights and Discrimination Protection".
5. Talk to a lawyer immediately to learn your rights and how to protect yourself.

[updated June 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [5].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.bclaws.ca
[2] http://www.labour.gov.bc.ca/esb
[3] http://www.bchrt.bc.ca
[4] http://www.chrc-ccdp.ca
[5] http://www.dialalaw.org

Protection Against Job Discrimination (Script 270)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

The BC *Human Rights Code* [1] prohibits discrimination in employment. The BC Human Rights Tribunal [2] handles discrimination complaints. This script explains how the Code protects you on the job and what you can do if an employer discriminates against you. Also, check the following related scripts:

- 236, called “Human Rights and Discrimination Protection”
- 271, called “Sexual Harassment”

Protection against discrimination in your job

Federal and provincial human rights laws protect you from workplace discrimination. If you are qualified for a job, it is illegal for an employer to fire you, or to not hire or promote you, based on the grounds covered in the Code. In addition, employers are liable for discrimination by their employees. If you’re fired, you may also be able to sue the employer in court for wrongful dismissal.

This script does not explain the Canadian *Human Rights Act* [3], which covers businesses and activities regulated by federal law. These include banks, railways, airlines and airports, phone and cable companies, and the federal government. If your case involves federal law, contact the Canadian Human Rights Commission [4] at 1.888.214.1090. If you don’t know whether to contact the Tribunal or the Commission, contact either of them—they can tell you which one can handle your complaint.

What protection does BC law give?

The BC *Human Rights Code* makes it illegal for employers to discriminate based on any of the following things, called "grounds":

- race
- colour
- ancestry
- place of origin
- political belief
- religion
- marital status
- family status (including family obligations of one person to another, not just parent - child)
- physical disability, including hiv and aids
- mental disability
- sex
- sexual orientation
- age (if you are 19 years of age or older)
- criminal or summary convictions (may include conduct that did not result in a charge or conviction, as long as it is unrelated to the job)
- retaliation (if someone discriminates against you because you complained to the Tribunal)

Discrimination includes decisions based on the fact that you are in one of the protected classes (for example, you weren't hired because of your religion or gender). The ground does not need to be the only or main reason for the decision. It is discrimination if the ground is a factor in the decision.

The *Human Rights Code* also protects you against employment policies or practices that are not obviously discriminatory but tend to place a greater burden on employees who are members of a protected class. For example, a job requirement may adversely affect a person with a disability. The employer must make reasonable efforts to avoid an adverse impact on an employee related to the grounds of discrimination.

The Code protects you in all aspects of employment, including if you are applying for a job, if you already have a job, or if you are denied a promotion in your current job. That means employers cannot use the grounds in the Code (or your involvement in an earlier complaint) to:

- fire you.
- not hire you.
- not promote you.
- discriminate in some other way against you in your job.

Employment agencies and unions can't discriminate against you either. For example, a union can't use any of the grounds in the Code to stop you from joining. And unions cannot discriminate in employment. But this would normally apply only if a collective agreement discriminated (the union negotiated a discriminatory term of employment) or the union impeded an employer's efforts to accommodate.

But a potential employer or your current employer may be able to make job-related decisions (for example, to refuse to hire or promote you) even though it appears that the decision is discriminatory—if the employer can show that it based the decision on bona fide or legitimate occupational requirements. A bona fide occupational requirement is a legitimate job-related qualification where the employer cannot accommodate the protected characteristics without facing undue hardship. For example, a women's health club could probably limit work cleaning a women's locker room while women

are present to a female cleaner, but if the job involved cleaning after hours, it probably could not limit it to females.

Does the Code cover job ads?

Yes. Employers cannot advertise a preference, specification, or limitation based on the grounds in the Code, unless it's a bona fide occupational requirement. Job ads should describe the job and the necessary skills and training, not a certain type of person. Normally, everyone has the right to equal opportunity in the workplace—taking into account only the qualifications for the job, not the grounds in the Code.

Are men and women supposed to get the same pay for similar work?

Yes. Generally, employers must not pay a man more than a woman for similar, or substantially similar, work. The reverse of this is also true: employers must not pay a woman more than a man for similar or substantially similar work. Whether work is similar, or substantially similar, depends on many things, including the skill, effort, and responsibility a job requires. Employers can still pay different wages to different people based on seniority, merit, and productivity.

What about mandatory retirement? Mandatory retirement is prohibited in BC (with exceptions for legitimate job requirements). More on this is available on the BC Ministry of Justice website [5].

What are some examples of discrimination in employment?

Typical examples of job discrimination include an employer:

- changing a term or condition of employment that interferes with an employee's religious beliefs.
- changing a term or condition of employment that interferes with a substantial parental or family duty.
- turning down a woman for a construction job, believing that only men are qualified for that work.
- failing to take reasonable steps to accommodate a deaf employee.
- firing an employee because of a mental or physical disability.
- harassing (or letting other employees harass) an employee over their race, religion, sex or other prohibited ground. An employer is responsible for any discrimination or harassment by employees. For more on sexual harassment, check script 271.
- requiring an employee with a drug addiction to undergo drug testing (unless the employer can justify the testing).

What can you do if an employer discriminates against you?

File a complaint with the BC Human Rights Tribunal [2]. Its website has details. Or you can call it at 604.775.2000 in Vancouver and 1.888.440.8844 elsewhere in BC (also, check script 236, called "Human Rights and Discrimination Protection").

You have to show that the employer's conduct (or the conduct of another employee) had an adverse impact on you and that one of the grounds of discrimination was at least a factor in the adverse impact. If you show that, the employer has to prove their conduct was justified (a bona fide occupational requirement). Write down anything the employer says or does that may be discriminatory. Keep your written record—it may be useful evidence later on.

The Tribunal will review your complaint and if it determines that the complaint may be a violation of the Code, the Tribunal will ask the employer to reply to your complaint. The Tribunal can attempt to help you and the employer settle the complaint. If that is not possible, the Tribunal may hold a hearing. If it decides your complaint is justified, the Tribunal can order the employer to stop discriminating and give you your job back, or give you the right to compete for a job. It can also order the employer to pay you money—called compensation—for lost income (including wages and

disability and other benefits) and expenses. The Tribunal can also order the person or business that discriminated to pay you compensation for injury to your dignity, feelings, and self-respect. In most cases, these damages are under $10,000, but some damage awards have been much higher, over $30.000.

Do you need help filing a complaint with the Tribunal?

The Human Rights Clinic [6] may be able to help you file a complaint with the Tribunal. The Clinic may also be able to help you at a hearing. The Clinic is a project of the BC Human Rights Coalition [7] and the Community Legal Assistance Society [8]. Call the Coalition at 604.689.8474 in Vancouver or 1.877.689.8474 elsewhere in BC.

Do you belong to a union?

If you belong to a union, ask the union to file a grievance about the discrimination by your employer. If the union refuses to file a grievance on your behalf, you can complain either to the Labour Relations Board or the Human Rights Tribunal—if the union refused to file a grievance for you because of some discriminatory reason.

Does the *Employment Standards Act* cover your case?

The *Employment Standards Act* covers some of the same situations as the *Human Rights Code*. But the Employment Standards Branch [9], (which enforces the *Employment Standards Act*) cannot apply the Code. For example, under the *Employment Standards Act*, an employer cannot fire you because you are pregnant. But the Branch cannot give you the same remedy you could get under the Code. Check script 280, called "Termination under the BC *Employment Standards Act*", for more information. It explains how to file a complaint with the Branch.

Can you sue for wrongful dismissal?

If you lose your job because of discrimination, you may also be able to sue in court for wrongful dismissal. Check script 241, called "If You're Fired - Wrongful Dismissal", for more information. But complaining to the Tribunal may work better in this type of case. As well, a wrongful dismissal lawsuit can be complicated and expensive. If you are thinking about suing, get legal advice first.

Have you seen a lawyer?

A lawyer can give you legal advice about your situation. For the name of a lawyer, call the Lawyer Referral Service at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in BC.

Are there time limits for filing a complaint or suing?

Yes, there are time limits in both cases. You have 6 months from when the discrimination occurs to file a complaint with the Tribunal. If you wait longer than 6 months, your complaint may still be accepted if the Tribunal believes it is in the public interest to accept it and no party will be prejudiced because of the delay. There are also time limits for suing in court—you need legal advice about that.

If you complain to the Tribunal and also file a complaint (or grievance) with a union or under the *Employment Standards Act*, or sue the employer for wrongful dismissal, the Tribunal can wait until your other complaints and the lawsuit are finished before dealing with your complaint.

Can an employer make you give up your rights under the *Human Rights Code*?

No. The Code does not let people agree to give up their rights. An employer cannot ask you to sign a contract that says the employer can discriminate against you.

[updated July 2014]

References

[1] http://http://www.bclaws.ca/civix/document/id/complete/statreg/96210_01
[2] http://www.bchrt.bc.ca/
[3] http://laws.justice.gc.ca/eng/acts/H-6/
[4] http://www.chrc-ccdp.ca/
[5] http://www.ag.gov.bc.ca/mandatory-retirement/
[6] http://www.bchrcoalition.org/files/services_a.html
[7] http://www.bchrcoalition.org/
[8] http://www.clasbc.net/
[9] http://www.labour.gov.bc.ca/esb/
[10] http://www.dialalaw.org

Sexual Harassment (Script 271)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Sexual harassment, which is discrimination based on sex, is illegal under the BC *Human Rights Code* (available at www.bclaws.ca [1]). The BC Human Rights Tribunal handles discrimination complaints under provincial laws. This script explains the types of sexual harassment the Code prohibits and what you can do if someone sexually harasses you. Also, check the following scripts:

- 236, called "Human Rights and Discrimination Protection"
- 270, called "Protection against Job Discrimination"

This script does not explain the *Canadian Human Rights Act*, which covers businesses and activities regulated by federal law. These include banks, airlines and airports, phone companies, and the federal government. If your case involves federal law, contact the Canadian Human Rights Commission at www.chrc-ccdp.ca [2] or phone 1.888.214.1090. If you don't know whether the Tribunal or the Commission is the right office, contact either of them – they can guide you.

What is sexual harassment?

Sexual harassment is unwelcome conduct of a sexual nature. Sexual harassment can occur in the workplace or away from it. Employees, tenants, students, and other people can be victims of harassment. It can interfere with an employee's ability to do a job, or create a hostile, intimidating, or offensive work environment. It can affect a tenant's rental housing situation or a student's education.

What is the law on sexual harassment?

The BC *Human Rights Code* protects people from sexual harassment in public services and in rental housing and employment situations. Everyone has the right to be free from sexual harassment in their job and in rental housing situations and services provided to the public generally. If sexual harassment is serious, it may be a crime under the *Criminal Code* of Canada – check script 206, called "Stalking, Criminal Harassment and Cyberbullying". A victim may also be able to sue the person harassing them for damages.

What are some examples of sexual harassment?

Sexual harassment can include the following conduct:

- sexual behaviour that you feel you must accept to keep your job, get a promotion, get a good mark, keep your apartment, or get repairs done.
- unwanted touching, patting, or grabbing (which may also be a crime under the *Criminal Code*)
- the unwanted display of sexual pictures such as pin-ups; employers may be responsible for harassment if they allow some employees to harass others, instead of stopping the behaviour.
- sexual leering, teasing, or telling obscene jokes.
- an invitation to dinner or a movie, or to some other social activity, from a supervisor, teacher, or landlord who implies that you must accept it or face trouble in your job, school, or apartment.
- an unwanted invitation from a supervisor, co-worker, teacher, or landlord that is continually repeated.

But not all invitations are sexual harassment: they can be innocent and reasonable requests that you can accept or reject without any trouble.

What can you do if you are sexually harassed?

1. React immediately and directly, if possible. Sometimes you can talk to the person harassing you. The best response may be to tell the person that you don't welcome or accept the behaviour, and if they repeat it, you will report it. But sometimes, talking to the harasser won't work. The next parts explain what else you can do.
2. If you're an employee, talk to your company supervisor or human resources person. Find out your employer's policy on human rights complaints. If you belong to a union, talk to the union steward. You have a right under the collective agreement between the union and employer to complain to the union about sexual harassment by the employer, a supervisor, or a co-worker.
3. Make and keep a written record of every incident of harassment – when it occurs. Tell someone else, like a trusted co-worker, friend, or family member that you are being harassed. Your written record, and the fact that you told someone, may be important evidence if you file a complaint or sue.
4. File a complaint with the BC Human Rights Tribunal – check script 236 for details. The Tribunal website, at www.bchrt.bc.ca [3], explains how to do this. Phone the Tribunal at 604.775.2000 in Vancouver and 1.888.440.8844 elsewhere in BC. If the Code covers your complaint, the Tribunal will ask the other person to reply to your complaint. The Tribunal will try to help you and the other person settle the case. If that's not possible, the Tribunal may hold a hearing. If your complaint is justified, the Tribunal can make orders to stop the harassment and pay you money – called damages – for lost income (including wages and disability and other benefits) and expenses. The Tribunal can also order the person who harassed you to pay you damages for injury to your dignity, feelings, and self respect.

   The Code prohibits anyone from threatening you for filing a complaint.

   The Human Rights Clinic may be able to help you file a complaint with the Tribunal and help you at a hearing. The Clinic is a project of the BC Human Rights Coalition and the Community Legal Assistance Society. Check the Coalition website at www.bchrcoalition.org [4] or phone 604.689.8474 in Vancouver and 1.877.689.8474 elsewhere in BC.
5. If you lose your job because of discrimination, you may also be able to sue in court for wrongful dismissal. Check script 241, called "If You're Fired - Wrongful Dismissal", for more information. But complaining to the Tribunal may work better in this type of case. As well, a wrongful dismissal lawsuit can be complicated and expensive, so if you are thinking about suing, get legal advice first.
6. Contact a lawyer for legal advice about what you can do. For the name of a lawyer, call the Lawyer Referral Service at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in BC.

Are there time limits for filing a complaint or suing?

Yes, there are time limits in both cases. You have 6 months from when the discrimination occurs to file a complaint with the Tribunal. If you wait more than 6 months, the Tribunal may still accept your complaint if it believes it is in the public interest to accept it and no party will be prejudiced (harmed) because of the delay. There are also time limits for suing in court – you need legal advice about that.

If you complain to the Tribunal and also file a complaint (or grievance) with a union, or sue the employer for wrongful dismissal, the Tribunal may wait until your other complaints and the lawsuit are finished, before dealing with your complaint.

[updated January 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [5].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.bclaws.ca
[2] http://www.chrc-ccdp.ca
[3] http://www.bchrt.bc.ca
[4] http://www.bchrcoalition.org
[5] http://www.dialalaw.org

Farm Workers' Wages (Script 273)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains the rules for farm worker wages (or pay), including minimum wages, how often wages must be paid, overtime pay, farm labour contractors, and payroll records. The *Employment Standards Act* is the provincial law that sets these rules for farm workers not in a union. It's available at www.bclaws.ca [1].

The Act also deals with who is a farm worker, public holidays (also called statutory holidays), vacation pay, and what to do if your employer doesn't follow the rules. For that and other information (on workers' compensation, employment insurance, Canada Pension Plan disability benefits, sexual harassment and discrimination at work), check script 274, called "Farm Workers' Rights".

Who is a farm worker?

A farm worker is a person who works in a farming, ranching, orchard, or agricultural operation. If you are hired to help grow or pick crops, cultivate land, or raise animals, you are a farm worker. You are also a farm worker if you clean, size, grade, box, or package fruits, vegetables, or other crops. But you are not a farm worker if you process food products, breed pets, work in forestry, aquaculture, or in a retail nursery, or work as a landscape gardener.

What is the minimum wage for farm workers?

The BC government sets the minimum wage for farm workers, who can be paid by the hour (or salary or commission) or by the piece, as described next.

1. If you're paid by the hour, or by salary or commission

The minimum hourly wage is $10.25.

2. If you're paid by the piece

The minimum rate for picking certain fruit or vegetables by hand is set by the BC government and depends on the crop. For example, the minimum rate is different for a pound of raspberries than for a pound of beans. A bin of apples and a bin of grapes have different rates.

Both the minimum hourly wage and piecework rates change occasionally – the Employment Standards Branch website lists them at www.labour.gov.bc.ca/esb [2]. Click "Factsheets - Minimum Wage" or click "Specific Industries – Agriculture".

Vacation pay and statutory holiday pay

Farm workers paid by the piece are not entitled to vacation pay since this is included in the piece rate (except for daffodils – the piece rate for them does not include vacation pay). But if you are paid by the hour or by a salary (or you pick daffodils) you are entitled to vacation pay (an extra 4% or 6% or your earnings depending on how long you have been employed) and vacation leave. Regardless of how you are paid, farm workers are not entitled to statutory holiday pay.

Are children paid less?

No. The minimum wage is the same for everyone, regardless of age. Currently, children 12 to 14 years old can work only if they get written consent from their parent or guardian. Children under 12 can work only if they get permission from the Director of Employment Standards.

How often, how, and when must you be paid?

An employer must pay you at least twice a month. A pay period cannot be longer than 16 days. An employer must pay all wages earned each pay period. An exception to this is if you hand pick fruit, vegetable, flower, or berry crops. Then, an employer must pay you 80% of all wages you earn in the first pay period of a month within 8 days of the end of that pay period. They must pay all wages you earn in the month (minus the wages paid in the first pay period) within 8 days of the end of the second pay period. Employers cannot wait until the end of the season to pay you.

If you work for a farm labour contractor, the contractor must pay you by direct deposit to your account at a bank, trust company, or credit union.

If an employer fires you or lays you off, the employer must pay you all wages owing within 48 hours of letting you go. If you quit, the employer must pay you all wages owing within 6 days of when you quit.

Do you get overtime pay?

No, farm workers do not get overtime pay. The law does not limit the hours that farm workers can work, but it does say that an employer cannot let an employee work excessive hours or hours that could harm their health or safety.

Do you get minimum daily pay?

If a farm labour contractor takes you to a worksite and then there is no work, the contractor must pay you for the longer of:

- 2 hours, or
- the time it takes to go from the starting (or departure) point to the worksite and back to the starting point (or to another place no further than the starting point and acceptable to you).

If work is not available because of bad weather or another cause beyond the control of the farm labour contractor, you do not get any minimum daily pay.

If you work for a farm labour contractor

If a farm labour contractor hires you, the contractor – not the farmer – is your employer. Farm labour contractors must have a licence from the BC government and follow certain rules. They must deposit money with the government to ensure that they will follow the rules. The government can use the deposit to pay farm workers hired by a contractor who does not pay them – even though the farmer paid the contractor.

Vehicle safety notice

All vehicles used by farm labour contractors to take farm workers to a job site must have a vehicle safety notice posted in them. The notice says that all passengers must be seated, and in vehicles requiring seatbelts, every passenger must wear a seatbelt.

Can a contractor charge you for gas, travel costs, or GST, or deduct money from your wages for hiring you or finding you work?

No, farm labour contractors cannot do any of these things. As well, contractors must clearly display the wages being paid in 2 places – where the work is done and on all trucks and vehicles used to carry workers. The contractor must also keep a record showing the dates worked by each worker, the crop picked each day, and the volume or weight of crop picked each day by each worker.

Payroll records

Your employer must keep a written record of payroll information about your job. The record must be in English and kept at the employer's principal place of business for 2 years after your employment ends.

The payroll record must include all the following information:

1. Your name, address, telephone number, date of birth, and occupation.
2. The date your employment began.

3. Your wage rate, no matter how you are paid (hourly, piece rate, salary, flat rate, commission or other incentive pay).
4. The hours you worked each day.
5. The benefits paid to you.
6. Your gross and net wages.
7. The amount and purpose of any deductions from your pay.
8. The dates of any vacation you take, the amounts you are paid, and any vacation days and amounts owed to you.

Your employer must also give you a written wage statement every payday showing items 3, 4, 6 and 7 of the payroll information, plus the following 3 things:

- The employer's name and address.
- How your earnings are calculated, if you're not paid by the hour or salary.
- Any money, allowance, or other payment you're entitled to.

Keep your own records of the hours you work and the wages you get. If you think you were not paid enough, your own records will help prove the hours you worked and wages you got.

For more information

Check script 274, called "Farm Workers' Rights", for information on:

- Public holidays
- Vacation pay
- Complaints against an employer
- Workers' compensation
- Employment insurance
- Canada Pension Plan disability benefits
- Sexual harassment and discrimination at work

Check the Employment Standards Branch website at www.labour.gov.bc.ca/esb [2]. Click "Specific Industries" and then "Agriculture", for fact sheets on farm workers and farm labour contractors. The fact sheets come in English, Punjabi, French, and Spanish.

You can also call the Agricultural Compliance Hotline at 604.513.4604. Or phone the Branch at 1.800.663.3316 or 250.612.4100 in the Prince George area. And for the location of the nearest Branch office, check www.labour.gov.bc.ca/esb/contact/welcome.htm [3].

[updated January 2014]

References

[1] http://www.bclaws.ca
[2] http://www.labour.gov.bc.ca/esb
[3] http://www.labour.gov.bc.ca/esb/contact/welcome.htm
[4] http://www.dialalaw.org

Farm Workers' Rights (Script 274)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains the following topics:

- Who is a farm worker
- Public holidays
- Vacation pay
- Complaints against an employer
- Workers' compensation
- Employment Insurance
- Canada Pension Plan disability benefits
- Sexual harassment and discrimination at work

The *Employment Standards Act* is the provincial law that sets working conditions and protects workers not in unions. It's available at www.bclaws.ca [1].

The Act also sets the minimum wages for workers, including farm workers. For information about farm worker wages, check script 273, called "Farm Workers' Wages".

For farm workers, there are no rules about meal breaks, split shifts, hours of work and overtime, or shift-change notices. But rules for maternity, family and other leaves, and rules if an employer fires or lays off an employee, are the same as rules for other employees.

Who is a farm worker?

A farm worker is a person who works in a farming, ranching, orchard, or agricultural operation. If you are hired to help grow or pick crops, cultivate land, or raise animals, you are a farm worker. You are also a farm worker if you clean, size, grade, box, or package fruits, vegetables, or other crops. But you are not a farm worker if you process food products, breed pets, work in forestry, aquaculture, or in a retail nursery, or work as a landscape gardener.

Do farm workers get statutory (public) holidays?

No, farm workers do not get statutory holiday pay or time off with pay for the 10 statutory holidays in BC.

Do farm workers get vacation pay?

Yes. If you're paid by the piece, the piece rate includes 4% vacation pay – unless you are picking daffodils: in that case, the piece rate does not include vacation pay so you get an extra 4% on your pay cheque.

If you're paid by the hour, and you work at least 5 days in a year for the same employer, you get vacation pay of 4% of total yearly earnings. Employers can add 4% of earnings to each pay cheque (if you approve in writing) or pay you a lump-sum when you go on vacation or when your job ends. After one year of continuous employment with the same employer, you also get 2 weeks' vacation. After 5 years of continuous employment with the same employer, you get vacation pay of 6% of total yearly earnings and 3 weeks' vacation.

If you have a complaint with your employer

If your employer does not follow the rules in the *Employment Standards Act*, you can complain to the BC Employment Standards Branch (the Branch). There's no charge to file a complaint. But first, talk to your employer and try to solve the problem. If you can't solve the problem with your employer, talk to the Branch right away.

You can file a complaint with the Branch in any of the following ways:

- fill out the online complaint form at www.labour.gov.bc.ca/esb/forms/esb_comp.htm [2].
- print the complaint form from the Branch website, fill it out, and then mail or fax it, or drop it off at the Branch office nearest you.
- fill out the form at the Branch office nearest you. A list of Branch offices is at www.labour.gov.bc.ca/esb/contact/welcome.htm [3]. You can also request the form by calling the Employment Standards Information Line at 1.800.663.3316 or 250.612.4100 in the Prince George area.

You can tell the Branch you do not want your employer to know that you complained. But normally, the Branch will not be able to keep that information from the employer. It will come out during the investigation.

Is there a time limit for filing a complaint?

Yes – 6 months. When the 6 months starts to count depends on whether you are still an employee.

If you are still working for the employer, you have 6 months from when the problem occurred to file a complaint. Because the Branch can go back only 6 months from when you file, if you delay in filing, you risk losing what you may have been entitled to.

If you are no longer working for the employer, you have only 6 months from your last day of employment to file a complaint with the Branch. The Branch can then recover wages owing from the last 6 months you worked for the employer.

If you miss the 6-month time limit for filing with the Branch, and it does not accept your late complaint, you may be able to sue in court – but only for unpaid wages and severance pay. You cannot sue in court for vacation pay or statutory holiday pay – unless they were in your employment contract. But there are also time limits for going to court – you should see a lawyer in this case.

Workers' Compensation

Workers' Compensation, now called WorkSafe BC, pays workers who are hurt on the job or get sick because of something that happened at work. Employers, including farmers and farm labour contractors, must pay into the plan for all their employees.

If you're hurt on the job, or get sick because of your job, you should immediately:

- report your injury or illness to your employer or someone in charge
- tell your employer and your doctor (if you need a doctor) that you will be claiming Workers' Compensation

Your employer has to send a report to WorkSafe BC to say you've been hurt on the job or you've gotten sick on the job because of your work. If your employer disappears or won't file a report immediately, call WorkSafe BC to report the accident or illness. The number is 1.888.621.7233 Monday to Friday, 8:30 am to 4:30 pm. After hours, call 1.866.922.4357. Don't rely on your employer or doctor to do this.

WorkSafe BC also has rules on occupational health and safety. For more information, check script 285, called "Workers' Compensation" and the Board's website at www.worksafebc.com [4].

Employment Insurance

You may be able to get employment insurance payments if you can't find work or if you are sick or pregnant. You pay for employment insurance with money deducted from your pay cheque.

Farm workers often have trouble getting employment insurance benefits because they may not work enough hours in a year to be eligible. The number of hours you need to make a claim changes, depending on where you live.

Keep your own, up-to-date pay records – they will help if your employer hasn't kept good records. When you leave each job, ask your employer for your "Record of Employment", also known as a "separation slip". You can apply for employment insurance even if you don't have all your employment records from all your employers. Check script 282, called "Applying for Employment Insurance Benefits", for more information. The Canada Employment Centre may be able to help you if you can't get your Record of Employment.

Canada Pension Plan disability benefits

If you paid into the Canada Pension Plan and you develop a severe and long-term disability that prevents you from working, the plan pays you and your dependent children a monthly pension. You can get these benefits until you are 65. Normally, you must have contributed to the Canada Pension Plan for 4 of the past 6 years, but there are many exceptions and you may qualify even if you haven't done this. Call Employment and Social Development Canada at 1.800.277.9914 for more information on Canada Pension Plan disability benefits. Or check its website at www.hrsdc.gc.ca [5] and search for "pensions".

Sexual harassment and discrimination at work

All workers have the right to work free from sexual harassment. Sexual harassment means any unwelcome sexual behavior that affects your working conditions. And all workers have the right to be treated fairly and not be discriminated against. If you have a complaint about sexual harassment or discrimination, you can call the BC Human Rights Tribunal at 604.775.2000 in the lower mainland or 1.888.440.8844 elsewhere in BC. Or check its website at www.bchrt.bc.ca [6]. Also, check script 270, called "Protection against Job Discrimination", and script 271, called "Sexual Harassment".

Appeals

You can appeal most government decisions. There are usually time limits for appeals. Get information about appeals from the government agency whose decision you want to appeal. In the lower mainland and some other communities, you can get help from law clinics run by law students.

For more information

Check script 273, called "Farm Workers' Wages" for the rules on farm worker wages (or pay), including minimum wages, how often wages must be paid, overtime pay, farm labour contractors, and payroll records.

Check the Employment Standards Branch website at www.labour.gov.bc.ca/esb [7]. Click "Specific Industries" and then "Agriculture", for fact sheets on farm workers and farm labour contractors. The fact sheets come in English, Punjabi, French, and Spanish.

You can also call the Agricultural Compliance Hotline at 604.513.4604. Or phone the Branch at 1.800.663.3316, or 250.612.4100 in the Prince George area. And for the location of the nearest Branch office, check www.labour.gov.bc.ca/esb/contact/welcome.htm [3].

[updated January 2014]

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[1] http://www.bclaws.ca
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[3] http://www.labour.gov.bc.ca/esb/contact/welcome.htm
[4] http://www.worksafebc.com
[5] http://www.hrsdc.gc.ca
[6] http://www.bchrt.bc.ca
[7] http://www.labour.gov.bc.ca/esb
[8] http://www.dialalaw.org

Termination Under the BC *Employment Standards Act* (Script 280)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script describes your rights under the BC *Employment Standards Act* (the Act) if your job ends, or terminates – whether you quit or you are fired or laid off. The Act is available at www.bclaws.ca [1]. You may also have other rights under your employment contract and they may be greater than your rights under the Act. Generally, your contractual rights cannot be less than the minimum protections under the Act. Some of your rights under the Act, such as the right to overtime pay, may not be available under your employment contract. Check script 241, called "If You're fired - Wrongful Dismissal". It explains that if you're fired, you may be able to sue your employer in court for breach of contract. That could be instead of, or in addition to, seeking the minimum protections in the Act. In some cases, you cannot do both things – you have to choose. This can be a complicated area and you should get legal advice about your case before deciding what to do.

Were you an employee? Were you in a union?

This script applies only to non-union employees – not to partners, contractors, or employees in unions. If you belong to a union, the collective agreement between the union and the employer has rules about terminating employees. If you're a partner or contractor, your contract controls the situation. But many people who are called contractors or partners are actually employees under the Act. The Act focuses on the real relationship between you and the person or organization you worked for, not on what you were called. So, if a person or organization directed and controlled your work, provided the tools and equipment you needed to do your work, and paid you a wage, you were probably an employee under the Act, even if you were called a partner or contractor.

Lastly, the script applies to most BC workers because provincial law covers them. But it doesn't apply to those who work for the federal government or in an industry regulated by the federal government, like banks and airlines – federal laws apply to them.

Did you quit?

If you quit your job, the Act doesn't require you to give your employer any notice that you're going to quit. But your employment contract (oral or written) may require you to do so. Generally, employees who have higher-level jobs must give some notice; if they don't, their employer may sue them (however, this is a very rare event). The amount of notice depends on several things including the type of job, how long they had the job, and general labour market conditions. Even if you don't have to give notice, it is usually a good idea to do so.

If you quit, your employer must pay you all wages and vacation pay owing within six days of your last workday.

Were you fired?

Employers can fire employees in several ways. Your boss may say, "you're fired". Or, your boss may fire you in a much more subtle way and the Act recognizes this. For example, you may have been demoted without your consent. Your salary may have gone down. Or your boss may have reduced your responsibilities and duties. Usually, if your employer makes any important change in your job without your consent, it may be a dismissal under section 66 of the Act. If an employer fired you this way, the Employment Standards Branch (which enforces the Act) might find that you were fired – even though no one ever said, "you're fired".

What happens if you are fired?

If you were fired for "just cause" – explained in the next section – the Act doesn't require the employer to give you any notice that you are going to be fired, or to pay you anything. But if you were fired without just cause, the Act says the employer must either give you written notice that you're going to be fired – or pay you the wages you would earn in the notice period. These wages are called compensation for length of service, and are sometimes known as termination pay or severance pay. An employer can give you an equivalent combination of notice and compensation. Some exceptions are described later in this script.

If you get written notice of termination, your job continues until the end of the notice period. During the notice period, the Act prevents your employer from changing your conditions of employment without your written consent.

If your employer gives you notice during your annual vacation, while you are on any type of leave, or during a strike or lockout, the notice is not legally valid. The employer must wait until you return to work before giving you written notice of termination.

What is "just cause"?

"Just cause" usually means that you did something seriously wrong, such as stealing from your employer or refusing to carry out a job duty. Your employer may have just cause to fire you if you:

- use drugs or alcohol that interfere with your job performance
- ignore a strict rule of "no alcohol during work hours"
- intentionally disobey your boss
- consistently refuse to follow a clearly defined chain of authority in a tightly-knit business
- are disloyal to your employer or put yourself in a conflict of interest; for example, you set up a business to compete directly with your employer
- ignore a clear workplace policy, procedure, or rule
- are dishonest about something important

There may also be other cases of just cause, and things aren't always as clear-cut as these examples. An employer does not have just cause to fire you if the employer is simply dissatisfied with your recent job performance. An employer may have to warn you before firing you. An employer may even have to offer you reasonable job training.

Some employers may try to avoid giving you notice or compensation by saying there is just cause to fire you, even if there wasn't. If you are fired and the employer says there was just cause, look very carefully at the employer's reasons for firing you to see if there really is just cause. For example, there's no just cause if you are dismissed because your employer is losing money or is reorganized, or because your job becomes redundant or is eliminated by technological change. A personality conflict between you and your boss may not be just cause – it depends on the facts of the case. In all these cases, the employer must give you written notice or compensation.

If you were fired without just cause, the Act says you get written notice or compensation for length of service

How much written notice or compensation?

The Act sets the following minimum amounts for written notice of termination and compensation for length of service. An employer can give you notice or pay (compensation), or a combination of the two – as long as you get the proper amount in total. If you have been employed less than 3 months in a row, no notice or pay is required. But if you have been employed for at least:

- 3 months in a row, you get at least 1 week's notice or pay
- 12 months in a row, you get at least 2 weeks' notice or pay
- 3 years in a row, you get an additional week's notice or pay for each additional year of service, to a maximum of 8 weeks

If your employer gives you pay instead of notice, the pay is based on your average weekly wages during your last 8 weeks of normal work.

If you are fired, your employer must pay all your wages and vacation pay within 48 hours of firing you – no matter why you are fired.

If an employer fires you because of pregnancy, parental or family responsibility, or jury duty, the employer may have to pay you more money unless it can show that it did not fire you for these reasons. In some cases, you can be reinstated, or put back, in your old job – but usually this is not realistic for employers or employees.

Exceptions: other times when notice and pay are not required

An employer can fire you without giving you any notice or pay if you:

- could accept or reject any work the employer offered you
- were hired for a specific period
- were hired for specific work that would not last over 12 months
- were laid off because of something unpredictable like a flood or fire
- worked at a construction site for a construction firm
- refused a reasonable offer of a comparable job with the employer

Exceptions: some people are not covered by the Act

The Act does not apply to people who are:

- professionals such as doctors, lawyers, architects, accountants, and dentists
- real estate agents
- secondary school students in work-study programs
- sitters (defined in the regulations, this can include more than babysitters; for example, someone who looks after a disabled person may be a sitter)
- in certain government incentive programs
- in job creation programs under the Employment Insurance program
- primary or secondary school students working 15 hours or less a week as newspaper carriers
- in industries regulated by the federal government such as banks and airlines

Other people not covered by parts of the Act that deal with termination are:

- student nurses
- teachers
- voluntary and auxiliary fire fighters
- fishers (this term is defined in the regulations)

Rules for layoffs

Temporary layoffs are still considered termination (requiring notice or compensation), unless the employee consents or if there is an implied or explicit term allowing this in the contract. A temporary layoff includes the case where you earn less than 50% of your normal wages because your work hours are reduced. If a temporary layoff is allowed, it can last up to 13 weeks in any period of 20 weeks. After 13 weeks of layoff, the Act considers an employee to be terminated when the layoff started.

Rules if 50 or more employees are fired

If an employer fires 50 or more employees at a single location within a two-month period, special rules apply unless the terminations are part of a normal seasonal reduction in staff. The employees are entitled to more notice or pay – between 8 and 16 weeks more – depending on the total number of employees who are terminated. In this situation, you should contact the Employment Standards Branch.

Summary and where to get more information

If you're fired or lose your job in some other way and don't get written notice or compensation for length of service, the Employment Standards Branch can help you recover compensation and any other unpaid wages owing to you. You can call the information line (1.800.663.3316) or go to the website (www.labour.gov.bc.ca/esb [2]) to find out if you have a right to compensation, and if so, how much. (The Branch has facts sheets on termination, just cause and many related topics.)

You will then probably have to ask for payment from your employer through a Self-Help Kit (though there are some exceptions to this). If your employer doesn't pay you after you do this, you can make a written complaint to the Branch online, in person, or by mail.

But instead, you may be able to sue for breach of contract – for more than the minimum amounts under the Act. Check script 241, called "If You're Fired – Wrongful Dismissal" for more information. You may need legal advice about whether to complain to the Employment Standards Branch or sue for breach of contract, or do both. There is debate in the legal profession about whether you can actually do both. Be very careful about accepting a severance or termination package from your employer without first getting legal advice.

If you think you were fired because of your age, gender, religion, or some other personal characteristic, you may have a separate claim under human rights law. In that case, contact the BC Human Rights Tribunal at 604.775.2000 in Vancouver and 1.888.440.8844 elsewhere in BC. See its website, at www.bchrt.bc.ca [3], for more information. Or if you worked for the federal government or in an industry regulated by the federal government, like banks and airlines, contact the Canadian Human Rights Commission at 604.666.2251 in Vancouver and 1.800.999.6899 elsewhere in BC. See its website, at www.chrc-ccdp.ca [4], for more information. As well, check script 270, called "Protection against Job Discrimination" and script 236, called "Human Rights and Discrimination Protection".

[updated February 2013]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [5].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.bclaws.ca
[2] http://www.labour.gov.bc.ca/esb
[3] http://www.bchrt.bc.ca
[4] http://www.chrc-ccdp.ca
[5] http://www.dialalaw.org

Outstanding Warrants and Welfare (Script 204)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains that, as of June 1, 2010, you cannot get welfare in BC if there is an outstanding warrant for your arrest. It describes when the rule applies and the exceptions to it.

What is a warrant?

A court document that authorizes the police to arrest a person.

What is an outstanding warrant?

A warrant that the police have not acted on – meaning the person has not been arrested.

What is "welfare"?

In this script, welfare means income assistance, hardship assistance, disability assistance, and other types of financial help under the BC Employment and Assistance Program.

How does an outstanding warrant affect welfare?

As of June 1, 2010, if there is an outstanding arrest warrant for you for an indictable or hybrid offence anywhere in Canada, you cannot get welfare in BC. You have to do something about the warrant before you can get welfare. This change is in section 15.2 of the *Employment and Assistance Act* and section 14.2 of the *Employment and Assistance for*

Persons with Disabilities Act. These BC laws, and their regulations, are available at www.bclaws.ca [1].

Indictable offences are the more serious ones, usually under the *Criminal Code or the Controlled Drugs and Substances Act*. They include aggravated assault, theft over $5000, drug trafficking, and murder. Less serious offences are called summary offences. Some offences, such as assault, assault causing bodily harm, theft under $5000, and breaking and entering a non-dwelling house can be either indictable or summary – they are called **hybrid offences**. The prosecutor can choose to proceed either summarily or by indictment in these matters.

The new rule prohibiting welfare payments if there's an outstanding arrest warrant also applies to warrants under the *Immigration and Refugee Protection Act (Canada)*.

These 3 federal laws are available at http://laws.justice.gc.ca/en.

How does the government know if there is an outstanding warrant for your arrest?

You have to say if you have any outstanding warrants when you apply for welfare and when you report monthly as you receive welfare. If you don't tell the truth, you can be penalized and lose payments. You also have to agree that the government can check the information you report.

But you may not know if you have an outstanding warrant. For example, even if there was a warrant for your arrest, it may have been canceled if the prosecutor "stayed" the charge (did not proceed with it). Or you may know there's a warrant, but not know if it's for an indictable or hybrid offence. So the most accurate answer may be that you don't know if there's an outstanding warrant for your arrest. The government can then check for any outstanding warrants for your arrest and what type of offence they are for.

Dealing with an outstanding warrant

How you deal with an outstanding warrant depends on the facts of the case and the offence you are charged with. You have various options. For example, you can call the prosecutor in the location where the warrant was issued to ask if the warrant can be canceled. Or you can go back to that place to deal with it. Or you can talk to a prosecutor in BC about resolving the warrant.

It's important to get legal advice before you decide what to do. For details, check the CLAS website listed at the end of this script.

Appeals

If the government says you can't get welfare or it cuts you off from welfare, you can appeal that decision. First, you ask for a reconsideration. If that doesn't work, you can appeal to the Employment and Assistance Appeal Tribunal. Check script 288, "Income Assistance: Reconsiderations and Appeals", for more information.

If you lose the reconsideration and the appeal, you may be able to get legal help from the Community Legal Assistance Society. Check its website at www.clasbc.net [2]—click on "How to Get Legal Help", then on "Self-help Guides", and finally on "Outstanding Warrants" factsheet.

Exceptions

The family of a person with an outstanding warrant is still eligible for welfare. Children, pregnant women, and people in the end stage of a terminal illness can still get welfare if there is an outstanding warrant for their arrest.

Financial help if you can't get welfare because of an outstanding warrant

You may be able to get a repayable monthly supplement for up to 3 months to avoid undue hardship (or for up to 6 months in exceptional circumstances).

You may also be able to get a repayable transportation supplement so you can to go back to the place where the warrant is outstanding and deal with it.

If the government says you can't get these two supplements, you can request reconsideration, but if that fails no appeal may be made to the Employment and Assistance Appeal Tribunal.

The rules about warrants are complex. For legal advice, consult a lawyer.

More information

Check the following websites about how an outstanding warrant may affect your eligibility for income assistance:

- The BC Ministry of Social Development online resources page at www.gov.bc.ca/meia/online_resource [3]—click on "Verification and Eligibility" and then on "Warrants".
- The Ministry's main page at www.gov.bc.ca/hsd [4]—click on "Appling for Income Assistance".
- Community Legal Assistance Society (CLAS) at www.clasbc.net [2]—click on "How to Get Legal Help", then on "Self-help Guides", and finally on "Outstanding Warrants" factsheet. It has detailed information.

You can apply for legal aid to see if you are eligible for a criminal lawyer to take your case, or at least give you some advice about a warrant.

- Over the phone through the LSS province-wide Call Centre at 604.408.2172 (Greater Vancouver) 1.866.577.2525 (elsewhere in BC), or
- In person through your local legal aid office, see the list of legal aid offices www.lss.bc.ca/legal_aid/legalAidOffices.php [5].
- Also check script 288, called "Income Assistance: Reconsiderations and Appeals" and script 289, called "Financial Help for People with Disabilities".

[updated November 2014]

References

[1] http://www.bclaws.ca
[2] http://www.clasbc.net
[3] http://www.gov.bc.ca/meia/online_resource
[4] http://www.gov.bc.ca/hsd
[5] http://www.lss.bc.ca/legal_aid/legalAidOffices.php
[6] http://www.dialalaw.org

Applying for Employment Insurance Benefits (Script 282)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What are Employment Insurance (EI) Benefits?

Employment Insurance (EI) benefits are temporary payments to people who lose their jobs, are between jobs, or cannot work for various reasons. For example, they may be sick or looking after a sick family member. They may be pregnant or have a new baby.

The EI program is run by the federal government department of Employment and Social Development Canada (ESDC). Its website (www.esdc.gc.ca [1]) has general information, including a link to apply online.

For detailed information on EI, including types of benefits available, how to apply, how much and how long you can collect, how to appeal an EI decision, and the *Employment Insurance Act*, check the Service Canada website at www.servicecanada.gc.ca [2] – click on "Employment Insurance [3]". The "Frequently Asked Questions [4]" (FAQ) section is a good starting point. As well, the "Employment Insurance Digest of Benefit Entitlement Principles [5]" is important. ESDC uses this digest—and the law and regulations—when deciding on EI claims.

You can also call Service Canada at 1.800.206.7218.

Types of EI Benefits

The type of benefit depends on the situation.

- **Regular benefits** are for people who lose their job through no fault of their own—for example, they were laid off. They have to be available and able to work but unable to find a job.
- **Maternity and parental benefits** are for people who cannot work because they are pregnant, or recently had a baby, or are adopting a child or caring for a baby.
- **Sickness benefits** are for people who cannot work because they are sick, injured, or quarantined.
- **Compassionate care benefits** are for people who cannot work because they are away from work temporarily to care for or support a family member who is gravely ill with a significant risk of death.
- **Benefits for parents of critically ill children** are for eligible parents who take time off work to care for their critically ill or injured child.
- **Fishing benefits** are for self-employed fishers who are actively seeking work.

People living outside of Canada can receive benefits if their job is insured under the EI program. As of 2011, self-employed people can get special benefits (maternity, parental, sickness, compassionate care, and parents of critically ill children) if they register and qualify. The script has more on this later.

Service Canada has more on benefit types at www.servicecanada.gc.ca/eng/sc/ei/index.shtml [3].

Can you get EI?

Regular benefits—you can get regular benefits if all the following things apply to you:

1. You lost your job through no fault of your own, for example, you were laid off. If you quit or were fired, you may not be able to collect—it depends on why you quit or were fired. If you had a good reason to quit—for example, you were harassed—you may still be able to collect EI. You need legal advice in these types of cases. If you are taking part in a labour dispute, such as a strike or lockout, you may not be able to collect EI.
2. You paid EI premiums when you worked.
3. You have been without work and pay for at least 7 days in a row in the last 52 weeks.
4. You are ready, willing, and capable of working each day.
5. You are actively looking for work—you must keep a written record of employers you contact, including when you contacted them.
6. You worked the required number of insurable hours in the "qualifying period". This is the 52 weeks before the start of your claim or the time since the start of your last EI claim, whichever is shorter. The number of insurable hours required varies between 420 and 700 depending on where you live and the unemployment rate in your economic region when you apply. If you are new to the workforce or have been out of the workforce for 2 or more years, you may need at least 910 hours of insurable work in the qualifying period.

ESDC can extend the qualifying period up to 104 weeks if you could not work because you were:

1. ill, injured, quarantined, or pregnant, or
2. in jail or penitentiary, or
3. attending an instructional course that esdc sent you on.

A longer qualifying period helps if you haven't worked enough hours in the normal qualifying period—you can count hours you worked more than 52 weeks ago. You have to ask for an extension and show that you are in one of these categories.

You also need at least 490 hours as a member of the labour force during the "labour force attachment period"—the 52 weeks right before the qualifying period. Being a member of the labour force means that you worked or received earnings, benefits, or compensation; participated in an approved training or other program; served a waiting period; or participated in a labour dispute.

Other benefits—different rules apply to maternity, parental, sickness, compassionate care, and fishing cases. The Service Canada website explains them.

How and when should you apply for EI?

You have to apply online (on the Service Canada website) or in person at a local Service Canada office.

Apply for EI as soon as you stop working—even if your last employer pays you severance or termination pay, when your job ends. Don't wait until the severance period ends to apply for EI.

Don't wait until the employer gives you your Record of Employment (**ROE** for short). Employers can issue the ROE electronically to Service Canada or in paper form. The ROE proves you were employed. Ask the employer how they will issue your ROE—if electronically, you don't need a copy. If it's a paper ROE, ask for a copy as soon as your job ends. If you worked for any other employers in the previous 52 weeks, you need an roe from each one.

If an employer does not issue the ROE electronically or give you a paper form, the local Service Canada office can help you. You will have to fill out a form explaining how you tried to get it. You will also have to give other proof of employment, such as pay stubs, cancelled pay cheques, T4 slips, or work schedules.

If you delay in applying for EI beyond 4 weeks after your last day of work, you may lose benefits.

What information do you need to apply?

- Your sin (social insurance number)—if your sin starts with a 9, you have to give proof of your immigration status and a work permit.
- Your ROE (explained above).
- Personal identification if you apply in person (driver's license, passport, or birth certificate).
- Your bank information for direct deposit.
- Details of your most recent employment, including salary before deductions (including tips and commissions, and amounts you will receive such as vacation and severance pay, pension, money instead of notice).
- Your detailed version of the facts—if you quit or were fired from any job in the last 52 weeks.
- If you are claiming sickness benefits, you need to supply a medical certificate saying how long your incapacity will probably last.
- If you are claiming compassionate care benefits, you need to provide a medical certificate saying the person you will be caring for has a serious medical condition with significant risk of death within 26 weeks.
- If you are applying for parents of critically ill children benefits, you need to provide a medical certificate saying that your child is critically ill or injured and requires your care or support.

If you are reactivating an existing claim, you may also have to provide:

- the salary before deductions for the last week you worked, including tips and commissions.
- any other amounts you received or will receive (for example, vacation pay, severance pay, pension payments, pay in lieu of notice, and other money).

When will you know if your EI application is approved?

If your application is approved, you should get your first payment within 28 days of when Service Canada received the application and the required documents. If your application is not approved, they will call or write you to explain why. You can appeal the decision, as this script explains later.

How long is the waiting period?

You don't get benefits in the first 2 weeks of your claim, called the waiting period. Any income you earn then is deducted from your benefits and delays your claim. Income includes vacation pay, severance pay, retirement pay and leave credits, and most bonuses and gratuities. Retirement pensions don't delay the start of a claim, but they are income and reduce benefits—unless you work long enough at another job, after the pension starts, to qualify for EI.

How much will you get?

The maximum weekly benefit as of January 1, 2014 is $514. Most people get 55% of their weekly average insurable earnings, up to a yearly maximum insurable amount. As of January 1, 2014, the maximum insurable amount is $48,600. Earnings include tips and commission and are before deductions. Benefits are taxable income, so taxes are deducted.

Benefits are based on your highest weeks of earnings over the qualifying period, usually 52 weeks. The number of weeks used to calculate your benefits ranges from 14 to 22, depending on the unemployment rate in your EI economic region (listed at http://srv129.services.gc.ca/eiregions/eng/rates_cur.aspx).

You can get more if you are in a low-income family (annual income under $25,921) with children and you or your spouse receive the Canada Child Tax Benefit. Then you can get the Family Supplement (explained on the Service Canada website).

These amounts are based on Service Canada's website as of July 2014. Rates change because they are reviewed each year, so check that website for current rates. Click "Employment Insurance" and then "Employment Insurance Regular Benefits".

EI benefits can be reduced if you receive other income during your benefit period, including:

- pension income from the Canada Pension Plan, the Quebec Pension Plan or a provincial pension plan.
- pension income from employment, including military service or police work—unless you work long enough at another job, after the pension *starts, to qualify for EI.
- damages and interest for wrongful dismissal.
- severance pay.
- callback pay.
- a partial payment of an amount owed.
- self-employment income.

But some other types of income do not affect your regular benefits, including:

- pension payments from a registered retirement savings plan (RRSP) or a registered retirement income fund (RRIF).
- disability pensions.
- survivor or dependant benefits.
- additional voluntary contributions to a pension fund.
- the Old Age Security pension.
- the part of a pension payable to a spouse in a legal separation or divorce.
- a pension paid by Veterans Affairs Canada.

Might you have to repay some EI?

Yes. After you file your tax return, you may have to repay part of the EI benefits you received. It depends on your net income and the amount of EI benefits you received.

How long can you collect EI?

You can get EI regular benefits for a period ranging from 14 to 45 weeks. The number of weeks is based on the unemployment rate in your region and the number of insurable hours you worked in the qualifying period.

You have to claim the EI within a 52-week period, called the "benefit period". ESDC can extend the benefit period up to 104 weeks if you didn't get EI for part of the period because of one of the following cases:

- You were collecting workers' compensation.
- You were in jail.
- You received severance pay.
- Your newborn or newly adopted child was hospitalized, or you were pregnant or breastfeeding and stopped working for your child's health (and as a result, got provincial benefits).

You have to apply to extend the benefit period—it's not automatic. An extension does not increase the total EI you get.

Can you work and still get EI regular and other benefits?

Yes. You can work part-time while receiving regular, fishing, parental, and compassionate care benefits. You must report anything you earn while you get EI. Under a new pilot project called, "Working While on Claim", you can keep 50 cents of your EI benefits for every dollar you earn, up to 90% of your weekly insurable earnings. The 90% amount is called the earnings threshold. Any amount that you earn above the threshold is deducted from your benefits. This pilot project runs for 3 years, starting August 5, 2012.

These amounts can change, so check the Service Canada website for current figures.

You can't work full-time and receive benefits.

Can you leave Canada temporarily and still get EI regular benefits?

Usually, you cannot receive regular benefits while you are out of Canada. But you can receive regular benefits if you show that you are available for work in Canada while abroad, and you tell your local Service Canada Centre that you will be away temporarily.

You can be outside Canada for up to 7 consecutive days to do one of the following things:

- attend the funeral of a member of your immediate family or a close relative.
- accompany a member of your immediate family to a medical facility, if the treatment sought is not readily available where the family member lives in Canada.
- visit a member of your immediate family who is seriously ill or injured.
- attend a bona fide (legitimate) job interview.

You can also be outside of Canada for up to 14 days in a row for a legitimate job search.

Can you work or live outside Canada and still get EI?

If you work outside Canada for a Canadian company or the Canadian government, you are usually eligible for EI, but not if your job is covered by a similar program in the country you are working in.

If you live outside Canada, you may be eligible for some types of EI in certain cases. You may also be eligible if you live in Canada or the United States and regularly cross the Canada/U.S. border between your home and workplace.

The Service Canada website has details on these cases.

What must you do while you get EI regular benefits?

File a report every 2 weeks with HRSDC (on the internet, or by phone or mail) to show your are still eligible to receive benefits. The report must say if you:

- were outside Canada during the report period.
- worked or received earnings, including earnings from self-employment.
- started a full-time job.
- attended school or a training course.
- were ready, willing, and capable of working each day.
- received or will receive any other money.

Check the Service Canada website for what to do if you get other types of benefits.

Can you get EI if you are self-employed?

Yes, as of January 2011, self-employed people can get EI special benefits in some cases (described on the Service Canada website). Special benefits consist of maternity, parental, sickness, compassionate care, and parents of critically ill children benefits. To be eligible, self-employed people must:

- be Canadian citizens or permanent residents.
- register with the government (by signing an agreement).
- operate their own business or work for a corporation but can't get EI benefits because they control more than 40% of the corporation's voting shares.
- wait 12 months after registering.

Is other EI help available?

Starting in July 2010, **Canadian Forces members'** eligibility (benefit) period was extended by one week for every week they could not collect all their parental benefits (in the regular eligibility period) because military service interrupted their parental leave. Details are on the Service Canada website, under the "Employment Insurance Initiatives" section.

Can you appeal an EI decision?

Yes—you can appeal EI decisions. So can employers.

Reconsideration by EI Commission—if you disagree with an EI decision (for example, if they refused your application for benefits), the first step is to ask for a **reconsideration**. The EI Commission will review the decision in your case. There is no cost, but you have to request the reconsideration within 30 days of receiving the EI decision. The EI Commission may allow more time if you have a reasonable explanation for why you missed the deadline.

During a reconsideration, Service Canada will:

- review any new information you provided.
- review the original decision and all relevant information on file.
- do more fact-finding and clarify all discrepancies or contradictions with all interested parties such as you, the employer, and anyone else with information on the case.
- obtain all relevant documents such as contract of employment or other relevant document.
- ensure the evidence and reason supporting the decision are well documented.
- assess all information on the issue.
- ensure the decision is consistent with the law and earlier decisions.

More details on the reconsideration process are available at www.ei.gc.ca/eng/reconsideration.shtml [6].

Appeal to Social Security Tribunal—if you disagree with the result of the reconsideration, you can file an appeal with the Social Security Tribunal of Canada. This new tribunal replaces the previous EI appeal process and is independent from the EI Commission. The Tribunal website (www.canada.ca/en/sst/ [7]) explains the appeal process.

Tribunal's General Division—you have to file an appeal with the Social Security Tribunal's General Division within 30 days of receiving the reconsideration decision. The Tribunal can dismiss an appeal or hold a hearing to assess the merits of it. Hearings can be by writing, phone, videoconference, or in person.

Tribunal's Appeal Division—if you disagree with a decision of the Tribunal's General Division, in some cases you can file an appeal with the Tribunal's Appeal Division. But you need permission from the Tribunal to do this. And you have to file an appeal within 30 days of receiving the General Division's decision.

[updated July 2014]

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[1] http://www.esdc.gc.ca
[2] http://www.servicecanada.gc.ca
[3] http://www.servicecanada.gc.ca/eng/sc/ei/index.shtml
[4] http://www.servicecanada.gc.ca/eng/ei/faq/faq_index_individuals.shtml
[5] http://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml
[6] http://www.ei.gc.ca/eng/reconsideration.shtml
[7] http://www.canada.ca/en/sst/
[8] http://www.dialalaw.org

Workers' Compensation (Script 285)

What is Workers' Compensation?

Workers' Compensation is a government program run by the Workers' Compensation Board of BC and paid for by employers. The Workers' Compensation Board now uses the name "WorkSafeBC." The program is designed to:

- pay workers for some of their lost income and certain expenses if they suffer a workplace injury or disease – regardless of who was at fault – or to pay a worker's family if the worker dies from the injury or disease.
- help injured workers get back to work.
- make and enforce health and safety rules and promote safety in the workplace. As of November 2013, WorkSafeBC policies deal with workplace bullying and harassment. They explain what these terms mean and set out the duties of employers, employees and supervisors to prevent and respond to workplace bullying and harassment. Details are on the WorkSafeBC website at www.worksafebc.com [1].

The *Workers Compensation Act* is available at www.bclaws.ca [2].

Who can get Workers' Compensation?

The program covers almost all workers, both full- and part-time, including office workers, farm workers, performers, and domestic workers. Unregistered labour contractors may also be entitled to benefits. Independent contractors can register with the program for personal optional protection. If they don't do this, they are not entitled to compensation for work injuries or diseases.

If you suffer a workplace injury or disease, you may be able to get one or more of the following benefits.

Types of benefits

1. Short-term disability or wage loss benefits for temporary disability

These benefits pay you, at least partly, for income you lose because of your workplace injury or disease. If you are injured and unable to work, the benefits are usually 90% of your net wages. These benefits pay you for lost income, but only up to a maximum wage (adjusted each year). If you remain temporarily disabled after 10 weeks, WorkSafeBC may recalculate your benefits based on your income in the 12 months before your injury or disease. Wage loss benefits continue until you are no longer temporarily disabled or your condition becomes stable and will not get any better or worse.

2. Long-term or permanent disability and death benefits

If you are permanently disabled, totally or partly, you are entitled to permanent disability benefits. These are paid in one of two ways: a "permanent functional impairment (PFI) award" or a "loss of earnings (LOE) award." Usually, WorkSafeBC pays a PFI award. But if WorkSafeBC finds that a PFI award does not properly compensate you – because your disability reduces your ability to continue working in your occupation to an exceptional extent – it may pay an LOE award. Although a permanent disability award covers permanent chronic pain, it does not cover loss of enjoyment of life, or damage to your clothes or vehicle.

Normally, if benefits are more than $200 a month, they are paid monthly. If benefits are less than $200 a month, you will probably get a lump-sum payout. Even if WorkSafeBC plans to pay you benefits monthly, you can apply for a "commutation" (a lump-sum payout) of all or part of your award. Generally, you won't get a commutation if the benefits are more than $200 a month. You may get a commutation only if it improves your income. And you must have another stable income source, apart from the benefits.

Families of workers who are killed on the job or die from a workplace injury or disease, may qualify for an award and vocational training help.

3. Health care benefits

Health care benefits pay for doctors, hospitals, nursing care, home care, prescription drugs, and other health care professionals like physiotherapists, dentists, and chiropractors. They also cover other expenses, including medical supplies, appliances like crutches, hearing aids, dentures, and eyeglasses, and modifications to home, vehicles, and workplace.

4. Vocational rehabilitation benefits

If WorkSafeBC decides that you cannot return to your pre-injury job because of your injury and your employer cannot offer a modified job, you may be entitled to vocational rehabilitation services. These benefits are for vocational retraining, workplace redesign or job modification, training on the job, and job search activity. If your injury or disease eventually forces you to change your occupation, you should think about your future educational and vocational needs. You should ask WorkSafeBC for rehabilitation guidance to help you plan your future. You have to take charge of your own rehabilitation. If you have a good idea of what you want, you explain it, and it is appropriate, the more likely you are to get it.

How to apply

If you suffer a workplace injury or illness, report it immediately to your employer, your doctor and WorkSafeBC. You can get application forms from your employer, your union, or the WorkSafeBC website at www.worksafebc.com [1]. Call 604.231.8888 in the lower mainland and 1.888.967.5377 elsewhere in BC (free of charge). Your employer and your doctor must report your injury or disease to WorkSafeBC within 3 days of when you tell them about it.

You have only one year from your accident or disease to apply for compensation. After that, you may lose your right to benefits unless special circumstances stopped you from applying on time.

A WorkSafeBC officer will examine your claim and decide if you get benefits, and if so, the type and amount. WorkSafeBC won't decide about any permanent disability until your condition becomes stable, meaning that it stays the same and does not get any better or worse.

Deciding whether you get benefits can be complicated. You should discuss your case with your union, a lawyer, or the Workers' Advisers Office. Workers' Advisers work for the Ministry of Labour and Citizens' Services to help workers

with their claims. They are separate from WorkSafeBC and there's no charge for their service. Their website is www.labour.gov.bc.ca/wab [3] and their phone numbers are 604.713.0360 in Vancouver and 1.800.663.4261 elsewhere in BC.

Reviews and Appeals – if you disagree with the WorkSafeBC decision

If WorkSafeBC decides that you are not eligible for benefits, or if you don't understand its decision, ask the WorkSafeBC officer handling your claim for an explanation. Ask for a decision letter if you didn't already get one. If you're still not satisfied, you can ask the Review Division of WorkSafeBC to review the decision. But you must ask for a review within 90 days of the date of WorkSafeBC's decision letter or, in some cases, within 90 days of the date when WorkSafeBC told you its decision orally. WorkSafeBC should automatically give you a copy of your claim file and you can use the information in it for your review. After you request a review, you will receive a letter setting a time to make written submissions. The Review Division does not normally hold oral hearings.

The Review Division considers the written submissions and WorkSafeBC's file and gives its decision, usually within 150 days. The WorkSafeBC website, at www.worksafebc.com [1], has more information on reviews. The phone numbers for the Review Division are 604.214.5411 in the lower mainland and 1.888.922.8804 elsewhere in BC. At the same time, if you feel that WorkSafeBC has treated you unfairly, you can also complain to its Fair Practices Office and the Ombudsperson of BC (www.ombudsman.bc.ca [4] and 1.800.567.3247).

If you're not satisfied with the decision of the Review Division, in most cases you have the right to appeal to the Workers' Compensation Appeal Tribunal (www.wcat.bc.ca [5]). You must appeal within 30 days of the date of the decision of the Review Division.

For more information

Check the WorkSafeBC website at www.worksafebc.com [1] for more information on workers' compensation and reviews.

Check script 286, called "Appealing a Workers' Compensation Decision", and the Tribunal's website at www.wcat.bc.ca [5] for more information on appeals. Also, check the Workers' Advisers website at www.labour.gov.bc.ca/wab [3] for detailed information on reviews and appeals. Employers should check the Employers' Advisers website at www.labour.gov.bc.ca/eao [6].

[updated February 2014]

References

[1] http://www.worksafebc.com
[2] http://www.bclaws.ca
[3] http://www.labour.gov.bc.ca/wab
[4] http://www.ombudsman.bc.ca
[5] http://www.wcat.bc.ca
[6] http://www.labour.gov.bc.ca/eao
[7] http://www.dialalaw.org

Appealing a Workers' Compensation Decision (Script 286)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

If you think that the Workers' Compensation Board, now called WorkSafeBC, made the wrong decision in your case, or if you don't understand the decision, ask the WorkSafeBC officer handling your claim to explain it. Ask for a decision letter, if you didn't already get one. If you are still not satisfied with the decision, you may request a review, and if you are not satisfied with the decision on the review, you may file an appeal.

Reviews

First, you have to ask WorkSafeBC's Review Division to review the decision – within 90 days of the date of WorkSafeBC's decision letter or, in some cases, within 90 days of the date that WorkSafeBC told you its decision orally or stopped paying you. Because WorkSafeBC routinely communicates some decisions orally, the Review Division will also accept review requests from oral decisions. After you request a review, you will receive a letter setting a time to make written submissions. The Review Division does not normally hold oral hearings.

The Review Division considers the written submissions and WorkSafeBC's file and gives its decision, usually within 150 days. The WorkSafeBC website, at www.worksafebc.com [1], has more information on reviews. The phone numbers for the Review Division are 604.214.5411 in the lower mainland and 1.888.922.8804 elsewhere in BC. At the same time, if you feel that WorkSafeBC has treated you unfairly, you can also complain to its Fair Practices Office and the Ombudsperson of BC (www.ombudsman.bc.ca [2] and 1.800.567.3247).

Appeals

If you disagree with the decision of the Review Division, you can usually appeal to the Workers' Compensation Appeal Tribunal www.wcat.bc.ca [3]). But you cannot appeal decisions of the Review Division on specific issues, such as vocational rehabilitation, commutations, prevention orders (other than penalties), and certain types of disability awards. If you want to appeal, you have to do so within 30 days of the date of the decision by the Review Division. Contact the Tribunal in writing (see address below) or phone 604.664.7800 in the lower mainland and 1.800.663.2782 (toll free) elsewhere in BC.

You can appeal by phone or letter, or you can use the Notice of Appeal form on the Tribunal's website. If you appeal by phone, you have to follow it up with the form within 21 days. If you use a letter or the form, fax them to 604.664.7898 or

mail them to:

WCAT

150 – 4600 Jacombs Road

Richmond, BC V6V 3B1

What the Tribunal does

The Tribunal will send you a letter to confirm that it got your appeal and give you an appeal number. You should always include this appeal number, and your WorkSafeBC file number, in any material you submit. The Tribunal will ask you to make your submissions in writing or tell you the date for your oral hearing. Normally, the Tribunal decides a case within 180 days of when it receives your claim file from WorkSafe BC.

The Tribunal must apply the law and the policies of the WorkSafeBC Board of Directors that apply to your appeal. You should find out what policies apply to your case. You can see previous Tribunal decisions on its website.

Preparing for reviews and appeals

Before you start, see the information guides on the Tribunal's website, at www.wcat.bc.ca [3]. Click on "Information Guides" for detailed information on appeals. Decide whether you want to handle your own appeal or have someone help you. If you are a union member, discuss your case with the union. They may have a representative who can help you, or they may hire a lawyer for you in a serious case. You may want to hire your own lawyer anyway. Make sure the lawyer has experience in workers' compensation.

If you don't get help from a union or lawyer, you should contact the Workers' Advisers Office of the BC Ministry of Labour and Citizens' Services. Workers' Advisers are separate from WorkSafeBC and there's no charge for their service. They can help workers apply for reviews and appeals, and they have detailed information on their website at www.labour.gov.bc.ca/wab [4]. Their phone numbers are 604.713.0360 in Vancouver and 1.800.663.4261 elsewhere in BC.

If you are an employer, you should contact the Employers' Advisers. They provide independent advice, assistance, representation and training to employers, potential employers and employer associations concerning workers' compensation issues. There is no charge for their service. They have detailed information on their website at www.labour.gov.bc.ca/eao [5].

What you need to show

Reviews and appeals are serious. You need to show clearly what's wrong with the decision. You may need new evidence to support your appeal. You may need more evidence than you had when you first made your claim, such as medical evidence from doctors and specialists. It's important to get all the evidence you need, as soon as you can.

Check the Information Guides and your WorkSafeBC file

To prepare your case, in addition to looking at the Tribunal's Information Guides, you should also look at your WorkSafeBC file. You have the right to see it and you should automatically get it when you ask for a review. You will automatically get updated disclosure when you appeal a Review Division decision.

Even if you don't have an active review or appeal, you can request disclosure of your claim file by sending a written request, using a form on the WorkSafeBC website (www.worksafebc.com [1]), to:

Disclosure Department

WorkSafeBC

PO Box 4700 Stn Terminal

Vancouver BC V6B 1J1

Fax: 604 233-9777 or toll free 1 888 922-8807

All your personal information is usually in your claim file, but sometimes other WorkSafeBC records also have personal information. To see these records, under the *Freedom of Information and Protection of Privacy Act*, send a written request to:

Freedom of Information and Protection of Privacy Office

WorkSafeBC

PO Box 2310 Stn Terminal

Vancouver, BC V6B 3W5

Phone 1.866.266.9405

Fax 604.279.7401

You can also see most of your claim file information online on the WorkSafeBC website. You will need your claim number and your personal access number.

For more on this, check script 235, called "Freedom of Information and Protection of Privacy". As well, the *Freedom of Information and Protection of Privacy Act* is available at www.bclaws.ca [6].

For more information

- Check script 285, called "Workers' Compensation", and the Tribunal's website at www.wcat.bc.ca [3], including its Information Guides.
- Check the Workers' Advisers website, at www.labour.gov.bc.ca/wab [4] or Employers' Advisers website at www.labour.gov.bc.ca/eao [5].

[updated January 2014]

References

[1] http://www.worksafebc.com
[2] http://www.ombudsman.bc.ca
[3] http://www.wcat.bc.ca
[4] http://www.labour.gov.bc.ca/wab
[5] http://www.labour.gov.bc.ca/eao
[6] http://www.bclaws.ca
[7] http://www.dialalaw.org

Income Assistance: Reconsiderations and Appeals (Script 288)

What social assistance does the BC Ministry of Social Development provide?

The Ministry provides income assistance, disability assistance, hardship assistance, and supplements to eligible people in need. These payments are sometimes called “social assistance” or “welfare.” They are delivered through the Employment and Assistance Programs. For more on these programs, check the Ministry website at www.hsd.gov.bc.ca/bcea.htm [1].

What laws deal with social assistance, reconsiderations, and appeals?

Two laws govern BC’s social assistance programs:

- The ***Employment and Assistance Act*** **and Regulation** deal with income assistance, benefits for Persons with Persistent Multiple Barriers to employment (PPMB), hardship assistance, and supplements.
- The ***'Employment and Assistance for Persons With Disabilities Act*** **and Regulation** deal with income assistance, disability assistance, hardship assistance, and supplements for people 18 and over who are designated as Persons with Disabilities (PWD).

Both laws are available at www.bclaws.ca [2].

What are your reconsideration and appeal rights?

You can ask for a reconsideration of Ministry decisions that deny, discontinue, or reduce benefits or supplements. For example, you can ask for a reconsideration if the Ministry denies your application for monthly assistance or a supplement. If you disagree with the reconsideration decision, you can appeal it to the Employment and Assistance Appeal Tribunal – in some cases. Finally, if you disagree with an appeal decision, you can ask for judicial review by the BC Supreme Court – but only in very limited cases. So there are 3 levels of review for Ministry decisions on social assistance or welfare.

Three review levels for Ministry decisions

1. Reconsideration by the Ministry
2. Appeal of Ministry decisions to the Employment and Assistance Appeal Tribunal (the Tribunal)
3. Judicial review of Tribunal decisions by the BC Supreme Court

1. Reconsideration by the Ministry – the first review level

If you disagree with a Ministry decision, first discuss it with the Ministry person who made it. If you're still unhappy with the decision, ask for a reconsideration of it. The Ministry will give you a package with a *Request for Reconsideration* form to complete. It's a good idea to get some help completing this form (sources of help are listed at the end of this script).

Not every decision can be reconsidered. But if you are not sure about your case, complete a *Request for Reconsideration* form and give it to the Ministry. A reconsideration officer will tell you if the decision can be reconsidered. The Ministry website has more on this at www.hsd.gov.bc.ca/publicat/bcea/appeal.htm [3].

How long do you have to submit the reconsideration form?

You have to sign and return the *Request for Reconsideration* form within 20 business days from when the Ministry first notified you of its decision. Include any other documents and evidence you need to support your case – but you can't submit any new documents after the decision is made. If you need more time to collect documents, ask for it when you give the signed form to the Ministry. You can ask for an extension of up to 10 business days.

What is a reconsideration or appeal supplement?

If you are applying for reconsideration or appeal of a decision to reduce or cut off your benefits or a supplement, ask the Ministry for a repayable supplement while you are waiting for the result. You have to sign an agreement to repay this money if you lose your reconsideration or appeal.

When is the reconsideration decision made?

A reconsideration officer at the Ministry will review your request and make a new decision about your case. The new decision will be mailed to you within 10 business days after the Ministry receives your signed reconsideration request (or within 20 days if you got an extension). Included with the new decision is a *Notice of Appeal* form to use if you disagree with the new decision and want to appeal it.

2. Appeal to the Employment and Assistance Appeal Tribunal – the second review level

If you disagree with the reconsideration decision, you can appeal to the Employment and Assistance Appeal Tribunal. You must send the Tribunal a completed *Notice of Appeal* form within 7 business days of receiving the reconsideration decision.

Not all reconsideration decisions can be appealed. If you are not sure if you can appeal a reconsideration decision, complete a *Notice of Appeal* form and send it to the Tribunal. The Tribunal will tell you if you can appeal. The Tribunal website has more on this at www.gov.bc.ca/eaat/popt/basis_for_appeal.htm [4].

You can ask the Tribunal to hold your hearing in person, by phone, or in writing. You have the right for an advocate, friend, or other representative to attend the hearing with you.

What is the Tribunal?

The Employment and Assistance Appeal Tribunal is an independent body that hears appeals of Ministry reconsideration decisions. The Tribunal has a Chair, 2 Vice-Chairs, support staff, and several members located throughout BC. The Chair appoints a panel of up to 3 members to hear each appeal. For more information on the Tribunal, and on how to appeal, check its website at www.gov.bc.ca/eaat.

When does the Tribunal hear, or deal with, an appeal?

The Tribunal panel must hear your appeal within 15 business days after it receives your completed *Notice of Appeal*, unless the Tribunal Chair, you, and the Ministry agree to a later date.

You will get notice of the date, time, and place of the hearing at least 2 business days before the hearing date. The Tribunal will send you a copy of all the information the Ministry decision-maker considered in making the reconsideration decision (called the appeal record). You and the Ministry representative get the same material.

What happens at the appeal hearing?

Most hearings are oral and held in person or by phone. You can ask for a written hearing. Both you and a Ministry representative attend the appeal hearing.

You present your side of the case at the hearing. You can do this yourself or have someone help you. Ask at the local Employment and Income Assistance Office, or call the Tribunal, for information about local advocates who can help. Also check with PovNet about an advocate (their contact information is at the end of this script). You cannot present new evidence at the hearing. But you can explain the evidence already on file or provide evidence to support the case you submitted with your Request for Reconsideration. You might also choose to call witnesses and make legal arguments.

The Ministry also gets an opportunity to present its case and call witnesses. You can question the Ministry witnesses, and the Ministry can question your witnesses.

How does the Tribunal decide?

The Tribunal panel first hears all the evidence. Then it decides if the decision you are appealing was reasonably supported by the evidence, and if the Ministry reasonably applied the law (also called legislation) to the facts.

When will you get the Tribunal decision?

The Tribunal panel normally gives its decision to the Tribunal within 5 business days after a hearing. The Tribunal then has 5 business days to send the decision to you.

3. Judicial review by the BC Supreme Court – the third review level

If you are still not satisfied with the Tribunal decision, you can ask the BC Supreme Court to review it, but you'll need a lawyer for this. This level of review is rare. There are deadlines for judicial review, so it's important to act quickly. The Tribunal website has more on this at www.gov.bc.ca/eaat/popt/redress.htm [5].

If you have an advocate, ask them about this option. The Community Legal Assistance Society (www.clasbc.net [6]) and the BC Public Interest Advocacy Centre (www.bcpiac.com [7]) have lawyers who can help with judicial review of some Tribunal decisions.

Where can you get more information and help?

- **Community advocates**: Many places in BC have community advocates who provide free help with welfare problems, including reconsiderations and appeals. PovNet (http://www.povnet.org www.povnet.org) is a website with contact information for advocates across BC. To find an advocate near you, go to www.povnet.org/find-an-advocate/bc [8].
- **Legal Services Society (LSS)**: LSS has a booklet called "Your Welfare Rights: A Guide to BC Employment and Assistance" with information about eligibility for social assistance (including PPMB and PWD benefits and supplements). The booklet is on their website at www.legalaid.bc.ca [9]. Click "Our publications", and then under "I want to find a publication by subject," click "Pensions, benefits, & welfare". Finally, click on "Your Welfare Rights".
- **BC Coalition of People with Disabilities**: The Coalition's website www.bccpd.bc.ca [10]) has many helpful guides on applying for the PPMB and PWD designation, and on appealing decisions. Click on "Library" and then on "Money and Income Supports". You can also ask them to mail you their publications – call 604.872.1278 in the lower mainland or 1.800.663.1278 elsewhere in BC.
- **Ministry of Social Development**: For more information about the Ministry, phone or visit the nearest Ministry office and speak with an Employment and Assistance Worker. For the phone numbers and addresses, call Enquiry BC at 604.660.2421 in the lower mainland, 250.387.6121 in Victoria, and 1.800.663.7867 elsewhere in BC. Or check the Ministry website at www.hsd.gov.bc.ca/bcea.htm [1].
- **Employment and Assistance Appeal Tribunal**: For more information about the Tribunal – including its practices and procedures, and videos of what a hearing looks like – visit its website at www.gov.bc.ca/eaat [11] or call 1.866.557.0035.

[updated February 2013]

References

[1] http://www.hsd.gov.bc.ca/bcea.htm
[2] http://www.bclaws.ca
[3] http://www.hsd.gov.bc.ca/publicat/bcea/appeal.htm
[4] http://www.gov.bc.ca/eaat/popt/basis_for_appeal.htm
[5] http://www.gov.bc.ca/eaat/popt/redress.htm
[6] http://www.clasbc.net
[7] http://www.bcpiac.com
[8] http://www.povnet.org/find-an-advocate/bc
[9] http://www.legalaid.bc.ca
[10] http://www.bccpd.bc.ca
[11] http://www.gov.bc.ca/eaat
[12] http://www.dialalaw.org

Financial Help for People with Disabilities (Script 289)

People with disabilities can get financial help and support from several places. This script explains some of the help available, plus how and where to get more information. It does not list every possible type of help, but it's a good starting point to learn more. Some information appears in more than one place.

Canadian government help and programs

Canada Pension Plan (CPP) Disability Benefit [1]

A monthly CPP disability benefit may be available to people who:

- are under 65,
- stopped working because of a medical condition, and
- paid into the Canada Pension Plan.

CPP Disability Vocational Rehabilitation Program [2]

This program offers vocational counseling, financial support for training, and job search services to people who receive CPP Disability Benefits to help them return to work.

Registered Disability Savings Plan (RDSP) [2]

This federal grant/bond program provides up to $4,500 in free grants/bonds a year, with a savings deposit of $1,500 each year. Anyone under 60 who is eligible for the disability tax credit can establish an RDSP. For a disabled child, the parent or guardian can set up the RDSP. The RDSP is a way for a person or child with a disability and their families to save for the future.

Tax breaks [3]

Several tax benefits are available to people with disabilities, including the disability tax credit. The Canada Revenue Agency website has details.

Federal excise gasoline tax refund [4]

If a medical doctor certifies that a person has permanent mobility impairment and cannot safely use public transport, they can apply for a refund of part of the federal excise tax on the gas they buy.

Disability benefits for veterans [5]

Disabled veterans may qualify for the Veterans Affairs Canada disability benefit—an award or pension. Veterans may also be eligible for other financial support [6], such as the War Veterans Allowance [7].

Employment Insurance compassionate care benefits [8]

People can receive compassionate care benefits for up to six weeks if they have to miss work temporarily to care for a family member who is gravely ill with a significant risk of death. Unemployed people who are already receiving Employment Insurance benefits can also apply for compassionate care benefits.

Persons with Disabilities Online, tax and financial benefits [9]

Click any of 3 headings on this website: "Benefits [10]", "Taxes [11]" and "Loans, Scholarships and Grants [12]". In each one, choose BC as the province for the relevant information.

Income assistance [13]

This site lists many other federal benefits (organized by category), such as:

- Employment Insurance regular benefits
- Employment Insurance (EI) sickness benefits
- Employment Insurance (EI) fishing benefits
- The GST/HST credit for people with low or modest incomes
- The GST/HST general rebates
- Employment Insurance benefits to certain people who live outside Canada if their job is insured under Canada's EI program
- International benefits

Income assistance for people with disabilities [14]

This site lists income assistance and other programs and services for people with disabilities.

CanadaBenefits [15]

The section for people with a disability [16] has a long list of programs and related links. They deal with financial help, employment, education and training, housing, health and safety.

You can also call Service Canada at 1.800.622.6232 to ask about any of this information.

BC government help and programs

BC Employment and Assistance (BCEA) Program [17]

The BCEA program helps adults 18 or over who are designated as a person with disabilities resulting from a physical or mental impairment that significantly restricts their ability to perform daily living activities. Some examples of assistance are:

- monthly support and shelter allowance

- various supplements, including health supplements
- medical coverage
- low-cost annual bus passes
- career planning services
- job training

The BCEA program also offers other help to people with disabilities (including children, adults, and their families). This includes:

- procedural help for 17½-year-olds to apply for the person with disabilities designation so they can receive disability assistance when they turn 18.
- increased assets limit of $10,000 (up from $5,000) based on family unit size.
- increased earnings exemption starting at $800 for a single person family unit and increased for family units of more than 1 person.

You can apply for BCEA online [18].

The Ministry of Social Development and Social Innovation has detailed information on income and disability assistance for persons with disabilities [19]. Or you can call the ministry at 1.866.866.0800.

If you have an outstanding arrest warrant for an indictable or hybrid offence anywhere in Canada, you cannot get income or disability assistance in BC unless you first do something about the warrant. Check script 204, on "Outstanding Warrants and Welfare", for details.

The **Personal Supports website** [20] has information about, and links to, programs that provide equipment, assistive devices, and other personal supports for people with disabilities in BC.

The **Bus Pass Program** [21] offers lower cost, annual bus passes for low income seniors and people receiving disability assistance from BC.

Call **Enquiry BC** to ask about any provincial program. The numbers are 604.660.2421 in Vancouver, 250.387.6121 in Victoria, and 1.800.663.7867 elsewhere in BC.

Financial help for students with disabilities (from Canadian and BC governments)

Canada Student Loans Program—Permanent Disability Benefit [22]

Students with a permanent disability who are having trouble repaying their loans due to their disability can apply to the National Student Loan Service Centre [23] to have their loans forgiven (so they don't have to repay the loan).

Canada student grant for students with permanent disabilities [24]

This program helps part- or full-time students with permanent disabilities with the cost of education.

Canada student grant for services and equipment for students with permanent disabilities [25]

This program helps part- or full-time students with permanent disabilities pay for exceptional education related costs for services and equipment.

Canada student grant for students with dependants [26]

This program helps full-time students with the cost of education if they have dependants 12 or older with a permanent disability. Part-time students [27] are also eligible.

StudentAid BC [28]

This BC government website has information on student loans, grants, and scholarships. It also has programs that help with loan repayment. And you can apply for student loans on the site. Search the site for “disability” to find all the relevant information.

BC assistance program for students with permanent disabilities [29]

This program helps students with permanent disabilities pay for exceptional education-related services and adaptive equipment.

BC supplemental bursary for students with a permanent disability [30]

Various bursaries are available, depending on your course load.

BC access grant for students with permanent disabilities [31]

This program helps full-time students with a permanent disability with the cost of education by replacing about $1,000 in BC student loan funding.

BC access grant for deaf students [32]

This grant helps deaf and hard-of-hearing students with the additional costs while attending specialized post-secondary institutions where curriculum is delivered in American Sign Language.

Youth educational assistance fund for former youth in care [33]

This program provides grants up to $5,500 to former BC youth in care students between 19 and 23 years old. They have to meet several criteria, including being a full-time student or a student with a permanent disability studying at a reduced course load.

Repayment assistance plan for borrowers with a permanent disability [34]

This plan helps you manage your Canada Student Loan and B.C. Student Loan debt by reducing your monthly payment and letting you pay back what you can reasonably afford.

Grants and scholarships that do not have to be repaid [35]

Several BC and federal grants and scholarships listed here are for students with a permanent disability.

Severe permanent disability benefit [36]

This program forgives (or cancels) student loans if you have a severe permanent disability that prevents you from working or going to school, and prevents you from ever being able to repay your loans.

Learning disability assessment bursary [37]

This bursary program helps part- and full-time students with the initial costs of the learning disabilities assessment.

Other help and information

- **The Law Centre** [38]: this clinic in Victoria, run by University of Victoria law students, helps people with disabilities (who cannot afford a lawyer) to get employment insurance, CPP disability benefits, and other benefits. They also help with appeals. Call 250.385.1221.
- **Law Students' Legal Advice Program** [39]: this is like The Law Centre in Victoria, but University of BC law students operate it. Clinics are throughout Greater Vancouver. Call 604.822.5791.
- **The BC Coalition of People with Disabilities** [40]: the Coalition has information on BC disability benefits and Canada Pension Plan Disability benefits [41]. These publications have checklists, help sheets, application guides, and appeal guides. Call 604.875.0188 in Vancouver and 1.800.663.1278 elsewhere in BC.
- **Together Against Poverty Society (TAPS)** [42]: based in Victoria, TAPS offers free legal help for people with income assistance, disability benefits, and tenancy issues. Call 250.361.3521.
- **Legal Services Society (LSS) BC** [43]: LSS provides free legal information. The publication called "Your Welfare Rights: A Guide to BC Employment and Assistance [44]" has information on social assistance.
- **Script 288, Income Assistance: Reconsiderations and Appeals**: this Dial-A-Law script explains that if you apply for or receive monthly income or disability assistance, you have the right to a reconsideration, and then an appeal, of most decisions that deny, reduce, or end that assistance. The script includes a link to the Employment and Assistance Appeal Tribunal (www.gov.bc.ca/eaat [45]).

[updated August 2014]

References

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Credit, Debt and Consumer

Your Bank Account (Script 245)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses your bank account and related service charges, NSF cheques, bank errors, stolen PIN numbers, and joint accounts.

You have a written agreement with your bank

People usually don't think much about their relationship with the bank. But the important details are always set out in writing. When you open a bank account, you typically have to sign a number of forms. One form is usually a signature card, so that the bank has a record of your true signature. For a chequing account, you have to sign a form to obtain personalized cheques. But at least one of the documents you sign contains the terms and conditions by which you agree to let the bank operate your account.

Different banks use different forms of agreement

Most of the agreements contain similar terms, but the only way to find out exactly what you've agreed to is to get a copy of the document from your bank and to read it.

Do you automatically get overdraft privileges?

No. If you have a personal chequing account, you expect your bank to honour your cheques when you write them. But unless you've arranged in advance for overdraft privileges, your agreement likely says that the bank only has to honour a cheque if there's enough money in your account. And if the bank chooses to allow you to go into overdraft, they can charge you interest at a rate determined by the bank. If you've arranged for overdraft privileges, make sure this is recorded in writing. Note that if you pay for goods or services and your bank doesn't honour your cheque because you don't have enough funds in your account, you could end up with a poor credit rating.

What about service charges?

Depending on your account, you may be charged for the cheques you write and for other services that the bank provides. For example, every time you go into overdraft, you may have to pay a certain minimum charge in addition to interest. Or you may have to pay a service charge every time you use a bank machine or ATM (automated teller machine). While your account agreement likely doesn't say specifically what those service charges are, it probably says that you agree to be bound by the bank's general schedule of rates and that the bank may debit your account for any charges that the bank may establish from time to time.

Now, when you open an account, banks must tell you what their service charges are, listed in their information brochures and posted on their websites. So if you're looking to open a bank account, shop around between banks to find the account option that best suits your needs. But remember that most banks will change these from time to time, and if your agreement permits, this will be done without notice to you. Even if your agreement requires the bank to notify you about changes in your service charges, the bank can generally do this by mailing a notice to your address, and they don't need your consent to change these charges.

What about "NSF" cheques?

If someone pays you with a cheque written on another bank account, normally you take that cheque to your own bank to cash or deposit it. Your bank will typically accept cheques drawn on other banks and present them to those other banks for payment – or to be "cleared," as it's called. Unfortunately, sometimes a cheque doesn't clear, and it's returned to your bank stamped "NSF" or "Not Sufficient Funds."

Your agreement with your bank says that the bank can debit your account for the amount of the NSF cheque – whether or not you've cashed it or received the funds. Even if your bank is slow and ignores the normal rules about clearing cheques in a timely fashion, it's usually the customer who gets stuck. In rare cases, where the bank's delay results in a cheque not clearing, you may have a claim against your bank, but even this may be limited or denied by the terms of your agreement.

Read your bank statements carefully

The first that you may learn of a cheque returned "NSF" may be from your statement. Also, in your agreement with the bank, you promise to be responsible for making sure that the statement is true.

What if the bank makes a mistake?

You have a certain period of time to point out that mistake to the bank – normally 30 days from the date the bank mails you your statement. If you don't point out the mistake, you're considered to have agreed that the balance shown in your statement is correct.

The only usual exceptions are if the bank makes a mistake in your favour by putting too much money into your account, or if the mistake is the result of someone forging a signature on your cheque, in which case you should take immediate steps to make a claim.

If a mistake is made, you have to prove it

For this reason, always get a receipt for any deposit that you make, and keep your cancelled cheques and bank statements for a reasonable period of time. If you use a bank machine or ATM, keep the receipts provided by the machine so they can be compared against your account statements. This way, you'll have a record of all of the transactions in your account. Remember that any deposits and transactions made at a bank machine on a weekend or holiday are processed on the branch's next banking day.

Note that ATM receipts aren't considered proof of actual deposits to your account. Only a bank teller receipt or copies of the actual deposited cheques are accepted as evidence of a deposit.

What if someone uses your PIN or bank machine card?

When you have a bank machine card and "personal identification number" or PIN, you're responsible for all amounts withdrawn from your account through the authorized use of your card. So if you lose your card or find out that someone has stolen your card or PIN, phone the bank immediately. Most agreements require you to phone within 24 hours.

You normally won't be responsible for the unauthorized use of your card and/or PIN after you've advised the bank about the loss or theft. But you must not have "knowingly contributed" to the unauthorized use, for example, by lending your card to a friend to withdraw money on a particular occasion. And you must have been careful to keep your PIN separate from your card.

For more information about bank cards, refer to script 246 on "Buying Goods on Credit, Credit Cards and Credit Bureaus".

How does a joint account work?

If you have a joint account with one or more people, depending on how the signature card is signed, you agree that the bank can pay out funds on a cheque or withdrawal signed by any of the account holders. This means that if the account is overdrawn, the bank can demand repayment of the full amount from anyone who has signed the signature card. If you end up paying more than your share of the overdraft, then it's up to you, not the bank, to get the difference from the other account holders.

What happens if you don't use your account?

The federal *Bank Act* says that if you haven't used your account for ten years or more, any money left in it must be transferred to the Bank of Canada. For more information on this point, call 1.800.303.1282 and ask for "Unclaimed Balances" or email ucbalances@bankofcanada.ca [1].

What should you do if you have a complaint?

First, discuss the problem with your bank's branch manager. If you're not satisfied with the response, contact the bank's head office. You can get a contact name and telephone number by calling the Office of the Superintendent of Financial Institutions (OSFI) at 1.800.385.8647. OSFI is the federal government agency that supervises and regulates Canadian banks. Their website is www.osfi-bsif.gc.ca [2]. If you're still dissatisfied, you may contact the Ombudsman for Banking Services and Investments at 1.888.451.4519. Their website is www.obsi.ca [3]. Of course, if you have a legal problem, you may need to consult a lawyer.

Where can you find more information?

- See the manual Consumer Law and Credit/Debt Law [4] published by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [5]. To find it, click "Our Publications" then under "I want to find a publication by subject," click "Consumer & debt". This manual is for paralegals, legal information counsellors, and lawyers with clients who have consumer/debt problems.
- The federal *Bank Act* is available online at http://laws-lois.justice.gc.ca/eng.

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Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [6].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

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Buying Goods on Credit, Credit Cards and Credit Bureaus (Script 246)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Many people can't pay cash for consumer goods like a new car or a major appliance. They get a loan or use a credit card so they can buy now and pay later. But if they can't make their payments, they face legal problems and their credit rating is often affected. People also worry if their credit card is lost or stolen and used by others. This script discusses these issues.

What does it mean to buy something on credit?

Say you want to buy a piano, so you agree with the seller to pay for it over two years, with interest. You get the piano immediately, but the seller still owns the piano until you make all the payments. Or say that you want to buy a new car, but the dealer won't finance it or you want to deal with your own bank. So you apply for a bank loan and sign an agreement where the bank pays the dealer for the car, and you pay the bank back for the cost of the car, plus interest, over a certain number of months. In both cases, you are buying something on credit.

When you buy something on credit, you typically sign a "security agreement"

The specific agreement may be called any number of things, like a "conditional sales agreement" or a "chattel mortgage" or a "lease with an option to purchase". But the type and name of agreement aren't important because they all work in a similar way. Basically, the agreement will say that you give the seller or lender a "security interest" in the goods as security for what you still owe – like when you give the bank a mortgage on your house.

The only exception is where you have a true lease, usually relating to a car or a large piece of equipment, where you pay monthly for the right to use it. In this case, you have no ownership rights in the item at all, and under the lease agreement, you would have no right to buy the item at the end of the term, although you do have the right to use the car during the lease term.

What rights does the seller or lender have under a security agreement?

Generally speaking, a lender can take back the item secured, sell it and still look to be paid any deficiency. But "consumer goods" are treated differently. Consumer goods are things used or bought for use primarily for personal, family or household purposes. If you default (or stop making payments) on a security agreement for consumer goods, the seller or lender generally has to choose either to seize (or take) the goods or sue you for what you owe. The seller can't do both.

What happens if you've almost paid all your debt?

With consumer goods, after you have paid back two-thirds of the loan, the lender cannot seize the goods. In BC, once a consumer has paid back two-thirds of the total value of a loan (excluding a mortgage), then the lender or creditor is no longer entitled to seize the item without going to court and obtaining a court order.

What happens if the seller or lender seizes the goods?

Consider the piano example, where you've agreed to pay for the piano over two years. After one year, your employer lays you off and you can't make the payments. The security agreement lets the seller come to your home and seize the piano. The seller chooses to seize the piano but, by law, cannot sell it until giving you 20 days "notice of disposition" and waiting until the end of the 20 days. Section 59 of BC's *Personal Property Security Act* lists all the information the seller must give you in the notice.

In response (and assuming the goods seized are consumer goods), you may bring your account up to date, or "reinstate" the security agreement, by paying, within 20 days, the amount in arrears plus the seller or lender's reasonable costs of seizure. If you reinstate the security agreement, you get the piano back. You also have the right in any situation to pay the balance of your full debt to get the piano back.

But if you don't pay the amount due in the seller's notice within 20 days, the seller can either sell the piano or keep it.

If the seller chooses to sell the piano, then they owe a duty to you to use commercially reasonable means to get a reasonable price from the sale of the piano. This doesn't mean they have to advertise in every paper from here to Calgary, but they must use reasonable efforts to try and sell the piano for a fair market price. After the sale, any amount left over after the seller is paid must be returned to you.

There are four important points to note about seizures:

- If you've paid at least two-thirds of the total price, a seller needs a court order before seizing the property.
- Sellers who seize property must give you a "notice of proposal" if they plan to keep it. You then have 15 days to give them a "notice of objection" if you don't want them to keep the property, and they must then sell it.
- A seller who seizes and sells the property but doesn't recover the full amount you owe, cannot sue you for the rest of what you owe (if the goods are consumer goods).
- From the sale money, the seller can keep the amount you owe, plus reasonable costs to seize, store and sell the property, but must then return any left-over money to you, or in some cases, to your other creditors.

What about credit cards? What law protects you?

BC's *Business Practices and Consumer Protection Act* protects the public in two ways. The Act controls unsolicited credit cards – the ones sent to people who didn't apply for them – and it also limits the responsibility of people whose cards are lost or stolen.

You don't have to accept unsolicited credit cards you never asked for If you get this type of card, you don't have to accept it, and if you don't, you aren't responsible for it. However, if you use an unsolicited credit card, you are telling the sender that you're accepting it, and you're then responsible for what you buy with it.

What happens if you lose your credit card or it's stolen?

The *Business Practices and Consumer Protection Act* says that you don't have to pay for anything bought with your lost or stolen credit card after you tell the card issuer, such as VISA or MasterCard, that it's lost or stolen. You can tell the issuer by phone or by registered mail. If someone uses your card before you report it lost or stolen, the Act limits your liability to $50 – even if your agreement with the credit card issuer says differently. In cases of theft, many card issuers don't even charge the $50, in the interest of good customer relations.

What if you let someone use your credit card?

If you let someone use your card, then later change your mind and say they can't use it, things are different. For example, say you give your card and personal identification number or PIN to a friend or relative to pay your bill at a bank machine. Later, without your authorization, that person uses your credit card and PIN to get cash advances from a bank machine. You're responsible for this debt.

Bank and debit cards are treated differently than credit cards

Bank and debit cards aren't covered by the *Business Practices and Consumer Protection Act*. So you're not protected by the $50 limit if someone steals your bank or debit card and PIN and uses them to get money from your account.

What about credit reporting agencies (sometimes referred as to credit bureaus)?

BC has two laws that regulate the use of personal credit information. Both the *Business Practices and Consumer Protection Act* and the *Personal Information Protection Act* control how credit bureaus handle personal credit information (such as your marital status, approximate income, and assets and debts owing) and also protect your privacy by controlling access to that information.

No one can ask for a personal credit report on you without your consent

Normally, when you seek credit, you agree that the lender can get your credit report – even if you don't realize you're agreeing to this. Application forms for loans, credit cards and jobs usually have small print saying that you authorize any credit bureau to give a credit report on you. But there are situations where your credit information can be released to law enforcement agencies, the courts (by court order) or the director of credit reporting without your apparent consent.

The two major credit bureaus in Canada are Equifax and Trans Union Canada

They collect personal credit information and sell it to banks, department stores, employers and others, and you have the right to know what information they have on you. Usually, both agencies have similar information, so if you want to check your credit rating and history, you probably only need to check the records of just one of them. The toll-free phone number for Equifax is 1.800.465.7166 and its website is www.consumer.equifax.ca [1]. Trans Union Canada's toll-free phone number is 1.800.663.9980 and its website is www.transunion.ca [2] (search under the "Personal tab).

Some kinds of information can't be included in a credit report

A credit report can't show:

- information about a criminal offence (unless you've been convicted of it)
- information about a criminal conviction, once six years have passed since the conviction or since your release or parole if you were in prison
- information about race, religion, ethnic origin or political affiliation
- information about a bankruptcy, if it's been more than six years since the discharge, unless it's a second bankruptcy

You have the right to correct any inaccurate information in your credit file

If you think something in your file is wrong, you can send a letter about the error, and the credit reporting agency must take reasonable step to check the information and respond to you within 30 working days. If you're right, they have to correct it as soon as possible. They also have to send a correction to everyone who received a report on you in the past year. If the agency doesn't make the correction you asked for, they have to make a note to your file that you asked for the information to be corrected, so anyone who gets a future report will see this note. Also, if there's anything in your file that you think should be explained, you have the right to place a statement of up to 100 words on the file, to be given to anyone who obtains a future report.

Where can you get help or find more information?

- See the manual Consumer Law and Credit/Debt Law [3] published by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [4]. To find it, click “Publications” then under “I want to find a publication by subject,” click “Debt.” This manual is for paralegals, legal information counsellors, and lawyers with clients who have consumer/debt problems.
- You can also contact Consumer Protection BC. Call 1.888.564.9963 toll-free. Their website is www.consumerprotectionbc.ca [5].

[updated February 2013]

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Co-Signing or Guaranteeing a Loan (Script 248)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

People often co-sign or guarantee a loan for a friend or relative without knowing what can happen. If they knew, they might not co-sign or guarantee the loan. This script explains:

- the difference between co-signing and guaranteeing a loan
- the different types of guarantees
- the legal result of co-signing or guaranteeing a loan

Guaranteeing and co-signing a loan are often similar

In many cases, if you guarantee a loan for someone who borrows money (called the debtor), the lender must first demand payment from the debtor, before going after you, the guarantor. But if you co-sign a loan, you are just as responsible to pay the loan back as the debtor is. So the lender can demand payment from you before, or even instead of, demanding payment from the debtor. It's important that you review the guarantee or co-signing documents carefully before signing. These documents are often drafted so that there is little difference between the two. The result is that guaranteeing a loan often carries with it similar obligations and responsibilities as co-signing a loan.

There are different types of guarantees

They include:

- a specific or limited guarantee
- a continuing guarantee
- an all accounts guarantee

Before you sign a guarantee, you should find out what type of guarantee you are signing. A guarantee document may contain one or more of these guarantee types.

What is a "specific guarantee" or "limited guarantee"?

A specific or limited guarantee means you agree to pay (or be liable for) a certain amount for a specific thing. For example, if you guarantee a car loan for a fixed amount of $10,000, you'd be responsible for paying the car loan of $10,000. Or if you decide to guarantee your child's purchase of a business, the lending vendor or bank may ask you to guarantee a specific amount of the associated debt or limit your guarantee to a certain figure.

What is a "continuing guarantee" or "limited guarantee"?

A continuing guarantee means you agree to pay a particular type of loan as long as the guarantee lasts. For example, you guarantee the operating line of credit for your spouse's business. The line of credit may be at zero or at the maximum amount. It usually goes up and down with the cash flow and profitability of the business. But you're responsible for everything owing until the guarantee ends and the entire debt is paid.

What is an “all accounts guarantee”?

An all accounts guarantee means you agree to pay any amounts the debtor owes to the lender, including amounts that you may not know about. The loan agreement may let the debtor borrow more, and you’ll be liable for those amounts too. You’re also liable for things called “contingent liabilities,” such as the lender’s costs to collect the debt, which may include the full amount of any reasonable legal and other fees. Lending companies use this type of loan agreement most often.

What can happen if you co-sign a loan?

If your son borrows money from a bank to buy a car and you co-sign his loan, things are fine as long as he makes all his payments on time. But if he can't make a loan payment, the bank can “garnish” (or take money from) your bank account before you know anything about it.

For more information on garnishment, refer to script 251 on “Garnishment”.

What can happen if you guarantee a loan?

In this example, if you guarantee the loan instead of co-signing it, you may still have to pay the full amount. But usually, the bank has to first demand payment from your son before getting it from you.

What if you or the borrower pledges something for the loan?

Say your son used (or pledged) the car he’s buying as security for his car loan, with a security agreement. If he can’t make a loan payment, the bank can seize the car. If the bank does that, you’re not responsible for anything more. The bank can’t sue after seizing the car, even if the car is worth less than the amount of the loan still owing. But if you pledged something as security for the loan, the bank can seize what you pledged, instead of going after your son or seizing what he pledged.

Be aware of acceleration clauses

Most loan contracts have an acceleration clause. It lets the lender demand immediate payment of the whole loan – not just the “arrears” (or missed payments) – if the borrower breaks any part of the agreement. So just one missed payment could mean you have to pay the whole loan immediately.

Also be aware of the risk of future borrowing

A major risk if you co-sign or guarantee a loan is that you may be responsible for additional money that the debtor may borrow later. In standard loan forms, a clause makes you responsible for both the loan, and any other amounts the debtor borrows from the same lender in the future, plus the lender’s costs to collect the debt. This is true even though you may not know anything about the debtor borrowing more. So if you co-sign or guarantee a loan, put a ceiling or an upper limit in the loan contract to limit how much you could be responsible for.

Your credit rating could be affected

Even though the loan is made for the benefit of the person you are helping, if that debt goes into arrears, a negative entry may be added to your credit report. This is usually more of a concern if you are a co-signer, where you are jointly responsible for the debt – any default on the debt can have an immediate impact on your credit rating. With a guarantee, because the guarantor generally isn't liable until repayment has been demanded, your credit rating may only be affected if you don't repay the debt when demanded by the creditor.

You can become a guarantor even though you don't sign anything

Guaranteeing a loan or other debt obligation doesn't always need your signature. One example is a secondary credit card, where a second person is given use of their own card on the primary card holder's account. The credit card's terms of service often say that the first time the secondary card holder uses the card, they are guaranteeing any and all subsequent debts on the credit card.

Another example involves small business loans. Often the loan agreement says that the person making the agreement on behalf of the company is also acknowledging that they are personally guaranteeing the debt. No separate signature or acknowledgement is required – the one signature you make on behalf of your company is deemed to also bind you personally.

Before you co-sign or guarantee a loan, read the document carefully

Sometimes it's necessary or helpful to co-sign or guarantee a loan. It may be a sound business deal, or it may help a family member. But before you agree to put yourself at risk, look at the situation carefully. Ask questions like:

- Why does the lender require a co-signer or guarantor?
- How high is the risk that the borrower will have trouble and you'll have to pay the loan?
- What will happen if you don't sign?
- Most importantly, can you afford to pay off the loan if the borrower can't?

If you're not sure about your responsibility, or about anything else in the loan contract, get advice from a lawyer. If you decide to co-sign or guarantee a loan, ask the lender in writing to keep you informed in writing of all activity on the loan. This can help you see a problem developing and correct it before it's too late. You should also insist on a copy of every document you sign.

What should you do when the loan is paid off?

If you guaranteed the loan, you want to be absolutely sure that you don't remain liable on your guarantee after the original loan has been paid off. To protect yourself, insist on the lender returning the original guarantee to you after the loan has been repaid in full.

Where can you find more information?

See the manual "Consumer Law and Credit/Debt Law [1]" published by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [2]. To find it, click "Our Publications" then under "I want to find a publication by subject," click "Debt". This manual is for paralegals, legal information counsellors, and lawyers with clients who have consumer or debt problems.

[updated September 2013]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [3].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.legalaid.bc.ca/publications/pub.php?pub=17
[2] http://www.legalaid.bc.ca
[3] http://www.dialalaw.org

Collection of Debts (Script 250)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is a debt?

Say someone owes you a fixed amount of money. That is a debt. A debt is an obligation owed by a debtor to a creditor. It may relate to an agreement to repay a fixed amount of money (for example, a loan) or an agreement to pay for goods or services. This script deals with these kinds of debts. But it doesn't deal with other types of debts, for example, relating to landlord and tenant obligations, family law situations and mortgages.

Is it worth trying to collect your debt?

No one enjoys collecting debts, but sometimes it's necessary to take decisive action to recover money from someone who owes you it. But first, you should decide whether to proceed at all. If the debt is small, or if the debtor is bankrupt or unlikely to be able to repay anything, you should consider abandoning your collection efforts. The effort necessary to collect the debt and get the debtor to repay you may not be worth the trouble.

If you want to proceed, what are your options?

You can:

- hire a collection agency
- pursue the collection yourself
- hire a lawyer to help you

You cannot harass the debtor

Whatever you decide, you can't try and take the debtor's property (except through proper legal proceedings), and you can't harass the debtor. Refer to script 252 on "Harassment by Debt Collectors" to learn more about this.

How much will a collection agency or lawyer cost?

Collection agencies often charge between 25% and 50% of the amount they recover. Lawyers often charge between $150 and $350 an hour, plus expenses. Neither can guarantee that they will be successful in recovering anything.

There's usually a two-year time limit to start a lawsuit to collect a debt

This two-year limit applies to most debts that become due after June 1, 2013. If you don't start proper legal proceedings within this time frame, you'll likely lose your right to collect the debt. There may be a longer time limit for some debts that became due and were owed before June 1, 2013. If the time limit is coming up soon for a debt owed to you, and you want to preserve your right to collect, you should start legal proceedings as soon as possible.

Gather the facts and the evidence

You should gather information and documents relating to the debt. This includes:

- the name and contact information of the debtor and any other person or company responsible for paying the debt
- how and when the debt arose
- the ability of the debtor to pay
- the reason, if known, why the debt hasn't been paid

The information and documents will help with collecting the debt.

Start by contacting the debtor yourself

A telephone call, an email to a private email address or a text to a private number is often the best first step. Remind the debtor of the debt and ask what steps the debtor can take to pay the debt and avoid legal proceedings. If the debtor agrees to make payments based on a payment schedule, you should get the debtor to date and sign a written agreement or letter confirming this. Note that any discussions or negotiations with the debtor don't usually extend the time limit for starting legal proceedings, so always keep the time limit in mind.

Sending a demand letter may help

A "demand" letter is a letter demanding payment of the debt. You may want to offer practical payment options that you're willing to accept, including payment by credit card or post-dated cheques. The letter can't include any threat to take improper action to collect the debt. You should, however, end your letter by advising that you "reserve the right to take legal proceedings" or "intend to take legal proceedings" to collect the debt, plus interest and costs of the legal proceedings, if satisfactory payment arrangements aren't made within a certain period of time (typically 7 to 30 days).

What if you want to start legal proceedings?

If your efforts don't produce the desired result, you may want to start legal proceedings. You can sue in Small Claims Court or Supreme Court in B.C. if the debt arose in B.C. or if the debtor lives in or carries on business in B.C. Court rooms for Small Claims Court and Supreme Court are found throughout B.C.

Simply starting a lawsuit will sometimes prompt the debtor to pay. And once you start legal proceedings, you may be able to collect the debt from the debtor's employer and others who owe money to the debtor, using "garnishment" proceedings. Refer to script 251 for more information about garnishment.

When can you use Small Claims Court?

A claim in Small Claims Court is often easier to pursue, without a lawyer, and less expensive and less risky than a claim in Supreme Court. You can use Small Claims Court if your claim is for $25,000 or less. The maximum limit for Small Claims Court is $25,000. If the debtor owes you more than the maximum $25,000 limit, for example $28,000, you can abandon the excess – in this case, the $3,000 – and simply sue for $25,000. A claim in Small Claims Court must be started by filing a Notice of Claim at the appropriate Small Claims Court Registry, which is often the registry closest to where the debtor lives or carries on business.

The loser in Small Claims Court must usually pay limited legal expenses to the winner.

For more information on suing in Small Claims Court, see the series of Dial-A-Law scripts on Small Claims Court. Also see the provincial government's Small Claims Court website at www.ag.gov.bc.ca/courts/small_claims/info/guides.htm [1].

When do you have to use Supreme Court?

To collect more than $25,000, you have to sue in Supreme Court. This can be more complicated and expensive than Small Claims Court, and it's recommended that you hire a lawyer, or at least speak to a lawyer before launching the lawsuit.

For more information about Supreme Court, you can consult the Supreme Court website for "self-represented litigants" at www.courts.gov.bc.ca/supreme_court/self-represented_litigants [2].

What happens after you get a court judgment?

Once you obtain a judgment, several remedies may be available to you to collect the money:

- questioning the debtor under oath about their income, assets and ability to pay
- seizing or taking the debtor's assets by court order using a bailiff
- registering the judgment against land owned by the debtor
- garnishing the debtor's wages or money owed to the debtor

How can a lawyer help?

A lawyer can advise you about your rights, your obligations and your options, and can provide their recommendations. Specifically, a lawyer can often help by preparing the demand letter discussed earlier and sending it to the debtor on the lawyer's letterhead. This often brings about the desired result. You can consult a lawyer at any time throughout the proceedings, although getting legal advice early is always best.

[updated September 2013]

References

[1] http://www.ag.gov.bc.ca/courts/small_claims/info/guides.htm
[2] http://www.courts.gov.bc.ca/supreme_court/self-represented_litigants
[3] http://www.dialalaw.org

Garnishment (Script 251)

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This script discusses a legal proceeding called "garnishment," used to collect money on a judgment or debt.

What is garnishment?

Garnishment is a drastic measure for collecting a debt, governed by Part 1 of The *Court Order Enforcement Act*. It allows a creditor to "attach" (intercept and take) the wages and debts owed to a debtor by others, before that property is paid to the debtor.

For example, say you (as the debtor) owe someone money and that person (the creditor) is suing you. You're expected to pay the creditor back. Now, if someone else is indebted to you, the creditor can intercept the money owing to you by requiring the money be paid into court, instead of to you.

Often the money garnished or intercepted is money in the debtor's bank account (money "owed" by the bank to the debtor) or wages owed to the debtor by an employer. In either case, a garnishing order can require the bank or employer to pay the money into court.

Money owing from a family court order for child or spousal support can also be garnished under the Family Maintenance Enforcement Program (FMEP) – but garnishment under this program is handled in a completely different way than other kinds of debts (discussed later in this script).

There are two forms of garnishment

These are:

- Pre-judgment garnishment
- Post-judgment garnishment

What is pre-judgment garnishment?

Pre-judgment garnishment allows debts, obligations and liabilities (but not wages) owed to a debtor by others to be attached before the creditor gets a court judgment against the debtor. It helps to preserve these assets of the debtor until the creditor gets judgment. Property or money garnished before a judgment has been obtained is paid into court and held until after the creditor wins their court case and gets judgment against the debtor.

What is post-judgment garnishment?

Post-judgment garnishment allows debts, obligations and liabilities (including wages) owed to a debtor by others to be intercepted after the creditor obtains a court judgment against the debtor.

For wages, a portion of the debtor's wages are protected and cannot be attached. In general, 70% of wages are protected. This is reduced to 50% if the creditor's claim is for alimony or child support payments.

The law about garnishing orders (especially pre-judgment orders) is very technical

It's best to get legal advice if you're faced with this situation. Through the Lawyer Referral Service, you can get some general advice for a small initial fee. Sometimes, you may be able to get the information you need over the phone.

Who is involved in garnishment?

Garnishment involves three parties:

- A creditor who seeks payment of a debt
- A debtor who owes money to the creditor
- A third party (called the "garnishee") who owes money to the debtor.

A garnishment action is taken by the creditor against the debtor, as defendant, and the third party, as garnishee. The garnishee is often the debtor's employer (when wages are garnished) or a bank where the debtor keeps their funds.

What three important facts should you know about garnishment?

- Garnishment is only made by court order.
- A garnishing order always requires that money is paid to the court. It's never paid directly to the creditor. The money (or some of it) is only paid from the court to the creditor after the creditor has judgment.
- The money owing to the debtor by the garnishee must be owed at the time the garnishing order is delivered to the garnishee. (Some garnishing orders don't "attach" or collect any money at all because at that particular point in time, no money is owed to the debtor.)

What are some examples of garnishment?

Say you work for a warehouse company and your wages are payable every two weeks. You owe money on your Visa card, which you're not dealing with. The Visa credit card company can intercept your wages and have those wages paid to the court, if it starts a court claim against you and gets a garnishing order.

Or say you are divorced and have been ordered to pay maintenance or financial support to your ex-spouse and/or children. If you're behind in your support payments, your ex-spouse can apply for a garnishing order to have money taken from your bank account. (Usually, however, garnishment for money owed as child or spousal support is made by the FMEP.)

Most often, garnishing orders are made against employers who owe wages to employees or against banks and financial institutions that hold deposits for customers.

How does a creditor get a garnishing order?

The creditor would first start a lawsuit against you for the debt you owe, and may then ask the court for a garnishing order to take money from your bank or financial institution. If the creditor gets a court judgment against you, the garnishing order can require your employer to pay a portion of your wages into court.

However, to obtain a garnishing order, the creditor must establish what's called a "liquidated" claim. This means that the creditor must be able to show exactly what is owed. If, for example, a creditor has a claim against you for damages, such as damages for personal injury or negligence, they cannot obtain a garnishing order, because the exact amount of the damages hasn't been decided. Once the exact amount has been decided, then a garnishing order can be made.

What happens to the money intercepted by a garnishing order?

A creditor can obtain a garnishing order even if there is no judgment against you, and even before you've been given the court documents starting the lawsuit against you. But the money that is taken from your bank account or employer isn't automatically paid to the creditor. It's only paid to the creditor if the creditor carries through with the lawsuit and gets a judgment against you. If you disagree with the claim against you, you can defend the lawsuit. If you're successful or prove that you don't owe as much as the creditor claims, then the appropriate amount of money will be paid back out of the court to you.

What happens if there's a garnishing order to intercept your wages?

If you're employed, the creditor can only garnish your wages after obtaining a court judgment against you. While a judgment in a lawsuit can be obtained after a trial in court, judgment can also be obtained by default if you, the debtor, don't defend the lawsuit.

A garnishing order to intercept wages must be given to your employer within a week of your payday, or it won't attach any money. Also, when garnishing wages, a new garnishing order has to be issued and given to your employer every pay period. A creditor cannot give the garnishing order once, and hope to intercept your wages every payday. This can make garnishment a slow and expensive process for creditors in collecting a debt.

But there are exceptions. Some types of garnishing orders can follow your assets and wages for a long time and don't need to be reissued every payday. If you owe child or spousal support under a court order, then your spouse or partner who is owed the support payment can register with the Family Maintenance Enforcement Program to have your wages continuously garnished. Also, if you owe money to the Canada Revenue Agency for taxes, they can issue a Requirement to Pay to your bank or your employer. A Requirement to Pay can be effective for up to 90 days without having to be re-issued.

If you're an independent contractor, your creditor can serve a garnishing order on the person with whom you contract. Even if no money is attached or intercepted, you might find this garnishing order causes you embarrassment.

What can you do if garnishing your wages creates a serious hardship for you?

First, it's important to note that an employer cannot dismiss or demote an employee simply because the employer is given a garnishing order for the employee's wages.

Second, as mentioned, the law generally restricts garnishing orders to attaching only 30% of wages (though up to 50% can be garnished for obligations such as child or spousal support, depending on the debtor's income and the number of dependents).

But you may be able to reduce the amount of wages garnished by applying to the court.

If the garnishing order creates a serious hardship for you and your family, you can ask a judge or registrar of the court to reduce the percentage of your wages that can be garnished, or to release the garnishment, or to allow you to pay the judgment by installments. Contact the court registry where the order was issued, and make an appointment to have a hearing in front of the registrar. For a Small Claims Court judgment, you'll probably appear in front of a judge.

Keep in mind, however, that the creditor can also ask the court to increase the percentage of wages that can be garnished.

If you apply to the court to pay the judgment by installments, and the court believes this is appropriate, a monthly payment will be set which is manageable for you. There are no court administration costs for this procedure. The creditor will have the right to ask questions about your financial situation, and the judge or registrar may also ask you some questions. If you're in real financial difficulty, the judge or registrar has the power to order that nothing need be paid for the time being.

What should you do if you are a garnishee?

Garnishment involves an order of the court, so if you're the garnishee (for example, the debtor's employer), don't ignore the garnishing order. You must pay the appropriate money to the court. Pay the court whatever you owe the debtor at the time you get the order, up to the amount claimed in the order. Any money that you pay into court doesn't have to be paid to the person you owe money to (for example, your employee). However if you ignore a garnishing order and pay the debtor instead, you may end up having to pay the money twice – the second time to the creditor.

If you as the garnishee believe you don't owe the debtor anything, then you should contact the court registry and submit what is called a Dispute Note. The Dispute Note explains your reasons why you believe you don't owe the debtor anything. The Dispute Note doesn't have to be on a particular form – it can be a letter printed on the garnishee's letterhead. If the creditor disagrees with you, then a judge will have to decide the matter.

Note again that it's illegal to dismiss or demote an employee who is a debtor because you've received a garnishing order, and there may be harsh penalties if you do.

What happens to any money paid into court?

If a garnishing order is successful in attaching money, and if money is paid to the court, the creditor cannot have the money paid out to them without a court order or the debtor's consent.

What about garnishment by the Family Maintenance Enforcement Program (FMEP)?

The FMEP is a free government program in BC that enforces court orders and agreements for child and spousal support. It can also enforce court orders and agreements from other provinces in some circumstances as well. It has special and wide-ranging powers to garnish bank accounts, tax returns and wages of people obligated to pay support. Many of the

rules that apply to normal garnishment don't apply to garnishment by the FMEP. If you owe money under a support order which is being garnished by the FMEP, you can ask the court to "suspend enforcement" in some cases. But it's usually better in the long run to negotiate a payment arrangement directly with the FMEP or consult a family lawyer about changing the terms of the court order which caused you to go into debt in the first place.

For more on the FMEP, refer to script 132 on "Enforcing Orders and Agreements for Support".

Where can you get help or find more information?

- If you're having trouble paying your bills, contact the Credit Counselling Society of BC, a non-profit debt counselling service. They can help set up a debt management program for you. Call 1.888.527.8999 (toll-free) or see their website at www.nomoredebts.org [1].
- Refer to Dial-A-Law script 253 on "When You Can't Pay Your Debts".
- See the manual Consumer Law and Credit/Debt Law [2] published by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [3]. To find it, click "Our Publications" then under "I want to find a publication by subject," click "Debt". This manual is for paralegals, legal information counsellors, and lawyers with clients who have consumer/debt problems.

[updated July 2014]

References

[1] http://www.nomoredebts.org
[2] http://www.legalaid.bc.ca/publications/pub.php?pub=17
[3] http://www.legalaid.bc.ca
[4] http://www.dialalaw.org

Harassment by Debt Collectors (Script 252)

If you are in debt and have fallen behind in your payments, you may have received phone calls or letters demanding payment. If you're far enough behind, you may even be threatened with court action, or the seizure of your car or furnishings. Sometimes you might even receive calls about a debt that isn't yours. If so, you'll want to know what your rights are.

There are laws to protect debtors

Without debt collection laws, there is the potential for abuse, including midnight phone calls demanding payment, complaints to a debtor's employer about the debt, and threats of terrible consequences. There are laws that protect debtors from unreasonable collection practices.

How does the *Business Practices & Consumer Protection Act* protect debtors?

In British Columbia, the *Business Practices and Consumer Protection Act* (administered by Consumer Protection BC) ensures the collection of debts is done in a reasonable manner. The Act has two important aims:

- to license debt collection businesses and collection agents
- to regulate the conduct of creditors and debt collection businesses

The Act recognizes that creditors have a right to collect monies owing to them and outlines how and when a collector may contact a debtor, but at the same time, it recognizes that debtors should be protected from unreasonable debt collection activities.

How do debt collectors operate?

A debt collector is someone who carries on the business of collecting debts for others for a fee. If you bought a suit from a local store and haven't made the payments, the store owner may eventually give up on you and hire a debt collection business to recover the money from you. Normally the debt collection business charges the creditor (in this example, the store owner) a fee in proportion to the amount they actually recover from you. If the debt collector recovers nothing, they get no fee, so they are more aggressive in their collection tactics than creditors who are doing their own collecting.

Harassment is forbidden

The general rule is that anyone collecting a debt – either a creditor or a debt collection business – cannot communicate or attempt to communicate with a debtor or their family, acquaintances or employer in such a way that the communication constitutes harassment. Harassment is defined in the *Business Practices and Consumer Protection Act* to include:

- using threatening or intimidating language
- exerting excessive or unreasonable pressure
- publishing or threatening to publish the debtor's failure to pay what they owe the creditor

Creditors and debt collectors cannot intimidate you

A debt collector is not allowed to contact you, your family, or your employer in such a way that it may cause alarm, distress, or humiliation. For example, they cannot phone your home every ten minutes all day long demanding payment, because it is likely that the tactic will cause distress to your family members. Similarly, they aren't allowed to stand on your front lawn with a megaphone, demanding payment, for all your neighbours to hear. Those are extreme examples, but many more subtle techniques are forbidden as well.

Can your employer be contacted?

Creditors and debt collectors must be careful when contacting your place of work. They can only contact your employer to confirm your employment. So they can't harass your boss, or prejudice your reputation by suggesting that you ought to be fired because of your debts. But a creditor or debt collector can make one attempt to collect a debt from you while you're at your place of work, if they can't reach you at home or if you won't respond.

Creditors and debt collectors aren't allowed to mislead you

They can't use forms or documents where the appearance or language would cause you to think that they come from a court or government office. For example, they can't mail you a letter demanding payment, produced in the form of a "Court Summons," because you might be misled into thinking that it is an official court document.

Only the appropriate amount can be collected, and only from the right person

Debt collectors cannot collect or try to collect money from someone who doesn't owe the money, or attempt to collect more money than is owed to the creditor. Keep in mind that interest can continue to accumulate on an outstanding debt, and this may be claimed as long as it is reasonable.

What if you believe that you're a victim of harassment or unreasonable collection practices?

If you think you're a victim, you have three options to consider:

- complain
- accept only written communications
- ask to be sued

Your first choice is to complain

Start by asking to speak with the supervisor at the debt collection agency. If that gets you nowhere, you can complain to Consumer Protection BC. They can provide you with information on how to address the complaint directly with the debt collector. If the unreasonable collection behaviour continues, Consumer Protection BC may investigate and can take steps against the debt collector or creditor. To make a complaint, call Consumer Protection BC at 1.888.564.9963 (toll-free).

Your second choice is to only accept written communication

If the nature or frequency of the collection telephone calls is upsetting you and the calls won't stop, you can request that all future communication be in writing only. It's an offence if a debt collector doesn't follow your request. You should put your request in writing and keep a copy for your records.

Your third choice is to ask the creditor to sue you

If you disagree with the debt, you can notify the creditor and debt collector that you dispute the debt and want the creditor to take the matter to court. Upon written notification, all other types of collection must stop. You should keep a copy of your communication to the creditor and debt collector for your records. Note that a debt may still show on your credit report while it is being disputed.

What if you're contacted about a debt that isn't yours?

If you're contacted about a debt that isn't yours, contact the collection agency to let them know that you are not the debtor. If the calls continue, contact Consumer Protection BC, who can assist you.

Remember, if you're in debt, you have a legal obligation to repay the money

But the *Business Practices & Consumer Protection Act* regulates the practices that debt collectors may use in recovering their money.

Where can you get help or find more information?

- See the consumer information section published by Consumer Protection BC on their website at www.consumerprotectionbc.ca [1], or call 1.888.564.9963 (toll-free).
- If you are in financial difficulty or have trouble paying your bills, refer to script 253 on "When You Can't Pay Your Debts".
- See the manual Consumer Law and Credit/Debt Law published by the Legal Services Society, BC and available for free on their website at www.legalaid.bc.ca [2]. To find it, click "Our Publications" then under "I want to find a publication by subject," click "Debt". This manual is for paralegals, legal information counsellors, and lawyers with clients who have consumer/debt problems.

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References

[1] http://www.consumerprotectionbc.ca
[2] http://www.legalaid.bc.ca
[3] http://www.dialalaw.org

When You Can't Pay Your Debts (Script 253)

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What should you do if you have money problems?

First assess your overall financial situation. List your monthly expenses for food, rent, clothing, transportation, medical and dental fees, and all regularly occurring expenses which you pay (for example, music lessons, if your child takes these). Remember to include a monthly amount for annual expenses like car repairs and insurance. Also include an amount for emergencies that could arise – like the need to replace the family car, the TV, your computer or the house furnace. Total this up, and then subtract it from your income. The amount left over is what you have available to pay towards your debts.

Do you have to pay more on your debts each month than you can afford? If so, you're getting further into debt and should consider one of the options which follow. Not all will work for you, but somewhere in the list is a solution that can be tailored to fit your specific situation.

What are your options?

You can:

1. solve the problem yourself,
2. use a debt management program,
3. consolidate your debts,
4. apply for a consolidation order under the *Bankruptcy and Insolvency Act*,
5. make a consumer proposal under the *Bankruptcy and Insolvency Act*,
6. declare bankruptcy, or
7. take no action at all.

One, solve the problem yourself

Sometimes, you can cut back on non-essential monthly expenses so you have more money to pay off debts. You can also try to increase your income enough to make all your monthly payments. Maybe you can get a second or part-time job. Or your spouse or family may be able to help with a gift or loan. Meanwhile, stop using credit cards – they charge very high interest rates. If you need to borrow, get a loan from a conventional lending institution like a bank or credit union.

Another thing you can do is contact your creditors, outline your situation, and ask them to suggest ways to help solve your problem. They may agree to a better deal that still lets you pay your debts, for example, by charging a lower interest rate, writing off interest or giving you more time to pay. Be careful about agreeing to repayment schedules that may be too difficult. And make sure you're not borrowing more money or putting off other creditors – and getting charged more interest – just to satisfy the creditors taking action against you.

Two, use a debt management program

A debt management program involves a written agreement between you and the lender, with the help of an agency such as the Credit Counselling Society of BC (their contact information is given at the end of this script). Typically your debts are consolidated, or combined, into one affordable monthly payment so you can repay them in a reasonable time. Creditors usually support people who enter into debt management programs by reducing or eliminating interest charges.

Three, consolidate your debts

You may be able to get a consolidation loan through a bank or consumer finance company, which consolidates all your debts. You make just one payment each month. Be aware that the finance company will charge you a fee, and the interest may be higher. Also, you may have to use your personal possessions and household items as security for the loan.

Four, apply for a consolidation order under the *Bankruptcy and Insolvency Act*

If you have money available after your monthly budget costs, you could apply for a consolidation order under the orderly payment of debts provisions of the *Bankruptcy and Insolvency Act*. This involves a consolidation of your debts into one payment per month, determined according to your ability to pay. Certain restrictions apply, and certain debts are excluded. The advantage is that creditors cannot take legal action against you unless you default on your monthly payments. However, they may still be able to seize any property you used to secure the debt. A credit counselling agency or bankruptcy trustee can explain this process to you.

Five, make a proposal under the *Bankruptcy and Insolvency Act*

If you receive a regular income and can make meaningful payments over time, you can obtain the help of a bankruptcy trustee to make a formal "proposal" to your creditors under the *Bankruptcy and Insolvency Act*. You can design the proposal to suit your circumstances and income. You may agree to pay in full, or you may agree to pay in some smaller amount that creditors are willing to accept. The repayment schedule can be as long as five years.

The advantage of a formal proposal over a debt management program or debt consolidation is that there's an immediate "stay of proceedings" when you make the proposal. This means your creditors cannot start or continue any collection action against you. As long as the proposal is accepted – meaning that more than 50% of the unsecured creditors approve it – and you make your payments on time, the "stay" continues. Also, once you've successfully completed your proposal, none of the affected creditors have any remaining claims against you – even if they voted against the proposal.

Six, as a last resort, you could declare personal bankruptcy

Sometimes, this is the only viable solution. Again, for this option, you need a trustee in bankruptcy. When you declare bankruptcy, you have to "assign" or give your assets to the trustee, with some exemptions. As well, bankruptcy stays on your credit rating and can affect your ability to obtain credit for six years.

In some very limited cases, no action may be needed

If you have no income or possessions, your creditors may not be able to collect any money from you to repay your debts. Or if your debts are more than six years old, or if you haven't made any payments or admitted your debts in writing in the last six years, and creditors haven't taken any legal action, they may have lost the right to sue you. But you should speak to a lawyer first before doing nothing.

How do you decide what to do?

- **Start by getting free advice and counselling**: The Credit Counselling Society of BC is a non-profit debt counselling service. In addition to offering counselling about possible solutions to your financial problems and free debt management workshops, they can help you set up a personal budget to regain control of your finances. They can also set up a debt management or debt settlement program for you. The Society has offices in Vancouver, Delta, New Westminster, Surrey, Abbotsford, Nanaimo, Kelowna and Victoria. Generally, there's no cost for their services. Their toll free phone number is 1.888.527.8999 and their website is www.nomoredebts.org [1].
- **You can also get professional help**: A reputable, licensed credit counsellor or bankruptcy trustee can help. To find a credit counsellor, look in the Yellow Pages of your phone book under "credit and debt counselling." For a bankruptcy trustee, look under "bankruptcy trustee." Or go to the website of the Canadian Association of Insolvency and Restructuring Professionals at www.cairp.ca [2] or phone them at 416.204.3242. Most bankruptcy trustees will give a free initial consultation to assess your financial situation and explain your choices and their consequences.

Where can you find more information?

- Excellent information is given in the brochure "Dealing With Debt: A Consumer's Guide [3]", published by the Office of the Superintendent of Bankruptcy Canada (found on Industry Canada's website at www.ic.gc.ca [4] (search under "All Topics" then "Bankruptcy" then "You Owe Money" and then "Guides". Or you can call the Office at 604.666.5007 and ask for a copy of the brochure, or pick up a brochure from your local government agent office. You'll also find other publications and information on the bankruptcy process, consumer debt and consumer proposals on this website.

- See the manual Consumer Law and Credit/Debt Law [5] published by the Legal Services Society and available for free on their website at www.legalaid.bc.ca [6]. To find it, click “Publications” then under “I want to find a publication by subject,” click “Debt”. This manual is for paralegals, legal information counsellors, and lawyers with clients who have consumer/debt problems.

[updated February 2013]

References

[1] http://www.nomoredebts.org
[2] http://www.cairp.ca
[3] http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01861.html
[4] http://www.ic.gc.ca
[5] http://www.legalaid.bc.ca/publications/pub.php?pub=17
[6] http://www.legalaid.bc.ca
[7] http://www.dialalaw.org

Warehouse Liens (Script 254)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains what warehouse liens are and how they work under the BC *Warehouse Lien Act* (the Act).

What is a warehouse lien?

A warehouse lien (also known as a lien for storage) is a charge or claim by a person (a **warehouser**) in the business of storing goods on goods stored in their warehouse. The *Warehouse Lien Act* defines a **warehouser** as a person in the business of storing goods as a bailee for hire. A warehouse lien helps a warehouser get paid for storing goods. For example, if you store goods in a commercial warehouse, under the Act, the warehouser has a lien against your goods. If you do not pay the storage bill, the warehouser can eventually sell them to get the money you owe.

How does a warehouse lien help ensure payment for goods stored?

Warehousers automatically have a lien on goods given to them for storage, whether given by the owner of goods or by any person entrusted with possession of the goods by the owner. If they are not paid – and they still have the goods – they can eventually sell them by public auction to get the money owed to them.

To do this, a warehouser must give written notice of the lien and then written notice of their intent to sell the goods by public auction. But if the owner of the goods (or someone with their authority) left the goods for storage, the warehouser does not have to give notice of the lien. Then, the warehouser must advertise the upcoming sale in a local newspaper. This script explains the details.

Does a warehouse lien exist and what amounts does it cover – section 2 of the Act

A warehouse lien exists automatically – unless it's void under section 3 (explained in the next section). The lien exists regardless of who left the goods for storage: the owner of the goods, someone with the owner's authority, or someone who received the goods from the owner or a person with the owner's authority.

A warehouse lien covers reasonable charges for all the following things:

- storing and preserving the goods.
- any money the warehouser advanced for the goods including interest, insurance, transportation, labour, weighing, and other expenses.
- any notice the warehouser had to give under the Act, and advertising and selling the goods if they are not paid for before they are advertised and sold.

Notice of warehouse lien if goods not left by owner – section 3 of the Act

The warehouser must give notice of the lien to the owner of the goods – but only if owner (or a person with their authority) was not the one who left the goods at the warehouse. If the owner of the goods (or a person with their authority) left the goods at the warehouse, no notice is needed because the owner already knows the goods are there.

The warehouser must also give notice of the lien to anyone who had registered a financing statement of a security interest in the goods by the time the goods were left at the warehouse.

The warehouser has to give notice of the lien within 2 months of when the goods were left at the warehouse. The notice must have all the following information:

- a brief description of the goods.
- the location of the warehouse where the goods are stored, the date they were left there, and the name of the person who left them.
- a statement that the warehouser is claiming a lien for the goods under the Act.

Lien not valid if required notice not given

The lien no longer exists against a person if the warehouser does not give notice to that person, as section 3 requires. For example, if a warehouser knew that a person who is not the owner of the goods (or a person acting with the owner's authority) left the goods for storage – and the warehouser does not give notice of the lien to the owner – the lien no longer exists against the owner after 2 months from when the warehouser knew who the owner was. Similarly, if the warehouser knew that a financing statement had been registered against the goods when they were left, but does not give notice to the person with the security interest in the goods, the lien no longer exists against that person after 2 months from when the warehouser knew who the person was.

Notice that warehouser intends to sell the goods – section 4 of the Act

Warehousers who want to sell the goods to pay off the debt must use a public auction. First, they have to give written notice to the following four parties (using one of the two methods in section 8) that they intend to sell the goods:

- the person who owes the debt to the warehouser for the goods.
- the owner of the goods.
- anyone who has registered a financing statement of their security interest in the goods by the time the goods were left at the warehouse.
- anyone else the warehouser knows to have – or claim to have – an interest in the goods.

This notice must have all the following information:

- a brief description of the goods.
- the location of the warehouse where the goods are stored, the date they were left there, and the name of the person who left them.
- an itemized statement of the warehouse's charges, showing the amount due at the time of the notice.
- a demand to pay the amount due (and other charges that may accrue) by the date shown in the notice, not less than 21 days from the delivery of the notice if it is personally delivered (if the notice is mailed, then 21 days from when the notice should reach its destination by regular mail).
- a statement that, unless the charges are paid by the date in the notice, the goods will be advertised for sale and sold by public auction at a time and place set in the notice.

Advertising that the goods will be sold by public auction – section 4 of the Act

If the charges are not paid by the date in the notice, the warehouser must advertise the sale before holding the public auction. The advertisement must be published at least once a week for 2 consecutive weeks in a newspaper in the local area where the sale is to be held, and must contain all of the following:

- a description of the goods to be sold.
- the name of the person who owes the debt for the charges covered by the lien.
- the time and place of the sale.

The warehouser must wait for at least 14 days after the first advertisement is published to sell the goods.

What happens with the sales proceeds – section 6 of the Act

The warehouser must use the money from selling the goods to pay off the debt for storing them and the other charges allowed under section 2. If any money is left after these charges are paid, the warehouser must pay it to a person entitled to it, along with a statement showing how the amount paid was calculated. If it's not clear who is entitled to any remaining money, or if a person entitled to the money has not demanded it within 10 days of the sale, the warehouser must pay it (and a calculation statement) to BC Supreme Court.

What happens if the warehouser is paid before the sale – section 7 of the Act?

Anyone with an interest in the goods can pay the debt for storing them and the other charges allowed under section 2. If that happens, the warehouser must then deliver the goods to the person who paid the debt – if that person is entitled to the goods. Otherwise, the warehouse must keep the goods, following the contract they signed when the goods were left with them.

Ways to give notice – section 8 of the Act

The written notice required under the Act must be given in one of two ways:

- delivering the notice to the person.
- mailing the notice to the person at the person's last known address, by registered mail.

Can self storage operators claim a warehouse lien?

No – only a warehouser can claim a warehouse lien. The Act defines a warehouser as a person in the business of storing goods as a bailee for hire. Self storage operators are not bailees for hire. So they cannot claim a warehouse lien.

What problems does the Act have?

To claim a lien, a warehouser must still have the goods. The Act does not permit what is called a "non-possessory lien". So if a warehouser has returned the goods to the person who left them, before being paid for storing them, the lien is no longer valid. That may happen because it's not always practical for warehousers to keep all the goods they have not been paid for.

The Act's notice requirements confuse people because there's no requirement to give notice of the lien to the owner if the owner (or a person with their authority) left the goods for storage.

More information

A warehouse lien is only one type of lien. Other types exist, in both common law and under other statutes. And a lien is only one type of remedy. Other remedies are available for collecting debts – for example, hiring a collection agency, suing, seizing and selling assets, and garnishing wages. Check script 250, called "Collection of Debts". The law in this area can be complex. For legal advice, consult a lawyer.

The *Warehouse Lien Act* is available at www.bclaws.ca [1]. So is the *Warehouse Receipt Act*. It may also apply in these situations.

[updated November 2014]

References

[1] http://www.bclaws.ca
[2] http://www.dialalaw.org

Door-to-Door Sales, Time-Shares and Contracts You Can Cancel (Script 255)

This script first discusses door-to-door sales, fitness club memberships and other similar contracts, and how you can cancel if you want to back out. Then it discusses time-shares and time-share contracts.

What is a “future performance contract”?

Perhaps you’ve signed a contract with someone who came to your home and sold you a magazine subscription or a vacuum cleaner, or you’ve entered into a contract for home repairs. Or perhaps you’ve gone out and signed up to join a health club. Under the *Business Practices & Consumer Protection Act*, these are known as “future performance contracts.” Most door-to-door sales and similar contracts are “future performance contracts”.

A future performance contract is one where you don’t receive the goods or services or the payment isn’t made in full when you sign the contract. For example, you agree to buy a vacuum cleaner and pay it off over six months. Or you agree to buy an encyclopedia set which will be delivered in installments. Or you agree to join a health or fitness club and pay a monthly membership fee. Contracts under $50 aren’t considered future performance contracts.

A future performance contract must include certain things

If the total purchase price is $50 or more, the *Business Practices & Consumer Protection Act* lists all the information the contract must include to be legally binding. Among other things, the contract has to be a written contract signed by you, and it must:

- show the date
- include the name, address and telephone number of the seller
- describe the goods or services
- show other costs, including taxes and shipping charges, as well as the total price
- include a detailed statement of the terms of payment

You must be given a copy of your contract within 15 days after signing it. If the contract you get doesn’t contain all of the things listed in the *Business Practices & Consumer Protection Act*, then you have up to a year to cancel the contract.

Special rules apply to two types of future performance contracts

The two types of future performance contracts are:

- direct sales contracts
- continuing sales contracts

What is a “direct sales contract”?

A direct sales contract is a contract signed at a place away from the seller’s permanent place of business, for example, at your home. There’s a limit to the down-payment the seller can ask from you. If, for example, you buy a vacuum cleaner from a door-to-door salesman who comes to your home, the direct seller can’t ask for a down-payment of more than $100 or 10% of the purchase price, whichever is less. But if you invite a supplier into your home more than 24 hours in advance, then a contract signed with the supplier isn’t a direct sales contract.

What is a “continuing services contract”?

A continuing services contract is a contract where you receive services over a period of time, rather than all at once. It is limited to contracts for dance lessons, personal training (i.e., a boot camp), weight loss programs, self defence lessons, and gym and travel club memberships. A continuing services contract must not be for longer than 24 months.

Can you cancel these contracts?

Yes. Whenever you sign a direct sales contract or a continuing services contract, the law gives you up to ten days to cancel the contract after receiving a copy of it. In fact, the contract itself has to state that you have this right to cancel at any time within the ten days.

What if you don’t receive the goods or services?

If it's a direct sale, and you don’t receive the goods or services within 30 days, you have up to a year to cancel. So if you don’t receive the promised vacuum cleaner within 30 days or the fitness club isn’t ready to be used within 30 days, then you have up to one year to cancel, so long as you don’t accept the goods or services later.

What if circumstances change?

For a continuing services contract, you can also cancel if there’s been a material change in the services that the seller was going to provide to you or in your personal circumstances. For example, you signed up for tango lessons and the seller now only offers tap dancing classes, or you moved more than 30 kilometres away and the business can’t provide the same service in your new location, or you signed up for boot camp but broke your leg. In each case, you would have to show proof of the material change to cancel the contract (for example, proof of your new address or medical documentation explaining the medical reasons why you can no longer participate in the activity).

How do you cancel?

It's best if you cancel the contract in writing – by fax, e-mail or registered mail, or by delivering a notice to the seller indicating that you're cancelling. Just be sure to keep a copy and proof of delivery that you cancelled within the allowed time.

Will you get your money back?

If you cancel the contract within ten days, you're entitled to a full refund of your money within 15 days after cancelling – even if you've already received the vacuum cleaner or started going to the fitness club. Once you've received your money back, you must return the vacuum cleaner.

Can you cancel a continuing services contract partway through?

If you cancel because there's a significant change in your personal circumstances – like being seriously injured or moving to another city – you're entitled to a pro-rata refund based on how much of the service you've used, less 30% to cover the seller's costs. If you cancel because the seller's services have changed – like offering different dance lessons or moving their dance studio – you're entitled to a straight pro-rata refund without any deduction.

What happens if the seller doesn't give you a refund?

Then you can sue for a contract debt, normally in Small Claims Court. If you win, the seller must pay you three times the amount of your refund.

What is a time-share?

Time-sharing is a legitimate form of owning an interest in property. Often, the time-share is for one week of time or use at a vacation resort. Typically, you go to a presentation, tour a condo unit and then sign a contract. But before you sign anything, make sure the deal is right for you. And don't sign a contract unless you understand it completely.

Can you cancel a time-share contract?

BC's *Real Estate Development Act* says that if you make the contract here in BC, and later decide you acted too quickly, you can back out of the contract if you cancel within seven days. This applies whether the time-share relates to property in or outside of BC. However, and this is very important, if you sign a deal outside of BC, say in Mexico for a Mexican time-share, BC's *Real Estate Development Act* won't apply, and the law of that country will apply.

Where can you get help or more information?

- To help protect against unscrupulous sellers, check the seller's record with the Better Business Bureau, available online. For mainland BC, the website is http://mbc.bbb.org (telephone 604.682.2711). For Vancouver Island, the website is http://vi.bbb.org (telephone 250.386.6348).
- Visit the Consumer Protection BC website at www.consumerprotectionbc.ca [1] or contact them by phone at 1.888.564.9963.
- To learn more about BC's consumer protection laws, read the *Business Practices & Consumer Protection Act*, available online at www.bclaws.ca [2] or at your local law library.

[updated January 2013]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [3].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.consumerprotectionbc.ca
[2] http://www.bclaws.ca
[3] http://www.dialalaw.org

Shopping by Phone, Mail or the Internet (Script 256)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses shopping by phone, mail order or over the Internet, as well as what to do if you receive unsolicited phone calls, faxes and mail after making such a purchase.

Shopping online or by phone or mail order has its pitfalls

Buying goods or services by phone or mail order or over the Internet can be a convenient way to shop. Sometimes you can buy things that aren't available in local stores. Many reputable firms use these sales methods. But shopping this way also has its dangers. There may be shipping delays, or the quality of the item may not match the advertised description, or you may pay for something but get nothing in return.

What is a "distance sales contract"?

When you buy goods or services by phone or mail order or over the Internet, you may be making a "distance sales contract." The *Business Practices & Consumer Protection Act* says that before you enter into a distance sales contract, the seller must clearly disclose the following things:

- the seller's name, address and telephone number
- the seller's email address, if available
- a description of the goods or services
- the total price and a detailed statement of the terms of payment

- the currency under which amounts owing are payable
- an explanation of how the goods will be shipped to you
- the seller's return or exchange policy, if any

You must be given a copy of the contract

To be legally binding, you must receive a copy of the contract within 15 days after making it. An email copy is sufficient. The contract must contain the information that the seller was required to disclose to you before you bought the goods or services, along with the following:

- your name as the consumer
- the date of the contract

Can you cancel a distance sales contract?

Yes. You may cancel in the following circumstances:

- If the seller doesn't disclose the required information or the contract doesn't contain it, you have up to seven days after receiving the contract to cancel it.
- If you don't get a copy of the contract within the 15 days after making it, as required, then you have up to 30 days to cancel it.
- If you don't receive what you ordered within 30 days of the supply date, you may cancel the contract anytime before the goods or services are delivered.
- If you don't receive what you ordered within 30 days of the date of the contract, and a supply date wasn't provided, you may cancel the contract anytime before the goods or services are delivered.

How do you cancel?

It's best if you cancel the contract in writing by fax, e-mail or registered mail, or by delivering a notice to the seller indicating that you're cancelling. This will provide proof that the seller received your cancellation notice within the allowed time frame. Just be sure to keep a copy so you have proof that you cancelled.

Will you get a refund?

If you cancel because the seller didn't disclose the required information or the contract doesn't contain it, the seller must refund your money within 15 days after you give notice of cancellation. You have to return the unused goods within 15 days after getting them or within 15 days after giving notice of cancellation, whichever is later. The seller is responsible for the reasonable cost of returning the goods.

What can you do to protect yourself?

- Check the reputation and product of the phone, mail order or online company.
- Pay with a credit card.
- Make sure the website is secure if you pay online.

How can you check the reputation and product of the company?

Contact the Better Business Bureau to see if there have been any recent complaints, and if so, if the complaints were resolved to everyone's satisfaction. Their phone number is:

- 604.682.2711 for mainland BC
- 1.888.803.1222 toll free for the interior
- 250.386.6348 for Vancouver Island

For an online company, look for a reliability seal from a reputable online consumer protection program. Check with the Better Business Bureau at www.bbb.org [1], to see if the company has a "BBB Accredited Business Seal for the Web [2]".

Or see if the company displays the Canadian Marketing Association member logo, which is your assurance that the company abides by a strict code of ethics. See www.the-cma.org/consumers/look-for-the-logo [3] for more information on this.

How is paying with a credit card safer?

When ordering goods, you may have the option of paying by Visa or MasterCard and giving your card number and its expiry date. This can actually be safer than sending a cheque or money order. If you cancel a distance sales contract, you can ask your credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges. The credit card issuer must acknowledge your request within 30 days of receiving it. Then if your request meets the requirements set out in the *Business Practices & Consumer Protection Act*, the credit card issuer must cancel or reverse the charge within two complete billing cycles or 90 days, whichever is earlier.

So, for example, if you don't get what you bought within 30 days and you cancel the contract before the goods arrive (if they ever do come), your credit card issuer must cancel or reverse the charges if you ask them. On the other hand, if you pay by money order or cheque and never receive the goods, you don't have much leverage.

How can you ensure a website is secure for online payments?

Look for the letter "s" in the prefix "https" to the website address or an unbroken lock and key symbol, usually found in the lower right-hand corner. Never send financial information by e-mail, which isn't secure.

What can you do if you receive merchandise you never ordered?

The *Business Practices and Consumer Protection Act* says that you have no obligation to pay for unsolicited goods or services unless you expressly tell the supplier in writing that you intend to accept the goods or services. So if you simply get something out of the blue that you never asked for, you don't have to pay for it. However, to protect yourself, you may wish to return the item, ensuring you keep copies of all correspondence.

What can you do to prevent unsolicited phone calls, email, faxes, and mail?

Sometimes after making a phone, internet, or mail order purchase, you may find yourself on various mailing and phone lists, and end up receiving piles of brochures, advertisements and sample products, and endless phone calls and emails from telemarketers and others. The emails may be phishing scams. And they often have spyware and malware that will harm your computer and steal your personal information and identity. To avoid this flood of junk mail (or spam) and calls, and the dangers they pose, here's what you can do:

- **Contact the Canadian Marketing Association:** See the Canadian Marketing Association's website at www.the-cma.org [4] and click on the "For Consumers" link to find their voluntary Do Not Contact Service [5]". Follow the registration instructions to have your name deleted from member phone and mailing marketing lists. This won't eliminate the problem but it can greatly reduce the amount of unsolicited calls and mail you receive. You'll be placed on their "Do Not Call" list for three years.
- **Register with the National Do Not Call List:** The Canadian Radio-Television and Telecommunications Commission – or CRTC – requires that telemarketers maintain "Do Not Call" lists and respect such requests for three years. Telemarketers must also issue a unique registration number for each "Do Not Call" request, so keep the number as proof of your request. See https://www.lnnte-dncl.gc.ca to register with the National Do Not Call List. But the CRTC has no control of businesses and people outside Canada, and they often ignore the list and continue to call.
- **Block the number that is calling you** if you have that feature on your phone. But telemarketers can constantly change their calling number so even if you block them, they keep getting through.

Canada's new anti-spam law starts July 1, 2014

Starting July 1, 2014, Canada has a new anti-spam law to protect people and businesses from spam (junk email and text messages) and online threats (spyware, malware, phishing scams, etc.) originating in Canada. It's called the *Electronic Commerce Protection Act*. Unfortunately, the law cannot control businesses and people outside Canada, and they produce huge amounts of spam and online threats. Some sections of the law take effect later: January 15, 2015 for the sections on installing computer programs and July 1, 2017 for the sections on suing for losses.

Consent is required—a key section of the new law requires senders of commercial emails and text messages to have the consent of the person they're sending the message to. The law also prohibits installation of computer programs and collection of electronic addresses without consent, as well as false and misleading representations.

Consent requirement is phased in—the law has two types of consent: **express** and **implied**. There is implied consent for 36 months after the law starts—if there is already a relationship between the sender and recipient of a commercial message. But the recipient can cancel this implied consent any time. During these 36 months, senders of commercial messages can ask recipients for express consent so they can continue sending commercial messages to those recipients after the 36 months.

Senders must identify themselves and let recipients unsubscribe—in addition to getting consent from recipients, senders of commercial messages must identify themselves and include an unsubscribe option in the message so recipients can stop receiving messages.

Three federal government agencies will enforce the law: the CRTC, the Competition Bureau, and the Office of the Privacy Commissioner.

Details on the new law are available on two government websites:

- https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html
- http://fightspam.gc.ca/eic/site/030.nsf/eng/home

What should you do if you have a complaint?

If you have a complaint about delays in delivery, an error on your bill, or the quality of the goods, write the company (don't phone). State the nature of the problem and what you want done. Keep a copy of all your correspondence, as well as a copy of the original advertisement for the product. If you don't receive a reply to your first letter, send another, this time by registered mail. In it, refer to your first letter and keep a copy of it as well. Hopefully this will resolve the problem.

More information

- If you make a complaint but don't get a satisfactory response within three weeks, or want more information, write the Canadian Marketing Association at 1 Concorde Gate, Suite 607, Don Mills, Ontario, M3C 3N6, or contact them via their website at www.the-cma.org [4].
- Check the "Consumer Tips" section in the Resource Library on www.mbc.bbb.org [6], the website for the Better Business Bureau for mainland BC.
- To learn more about how to prevent and handle consumer problems when they arise, contact Consumer Protection BC at 1.888.564.9963. Their website www.consumerprotectionbc.ca [7].
- Check also www.competitionbureau.gc.ca [8], which is the website for the federal government's Competition Bureau, and search under the "Resources" section under "Publications" for consumer tools and pamphlets.
- Check script 260 on "Dishonest Business Practices and Schemes". If the goods you bought are defective, check script 257 on "Buying Defective Goods".
- Check https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html and http://fightspam.gc.ca/eic/site/030.nsf/eng/home for information on Canada's new anti-spam law.

[updated June 2014]

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[3] http://www.the-cma.org/consumers/look-for-the-logo
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[5] http://www.the-cma.org/consumers/do-not-contact
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[9] http://www.dialalaw.org

Buying Defective Goods (Script 257)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses what you can do if you've bought a product or items (called "goods"), which turn out to be defective.

When you buy goods, you are making a contract with the seller

Your rights as a buyer depend on the terms of the contract. Those terms can be either "express" or "implied".

What is an "express" term?

An express term is one that you and the seller actually agree upon. It doesn't matter if your agreement was verbal, or written, or a bit of both. If the seller doesn't give you what was agreed, then you have certain rights to get what you agreed to or get your money back.

Guarantees and warranties are common types of express terms

Look carefully at them in your purchase contract. Often your rights under a guarantee or warranty depend on you following certain operating or cleaning instructions. For example, in the case of a car, your rights under the warranty might only apply if you get the car regularly serviced at an authorized dealer. And some goods are sold for certain purposes or uses only. Using the goods for uses not intended would void (or cancel) the warranty.

What is an “implied” term?

Purchase contracts can also have implied terms. Implied terms are those that the law includes in a contract between a buyer and seller in certain circumstances.

There are four implied terms when you buy new goods

In BC, the *Sale of Goods Act* says there are four implied terms, called “conditions,” that exist in particular contracts for the purchase and sale of new items. If the seller breaks the condition or doesn’t carry out a condition of the contract, then you (the buyer) have the right to reject the goods and cancel the contract. You’re entitled to get back the money you paid, plus compensation for any extra expenses caused by the defective goods.

The four implied terms are:

- The goods must match the description or the sample.
- The goods must be reasonably fit for your purpose for them.
- The goods must be of merchantable quality.
- The goods must last for a reasonable time.

First, the goods must match the description or sample

If you were shown a sample of the goods, there’s an implied condition that the goods will match their description or match the sample. An example of goods sold by sample is carpeting. If the carpet that ends up on your floor isn’t the same as the sample you saw in the showroom, you don’t have to accept it. Similarly, if the goods are sold by description, there’s an implied condition that the goods will match the description. Catalogue sales are a good example of a sale by description. If you ordered something from a catalogue, you have the right to send it back if it isn’t the same as the description.

Second, the goods must be reasonably fit for their purpose

There’s an implied condition that the goods will be reasonably fit for the buyer’s purpose. There are, however, two catches to this condition:

- This condition only applies if it’s the seller’s business to sell things, and the goods are things he or she usually sells. So a private sale between two individuals isn’t covered, or if your hairdresser orders you a computer, that also isn’t covered.
- Further, this condition only applies if you explained to the seller how you planned to use the goods and also explained that you were relying on his or her skill and judgment. For example, if you go to a hardware store and tell the saleswoman you want a saw to cut metal pipes, and she sells you a saw that only cuts light wood, you would have a case for saying that the saw isn’t reasonably fit for the purpose for which you bought it. But if you just picked up the saw yourself (thinking it should work for metal pipes) and took it home without any discussion, you wouldn’t have the right to cancel the contract, because you didn’t explain to the seller why you needed the saw. Also, if the seller gave you notice of the intended use (for example, a label says “this is a saw for cutting wood only”) and you used it differently, like metal cutting, then you couldn’t rely on this condition to get your money back.

The third condition is that the goods must be of merchantable quality

There's an implied condition that the product won't have any defects if you buy it by description from someone who sells that type of goods. So, it applies to catalogue sales and most mail order sales. But it wouldn't apply if you bought something privately through the classified ads, for example. It also wouldn't apply if you examined the goods first and had a chance to discover any defects before buying.

The fourth condition is that the goods will last for a reasonable period of time

Of course, this implied condition only applies if you use the product as intended. It won't apply if the goods are put to some use for which they weren't made. You can't say that an ordinary vacuum cleaner designed for household dust hasn't lasted for a reasonable time if it breaks down while using it to suck up heavy construction debris.

What should you do if you discover the goods you've bought are defective?

You should immediately return the goods to the seller. Request an exchange for replacement goods. If a replacement product isn't available, ask for a refund. If the product isn't suitable for its use, then you'll only want a refund. Also, don't continue to use the defective goods until you return them or after demanding a refund or exchange. If you continue to use the defective product, you could and probably will lose the right to return it.

What if trying to return the goods doesn't work?

Then tell the seller in writing that you're rejecting the goods. Act quickly. If after writing and attempting to return the goods, you're still met with resistance in obtaining either a replacement or refund, insist on leaving the defective goods with the seller, and get a dated receipt indicating this. Then make your complaint to the store's customer complaint department, and if you still don't get any satisfaction, complain to the president of the company and tell the company in writing that you intend to sue.

In general, your best protection as a consumer is to be well informed

And if a seller makes promises or guarantees that you're relying on, make sure those promises are in writing and that you understand them.

Where can you get help or more information?

- You can call the Better Business Bureau. They may propose mediation or arbitration as informal ways to resolve your dispute. You and the seller must both agree to this. With mediation, a qualified third party mediator helps to facilitate a mutually acceptable resolution. With arbitration, an arbitrator hears both sides of the story and then makes a decision that is legally binding. The phone number for the Better Business Bureau for mainland BC is 604.682.2711 (website www.mbc.bbb.org [1]) and 250.386.6348 for Vancouver Island (website www.vi.bbb.org [2]).
- You may also contact one of the various consumer agencies listed on Consumer Protection BC's website at www.consumerprotectionbc.ca [3] under its "How Can We Help?" page (under the "Help for Consumers" tab), or phone Consumer Protection BC at 1.888.564.9963 for guidance.
- If the goods you've bought aren't defective, but don't live up to the glowing promises made by the seller, refer to Script 260 on "Dishonest Business Practices and Schemes".

[updated February 2013]

References

[1] http://www.mbc.bbb.org
[2] http://www.vi.bbb.org
[3] http://www.consumerprotectionbc.ca
[4] http://www.dialalaw.org

Receiving Unsatisfactory Services (Script 258)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses what you can do if you buy services that turn out to be unsatisfactory.

When you buy and receive a service, you are making a contract

Your contract is with the person or company who provides the service. (If a person is an employee of a company, your contract is with the company only.) Your rights and obligations depend on BC law and the terms of the contract. Note that a contract does not need to be in writing. There are also oral or verbal contracts.

The terms of a contract can be “express” or “implied”

- An “express” term is one that you and the service provider have agreed on – either verbally or in writing, or both.
- An “implied term” is one that the law says is part of a contract, even though you haven’t discussed it with the service provider.

Guarantees and warranties are common types of express terms

For example, a painter might guarantee that your house won’t need repainting for five years. But guarantees and warranties are often so vague, or buried in so many qualifications, that they’re worth very little to you. If the service provider makes any promises or guarantees, get them in writing, and be sure you understand any conditions that limit them. If your painter, for example, has a standard guarantee that excludes brickwork, and you don’t like that, discuss it. If the painter says, “Oh, don’t worry, I’ll guarantee your brickwork too”, don’t just accept that. Change the term in the

contract to say the guarantee includes brickwork, and get the painter to initial the change.

The law says certain implied terms are part of all service contracts in BC

These implied terms are that the service provider:

- must use reasonable care
- must do the work in a "proper and workmanlike manner"
- must use materials of reasonable quality

So, if you hire someone to perform a service for you, and the person performs the service poorly, you can sue the person for breaking an implied term of the contract, even if you had no written agreement and didn't talk about the quality of service.

It's better to have express terms in the contract

To avoid misunderstandings and arguments, it's better if you have express terms, rather than just relying on implied terms. Implied terms are broad and general, and different people can interpret them to mean different things. So if it's important that the job be done by a certain date, set a date when the service must be done. If you don't set a date, the service provider only has to get the job done within a reasonable time. And that may be longer than you want. Also, include in the contract what will happen if the service provider doesn't live up to the contract.

Make sure you have a written contract

Oral contracts are much harder to prove, so make sure your agreement is in writing – especially if it involves a lot of money. Even though an oral contract is legal, it can be very hard to prove. It can also lead to misunderstandings about what you and the other side expect.

Make sure that the written contract has all the terms that are important to you, and don't leave any term in the contract just because it's a standard term. If a term doesn't apply to you, cross it out, initial the change and get the other side to initial the change too.

Don't pay for the services in cash

If you pay cash, you'll have no evidence that you paid the service provider, and no recourse if there's a problem.

What about repair estimates?

If you have a written repair estimate, the person doing the repairs cannot charge you for work that isn't described in the estimate, unless you consent to it. But if you have a dispute with a repairperson, you may have to pay the bill first and go to court later. That's because some repairpersons can put a "repairer's lien" on the thing they repaired and keep it until you pay the bill. Or, the repairperson can sell the item to pay for the repairs.

What about charges for unnecessary services or services never performed?

Sometimes you may find that a service provider is trying to charge you for services that weren't necessary or that were never performed. This may be in violation of the provincial *Business Practices and Consumer Protection Act*. If you suspect this, contact Consumer Protection BC at 1.888.564.9963 (toll-free) or through the Internet at www.consumerprotectionbc.ca [1].

Professionals have organizations you can complain to about poor service

If you got poor service from a professional such as a doctor, lawyer, architect, accountant or dentist, try to solve the problem first by talking to the person. If this doesn't work, go to the organization for that profession. For example, for lawyers, go to The Law Society of British Columbia (www.lawsociety.bc.ca [2]). For doctors, go to the College of Physicians and Surgeons of British Columbia (www.cpsbc.ca [3]). Professional organizations have discipline committees that review complaints from the public, and they may be able to help you. If you don't know the name of the organization or where to locate it, ask another member of the same profession.

You can also find help for other occupations too

Real estate agents, travel agents and car dealers have to be licensed or certified by provincial or municipal authorities. Other occupations have voluntary organizations – the Canadian Association of Movers, for example. If you aren't satisfied after complaining to the service provider, you should contact these authorities or organizations. For example, for automobile dealer complaints, contact the Motor Vehicle Sales Authority of British Columbia (www.mvsabc.com [4]). For complaints dealing with realtors' services, contact the Real Estate Council of BC (www.recbc.ca [5]).

In some cases, you may be able to sue

If you've been the victim of professional malpractice or poor workmanship and have suffered some loss or injury, you may want to sue for negligence or breach of contract. For more information on professional malpractice, refer to Script 420 on "Medical Malpractice" or Script 436 entitled "If You Have a Problem with Your Lawyer". But if you're thinking of suing, you should speak with a lawyer.

Remember, complain promptly

If you buy a service that turns out to be unsatisfactory, complain about it promptly. Get legal advice early, if necessary. Keep good records. And always correspond in writing, so you have a record of what was said.

Where can you get help or more information?

- You can contact the Better Business Bureau. The phone number for the Better Business Bureau for mainland BC is 604.682.2711 (website www.mbc.bbb.org [6]) and 250.386.6348 for Vancouver Island (website www.vi.bbb.org [7]). Also check "Helpful Links" on the mainland BC Better Business Bureau's website.
- You may also contact one of the various consumer agencies listed on the Consumer Protection BC website at www.consumerprotectionbc.ca [1] under its "How Can We Help [8]?" page (under the "Help for Consumers" tab), or phone them at 1.888.564.9963 for guidance.
- If you feel you've been duped or misled, refer to Script 260 on "Dishonest Business Practices and Schemes". If the services you've bought include the supply of defective goods, refer to Script 257 on "Buying Defective Goods".

[updated February 2013]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [9].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

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[1] http://www.consumerprotectionbc.ca
[2] http://www.lawsociety.bc.ca
[3] http://www.cpsbc.ca
[4] http://www.mvsabc.com
[5] http://www.recbc.ca
[6] http://www.mbc.bbb.org
[7] http://www.vi.bbb.org
[8] http://www.consumerprotectionbc.ca/consumers-alias/help-for-how-can-we-help
[9] http://www.dialalaw.org

Dishonest Business Practices and Schemes (Script 260)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses dishonest business practices, misleading advertising, deceptive telemarketing, scams, and business schemes to stay away from.

Consumers are protected against dishonest business practices

In addition to other federal and provincial laws, BC's *Business Practices and Consumer Protection Act* (the Act) protects consumers against misleading advertising and dishonest sellers. It prohibits two unfair practices:

1. deceptive acts and practices
2. unconscionable acts and practices

The Act applies to transactions and sales between "consumers" and "suppliers"

A supplier is basically a business or someone who is in the business of promoting, advertising or conducting consumer transactions. So it covers the department store, but not your neighbour who has a garage sale once a year. A consumer is someone who buys, rents or leases something for their own personal, family, or household use. The Act applies to sales, transactions or advertisements involving goods, real estate, services or credit, but it doesn't cover securities or insurance.

What are deceptive acts or practices?

These include any oral or written statements, visual or descriptive representations, or conduct by a seller that can deceive or mislead a consumer. For example, it's deceptive for someone selling roofing products to say that your house needs a new roof when it doesn't. And it's deceptive for a car dealership to tell you that the vehicle you're interested in was previously owned by a senior citizen when, in fact, it used to be a taxi.

What are unconscionable acts or practices?

Unconscionable acts are unscrupulous or dishonest sales practices often involving high-pressure sales tactics. Was a lot of undue pressure put on you to persuade you to enter into the consumer transaction? Were you taken advantage of because of your age or inability to understand the nature of the deal? Was the price much more than the price for similar products sold elsewhere?

What happens if a business commits a deceptive or unconscionable act?

If warranted, Consumer Protection BC can investigate your complaint (their contact information is at the end of this script). They have the authority to issue "compliance orders" compelling businesses to comply with the Act and possibly reimburse any monies lost by consumers. In extreme and rare cases involving numerous consumers who have lost significant amounts of money, the business' bank account can be frozen and a lawsuit started against the business. In serious cases, the supplier could also be charged with an offence under the Act and fined.

You may have to sue the supplier to recover any loss you suffered

You can use Small Claims Court if your claim is for less than the court limit of $25,000. If you win, the court may give you a judgment for "punitive damages" to punish the supplier, in addition to ordering compensation for your financial loss. But before starting a court action, try to resolve the problem first. You can do this yourself, through a lawyer, or perhaps with the help of the Better Business Bureau.

The federal *Competition Act* also prohibits misleading price advertising

For example, "bait and switch" tactics are against the law. In general, if a business advertises a sale, it must stock sufficient items at the bargain price or give you a rain cheque, rather than use high-pressure sales tactics to get you to buy a different, more expensive item. Also, if there's more than one price tag, the store must charge you the lowest price, unless the lower price has been crossed out or covered up.

What about deceptive telemarketing?

Some companies use deceptive practices when trying to sell you something over the phone. They'll call saying that you've won a prize, and all you have to do is pay for the shipping and handling fees or give your credit card number for verification purposes. Or they offer to sell you something that sounds like a really good deal, but you end up with a cheap plastic watch instead of the expensive watch you expected. This is deceptive telemarketing. Deceptive telemarketing is prohibited by the *Competition Act* and is a criminal offence.

Telemarketers must follow rules

BC's *Telemarketer Licensing Regulation* applies to telemarketers operating in BC who contact consumers to buy something over the phone and to third-party fundraisers. This regulation helps protect consumers by licensing and regulating telemarketers, and imposing penalties for violations of the regulation. For example, a licensed telemarketer may only contact you weekdays between 9:00 a.m. and 9:30 p.m. and weekends between 10:00 a.m. and 6:00 p.m., and they can't communicate with you on a statutory holiday.

How should you deal with telemarketers?

If you get an unsolicited phone call to buy something, don't give out information about your bank or credit card, and don't be afraid to hang up the phone. Note that telemarketers who phone you offering prizes or products for sale must tell you who they work for. To reduce the number of unsolicited calls, contact the National Do Not Call List registry at www.lnnte-dncl.gc.ca [1]. Consumer Protection BC may also be able to help if you have a problem.

Canada's new anti-spam law starts July 1, 2014

Starting July 1, 2014, Canada has a new anti-spam law to protect people and businesses from spam (junk email and text messages) and online threats (spyware, malware, phishing scams, etc.) originating in Canada. It's called the *Electronic Commerce Protection Act*. Unfortunately, the law cannot control businesses and people outside Canada, and they produce huge amounts of spam and online threats. Some sections of the law take effect later: January 15, 2015 for the sections on installing computer programs and July 1, 2017 for the sections on suing for losses.

Consent is required—a key section of the new law requires senders of commercial emails and text messages to have the consent of the person they're sending the message to. The law also prohibits installation of computer programs and collection of electronic addresses without consent, as well as false and misleading representations.

Consent requirement is phased in—the law has two types of consent: **express** and **implied**. There is implied consent for 36 months after the law starts—if there is already a relationship between the sender and recipient of a commercial message. But the recipient can cancel this implied consent any time. During these 36 months, senders of commercial messages can ask recipients for express consent so they can continue sending commercial messages to those recipients after the 36 months.

Senders must identify themselves and let recipients unsubscribe—in addition to getting consent from recipients, senders of commercial messages must identify themselves and include an unsubscribe option in the message so recipients can stop receiving messages.

Three federal government agencies will enforce the law: the CRTC, the Competition Bureau, and the Office of the Privacy Commissioner.

Details on the new law are available on two government websites:

- https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html
- http://fightspam.gc.ca/eic/site/030.nsf/eng/home

What business schemes should you be wary of?

Many business schemes that promise you'll get rich quick will only cause you to lose money or are illegal. Consider "multi-level marketing", which involves selling a service or products through distributors who earn money by supplying the service or product to other participants in the venture, who in turn make their money by supplying the same or another service or product to other participants. Typically, consumer products such as cosmetics, jewelry or cleaning products are sold in customers' homes. Promoters asking you to get involved are not allowed to make exaggerated claims. And any claims made about expected earnings must be fair and reasonable and include the average compensation earned by the typical distributor in that business, and the time and effort needed to reach specific levels of income.

A pyramid scheme is an illegal type of multi-level marketing

Typically, with pyramid schemes, the focus is on recruiting new distributors, not on selling the product. You're promised that by buying a distributorship, you can make money by recruiting other people to be distributors. If those new distributors recruit other new distributors, everyone up the pyramid will get a share of the recruitment fee. But simple arithmetic tells us that after only a few recruitment levels, everyone in BC would be distributors, with no one left to be buyers!

What should you do if you're a victim of an unlawful multi-level marketing scheme?

Contact the Competition Bureau. The toll-free phone number is 1.800.348.5358. A person convicted of promoting a pyramid scheme can be sentenced to a fine decided by the court, or up to five years in jail, or both.

What about franchises?

A "franchise" involves the "franchisor" granting the "franchisee" the right to use a particular system of carrying on business or the right to sell a certain product or service. In return, the franchisee typically pays a fee and ongoing royalties to the franchisor. Be cautious, however, of franchises that consist of selling a product through automatic vending machines or on display racks. You may be promised lucrative high-volume locations and told that all you have to do is keep the machines or racks stocked – and collect the money. But, in fact, the locations are often poor and the

sales figures only a small fraction of those promised. After initially shelling out thousands of dollars, you may be stuck with some greatly overpriced vending machines and unsaleable products.

Also be cautious of work-at-home schemes and chain letters

Work-at-home schemes urge you to send away money to learn how you can make good money working from your home. But these schemes are misleading. And chain letters inviting you to send and receive money are illegal under the Criminal Code.

Be wary of other scams too

Watch out for scams involving the sale of office supplies, listings in directories and phoney invoices. In the office supply scam, for example, an employee of yours will get an unsolicited call implying that your business has agreed to accept shipment of paper and office supplies, when you haven't in fact ordered them. When the supplies arrive, you discover that they cost way more than the going rate and/or are inferior.

Before investing money in any business opportunity, investigate the scheme carefully

A well-researched franchise may well be an effective way to carry on a business. But you must see a lawyer and have a properly prepared franchise agreement. A legitimate multi-level marketing venture could also prove profitable if you invest time, effort and money. But be aware that there are many scams out there.

Where can you get help or more information?

- Call Consumer Protection BC toll-free at 1.888.564.9963. Their website is www.consumerprotectionbc.ca [2].
- Check https://www.ic.gc.ca/eic/site/ecic-ceac.nsf/eng/gv00521.html and http://fightspam.gc.ca/eic/site/030.nsf/eng/home for information on Canada's new anti-spam law.
- You can also contact the Better Business Bureau at 604.682.2711 for mainland BC (www.mbc.bbb.org) or 250.386.6348 for Vancouver Island (www.vi.bbb.org [3]).
- For inquiries on the *Competition Act*, call the Competition Bureau at 1.800.348.5358. Also check their website at www.competitionbureau.gc.ca [4].
- For inquiries relating specifically to dishonest selling practices with vehicles, contact the Motor Vehicle Sales Authority of British Columbia at 604.574.5050. Also check their website at www.mdcbc.com [5]. Search under "Consumer Resources" for information on consumer complaints. Also search under "Dealer Resources" then "Advertising Guidelines" for information on advertising rules for motor vehicle dealers.
- For more information on telemarketers, check script 256 on "Shopping by Phone, Mail or the Internet".
- The laws referred in this scripts are available at www.bclaws.ca [6] or http://laws-lois.justice.gc.ca/eng/.

[updated June 2014]

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[7] http://www.dialalaw.org

Class Actions in British Columbia (Script 233)

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What is a class action?

Mass production and marketing of consumer goods and services means that a single mistake or wrongful act at any stage of design, production, or distribution can injure or cause loss to many people in a similar way. One response to these injuries or losses (called “mass wrongs”) is a “class action” – a lawsuit that groups people with a common claim together against the same defendant. A class action deals with several claims that would otherwise be separate lawsuits.

A class action is cost effective

Often, injured people won’t sue individually because the amount of money they seek is too small compared to their legal costs. And it’s often not practical for just one buyer of a defective product to sue a large manufacturer. But the total loss or damages suffered by many injured people or buyers may be very large. Class actions make lawsuits more affordable by allowing all the victims of a mass wrong to, in effect, share the cost of a lawsuit. You might say that class actions allow “mass-produced lawsuits” for “mass-produced wrongs.”

What kinds of cases are suitable for a class action?

Class actions are often used in product liability cases when a manufactured item, like a drug or a vehicle, is defective and injures many people. Class actions are also common against governments, banks, and businesses related to the stock market – for overpayment of taxes, illegal service charges, misrepresentations, and even systemic discrimination. Class actions may also be brought against companies for price fixing, monopolization and providing misleading information. Whenever a mistake or wrongful act affects many people, a class action may be effective.

What court hears a class action?

Class actions have been part of the legal landscape in British Columbia since 1996. They are governed by the *Class Proceedings Act*. It lets one person sue in the BC Supreme Court on behalf of a group of people if they have similar claims against the same wrongdoer. The Federal Court of Canada also allows certain class actions involving federal law and the federal government.

How is a class action started?

Under BC law, a person who has been hurt or suffered loss can apply to the BC Supreme Court to be the "representative plaintiff" in a lawsuit on behalf of a group of people. These people also have to ask the court to "certify" the lawsuit as a "class proceeding." The lawyer for the representative plaintiff becomes the lawyer for all the class members. A defendant to two or more proceedings may also ask the court to convert those proceedings to a class proceeding.

Certification is the most important stage in a class action

Almost all class actions that are certified go on to be settled. If a court doesn't certify a class action, the members of the group can usually sue individually, as if the class action had never started.

What's needed to get a court to certify a class action?

The court must certify the lawsuit as a class action if the following five criteria are satisfied:

1. The document that the plaintiff files in court (called the Notice of Civil Claim) shows a legally valid claim based on a mistake or wrongful act.
2. The court can identify two or more people as a class, who are then called class members. The class is easily defined, so individuals can readily identify whether they fit into the class. (In some cases, classes are further divided into subclasses.)
3. There are common issues in the claims of the class members.
4. A class action is the best way to fairly and efficiently resolve the common issues.
5. There is a representative plaintiff – someone who can represent all the members of the class.

There are three requirements for the representative plaintiff

A representative plaintiff:

1. Must fairly represent the interests of the class members.
2. Must have a plan to run the class action for the class members and notify them of the lawsuit.
3. Must not have an interest conflicting with interests of other class members on the common issues.

How do you decide whether there should be a class action?

People who are thinking of using a class action should consider the following things:

1. Has a class action dealing with the same issues already been filed?
2. Is a class action a fair and efficient way to solve the common issues?
3. Are the common issues more important than the individual issues?
4. Is a lawsuit the best way to solve the claims? Has the defendant come up with other ways to compensate class members?
5. What type of lawsuit is best for the case: class action or individual?
6. Is a class action too complicated?

For example, a class action is not appropriate when individual issues that have to be determined would overwhelm any benefit from determination of the common issues. In these cases, there is a risk of long and complex individual trials after the common issues are determined.

Class members must be notified of a class action

Many class members wouldn't know if a class action has been started and certified by the court. To protect these people, the representative plaintiff must notify the class members of the class action in a way approved by the court. This notice can be by letter if the class members are known; otherwise, it will most often be by newspaper or magazine advertising. Class members must also be notified of any determination of common issues and any settlement.

Can class members opt out of a class action?

Class members can choose not to be part of a class action (or "opt out" of it) if they want to sue on their own. To opt out, they must usually fill out a form or write a letter to the court or the lawyer of the representative plaintiff. People who don't opt out have to accept the result of the class action.

A judge supervises the lawsuit for all class members

Even if class members know about a class action, most of them probably won't be in court. To protect their interests, a judge supervises every stage of the class action, from start to end. The judge looks out for the best interests of the class as a whole, not just the representative plaintiff, to ensure both the process and results are fair. If the representative plaintiff agrees to settle the class action, the judge will ensure that a notice to class members is published and that the settlement is fair, reasonable and in the best interests of the class as a whole.

How is a judgment made?

The court can assess compensation for the class as a whole without proof of individual claims. It may use statistical evidence when assessing the amount. After this assessment, the court can award individual class members compensation as a proportion of the total amount, or it can decide their compensation individually.

Paying the defendant's legal costs is usually not a risk

With class actions, an unsuccessful representative plaintiff in BC doesn't usually have to pay part of the defendant's legal costs (which can happen in individual lawsuits). So starting a class action is not as risky as starting an individual lawsuit. This "no costs" regime in BC is meant to increase people's access to justice. Not all Canadian provinces operated on a "no costs" basis.

Can you appeal a class action?

Any member of the class may appeal an order to certify a proceeding as a class, a refusal to certify a proceeding as a class, or a judgment on a common issue.

Class actions are becoming more common

The trend towards more frequent class actions will probably continue now that all 13 jurisdictions in Canada have class action laws. The Canadian Bar Association hosts a National Class Action Database, designed to give lawyers and the public easy access to court documents submitted in relation to class action lawsuits currently underway across the country. In BC, registration with the Database is mandatory. You can search the Database at www.cba.org/CBA_ClassAction/Search.aspx [1].

Summary

Class actions are complicated, but they're often an effective way to make several claims collectively against one or a few wrongdoers. If you think a class action may be best in your case, you should speak to a lawyer. If you get notice of a class action that might affect you, you may also want to see a lawyer to find out whether you should participate in the lawsuit.

[updated April 2013]

References

[1] http://www.cba.org/CBA_ClassAction/Search.aspx

[2] http://www.dialalaw.org

Commercial Law

Patents, Industrial Designs, Trademarks and Copyright (Script 231)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Inventors, designers, entrepreneurs, writers and other creative and business people are often interested in protecting their ideas and business inventions. But how do you protect a new invention, or the brand name of a product, or the words of a song? Through patents, industrial designs, trade-marks and copyright—and sometimes as trade secrets too. This script discusses these forms of what the law calls "intellectual property," starting with patents.

What is a patent?

Suppose that a company, National Mousetrap Corporation, has developed a new and better mousetrap. To protect that invention, it can apply for a patent.

A patent is essentially a contract between an inventor and the federal government. The government gives you, the inventor, the right to prevent others from making, selling or using your invention in Canada (and possibly elsewhere) for the life of the patent. In return, you share the technological information behind your invention, so that others can benefit from and build on this knowledge when the patent expires or they obtain a licence from you

How do you get a patent?

You must submit a patent application, along with the appropriate fee, to the Patent Office of the Canadian Intellectual Property Office (CIPO) in Hull, Quebec. (CIPO's address and website is given at the end of this script.) Your application must describe your invention in full and demonstrate that it is new, useful, and has inventive ingenuity.

But your application isn't automatically looked at. Within five years, you must formally ask that your application be considered and pay the prescribed fee. Approximately two years after you've paid this Request for Examination fee, a government patent examiner familiar with the subject matter in question will examine your application. If the examiner has any objections to the application, they will issue an examiner's report explaining why the application is being rejected. The inventor (or patent agent hired by the inventor) must then respond within the prescribed time frame by submitting arguments and/or amendments in support of their patent application. The examination process itself can take one to four or more years, and after that, if your application is approved, you'll receive your patent.

How long does a patent last for?

The life of a patent is 20 years from the time you first submitted your patent application. To keep your patent alive, you must pay annual government maintenance fees.

A patent application is a complicated process

Most applicants hire a registered patent agent or patent lawyer to help them with the complicated application process. You can get a list of registered patent agents from the Patent Office at CIPO.

Time is of the essence

If you're concerned about a competitor being on the same track, you'll want to submit your patent application for your invention as soon as possible. In most countries, including Canada, the person who applies first to the Patent Office is given the patent over another applicant who applies later claiming the same invention. This is true even if the second applicant can prove that they invented the same product before you did.

Also, any public disclosure, use or sale of your invention starts a one-year clock ticking. After that one year period, you cannot obtain a valid patent for your invention. Most countries, other than Canada and the US, don't allow you this one-year grace period—they don't allow any public disclosure before a patent application can be validly filed, and you could lose your right to obtain a patent internationally if you rely on the one-year grace period afforded in Canada. It's therefore important to keep your invention secret and to file your patent application (or evaluate your other options) before you publicly disclose your invention.

What is an industrial design?

Returning to the mousetrap example, imagine that the company has also designed its mousetrap so that it has an attractive shape or design that appeals to consumers. But the company is worried that a competitor might soon copy the look and visual design of the mousetrap. To protect the design, the company can apply for an industrial design.

An industrial design protects the unique shape or ornamental appearance of a product. Examples include the shape of a table, the pattern of a fabric, the visual design of a computer keyboard, and the decoration on the handle of a spoon.

You must apply to register an industrial design

You must do this within one year after the design, or an article showing the design, has first been publicly used, displayed or sold. Registration protects an industrial design for 10 years, but a maintenance fee must be paid after five years. Like patents, many countries outside of Canada and the US require you to submit your application for registration before there is any public disclosure of your design.

What about trade-marks?

Now suppose that the company, National Mousetrap Corporation, has also developed a catchy name to brand the product and/or a distinctive logo to use on the boxes in which the mousetraps are sold and in magazine ads promoting its mousetraps. To prevent competitors from using the same logo and/or name, it would apply for trade-mark registration. (Copyright protection for the logo may also be available, discussed later.)

What is a trade-mark?

A trade-mark is a word, logo, symbol or design (or a combination of these) used to distinguish a product or service from competitors in the minds of consumers. The red "K" on a box of Kellogg's Cornflakes, and the alligator on Lacoste t-shirts, are familiar examples of trade-marks.

How do you protect a trade-mark?

To register a trade-mark, you must submit a trade-mark application to the Trade-marks Office of CIPO in Hull, Quebec. You may file a trade-mark application on the basis of use (i.e., you have already started using the trade-mark in association with your business) or on the basis of proposed use (i.e., you intend to use the trade-mark in the near future, but you haven't yet started using it). After examination and publication of your trade-mark, and if no one opposes it, your trade-mark will be registered.

Although not as tricky and complex as patent applications, it's still best that you hire a trade-mark agent to help you with the application process. You can get a list of agents from the Trade-marks Office at CIPO.

Registering a trade-mark isn't essential, but can be helpful

While you don't have to register a trade-mark to use it, registration gives you the exclusive right to use your trade-mark throughout Canada for 15 years and the right to stop others from using a mark that is confusingly similar to yours. You can also renew your trade-mark every 15 years as long as you continue to use the trade-mark in your business. On the other hand, an unregistered trade-mark can only be protected in those places where you can prove the trade-mark is known and has an established reputation.

What about copyright?

Suppose that the mousetrap company is ready to launch an advertising campaign. Its advertising department has created a brilliant script for a TV commercial. The law of copyright protects the ownership of the script.

What does copyright mean?

In Canada, the law automatically gives the author, artist or creator of original works like poems, books, plays, musical scores, software codes and paintings ownership rights or "copyright" in that creation. Many items in your business—such as your logo, website, advertising materials and more—are probably protected by copyright. Simply put, copyright means that no one else can copy your work without your permission. This right generally lasts during your lifetime plus another 50 years after your death.

When does copyright not apply?

If you use your artistic work on a useful article, such as a decorative lamp or goblet, by employing the article as a model or pattern to make 50 or more decorative lamps or goblets, then copyright protection, with some exceptions, isn't usually available, and you generally have to apply for registration of an industrial design instead. You also can't claim copyright in a very short combination of words, such as the title of a book or song.

Do you have to register your copyright?

Because copyright is automatic, you don't have to register it. But registration can help prove you own the copyright, especially if you have to sue someone for what's called "infringement" of your copyright. When you register your copyright, you are the presumed owner of the work and the burden of proof is on the person challenging your copyright to disprove your ownership. If you don't register your copyright, the burden of proof is on you to prove that you own the copyright.

How do you contact the Canadian Intellectual Property Office?

The address for the Patent Office, Trade-Marks Office and other offices is care of the:

Canadian Intellectual Property Office

Place du Portage Phase I

50 Victoria Street

Gatineau, Quebec K1A 0C9

CIPO's website is www.cipo.gc.ca [1]. For brochures and other information, check their website or call them at 1.866.997.1936.

Can you protect trade secrets and confidential business information?

As well as traditional forms of intellectual property (patents, industrial designs, trade-marks and copyright), courts recognize that businesses should also be able to protect their trade secrets and certain business information that they want to keep confidential. This could include special recipes, training manuals, methods of doing business and inventions that aren't patented—all of which is kept secret from the public. You don't register this type of information. Having employees, customers or business partners sign a confidentiality or non-disclosure agreement is the most common way to protect this secret and confidential information, and if someone breaks the agreement, you could be entitled to get compensation from them.

Summary

Patents protect new, useful and ingenious inventions. Industrial designs protect the shape or ornamental appearance of manufactured goods. Trade-marks protect words, symbols and logos used to distinguish the goods or services of one trader from those of another. And copyright protects original books and poems, computer program websites, artwork, movie scripts and the like. It's also possible to protect your trade secrets and confidential business information.

[updated July 2014]

References

[1] http://www.cipo.gc.ca
[2] http://www.dialalaw.org

Music Law: Copyright and Trademarks (Script 264)

This script discusses the law as it applies to song writing, performing and recording music. In particular, it discusses the ownership of music and lyrics, getting paid for performances, the legal relationship among band members, contract relations with managers and agents, and dealing with agreements offered to you by recording companies and others. This script will be of particular interest to independent, non-union musicians who play in a group or band and hope one day to perform at a large event and be offered a recording contract.

Do songwriters and musicians have the right of "copyright"?

Yes. When a song is created, copyrights arise immediately for the music, the lyrics and the combination of music and lyrics. The owner of the copyright may be the person who creates the particular song (musician or lyricist) or it may be another person who has made a contract with the musician or lyricist (such as a publisher or recording company).

Before a song is recorded, it's generally known as a composition. Once it's recorded, a separate (but interdependent) copyright applies to the recording.

Copyright owners (in some cases, the musicians and songwriters, but often the publishers and recording companies) have the right to control copying and distributing their compositions and recordings. This means it is generally illegal to copy songs (and sheet music and song lyrics) without permission of the copyright holder.

But there are some exceptions. For example, it's not an infringement of the copyright to reproduce a song for private purposes if the original copy of the song was legally bought. It's also not a copyright infringement to make a backup copy or to reproduce the work for the purposes of criticism or review. The *Copyright Act* has strict conditions for these exceptions though, so you need to be very careful when considering using or copying music, lyrics or other works for which you don't hold the copyright.

If you play someone else's music, do you have to pay a "royalty"?

To publicly play or perform music that's been created or recorded by another songwriter or musician, you, your label or the venue are legally obligated to pay a fee or royalty. So, if you perform cover songs with a group in public, you may be surprised to find a musicians' collective asking to collect royalty payments from you or the venue. You also have to pay royalties if you record cover songs, whether you manufacture CD's or simply sell the song over the Internet.

One collective is called the Society of Composers, Authors and Music Publishers of Canada (or SOCAN), found on the Internet at www.socan.ca [1]. SOCAN is entitled to demand a play list and royalty fees for pieces performed, including CD's played by disk jockeys in public places.

Another collective is the Canadian Musical Reproduction Rights Agency, found at www.cmrra.ca [2], which collects mechanical royalties for songwriters and publishing companies.

And another collective is Connect Music Licensing (formerly Audio-Visual Licensing Agency or AVLA), found at www.connectmusiclicensing.ca [3]. They collect royalties for owners of master recordings, something that disc jockeys should pay special attention to.

Of course, these same laws concerning copyright and the payment of royalties protect you too if you write and record your own music. It's recommended that you register with SOCAN, which collects licensing fees and royalties on behalf of member songwriters and musicians whenever their music is broadcast on the radio or TV or performed in public. (That's done through the Canadian Intellectual Property Office, which be found at www.cipo.gc.ca [4].)

How do you get paid if you work independently on a single performance or call out basis?

If you work on a single performance as a back-up or are called to perform a jingle for a radio ad or work on some other call out gig, either live or recorded, you're normally paid on the day of performance just for that performance. You have no rights in the music beyond the day of performance and generally aren't entitled to any further payment (there are exceptions, however, for example, if you're part of the musician's union). If you're satisfied with these arrangements, you may not need a written agreement. It's usually a good idea, though, to ensure you're paid what you expect when you expect it, and to ensure you (and the band leader) are aware of any other requirements (such as scheduling, equipment

rentals or wardrobe).

What about further payment beyond the day of the performance?

These are called royalties. Royalties are further payments if your performance is recorded or taped and the recording is later used on TV or radio or in some other commercial way. If you're looking for royalties, make sure you get a proper written contract.

When can you ask for song writing credit?

If you work on a piece of music written by others and suggest changes that have a large impact on the music, you may want co-writing credit for your contribution. If you feel you're entitled to a co-writing credit for your contribution, you should ask for song writing credit at the time the music is written or recorded. The agreement must be in writing and properly reflect what you are getting credit for.

What is the legal relationship among group members?

Most of the time, a group works together with the common goal of earning money, and they make decisions in a co-operative way. Legally, they may be deemed to be a partnership. The arrangement among members should be made in writing by all members sitting down together, setting out the rights and responsibilities of each, how members may join or leave, who writes the music, who owns the band name and so on. Misunderstandings can lead to break-ups and even lawsuits, so make sure everyone understands the agreement.

Sometimes, a group leader hires and pays the musicians and makes all the decisions for a particular kind of show. That person is called a band leader and is legally considered a proprietor. The hired musicians are employees only. They have no ownership interest in the group, unless a different agreement has been negotiated and put in writing.

A group can also consider carrying on business as an incorporated company. The group may choose to do this if their earnings are significant or if they are signed to publishing or recording deals. Individual members of the group may also consider incorporating their own companies (often referred to as "loan out" companies), which can offer certain tax benefits if the musician's earnings are significant.

What about the name of the band?

It's important as a group becomes popular to ensure that another group isn't using your group name. To properly protect your band name, you need to consider registering it as a trademark, because other registration methods, such as Internet sites, will not protect you properly. Refer to script 231 on "Patents, Industrial Designs, Trademarks and Copyright" for more information on this.

Who in the band gets credit for original music?

It's important to discuss writing credits for original music and understand each other as to who the writers are. Is the music created by the band, or only by certain members? This should be written down for each piece of music, and agreed to by all. Sometimes the co-writing credits involve persons outside of the band members, and those people need to be acknowledged.

How do you protect your band's copyright in your music?

Since copyrights arise immediately on the creation of the work, evidence of the time of that creation can be critical if you have a copyright dispute. You may also need to show that you (or your band) actually created the work (song) in question.

Formally registering the work with Industry Canada (see www.cipo.gc.ca [4]) is one, very powerful way to prove that you created a work at a given time, but it's not the only way.

If you keep notes, communications (such as email messages) and other material (such as song and lyric versions) relating to the work, those too can be valuable evidence in a copyright dispute. There are a number of inexpensive online storage tools that can help (check out secure cloud storage).

Also, if you take the time to document who wrote the song (including the date and the percentage of ownership to each band member) and have everyone sign off, that too can be good evidence of the copyright.

It's wrong to believe that copyright can be fully protected only by mailing the original music, lyrics and recording to yourself by registered mail. While this may help to verify the date the work was created, it doesn't in itself connect the creation to the creator. If you choose to do this, make sure you include inside the envelope a signed statement setting out who created the songs and when, and also who created the recording and when. You can also consider emailing a copy of the songs to all songwriters and performers, along with a summary of who created them.

If you plan on formally registering your song, you should note that Industry Canada doesn't accept copies of single physical recordings, but the U.S. Copyright Office does. See www.copyright.gov [5]. Canadian albums that go into general release are, however, registered at the National Library of Canada by the publisher. See www.collectionscanada.ca [6].

How do you distribute and market your recordings?

Once the musical work is recorded, arrangements need to be made for distribution (via CD and online), marketing and appearances in support of the recording. This is the point where a group usually hires a manager and agent, and looks for deals with publishers and record companies. Make sure everyone is clear on their rights and responsibilities, the commission to be paid to the manager and agent, and the length of time of the agreements. These should be put in writing and reviewed by a lawyer.

When does a record company get involved?

If the group is successful and creates sufficient buzz, a record company may become interested. Deals offered by record companies tend to be lengthy and very technical. All agreements must be in writing and must be reviewed by the group's manager and lawyer.

Where can you find more information?

- A good resource is "Musicians and the Law in Canada" by Paul Sanderson. The book is available at most libraries and is published by Carswell.
- Another good book is "All You Need to Know About the Music Business" by Donald S. Passman.
- www.MusicBC.org [7] has many resources for musicians, including seminars, a library and technical help. Initial membership is free.
- Also refer to Dial-A-Law scripts 266 on "Forming a Partnership", 267 on "Forming a Private Company" and 231 on "Patents, Industrial Designs, Trademarks and Copyright".

[updated April 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [8].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

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[1] http://www.socan.ca
[2] http://www.cmrra.ca
[3] http://www.connectmusiclicensing.ca
[4] http://www.cipo.gc.ca
[5] http://www.copyright.gov
[6] http://www.collectionscanada.ca
[7] http://www.MusicBC.org
[8] http://www.dialalaw.org

Starting a Small Business (Script 265)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

There's a lot to be said for starting your own small business. You can be your own boss, and if it goes well you'll have the satisfaction of having created something of value. But statistics show that small businesses have a high failure rate too. Often it's because of inadequate or unrealistic business planning. This script discusses some of the legal aspects to starting a business that you should consider.

Generally speaking, there are three ways to start a business

- You could buy an existing business.
- You could acquire a franchise.
- You could start a business yourself from scratch.

Buying an existing business has many obvious advantages

These include loyal customers, trained employees, reliable suppliers, and fully equipped premises. Sometimes the seller will even stay on for a while until you learn your way around. But you'll pay for this convenience—buying an existing business usually involves the greatest initial capital outlay. And you need to take care that you really are getting what

you're paying for and won't be stuck with any hidden liabilities. You might even want to prevent the seller from turning around and setting up shop in direct competition with you. These are all things that should be included in a written purchase agreement.

If you're considering buying an existing business, consult your lawyer early before making an offer to ensure your investment is protected. Note that there's a distinction between buying the shares of the business as opposed to the assets. Buying the assets usually means taking on less risk. Your lawyer can explain this to you.

Acquiring a franchise is a common way to start a business

A franchise is a system for distributing and marketing a product or service, such as the right to sell a certain brand of fast-food hamburgers or a dollar store. Sometimes financing and training are supplied, so a franchise can be a good turnkey operation. Usually you're obliged to buy goods or services from the "franchisor" (the person or company who grants you the franchise) on an on-going basis, as well as pay for your initial investment, and there are nearly always restrictions on how you run the franchise. Sometimes these are so strict that you're the boss in name only. And there's a danger that you may end up paying substantial royalties or supply premiums. Also, franchisors often require a deposit to apply. Don't give the deposit until you're sure you qualify for the franchise.

If you're considering a franchise, check out its reputation in the business community as best you can, and have your lawyer examine the agreement before you sign. Depending on the franchise, many terms may be negotiable, so you may not have to accept what the franchisor first offers you.

What about starting your business from scratch?

There are pros and cons to starting your business from scratch. On the plus side, it's usually less expensive than, say, buying a franchise or existing business. The cons, on the other hand, include having no support from a vendor or franchisor, starting with no customers, and losing money while starting up as you attract customers from a zero base.

If you start from scratch, you'll have to decide what form of business to use:

- Will it be alone in a sole proprietorship?
- Will you work with others in a partnership?
- Will you incorporate a company?

There are advantages and disadvantages to each of these, and your particular circumstances will determine which is best for you.

A sole proprietorship is the simplest form a business can take

There are several advantages to starting a business as a sole proprietorship:

- It's the least expensive form of business to set up.
- You don't have to share the profits with anyone.
- Decision-making is quick and management is relatively easy there's no one to consult but yourself.
- You can do business under a business name even if you're a sole proprietorship. For example, as John Smith, you can do business under the name of "The Sandwich King." (But make sure you've registered the name before using it.)

But there are disadvantages too:

- If you should die, the sole proprietorship comes to an end.
- You have unlimited personal liability for the debts of the business, so if the business fails, you may risk losing your personal assets, such as your house or car.

With respect to income taxes, if the business makes money, it will be taxed as your personal income—you don't get the benefit of the small business tax rate. On the other hand, as many businesses don't make money in the first few years, you'll have tax deductions you can use. A good rule of thumb is to save a percentage equal to your potential taxes so that you don't have a large tax bill at the end of the year.

What about a partnership?

A partnership has the advantage of combining the talent and resources of two or more people in a way that can be tailored to suit the needs of your business. A partnership agreement setting out each partner's rights and responsibilities is very important, and you should take the time to develop one before you start the partnership.

But there are drawbacks to a partnership. As a partner, you'll be personally responsible for all the debts of the partnership and, generally speaking, you'll be bound by the acts of your partners, even if you don't agree with them.

For tax purposes, each partner will treat his or her share of the partnership's profits as personal income.

There is a type of partnership, called a "limited liability partnership," that limits the liability you may have for your partner's actions—talk to your lawyer about this.

For more information on partnerships, refer to Script 266 on "Forming a Partnership".

A company is a popular way to start a business from scratch

It is a separate legal entity from its owners. A company is liable for its own debts, owns its own property and can sue or be sued. Its owners, called shareholders, enjoy limited liability. This means that their personal assets are generally not at risk and they are not personally liable for the company's debts. The loss that they're exposed to is their initial investment.

But sometimes this isn't as good as it sounds. Lenders often insist that the shareholders of small companies personally guarantee the company's debts, so that the lender is sure of getting repaid even if the company can't pay. Also there are some circumstances in which a shareholder may be held personally liable for the company's obligations.

Other points to note:

- You must use the words "incorporation," "limited" or "corporation" (or Inc., Ltd., or Corp.) with the company name.
- You can incorporate federally or provincially. (If you're going to do most or all of your business in BC, you should register in BC, as it's much easier in the long run.)
- You should have a shareholder's agreement. Have your lawyer assist you with preparing one.

As for tax, a company files its own return and pays its own tax. Shareholders pay tax on what they receive in dividends, bonuses or salary from the company. Depending on your personal income level, you might be able to save tax dollars by incorporating.

For more information on incorporating a company, refer to Script 267 on "Forming a Private Company".

You'll need a business licence and name approval

Whatever form of business you choose a sole proprietorship, partnership or company—you'll need a business license and name approval. You get a business licence from your town or city hall, and the cost will vary depending on the type of business and whether it's operated from commercial or residential premises. You can get the name approval from the provincial government. Many banks won't give you financing until you have a business licence and name approval.

Other government regulations and requirements may apply too

- **Licences and registrations**: Some businesses cannot be carried on at all unless you're legally qualified to do so. For example, you can't start up a real estate agency unless you're licensed. So make sure you have any special licenses or registrations that are required for your particular business.
- **Employee rules**: If you have employees, you'll have to set up accounts with the Canada Customs and Revenue Agency (or CCRA) for withholding taxes, Canada Pension Plan (or CPP) deductions, and Employment Insurance (or EI) premiums. You may also have to establish accounts for the Good and Services Tax and Provincial Sales Tax remittances and Workers Compensation Board contributions.
- **Zoning and bylaws**: Do you know where you'll be located? Some types of business can't be operated in certain areas because of zoning by-laws. If you're planning to run your business from home, be sure to check the by-laws at your local city hall, and if you live in a condominium, look at the strata corporation by-laws as well. As for commercial premises, just because someone is willing to sell or rent space to you doesn't mean that the property meets all zoning requirements for the business you have in mind. Check this out yourself at your town or city hall
- **Building permits**: If you're going to renovate the premises, you'll need a building permit. If you're renting commercial space you'll probably have to pay at least a share of all municipal assessments on the premises, including a business tax over and above your rent. Make sure you get your lawyer to review your lease agreements before signing them.
- **Other regulations**: Depending on the business you're in, your product or service may be subject to certain regulations. Some products have labeling requirements and door-to-door sales are subject to regulation, just to give two examples.

Where can you get help or find more information?

- Small Business BC has excellent information on starting a business and free guides. Call 604.775.5525 in Vancouver or 1.800.667.2272 elsewhere in the province, or visit www.smallbusinessbc.ca [1].
- The federal Industry Canada site www.ic.gc.ca [2] has information and free guides on starting a business, incorporating a federal company, patents, taxes, and so on.
- Visit the provincial OneStop Business Registry website at www.bcbusinessregistry.ca [3], which allows you to apply for various business licences and registrations at one time. It also refers you to "kiosks" where you can get a real person to help you. The OneStop Help Desk number is 250.370.0332 in Victoria or 1.877.822.6727 elsewhere in the province.
- For more information on incorporating a BC company, visit the Corporate Registry's website at www.bcregistryservices.gov.bc.ca/bcreg/corppg/ [4].
- Your lawyer, accountant or bank manager can advise you on certain matters. Many school boards and colleges offer seminars on starting a business. Your public library has a wealth of information including trade directories and information on sources of government assistance.
- Finally, don't be afraid to talk to other people who have started their own business.

[updated July 2014]

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The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.smallbusinessbc.ca
[2] http://www.ic.gc.ca
[3] http://www.bcbusinessregistry.ca
[4] http://www.bcregistryservices.gov.bc.ca/bcreg/corppg/
[5] http://www.dialalaw.org

Forming a Partnership (Script 266)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

If you're involved in a business venture or plan to start a small business with someone else, you might be thinking about forming a partnership. (There are also other ways to run a business, so you should refer to script 265 on "Starting a Small Business" to find out more about the alternatives before deciding on a partnership.)

What is a partnership?

A partnership is formed when two or more people – or companies, for that matter – agree to carry on a business together and share its profits and losses. Whether or not you are actually profitable doesn't matter. What counts is forming a business together with the intention of making a profit.

BC's *Partnership Act* sets out the rules for partnerships

These rules apply automatically to all partnerships. If you choose to be involved in a partnership, you may want to change some of these rules by making a written partnership agreement. Partnership agreements are discussed toward the end of this script.

Are there different types of partnerships?

The *Partnership Act* talks about three types:

- general partnerships
- limited partnerships
- limited liability partnerships

Most small business partners are partners in a general partnership

To understand how a general partnership operates, say you and your friend Bill Smith want to open a store and be partners. You would both be equal partners. The law presumes that, as partners, you and Smith would share equally in the profits and losses of the partnership business, unless you have a partnership agreement that sets out a different arrangement. And you would both have the right to be involved in managing the partnership.

Is a partner responsible for the general partnership's debts?

Yes. General partners are each personally responsible for the partnership's debts. This is true whether or not you're an active or inactive partner in the business.

Suppose you and Smith borrow $10,000 to set up your shop, but your business doesn't do well and the partnership cannot repay the loan. Of course, the bank can ask that you and Smith pay back $5,000 each. But there's also nothing to stop the bank from suing you alone for the whole $10,000. It would then be up to you to try to get Smith's share from him. And if you don't have enough cash to repay the debt, your personal assets – such as your house or car – could be taken, even though they have no connection with the business.

In a general partnership, each partner is personally liable for all of the obligations of the partnership, including any negligence of one of the partners.

Can any partner make decisions on behalf of the partnership?

Yes. Each general partner is an agent for both the partnership and the other partners. You and Smith can both make legally binding contracts on behalf of the partnership. So if Smith signs a contract with Jane Jones for supplies for the partnership business, you, Smith and the partnership each have to fulfill the contract, whether you agree with it or not.

And any partnership agreement between you and Smith cannot limit your responsibility to individuals who innocently sign a deal with Smith, believing he is authorized to act on behalf of the partnership.

General partners must act in good faith

General partners owe a duty to each other to act with utmost good faith and fairness. You have to give each other full information on matters affecting the partnership. You can't take advantage of something that belongs to the partnership without your partners' permission, such as using the partnership's business connections to set up a competing business on the side. And you can't take a personal benefit from any transaction involving the partnership – like taking kickbacks from suppliers.

It's important to choose your partners carefully

You should only be partners with people you trust and have confidence in.

It's best to have a partnership agreement

A carefully drafted agreement can be a very useful planning tool and help your partnership run smoothly. It can cover certain things like the following:

- Will you share the profits 50/50? What if one of you puts up more money at the beginning than the other?
- Will you also share equally in the losses?
- Who will manage the business? (If you're going to run the store and expect to get paid a salary, this should be included in your agreement or in a separate employment agreement.)
- How much money will each partner contribute, and when will it have to be paid?
- How will decisions be made? By majority vote, or unanimous decision? (You could agree to make some decisions one way, and other decisions another way.)
- How will new partners be brought into the business, and how can you get rid of a partner or leave the partnership if you have to?
- How will you end the partnership when the time comes, and who'll get what?
- What happens when a partner doesn't live up to his or her obligations?

It's true that verbal partnership agreements or "hand shake" agreements may be enforceable. But partnership agreement should be in writing, so you can prove what the terms of the agreement are.

What is a limited partnership?

Limited partnerships are mainly a tool for investors who want to invest in the partnership business, but who aren't interested in getting involved in running the business. If you're an investor only, you could be a limited partner and would only be responsible for the debts of the partnership up to the amount of money you invested or agreed to invest. This is true so long as you don't get involved in the management of the partnership. But if you help manage the business, then you would have the same liability you'd have if you were a partner in a general partnership.

Note that a limited partnership must have at least one general partner who has the usual unlimited personal liability. Usually the general partner is a company incorporated just for that purpose, so that its shareholders aren't generally personally liable for the obligations the company has as a company (refer to script 267 for more information about companies). The general partner is the only partner who can manage the business, so the shareholders who have most of the voting shares of a general partner company also control the management of the partnership business.

What is a limited liability partnership?

A limited liability partnership (or LLP) is an alternative to a general partnership. The idea is that if you're a partner in an LLP, you aren't liable for the obligations of other partners or the partnership to the same extent you would be if the partnership was a general partnership – unless those obligations result from your own actions or inaction. Assuming you haven't personally incurred any debts, the most you would lose is your investment in the partnership. Your personal and other assets, like your home, wouldn't be at risk. So with a limited liability partnership, you can be involved in running the partnership business, but enjoy some protection from being sued for the negligence or wrongdoing of your partners.

It's possible to convert a general partnership or limited partnership to a limited liability partnership.

Does a partnership have to be registered?

Limited partnerships and LLP's must be registered with the Registrar of Companies to exist. The *Partnership Act* contains a list of the documents that must be filed or submitted to create these partnerships. A general partnership should be registered, but it will still exist even if you don't register it.

You should make sure that you let the Registrar know if any information on your registration changes (for example, if a partner joins or leaves, or if your address changes).

You have to pay a fee to register your partnership with the Registrar of Companies and to have the Registrar search the corporate records to make sure someone else isn't already using your partnership name. Depending on the type of partnership, procedures must be followed regarding the use of the partnership name and address. If your partnership is for trading, manufacturing or mining purposes, or is a limited partnership or a limited liability partnership, you also have to file other information and documents with the provincial government.

Consider seeing a lawyer

Before making a partnership agreement, it's best to hire a lawyer to help you. Also, limited liability partnerships and limited partnerships are usually quite complicated, so you typically need the assistance of a lawyer to set them up.

What income tax does a partnership have to pay?

The good news is that a partnership doesn't have to pay any income tax on its profits. Unfortunately, there is the usual bad news – each partner has to pay income tax on his or her share of partnership profits. Likewise, if a partnership business loses money, the losses are divided among the partners in the same way as profits would have been, and for income tax purposes, are treated as though each partner had lost that amount of money running his or her own business.

Before setting up a partnership, in addition to consulting a lawyer, you should obtain some income tax advice from a qualified professional.

How do you end a partnership?

When the partnership is over, a Dissolution of Partnership (Form 3) should be filed with the BC Registrar of Companies. At that point, you stop any of your ongoing liabilities.

Where can you get more information?

- You can obtain a copy of BC's *Partnership Act* from any bookstore that sells government publications or download a copy from www.bclaws.ca [1].
- Small Business BC is a government resource centre with excellent information and free guides. Call 604.775.5525 in Vancouver or 1.800.667.2272 elsewhere in the province, or visit www.smallbusinessbc.ca [2].
- See the information for businesses on the provincial Ministry of Finance website at www.sbr.gov.bc.ca/business.html [3].
- Also see the provincial government's Resource Centre for Small Business at www.resourcecentre.gov.bc.ca [4].

[updated July 2013]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [5].

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References

[1] http://www.bclaws.ca
[2] http://www.smallbusinessbc.ca
[3] http://www.sbr.gov.bc.ca/business.html
[4] http://www.resourcecentre.gov.bc.ca
[5] http://www.dialalaw.org

Forming a Private Company (Script 267)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script discusses incorporating and maintaining a company.

There are different ways to form a business, other than a company

To learn more on whether you want to incorporate a company, refer to Script 265 on “Starting a Small Business”. Also, before incorporating, you may want to seek advice from a lawyer and an accountant. They can help you decide the best way to set up the company’s “authorized share structure” (explained later) and structure the company for optimal tax planning.

There are basically two types of companies

Under BC’s *Business Corporations Act*, these are:

- a public company
- a private company

A public company has its shares listed and traded on a stock exchange. A private company is typically a small company with very few shareholders, and its shares aren’t offered for sale to the public. This script only applies to private BC companies.

All private BC companies are incorporated online

Use the Corporate Online services found at www.corporateonline.gov.bc.ca [1]. You can use a credit card to pay for the fees.

Decide on a name for your company

The name must end in "Limited," "Ltd.," "Inc.," "Incorporated," "Corp." or "Corporation," or the French equivalent to these words. Your new company name needs to be distinctive and have a descriptive element, or you can choose a numbered BC company name. The Corporate Registry has more information on choosing a name – see www.bcregistryservices.gov.bc.ca [2] and click on the "B.C. Companies" link. Note that if you decide to carry on business under a trade name, you have to display the full legal name of your company on certain documents like contracts and invoices.

You must then reserve the name with the Corporate Registry

The easiest way is to reserve online at www.corporateonline.gov.bc.ca [1]. If the name you want to use is available, it will be reserved for 56 days.

Decide who is going to be involved in your company

The shareholders are the owners of the company. The directors have the responsibility and control of the company. They may appoint officers, such as a president or secretary. Typically, the officers handle the day-to-day operations of the company and are overseen by the directors. You can have a one-person company and be the sole shareholder, director and officer.

Are there any requirements for directors?

Yes. Some of the requirements are:

- A private company must have at least one director.
- A director doesn't have to live in BC or Canada, but they do have to consent in writing to act as a director.
- A director must provide the Corporate Registry with an address where they can receive documents during standard business hours. If there's no such office, then the Registry requires the director's home address.
- A director must be at least 18 years old and cannot have certain criminal convictions, be a bankrupt person (who hasn't yet been granted formal discharge from bankruptcy) or have been found by a court to be incapable of managing own affairs.

The company must have a registered and records office

The registered office for your company is where legal documents can be delivered. The records office is the address where all records for the company are kept. The registered and records offices must be in British Columbia and may be at the same address.

Every company must also have both a mailing address and a delivery address for its registered and records offices. The registered office mailing address is where the company will receive its mail. The registered office delivery address is where the company is given any notices like legal documents. The registered office mailing address may be a post office box, but the registered office delivery address must be a street address that's accessible to the public during business

hours.

You need to decide on an "authorized share structure"

The number of shares your company is authorized to issue to its shareholders is called the authorized share structure. This can be a limited number of shares or an unlimited number.

There are two main kinds of shares: par value shares and shares without par value. Par value shares have a minimum price at which they must be sold. Shares without par value don't have a minimum price. You can also have different classes of shares with different attributes and rights, such as common shares and preferred shares, voting rights, the right to receive dividends, as well as different series of shares within a class of shares. The specifics can be complicated, so professional guidance from your lawyer or accountant is recommended.

To incorporate a company, certain incorporation documents must be prepared

These include:

- an Incorporation Agreement
- the Incorporation Application
- the Articles
- your Notice of Articles

What is the Incorporation Agreement?

This is an agreement between the incorporator (or incorporators) and the company. It describes the number, kind and class of shares each incorporator agrees to take once the company is incorporated. The incorporator must agree to take at least one share of the company and therefore become the company's first shareholder. The Incorporation Agreement must be signed by the incorporator before submitting the Incorporation Application to the Corporate Registry. You don't submit the Incorporation Agreement itself to the Corporate Registry, but a signed original should be placed in the company's records book.

The Incorporation Application is a document available through Corporate Online

The person who completes the Incorporation Application is called the Completing Party. The Completing Party must ensure that the Incorporation Agreement and Articles are properly prepared and signed by the Incorporator.

The Articles are the rules and regulations for the conduct of your company

You can use the sample set in the *Business Corporations Act* or have them specially drafted to suit your needs. The Incorporator must sign the Articles of the company. You don't need to submit the Articles to the Corporate Registry, but you should file a copy in the company's records book.

What is the Notice of Articles?

The Notice of Articles is a document that contains the following information:

- the company's name
- the authorized share structure
- whether or not there are special rights and restrictions attached to the shares
- the addresses of the registered and records offices
- the names and residential or business addresses of the directors

How do you submit the incorporation documents to the Corporate Registry?

You must "e-file" or electronically submit your Incorporation Application and attached Notice of Articles to the Corporate Registry, along with the prescribed fee, through Corporate Online. Your company will then be incorporated almost instantly. If you prefer, for an additional fee, you can specify a date and time up to ten days in future for the incorporation of the company.

When you e-file, you'll have to set up a password (and specify a hint to help you remember the password) for your company so you can submit forms in the future using www.corporateonline.gov.bc.ca [1]. After you e-file, the Corporate Registry will issue a Certificate of Incorporation and send you "certified" or true copies of the Incorporation Application and Notice of Articles.

After incorporating your company, it must be organized

This includes preparing the company's records book, preparing director and shareholder resolutions, issuing shares, and preparing a directors' register plus a "central securities register" or share register. You may wish to talk to a lawyer about this. Maintaining a well-organized corporate record book and set of financial statements will help you get a better price when you sell your company and if the Canada Revenue Agency (CRA) decides to audit your company.

How do you maintain your company?

Certain steps must be taken to keep your company alive. Your company must file an annual report with the Corporate Registry each year within two months of its anniversary date of incorporation. Failure to file an annual report for two consecutive years can result in the company being dissolved. Also, if the company changes its registered or records office, or if the directors resign or change their address, the company must e-file other forms with the Corporate Registry. There are fees associated with most of these filings. As well, each year, every BC company must choose to either appoint an auditor or waive the appointing of an auditor.

What about incorporating a federal company?

It's possible to incorporate a federal company under the *Canada Business Corporations Act*. A federally incorporated company has the right to carry on business anywhere in the country and will have its name protected across Canada. But a federal incorporation usually takes more time, and the corporation is often more expensive to operate than a BC company.

Alternatively, a BC company can carry on business in other provinces

Your private BC company can do this if it takes steps to register itself extra-provincially in those provinces. But unlike a federally incorporated company, there's a risk that an extra-provincially registered BC company may have its application to register its name in another province refused by the Registrar of that other province.

How can you protect your company's brand?

Registration and use of a trademark is the best protection for your company's name and brand. Refer to Scripts 231 and 264 to learn more about trademark law.

Where can you get help or find more information?

- You can obtain a copy of BC's *Business Corporations Act* from any bookstore that sells government publications or download a free copy from www.bclaws.ca [3].
- Visit the Corporate Registry's website at www.bcregistryservices.gov.bc.ca/bcreg/corppg/index.page [4].
- Small Business BC has excellent information on incorporating a company and free guides. Call 604.775.5525 in Vancouver or 1.800.667.2272 elsewhere in the province, or visit www.smallbusinessbc.ca [5].
- You can also consult your local library, bookstore and Chamber of Commerce for other books and resources on incorporating a company.

[updated October 2014]

References

[1] http://www.corporateonline.gov.bc.ca
[2] http://www.bcregistryservices.gov.bc.ca
[3] http://www.bclaws.ca
[4] http://www.bcregistryservices.gov.bc.ca/bcreg/corppg/index.page
[5] http://www.smallbusinessbc.ca
[6] http://www.dialalaw.org

Your Rights

Charter of Rights and Freedoms: Legal Rights (Script 200)

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The Charter protects several rights and freedoms—but there are reasonable limits

The *Charter of Rights and Freedom*s is part of Canada's Constitution. It gives important rights to people accused of a crime and to people who deal with government agencies. These rights are in addition to traditional legal rights and, in some cases, improve those rights. The Charter also gives remedies, which give strength and meaning to those rights. As well, the Charter controls the actions of government officials, such as the police. Both the Constitution and the Charter are on the Canadian Department of Justice website [1].

Section 1 reasonable limits: if a court decides that a law, or part of a law, violates the Charter, that law is not valid—unless Canada's Parliament or a provincial legislature can justify the Charter violation—under section 1—as a reasonable limit on the right or freedom. Section 1 says that a reasonable limit has to be prescribed by law and demonstrably (clearly) justified in a free and democratic society.

Section 33 notwithstanding clause: if a law cannot be justified as a reasonable limit on a right or freedom, in some cases, Parliament or a provincial legislature can say—under section 33—that the law operates notwithstanding (in spite of) section 2 or sections 7 to 15 of the Charter (check script 230 for more on the "notwithstanding clause"). The Canadian Parliament has never used this notwithstanding clause, but Quebec, Alberta, Saskatchewan, and Yukon have.

Legal rights in the Charter

Sections 7 to 14 of the Charter guarantee everyone certain legal rights. Some of these rights require every person accused of a crime to be treated in a just and fair manner. And some of these rights existed long before the Charter. But they are now in the Constitution.

These legal rights are not absolute. As explained above, governments can limit them under section 1 of the Charter. Apart from these possible limits, the Charter protects the rights described below. The legal rights in the Charter most often apply in criminal cases, but they can also apply in other cases—for example, if you worked for a government agency and your employer attempted to search you before you left the premises after completing your shift.

Section 7: the right to life, liberty, and security of the person

Section 7 gives everyone the right to life, liberty, and security of the person, and the right not to lose these things unless they are taken away according to principles of fundamental justice. The Charter protects more than just the right to physical liberty—the right not to be held against your will without proper process. It also protects the right to be free from physical assault or interference, or the threat of them. It protects conduct that people are free to pursue. If the government interferes with your liberty or security, it must follow fair laws and procedures.

For example, if a criminal law said you can go to jail for up to 6 months if your husband or wife commits robbery, a court would probably use section 7 to strike down this law, making it invalid. The court would say that the law takes away your liberty (you could go to jail) and it does not follow the principles of fundamental justice. One of those principles is that you must be personally responsible for a crime to be convicted; it is not enough just to know someone who did it.

An important right under section 7 is the right to remain silent if you are a suspect in a criminal offence. The police cannot force you to answer their questions, but they may continue to ask questions even if you say that you do not want to answer.

Section 8: the right to be secure against unreasonable search and seizure

Section 8 gives everyone the right to be secure against unreasonable search or seizure. Section 8 affects the laws that permit the police to search your home or place of business, your car, or even you, in certain cases. It also affects the actions of individual police officers. Section 8 protects property if you have a reasonable expectation of privacy. So before police can search or seize, they must have a good reason to do so. For example, if the police believe that you have stolen TVs and cell phones, they cannot just enter your apartment and search you and your rooms. Such a search would usually be unjustified if the police do not have a search warrant from a judge or justice of the peace. And even if they did have a warrant, it might not be properly issued. These are examples of searches that would be unreasonable, and would therefore violate section 8. But section 8 does not protect your privacy in all cases. It depends on the context. Courts focus on the person's expectation of privacy in the place, thing, or information at issue. For example, if you leave property at a friend's house or put garbage out on the sidewalk for pick-up, you don't have a reasonable expectation of privacy in those places. But if you password-protect your personal computer at your home, you have a stronger expectation of privacy.

Section 9: the right not to be arbitrarily arrested

Section 9 gives everyone the right not to be arbitrarily arrested, held, or imprisoned. Something is arbitrary if there is no good reason for it or if it is done because of someone's opinion and there is no good reason for that opinion. The *Criminal Code* and other laws control powers of arrest and those laws must be consistent with section 9 of the Charter. For example, the police can arrest a person who they reasonably believe committed a murder or fraud or some other criminal offence. The person must be brought before a Justice of the Peace as soon as possible—normally within 24 hours—to see if they can be released from custody. The police cannot hold the suspect in custody without proper grounds (or reasons) to arrest or detain them. The police must be able to justify what they did.

Section 10: the right to know why you're arrested

Section 10 applies if police arrest or detain you. It gives you the right to be told promptly why you are arrested or held. You also have the right to speak to a lawyer immediately – before the police question you – and to be told that you have that right. The police must give you privacy and a way to exercise your right to call a lawyer.

Section 11: rights if you're charged with an offence

Section 11 puts several fundamental principles of Canadian criminal law into the Charter. It controls how a person charged with an offence is treated in a criminal case. Some of these rights, such as the right to be presumed innocent until proven guilty, and the right not to be a witness against yourself, existed long before the Charter. One important right with a powerful effect under the Charter is the right to a trial within a reasonable time. Another is the right to be informed without unreasonable delay of the specific offence you are charged with. Section 11 also gives a person charged with an offence the right to reasonable bail unless there is just cause (a good reason) to deny it. Section 11 provides a right to trial by jury if an offence can be punished with imprisonment for 5 years or more (the *Criminal Code* also gives a right to trial by jury for some other serious offences).

Section 12: the right to no treatment or punishment that is cruel and unusual

Under section 12, everyone has the right not to be subjected to cruel and unusual treatment or punishment. When courts decide whether treatment or punishment is cruel and unusual, they often ask if it is so harsh that it shocks the conscience of the Canadian public. Torture is an example of cruel and unusual treatment.

Section 13: protection against the use of your own testimony to prosecute you

At a criminal trial, the accused person can decide whether to testify (give evidence) in their own defence. Other people generally cannot refuse to testify: they must do so if they receive a subpoena (a document ordering them to come to court and give evidence). If they refuse to testify, they can be charged with contempt of court. And anyone who lies in their testimony (the evidence they give) can be charged with perjury.

If a witness at the criminal trial of another person is asked about their personal involvement in criminal activity, they must answer honestly. But a prosecutor cannot use their answers against them. Section 13 says that testimony from a witness showing they committed criminal cannot be used to prove they are guilty of that criminal activity. But a prosecutor can use a witness's answer to show that they are lying (committing perjury) in that case, or in a later case if they are charged and deny the criminal activity.

Section 14: the right to an interpreter

Section 14 gives everyone the right to an interpreter in any legal proceedings if they don't understand or speak the language being used, or if they're deaf.

Other rights

Other sections of the Charter also have rights that apply to a person charged with an offence and to a person affected by a government action. Check script 232, called "*Charter of Rights and Freedoms*: Equality Rights", and script 230, called "*Charter of Rights and Freedoms*: Overview". The Charter's equality rights apply to criminal law and may affect what questions a lawyer can ask a witness in court, for example. In addition to the Charter legal rights, other laws give rights to anyone charged with an offence. Some of these rights existed before the Charter and they continue to apply, although the Charter does not mention them.

Remedies if Charter rights violated

The Charter gives courts a lot of discretion about the remedy they can use if a Charter right is violated. Section 24 of the Charter allows a person whose rights have been violated to apply to a court for a remedy the court considers appropriate and just in the circumstances. Whenever someone illegally interferes with your rights, you can always sue them to recover any losses you suffer as a result. But this does not help a person charged with an offence after an illegal search or after they confess to a crime without being advised of their right to speak to a lawyer. A court may exclude (not consider) evidence if it was obtained in a way that interfered with a Charter right. But a court will exclude evidence only if the accused person can show that using the evidence would bring the administration of justice into disrepute.

The type of remedy a court uses often depends on the type of Charter right violated. For example, if the right to a trial within a reasonable time has been denied, and it is no longer possible for a person to properly defend themselves, the court may simply "stay" the charges. That means the trial won't proceed and the person won't be convicted.

Summary

The Charter gives important rights to people accused of a crime and to people who deal with government agencies. These rights are in addition to traditional legal rights and, in some cases, improve those rights. The Charter also gives remedies, which give strength and meaning to those rights. As well, the Charter controls the actions of government officials, such as the police.

For more on the Charter, check the Charter [2] itself, script 232, called "*Charter of Rights and Freedoms*: Equality Rights", and script 230, called "*Charter of Rights and Freedoms*: Overview".

[updated August 2014]

References

[1] http://laws-lois.justice.gc.ca/eng/const
[2] http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-38
[3] http://www.dialalaw.org

Charter of Rights and Freedoms: Overview (Script 230)

The Charter protects several rights and freedoms

The *Canadian Charter of Rights and Freedoms* is part of Canada's Constitution. If a court decides that a law, or part of a law, or an action by a government actor or entity, violates the Charter, that law, or action, is not valid—unless the Canadian Parliament or a provincial legislature can justify the Charter violation as being necessary as a reasonable limit, or the legislature uses section 33 (the notwithstanding clause of the Charter) to say that the challenged law operates in spite of the Charter. (The "reasonable limits" and "notwithstanding" clauses are explained later in this script). As well, the Charter controls the actions of state officials such as the police. Both the Constitution and the Charter are on the Canadian government website at http://laws-lois.justice.gc.ca/eng/const.

The Charter guarantees the following freedoms and rights:

- **Fundamental freedoms—**section 2 guarantees freedom of:
  - association
  - peaceful assembly
  - conscience and religion
  - thought, belief, opinion, and expression, including freedom of the press and other media
- **Democratic rights—**sections 3, 4, and 5 cover the right to vote and the maximum time between elections
- **Mobility rights—**section 6 guarantees to Canadian citizens and permanent residents the right to live and work anywhere in Canada
- **Legal rights—**sections 7 to 14 contain the rights to:
  - life, liberty, and security of the person
  - be free from **unreasonable** search or seizure
  - not be **arbitrarily** detained or imprisoned
  - be informed promptly of the reasons for any arrest or detention and be released if the reasons are not valid
  - have a lawyer, if you are arrested
  - a fair and public trial within a reasonable time, by an impartial tribunal, if you are charged with a crime
  - not give evidence against yourself
  - be presumed innocent
  - be free from cruel and unusual punishment
  - be granted reasonable bail if appropriate
  - a court-appointed interpreter
- **Equality rights—**section 15 ensures equal benefit and protection of the law without discrimination based on personal traits such as race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.

- **Language rights—**section 16 makes English and French the official languages of Canada. Section 23 protects minority language education rights in certain circumstances.

Other sections deal with enforcing Charter rights and freedoms, whom they can be used against, and how courts have to interpret the Charter.

Section 1 allows reasonable limits on Charter rights

Charter rights and freedoms are not absolute. The Charter and the courts recognize that governments can make laws in the broader public interest, even if a law violates a Charter right or freedom. In such a case, a court will ask if the government can justify the violation under section 1. This section says that Charter rights and freedoms are subject to reasonable limits prescribed by law as can be demonstrably (clearly) justified in a free and democratic society. A court may allow a violation of a Charter right if the government can meet this section 1 test. But section 1 applies only to written laws, not to government action, because it requires any limit on a Charter right to be "prescribed by law". So when government **action** violates the Charter, section 1 does not let the government try to justify the violation. The action is unconstitutional.

The "notwithstanding clause" —section 33

The federal and provincial governments can override specific Charter rights in certain situations. They can say that a law operates "notwithstanding" (in spite of) some Charter rights. So far, governments have used this power only rarely.

The Charter controls government, not the private sector

You can't use the Charter to challenge every possible violation of your rights. The Charter controls government laws and other government actions. It doesn't control private citizens, businesses, or organizations. Before you can claim the Charter's protection, you must show that the government, or some agency very closely connected to government, such as a school board or labour-relations board, violated your rights. If a private individual, organization, or company violates your rights, you may be able to complain under the BC *Human Rights Code* or the *Canadian Human Rights Act*. For more information on this, check script 236 on"Human Rights and Discrimination Protection", and script 270 on "Protection Against Job Discrimination".

Enforcing Charter rights

Canadian courts interpret and enforce the Charter. The courts have described themselves as the guardians of the Charter. In that role, judges have the power to strike down and invalidate laws or other government actions. They will do so if necessary to defend a protected right or freedom. If you think a provincial or federal law or action violates your Charter rights, you can ask a court to do several things.

What a court can do depends on what you ask for. For example, if you say that a law violates the Charter, a court will decide if the law actually does violate the Charter. If the court finds a violation, the government can try to justify the violation under section 1. You may ask a court to declare that your rights have been violated or to give you a specific remedy. In criminal cases, for example, the accused person can ask the court to end the trial or to exclude evidence obtained in violation of the Charter. Or you may ask a court for a general remedy not specific to your case, such as striking down a law entirely. The court will generally assess these questions:

First: was your Charter right violated?

You have to show the court that one of your Charter rights was violated. This usually means persuading the judge that the law or government action violated a specific Charter right. For example, you might complain that a law restricting what signs you can put in your window violates freedom of expression. But even if you prove a violation, Charter rights are balanced against the rights of others and the interests of society, as explained in the earlier paragraph on reasonable limits under section 1.

Second: can the government justify—under section 1—a law that violates the Charter right?

If a court finds that the government violated your rights, the next step depends on what caused the violation: was it a written law—or action by the government or a government actor. If government action caused the violation, the government does not get a chance to justify it under section 1. In this case, the court just decides the right remedy (which the next section explains). But if a written law violated your rights, the court decides whether the government can justify the violation under section 1. Is the violation reasonable and justified in a free and democratic society? To decide that, the court looks at several things, including whether the government has an important objective in violating your right.

Specifically, a court will ask if the government acted reasonably in achieving its objective. If the court finds that the government's objective is important, the court must decide if the government is acting in a reasonable and justified way to achieve that objective. The Supreme Court of Canada says this usually depends on the answers to three more questions:

1. Are the means that the government used to achieve its objective rationally connected to that objective?
2. Could the government have achieved the same objective in some other way, without violating anyone's rights or freedoms, or violating them to a lesser degree?
3. Is the government's objective important enough – and are the benefits of the law significant enough—to justify violating a Charter right?

The government must prove that the violation of the Charter is reasonable under section 1. Often, the government tries to show that the law's **objective** is important to Canadian society, and that the violation of Charter rights is minimal.

The more severe the violation, the harder it is for government to justify it. Only after the court considers all these things, can it decide if you deserve a remedy for the Charter violation. Charter cases can be complex and hard to resolve because courts have to consider and balance many competing interests. The court must go beyond the narrow facts of one case and consider the competing interests in relation to a law and how it operate for society.

Individual and broad remedies if Charter rights violated

If you prove a violation of a Charter right, and the government cannot justify it under section 1, the next question is what kind of remedy or consequence is appropriate. Different kinds of remedies apply to different types of cases. Section 52(1) of the *Constitution Act*, 1982 says that any law inconsistent with the Constitution is of no force or effect. So a court may declare that a law is unconstitutional. This is what the news media mean when they talk about a court striking down a law. In such a case, a court may "suspend" its declaration to give the government time to make a new law that will be valid.

In other cases, an individual (personal) remedy is necessary. Section 24 of the Charter allows a person whose rights have been violated to apply to a court for a remedy the court considers appropriate and just in the circumstances. The Charter gives courts a lot of discretion about the kind of remedies they can order if a Charter right is violated.

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 only 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, a broad remedy, such as striking down the law, may be necessary. For example, if the government passed a law that discriminated based on sex, the court would give a remedy that helps everyone affected by the law.

Usually, when someone illegally interferes with your rights, you can sue them to recover any losses you suffer as a result. But this does not help someone charged with a crime after an illegal search or after they've confessed to a crime without being told of their right to speak to a lawyer. In this type of case, a court can exclude evidence in a criminal trial if the way it was obtained violated a Charter right. A court will exclude evidence only if the accused person can show that using the evidence would bring the administration of justice into disrepute.

In other cases, the court may be able to do something else, like stop a prosecution, order one side to pay the other side's legal costs, or declare that certain rights were violated. The court will always decide what is fair and appropriate depending on the facts of the specific case.

More information

For more information, check the Charter [1] itself, script 200, called "*Charter of Rights and Freedoms*: Legal Rights", and script 232, called "*Charter of Rights and Freedoms*: Equality Rights".

[updated July 2014]

References

[1] http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-38

[2] http://www.dialalaw.org

Charter of Rights and Freedoms: Equality Rights (Script 232)

The Charter protects several rights and freedoms

The *Charter of Rights and Freedoms* is part of Canada's Constitution. It protects a broad range of rights and freedoms. If a court decides that a law, or part of a law, violates one of those rights or freedoms, and the government cannot justify the violation under section 1, that law is not valid – unless the Canadian Parliament or a provincial legislature says that it operates in spite of (or notwithstanding) the Charter. (Check script 230 for details of the "notwithstanding clause".) Both the Constitution and the Charter are on the Canadian government website at http://laws-lois.justice.gc.ca/eng/const.

Equality Rights in the Charter

Section 15 guarantees equal benefit and protection of the law to people, saying:

1. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
2. Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

Section 15 applies to government, not the private sector

You can't use section 15 to challenge every inequality in life. The Charter controls laws and other government actions. It doesn't control private citizens, businesses, or organizations. Before you can claim the protection of section 15, you must show that you are being treated unequally by a law or by the action of a government official or department or some agency very closely connected to government, such as a school board or labour relations board. If a private individual, organization, or company violates your rights, you may be able to complain under the BC *Human Rights Code* or the *Canadian Human Rights Act*. For more information on this, check script 236 on "Human Rights and Discrimination Protection", and script 270 on "Protection Against Job Discrimination".

Section 15 protects people, not companies

Courts have said that section 15 protects people, not companies or other artificial persons, because it gives the right to equality to “every individual”.

The Supreme Court of Canada’s approach to equality

Section 15 does not require everyone to be treated the same way regardless of different circumstances. Showing that the government or the law is treating you differently, or showing that a law that appears to treat people the same way actually treats members of a particular group differently, is just one step in showing a violation of section 15 equality rights.

You also need to show that section 15 applies to the different treatment you received. Section 15 prohibits discrimination because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It also prohibits discrimination on “analogous” grounds—meaning comparable grounds not listed in section 15. The Courts have said that something “analogous” is a personal characteristic that you can’t change at all, or you can’t change without great personal cost or difficulty—like sexual orientation or citizenship.

The Supreme Court has said that the central purpose of section 15 is to promote “substantive equality” by fighting discrimination. So in addition, courts will focus on whether the law or government action is discriminatory in creating a disadvantage by perpetuating (or indefinitely continuing) prejudice or stereotyping.

Section 15 allows affirmative action programs

Some differences in treatment may not violate section 15. Courts have said that equality may require different treatment for different groups. Section 15(2) protects “affirmative action programs”. It says that laws or government programs designed to improve the conditions of disadvantaged individuals or groups do not violate section 15. So governments can set up programs to help people or groups disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 1 allows reasonable limits on Charter Rights

Charter rights and freedoms are not absolute. The Charter and the courts recognize that governments make laws in the broader public interest, even if a law harms some groups and violates their right to equality under section 15. In such a case, a court will analyze whether the government can justify the violation under section 1. This section says that Charter rights and freedoms are subject to reasonable limits prescribed by law as can be demonstrably (clearly) justified in a free and democratic society. A court may accept and permit a violation of a Charter right if the government can meet the test under section 1. But section 1 applies only to written laws, not to government action, because it requires any limit on a Charter right to be “prescribed by law”. So when government action—not a written law— violates the Charter, section 1 does not let the government try to justify the violation. The action is unconstitutional.

The essential questions courts must decide under section 1 are whether the law has a very important objective and whether the government chose a proportionate way to meet that objective—a way that interferes as little as possible with constitutional rights. For example, could the government achieve its objective in another way, without violating equality rights? Does the law do more harm than good?

Remedies if Charter Rights violated

Section 52(1) of the *Constitution Act, 1982* says that any law inconsistent with the Constitution is of no force or effect. Section 24 of the Charter allows a person whose rights have been violated to apply to a court for a personal remedy the court considers appropriate and just in the circumstances. The law gives courts a lot of discretion about the kind of remedies they can order if a Charter right is violated. The type of remedies a court orders often depends on the type of Charter right that is violated. Check script 230 for more on remedies.

For more information, refer to the Charter [1] itself, script 200, called "*Charter of Rights and Freedoms*: Legal Rights", and script 230, called "*Charter of Rights and Freedoms*: Overview".

[updated July 2014]

References

[1] http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-38
[2] http://www.dialalaw.org

Freedom of Information and Protection of Privacy (Script 235)

You have a right to certain information

BC's *Freedom of Information and Protection of Privacy Act* (called FIPPA in this script) gives you the right to see many records kept by provincial government ministries and other public bodies - including records of your personal information, such as your name, address, age, employment history, educational background. Public bodies include provincial government ministries, local municipalities, schools and school boards, hospitals and health authorities, local police forces, colleges and universities, and self-governing bodies such as the College of Physicians and Surgeons of British Columbia and the Law Society of British Columbia.

In addition, BC's *Personal Information Protection Act* (PIPA in this script) gives you the right to see your personal information held by organizations in the private sector in BC. Organizations include stores, unions, hotels and restaurants, doctors, not-for-profit agencies, credit unions (but not chartered banks) and many others. Under PIPA, you can ask an organization for access to your personal information that it has, or explain how it has used your personal information and who it has given your information to. You can also ask for information on the organization's privacy policy.

Both these laws are available at www.bclaws.ca [1].

How do you ask for information?

In some cases, it may be quick and easy to access records held by provincial government ministries or other public bodies, or to access your personal information held by a private organization. Their website may have the information you want, or a phone call may be enough get the information. But if there's no other way of getting the information you want, you can send a written request to the information and privacy branch of the government ministry or other public body, or to the privacy officer of the private organization. For example, if you want to see records on an ICBC claim, you would send a written request to the Information and Privacy Branch of ICBC. If you want access to information about your gym's privacy policy, or your personal information it has on file, you would send a written request to the gym's privacy officer.

How long does a public body or an organization have to respond?

FIPPA gives public bodies 30 business days to respond to your request. They can't charge you any fees for your own personal information, but they can charge you fees for finding, copying, retrieving, and producing records not related to your personal information. You can ask them to waive the fees if you can't afford them, or if the information is in the public interest.

Private organizations also have 30 business days to respond to your request. They can't charge you a fee for your own employee personal information. But they can charge a reasonable fee for giving you access to your other personal information – not employee personal information.

Some information isn't available

Under FIPPA, you may not be able to get certain records, such as Cabinet records, someone else's personal information, court files, current work files of the Auditor General or Ombudsman, or certain information if its release or disclosure would harm private business interests. You may also not be able to see information if its disclosure would harm a law enforcement matter, or harm people or public safety.

What can you do if your request for information is refused?

If a public body or private organization refuses your request, or if you're not satisfied with its response, you can ask BC's Information and Privacy Commissioner to review the response. There's a time limit of 30 business days to make this request to the Commissioner. The Commissioner is an independent officer of the provincial Legislature who reviews the decision and can order a public body or private organization to release information that FIPPA or PIPA gives you the right to see. See the website for the Office of the Information and Privacy Commissioner at www.oipc.bc.ca [2] for how to ask for a review.

What if an organization's personal information about you is wrong?

An organization must make reasonable efforts to ensure that your personal information is accurate and complete. You can ask a public body to correct any factual error or omission (but not opinions or judgments) in your personal information. If the public body refuses your request, FIPPA requires them to mark your information with the correction you requested. You can also ask a private organization to correct any inaccurate personal information. If you are not happy with the decision of the public body or organization, you can ask the Commissioner to review it.

You also have a right to privacy

Both FIPPA and PIPA protect your right to privacy by regulating how public bodies and private organizations collect, use, and give out (or disclose) personal information. Public bodies and organizations can use personal information only for the purposes they collect it for, unless they get your consent to use it for another reason. Organizations and public bodies must ensure that they don't give out personal information without proper authorization.

What if you're upset with how your personal information is being handled?

If you disagree with how your personal information is being managed, you should first complain directly to the public body or organization about how it collects, uses, or discloses your personal information. If that doesn't help, you can file a complaint with the Information and Privacy Commissioner. Their website (www.oipc.bc.ca [2]) explains how to do that.

Where can you find more information?

See the website of the Office of the Information and Privacy Commissioner at www.oipc.bc.ca [2]. You can phone the Office at 250.387.5629 in Victoria. For toll-free access, call Enquiry BC (604.660.2421 in Vancouver and 1.800.663.7867 elsewhere in BC) and ask them to connect you.

For information records, send your written request directly to the public body or private organization that has the information you want.

[updated June 2014]

References

[1] http://www.bclaws.ca
[2] http://www.oipc.bc.ca
[3] http://www.dialalaw.org

Human Rights and Discrimination Protection (Script 236)

The BC *Human Rights Code* prohibits some types of discrimination. The BC Human Rights Tribunal handles discrimination complaints. This script explains the types of discrimination the Code prohibits, how to complain to the Tribunal, and what the Tribunal does with complaints. The Code is available at www.bclaws.ca [1]. Also, check the following scripts:

- 270, called "Protection Against Job Discrimination"
- 271, called "Sexual Harassment"
- 230, called "*Charter of Rights and Freedoms*: Overview"

This script does not deal with:

- The *Canadian Human Rights Act*, which covers businesses and activities regulated by federal law. These include banks, airlines and airports, phone companies, and the federal government. If your case involves federal law, contact the Canadian Human Rights Commission at www.chrc-ccdp.ca [2] or phone 604.666.2251 in Vancouver and 1.800.999.6899 elsewhere in BC. If you don't know whether to contact the Tribunal or the Commission, contact either of them – they can tell you which one can handle your complaint.
- Municipal laws, which may also prohibit some types of discrimination – contact your city hall for information on them.

What types of discrimination does the BC *Human Rights Code* prohibit?

The Code prohibits discrimination based on any of the following 16 things, called grounds:

- race
- colour
- ancestry
- place of origin
- political belief – this applies only to employment, employment ads, and membership in a union or occupational association
- religion
- marital status
- family status – this does not apply to the purchase of property
- physical disability, including HIV and AIDS
- mental disability
- sex
- sexual orientation
- age (if you're 19 and above) – this does not apply to the purchase of property
- criminal or summary convictions unrelated to employment or membership – this applies only to employment, and membership in a union or occupational association

- lawful source of income (this applies only to tenancies)
- retaliation (taking action against a person who complained to the Tribunal, was named in a complaint, was a witness, or helped someone with a complaint)

The Code prohibits discrimination in the following 8 areas:

- tenancy premises (renting property) – section 10
- accommodation, service, and facility – section 8
- publication – section 7
- purchase of property (including commercial and residential property, bare land, and leases) – section 9
- employment ads – section 11
- wages – section 12 (this is about wage differences based on sex)
- employment – section 13
- membership in unions and occupational associations - section 14

Not all 16 grounds apply to all 8 areas – some of the exceptions are described below. Human rights cases often involve the first three areas – here are more details on them:

1. Tenancy premises (renting property) – section 10

No person, including property owners, landlords, and building managers, can refuse to rent a space (for example, an office or an apartment) or charge a higher rent or security deposit, or otherwise discriminate against a tenant based on the grounds in section 10 of the Code. In addition, a person cannot normally stop a tenant from using common facilities. For example, in most cases, a person can't prevent a tenant with a physical disability from using the pool. But a person can restrict rentals as follows:

- a person looking for a roommate to share their own place can restrict the rental to people based on any ground
- rentals can be restricted to people over 55 – or couples or families with one member over 55 – in some cases
- rentals may also be restricted to people with mental or physical disabilities – if the residence is designed for people with disabilities – in some cases

2. Accommodations, services, and facilities – section 8

Restaurants, hotels, and other service providers can't refuse service, charge higher rates, or discriminate in any other way based on the grounds in section 8 of the Code. Governments and educational institutions cannot discriminate in providing accommodations, services, and facilities. However, the Code applies only to accommodations, services, and facilities normally available to the public. As well, the Code allows:

- public facilities to be restricted by sex (washrooms, change rooms).
- insurance companies to distinguish based on sex and mental and physical disability – by charging different premiums and paying different benefits.

3. Publications – section 7

The Code says no person can publish or publicly display a statement, notice, publication, symbol, emblem, or sign if it shows an intention to discriminate or if it is likely to expose a person or group of people to hatred or contempt based on the grounds in section 7 of the Code. But the Code doesn't apply to communication intended to be private, meaning not published or publicly displayed.

Exceptions and special programs under the *Human Rights Code*

Charitable, philanthropic, religious, educational, and other non-profit organizations and corporations may be able to give a preference to certain people. The organization's primary purpose must be to promote the interests and welfare of a group of persons identified by a physical or mental disability, or a common race, age, religion, sex, marital status, political belief, colour, ancestry, or place of origin.

In addition, organizations can ask the Tribunal to approve a specific program or activity as a Special Program under the Code. The purpose of the program or activity must be to improve conditions for a disadvantaged group. For example, the Tribunal has approved a school district hiring a member of a protected group to provide services to students and families who are members of that same group.

Duty to accommodate

The Code prohibits acts or omissions that have a discriminatory effect and may require reasonable steps to remove the discriminatory effect. This is called the duty to accommodate to the point of undue hardship. For example, a restaurant or apartment building may have to provide a ramp for people who use wheelchairs. Many human rights cases involve complaints where an employee believes that their employer has not adequately accommodated their disability.

Accommodation requires an employer **and** an employee (and an employee's union if the workplace is unionized) to work together to find a practical solution that accommodates the complainant's disability, in a way that does not create an undue hardship on the employer. Accommodation to the point of "undue" hardship means that an employer may have to accept some hardship. That hardship might involve expense, inconvenience, or disruption – as long as it does not unduly interfere with the business.

The Code does not define disability, but cases have determined that a disability generally indicates a state that is involuntary, has some degree of permanence, and impairs the person's ability, in some way, to carry out the normal functions of life.

The duty to accommodate requires that all the parties engage in the process of trying to discover ways to accommodate, even if ultimately no accommodation can be found. The failure to engage in the process can by itself be a breach. A person requesting accommodation is entitled to a reasonable not a perfect accommodation. There may have to be some compromise.

Any request for accommodation must be supported by medical evidence. It cannot be only the unsupported wish of the disabled person.

What can you do if someone discriminates against you?

Get a complaint form from the Human Rights Tribunal, fill it in, and file it with the Tribunal within 6 months of when the discrimination happened. For example, if the discrimination happened on July 30, 2012, you must file the complaint by January 30, 2013. If you wait more than 6 months to file your complaint, you have to explain on the form why you are filing late. The Tribunal may accept a late complaint if it is in the public interest and won't harm anyone.

You can get a complaint form from the Tribunal website, the Tribunal office, and government agents. You can file a complaint in person, or by mail, fax, courier, or email.

The Tribunal has guides and information sheets on the Code, the Tribunal, how to make and file a complaint, how to respond to a complaint, and many other topics. To get this material, see the Tribunal website at www.bchrt.bc.ca [3] or phone the Tribunal at 604.775.2000 in Vancouver and 1.888.440.8844 elsewhere in BC.

What is the Human Rights Tribunal?

The Tribunal is the organization that deals with complaints under the Code. It operates like a court, but is less formal. It consists of staff and members who hold hearings into complaints that are not settled. Members are experts in human rights law who are appointed by the BC government. Tribunal proceedings and material are normally public.

Do you need help filing a complaint?

The Human Rights Clinic may be able to help you file a complaint with the Tribunal and help you at a hearing. The clinic is a project of the BC Human Rights Coalition and the Community Legal Assistance Society. In addition, an onsite consultation service is offered every Monday between 9:30 am and 3:30 pm at the Tribunal's offices in Vancouver. For details, see the Coalition website at www.bchrcoalition.org [4] or phone 604.689.8474 in Vancouver and 1.877.689.8474 elsewhere in BC.

What happens when you file a complaint?

The Tribunal can handle complaints only if the Code covers them. It also considers if there is enough information to support a possible violation of the Code. So it is important to give all the information that supports your complaint.

So first, the Tribunal must decide if the Code covers your complaint. If it does, the Tribunal will ask the person or business you complained about, called the respondent, to reply to your complaint. The respondent can ask the Tribunal to dismiss your complaint without a hearing. The Tribunal will try to help you and the respondent settle the complaint – it holds a settlement meeting. If you can't settle the case, a Tribunal member may hold a hearing. The member will decide if the complaint is justified, and if it is, order a remedy. The decision will be oral or written.

What remedies can the Tribunal order?

Remedies are designed to reverse the effects of discrimination, not to punish the person or business that discriminated. They can include an order that the person or business that discriminated must do any of the following:

- stop discriminating
- make available the right, opportunity, or privilege that you didn't get because of the discrimination (for example, give you your job back, or the right to compete for a job)
- pay you money – called damages – for lost income (including wages and disability and other benefits) and expenses
- the Tribunal can also order the person or business that discriminated to pay you damages for injury to your dignity, feelings, and self respect. There are no limits to the amount of an injury to dignity award, but one of the highest

amounts awarded by the Tribunal award was $35,000 in June 2009.

What if you disagree with the Tribunal's decision?

You can apply to the BC Supreme Court to review the Tribunal's decision. That can be complicated and you probably need legal help to do so. The Tribunal has information sheets on judicial review on its website at www.bchrt.bc.ca [3].

What else can you do?

Talk to a lawyer about all your legal options. For the name of a lawyer, call Lawyer Referral at 604.687.3221 in the lower mainland and 1.800.663.1919 elsewhere in BC.

If the discrimination is in your job, and you belong to a union, it may be able to help you. As well, the *Employment Standards Act* may cover your case and you may have a wrongful dismissal claim – check scripts 270, 280, and 241 for more details. The BC Ministry of Attorney General also has information on human rights protection on its website at www.ag.gov.bc.ca/human-rights-protection [5].

Are there time limits for filing a complaint and suing?

Yes, there are time limits in both cases. You have 6 months from when the discrimination occurs to file a complaint with the Tribunal. If you wait longer than 6 months, the Tribunal may still accept your complaint, but you will have to explain why you delayed.

There are also time limits for suing in court – you need legal advice about that.

If you complain to the Tribunal and also file a complaint (or grievance) with a union or under the *Employment Standards Act*, or sue the employer for wrongful dismissal, the Tribunal can wait until your other complaints and the lawsuit are finished before dealing with your complaint.

[updated February 2013]

References

[1] http://www.bclaws.ca
[2] http://www.chrc-ccdp.ca
[3] http://www.bchrt.bc.ca
[4] http://www.bchrcoalition.org
[5] http://www.ag.gov.bc.ca/human-rights-protectio
[6] http://www.dialalaw.org

Aboriginal Law (Script 237)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script highlights key areas of law that apply to Aboriginal people in BC. But this is a complex and changing area of law, which the script cannot explain in detail. For more information, check the various sources listed in the script.

Who is an Aboriginal Person and why does it matter?

An Indian is a person registered as an Indian with the federal government under the *Indian Act* [1]. These people are called status Indians or registered Indians. Every Indian must apply for Indian status and show that they have a right to be registered based on factors in the *Indian Act*. It's a complex process.

An amendment to the Canadian constitution in 1982 defined the Aboriginal peoples of Canada to include Indian, Inuit and Métis people.

The primary legal relationship of Indian people is with the federal government. Lands held by the federal government for the use and benefit of Indian people are known as "reserves". Status Indians may receive various rights and benefits for housing and tax exemptions when living on reserves. Other benefits, such as health and education, may be available both on and off reserve.

The basic unit of Indian organization and government is the "band", but Indian status does not necessarily include band membership. Band membership depends on who controls the band's membership list: Aboriginal Affairs and Northern Development Canada or the band, but only the federal government can decide on status. The Nisga'a Lisims Government has its own citizenship laws. For more information about Indian status and band membership, check with Aboriginal Affairs and Northern Development Canada [2].

Many provincial laws do not apply to Indian people or reserve land; others apply through section 88 of the *Indian Act*. As well, some Indian people are parties to treaties and land claims agreements that set out rights and responsibilities that may operate independently of the *Indian Act*. In other words, the legal position of Indian people in British Columbia involves a complex interplay of federal and provincial law, as well as possible treaty and other rights.

The term "First Nation" has come into popular use as a term of respect for the position of Aboriginal people as the original inhabitants of Canada. But it has no consistent legal definition and its application is becoming uncertain because it is increasingly defined in various laws. Generally, it applies to Indian bands or groups of bands and to Indian people. That's how it is used in this script.

Inuit are the people of the arctic. Their primary legal relationship is with the federal government, similar to Indian people. But the *Indian Act* doesnot apply to Inuit people. Most Inuit people are now participants in modern treaty and

land claims agreements that govern their unique interests. There are relatively few Inuit people in British Columbia and they are not covered further in this script.

The Metis are people of mixed aboriginal and non-aboriginal ancestry, but their precise legal definition is not certain. Section 35 of the *Constitution Act, 1982* [3] recognizes three groups of Aboriginal peoples—Indians, Métis and Inuit peoples. The Supreme Court of Canada [4], in a case called *R v. Powley*, outlined three broad factors to identify Métis rights-holders:

- self-identification as a Métis individual;
- ancestral connection to an historic Métis community; and
- acceptance by a Métis community.

But there is still a lot of uncertainty.

How does criminal law apply to Aboriginal people?

Canada's *Criminal Code* [5] applies to all Aboriginal people. It applies to offences by Indians, both on and off reserve. But the *Criminal Code* tells judges to consider all reasonable alternatives to imprisonment, with particular attention to Aboriginal offenders. This is Parliament's response to the fact that Aboriginal people are overrepresented in Canadian prisons. They may often have experienced disproportionate social issues throughout their lives. Judges must consider what are called *Gladue* principles when they sentence an Aboriginal offender (named after a 1999 Supreme Court of Canada case).

Some courthouses have a Native Court worker who can help Aboriginal people understand the court process, find a lawyer, and apply for legal aid. Aboriginal people who are convicted of an offence should ensure that their lawyer knows about their ancestry so they can tell the court before sentencing, normally, in the form of a *Gladue Report*. Many communities have Aboriginal restorative justice programs. Native Court workers and lawyers should check if these programs can help their clients.

How does family law apply to Aboriginal people?

Two BC laws – the *Family Law Act* [6] and the *Child, Family and Community Service Act* [7]—apply to Aboriginal families on and off reserve. But there are some important exceptions.

The *Family Law Act* [6] deals with parenting arrangements, child and spousal support, and division of matrimonial property after family breakdown. But the parts of this law dealing with real property do not apply on reserves. So there is a gap in the law dealing with the ownership, division, and possession of real property on reserves and what happens when a spousal relationship ends or a spouse dies.

The federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* [8] responds to this gap in two ways. First, as of December 16, 2013, it allowed individual First Nations to make their own matrimonial real property laws. A list of First Nations that have done this is available on the website of Aboriginal Affairs and Northern Development Canada [9].

Second, as of December 16, 2014, the federal law has provisional (or temporary) rules that apply until First Nations make their own laws. The provisional rules allow for three types of orders: emergency protection orders; exclusive occupation orders; and orders on the division, ownership, and transfer of the interests or rights in real property under sections 29 to 33 of the federal law. If you live on reserve, and you need an order—especially an emergency order to protect yourself, your property, or your family—get legal advice.

Aboriginal Affairs and Northern Development Canada [10] has more on this topic. So does the Centre of Excellence for Matrimonial Real Property [11] (hosted by the National Aboriginal Lands Managers Association) [12].

Also, other rules may apply if an Indian band or First Nation has signed a modern treaty or has a matrimonial property regime under the *First Nations Land Management Act*.

The *Child, Family and Community Service Act* [7] deals with child protection on or off reserve. Some First Nations have their own child protection agencies with authority from the province. This means the First Nation hires its own social workers and applies community standards, as far as this law allows. Most First Nation child protection agencies have authority on reserve only, but work closely with social workers from the Ministry of Children and Family Development to help families living off reserve. The Act also applies to First Nations with modern treaty agreements, subject to the agreements.

The key principles guiding all family laws are the best interests of the child plus protection and safety of the child. To decide on an Aboriginal child's best interests and safety, courts look at the child's community, extended family, and culture.

How does tax law differ for Indian people?

Many people mistakenly think that Aboriginal people do not pay income tax, GST or property tax. In fact, most Aboriginal people pay tax unless they are exempt under section 87 of the *Indian Act*. Under this section, the interest of a status Indian or band in reserve lands, and the personal property of a status Indian or band situated on a reserve, are tax exempt. As well, section 87 exempts from tax the goods and services bought by status Indians at businesses on Indian reserves. The exemption also includes goods bought elsewhere and delivered to the reserve.

Canadian courts have developed a series of "connecting factors" that must link a status Indian's employment and investment income to the reserve for the income to be tax exempt. This "connecting factors test" is fact-specific and beyond the scope of this script. Because of the high levels of unemployment on most Indian reserves, these tax benefits are not as significant as some people think.

Like other levels of government, Indian bands can make property tax bylaws for people and businesses on reserves under section 83 of the *Indian Act*. Some Indian bands have a First Nations' Tax (FNT) instead of GST. It can apply to alcohol, fuel and tobacco sold on reserve. Finally, modern treaties and land claims agreements cover all aspects of taxation.

How are Indian wills and estates regulated?

Aboriginal Affairs and Northern Development Canada deals with the wills and estates of status Indians who are "ordinarily resident" on reserve when they die. The Minister of Indian Affairs and Northern Development is responsible for several things. These include granting probate (deciding if a will is legally valid and then granting approval of it to the executor), appointing an administrator or executor to distribute the estate, and responding to anyone who challenges a will or complains about an administrator or executor.

The *Indian Act* has rules for transferring a person's reserve property to heirs and beneficiaries. The Minister of Indian Affairs and Northern Development has to approve all transfers of reserve property and a person who is not a member of the deceased person's band may not be able to inherit the person's house or land on a reserve.

The BC Supreme Court deals with the wills and estates of status Indians not "ordinarily resident" on reserve when they die and with all non-status Indians and other Aboriginal people. The BC Public Guardian and Trustee is also sometimes involved with these cases.

A will that is valid under the *Indian Act* may not be valid under BC provincial law because some parts, such as the requirement for a witness's signature, may differ. So even a status Indian ordinarily resident on reserve should make sure a will meets the BC rules and the *Indian Act*. Check the scripts on Wills and Estates [13] (numbers 176 to 180) for more information. So does the Aboriginal Affairs and Northern Development Canada estates program at 604.666.3931 in Vancouver and 1.888.917.9977 elsewhere in BC.

What laws apply to Aboriginal rights, treaty rights, and human rights of Aboriginal people in BC?

The *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms* [14] applies to every person in Canada, including Aboriginal people. But it applies only to laws and government actions, or the actions of agencies very closely connected to government, such as school boards and labour relations boards. The Charter will normally apply to band councils and other Aboriginal governments, but not always. Scripts 200, 230, and 232 have more on the Charter.

Section 35 [15] of the *Constitution Act, 1982* is not in the Charter, but it gives constitutional protection to existing Aboriginal and treaty rights and to rights acquired through treaty and land claim negotiations. Since 1982, a lot of common law on identifying and defining aboriginal and treaty rights and how they fit with Canadian society has developed. These rights are site and fact-specific. They are protected from conflict with the rights and freedoms protected by the Charter (by section 25 of the Charter). To date, aboriginal rights are related mainly to the use of natural resources and aboriginal governance. Treaty rights are written into specific treaty documents.

Canadian *Human Rights Act*

The *Canadian Human Rights Act* [16] applies to the federal government and businesses that it regulates, such as airlines and banks. The Canadian Human Rights Commission [17] investigates complaints of discrimination and other violations of this law. Before the *Canadian Human Rights Act* was amended in 2008, it prevented challenges of federal or band government decisions made under the *Indian Act*. The 2008 amendments applied to the federal government immediately. First Nations had a 3-year transition period so the amendments applied to them as of 2011. Script 236 has more on human rights and discrimination.

British Columbia Human Rights Code

The BC *Human Rights Code* [18] is similar to the federal *Human Rights Act* but it applies to the provincial government and businesses it regulates. The *Human Rights Code* prohibits discrimination by schools, stores, restaurants, and rental properties. The BC Human Rights Tribunal [19] enforces the Code and has more information. As well, check script 236 and the BC Human Rights Coalition [20].

Deciding which human rights laws apply to cases involving Aboriginal people can be a complicated legal question. You should get legal advice about which laws apply to specific situations.

International Human Rights Law

Some Aboriginal people have relied on international human rights law to have their rights recognized. The main laws that have helped Aboriginals in Canada are the *United Nations Declaration of Human Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*. These are available on the website of the United Nations High Commissioner for Human Rights [21]. The Human Rights Committee at the United Nations deals with discrimination complaints under international law but has no direct authority to enforce these laws in Canada. Canada has not signed the United Nations Declaration on the Rights of Indigenous Peoples.

Where can you find more information on Aboriginal law?

- Check the following websites:
  - Public information on Aboriginal law issues [22] by Toronto lawyer, Bill Henderson.
  - Practice Points [23]—papers on several topics from the Continuing Legal Education Society of BC.
- Confirm the status of individual First Nations in treaty negotiations with the BC Treaty Commission [24].

[updated February 2015]

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Children's Rights (Script 238)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Can children have input about things that affect them?

Sometimes—it depends on the situation. Section 37 of the *Family Law Act* [1] says that in making an agreement or order about guardianship, parenting arrangements, or contact with a child, the parties and the court must consider the best interests of the child only. Subsection 37(2)(b) says that the views of the child are one factor to consider in deciding what the best interests of the child are, unless it would be inappropriate to consider them. And a judge may find it inappropriate to consider a child's views.

On the other hand, decisions about child protection focus on safety (does the child need protection) not on their best interests or their views. But when it comes to adoption, any agreement or order to adopt a child aged 12 or older (and changing the child's name) can proceed only if the child agrees to it.

Children in care have a right to be consulted and express their views. "In care" means a child is in the custody, care or guardianship of the director of child welfare or the director of adoption. And "care" means physical care and control. Children can say what they want in the following areas (though a judge can still decide not to consider what they say):

- which parent they prefer to live with if their parents separate or divorce.
- whether to receive or refuse medical or psychiatric treatment. This is a complicated area of law. For example, a parent or guardian can have a child under 16 admitted for psychiatric care and the child may not be able to leave without the consent of the parent or guardian. And the ability of a child under 19 to consent to medical treatment depends on whether they have the capacity to consent. A healthcare provider has to assess that capacity.
- what they want in child protection cases. This information usually comes from the social worker. The child does not have their own lawyer or talk to the judge.
- significant decisions that affect them while they are in foster care.
- access to money held in trust for them.
- what to do if they are charged with a crime.

As children get older, their capacity to make decisions increases and their input will generally have more influence on the decisions made about and for them.

Can children choose which parent to live with if their parents separate or divorce?

Children do not generally get to choose which parent they live with if their parents separate or divorce, but they can express their views. The parents can agree on which one of them their children will live with and how often each parent will see their children. The parents may decide not to consult the children or anyone else when they make these decisions. Or the parents may talk to the children, social workers, lawyers, counselors, or other professionals. If the parents make an agreement that their children are not happy with, the children can talk to the parents about it, but it's still the parents' decision.

If the parents can't agree, a court may have to decide who the children live with. Section 37(1) of the *Family Law Act* says that the parties and the court must consider the best interests of the child only in making an agreement or order about guardianship, parenting arrangements, or contact with a child. Section 37(2) says that to decide what the child's best interests are, all of the child's needs and circumstances must be considered, including:

1. The child's heath and emotional well-being.
2. The child's views, unless it would be inappropriate to consider them.
3. The nature and strength of the relationship between the child and significant people in the child's life.
4. The history of the child's care.
5. The child's need for stability, given the child's age and stage of development.
6. The ability of each person (who is or seeks to be the child's guardian, or who has or seeks parental responsibilities, parenting time or contact with the child) to exercise their responsibilities.
7. 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.
8. Whether the actions of a person responsible for family violence indicate the person's ability to care for the child and meet the child's needs may be impaired.
9. The appropriateness of any arrangement requiring the child's guardians to cooperate on issues affecting the child, including whether it would increase risks to safety, security or well-being of the child or other family members.
10. Any civil or criminal proceeding related to the child's safety, security or well-being.

As this shows, a child's view is important, but it's only one of many things that matter. Both the age and maturity of a child are important when a court considers a child's views. A court often assesses a child's maturity by examining how the child behaves at home and at school.

Do children need their parents' or guardians' permission to see a doctor?

It depends on the child's mental capacity. BC's *Infants Act* [2] says that children under 19 can consent to their own healthcare if a healthcare provider has decided that the child understands the nature and consequences, and the reasonably foreseeable benefits and risks, of the healthcare. And the healthcare provider must also have decided that the healthcare is in the child's best interests. In those cases, a child does not need the consent of a parent or guardian to see a doctor. So they could get a prescription for birth control, without a parent's permission. A teenager could also get an abortion without their parents' consent.

For more on this, check script 422, called "Children and Consent to Medical Care".

What rights do children have if they are hospitalized against their will for psychiatric treatment?

A child under 16 can be hospitalized against their will for psychiatric treatment in one of two ways:

- if a parent or guardian requests it and a doctor agrees that it's in the child's best interest.
- if the child is admitted as an involuntary patient under the *Mental Health Act* [3].

In both cases, the child has the right to be told why they've been admitted and the right to contact a lawyer immediately. If they want to leave but their doctor won't let them, they can ask for a hearing by a review panel or court.

A child 16 or older can be admitted against their will for psychiatric treatment only as an involuntary patient. To find out more about involuntary admissions, check script 425, called "Hospitalizing a Mentally Ill Person".

Can children have input in child protection cases?

Yes. The *BC Child, Family and Community Service Act* [4] requires a child's views to be taken into account when decisions about the child are made. The Act defines a child as a person under 19 years old.

If a child has been—or is likely to be—abused or neglected, child welfare workers will investigate and do their best to keep the child safe with their parents. For example, the worker may provide in-home support services for the family or obtain a court order to supervise the child in the home. The worker can remove a child from the child's home if the child is in immediate danger or if the worker decides—after fully exploring all available options—that there is no other way to keep the child safe.

If a child is removed from their home, a presentation hearing must be held within 7 days in Family Court. Children 12 and older must be notified in writing of the date and place of the hearing. They have a right to be consulted and express their views, but often this consultation is with a social worker who tells the court about the child's views. A social worker must say in the plan of care (for the child) that they give to the court whether they considered the child's views in making the plan. In some cases, a lawyer may be appointed to represent the child. Children under 12 may be invited to attend the hearing and say what they think.

A child may also be asked to consent to an agreement or court order that affects them. If the child is 12 or older, no agreement or consent court order can be made without the child's consent, and the child has the right to speak to a lawyer.

For more information on child protection services, see the publication called Know Your Rights: A Guide for Young People in Care [5], published by the Ministry of Children and Family Development [6].

What rights do children in care have?

If a child is in the Ministry's care, or "in care", section 70 of the *Child, Family and Community Service Act* gives the child certain rights. They include the right to be consulted and give their views on decisions that affect them. They also include the rights to reasonable privacy, to be free from physical punishment, and to be informed about (and helped to contact) the Ombudsperson and the Office of the Representative for Children and Youth.

"In care" means a child is in the custody, care or guardianship of the director of child welfare or the director of adoption. And "care" means physical care and control. If a child is removed by the director of child welfare, the director has care of a child until the child is returned to their parents or a court makes an order.

If a child is in care, the child's worker, other people important to the child, and the child, if possible, meet and develop an interim care plan for the child within 30 days of when the child is put in care. They then develop a care plan within 6 months of when the child is put in care. The same people review the care plan 6 months after it is completed and

whenever a significant event occurs in the child's life. They also develop a new care plan each year.

For more information, see the publication called Know Your Rights: A Guide for Young People in Care [5], published bythe Ministry of Children and Family Development [6].

Can children access money held in trust for them by the Public Guardian and Trustee?

It depends on the situation. BC's Public Guardian and Trustee oversees the legal rights and financial interests of children under age 19. The Trustee holds money that children receive in the following types of cases—if another trustee is not appointed:

- an injury award after an accident.
- an inheritance.
- life insurance proceeds.
- part of the money that a child under 15 makes from acting in TV or films.

The Trustee pays all a child's money (with interest) to the child when they turn 19. The Trustee may also use some of a child's money—before the child is 19—to pay for things that a child or their family cannot afford, such as school fees, tutoring, camps and trips, transportation, computers, and dental needs.

For more information, check with the Public Guardian and Trustee [7]. Call 604.660.4444.

What rights do children have if they are charged with, or convicted of, a criminal offence?

The *Youth Criminal Justice Act* [8] explains how police, courts, and the correctional system must treat young people, 12- to 17-years old, who are arrested for, charged with, or convicted of a crime under federal laws.

The most important federal criminal law is the *Criminal Code* [9]. It covers common crimes like shoplifting, breaking and entering, car theft, and assault. Other federal laws deal with things like possessing and selling (or trafficking) illegal drugs.

Under the *Youth Criminal Justice Act*, children who are stopped and questioned by the police have the right to a lawyer and the right to remain silent, with some exceptions. Children who are arrested or who are charged with a crime but not arrested, have other rights. For more information, check script 225, called "Young People and Criminal Law". As well, check Youth Justice [10] on the Ministry of Children and Family Development website [6].

Provincial laws, not the *Youth Criminal Justice Act*, cover many other crimes, such as drinking under age, trespassing, and breaking traffic laws.

Where can children, parents, and guardians get help?

Call the **Representative for Children and Youth** [11] at 1.800.476.3933. The Representative does not work for government. She is an independent officer of the BC legislature. She supports children, youth, and families who need help dealing with the child welfare system. She also suggests changes to the system.

Contact the **Ministry of Children and Family Development** [6]. A child or youth receiving services from the ministry (or their family member or caregiver) who disagrees with something the ministry did or decided, has a right to complain and be taken seriously. For more information on how to make a complaint, go to Complaints Process [12] on the Ministry website [6].

The **Provincial Ombudsperson** [13] ensures that youth are treated fairly by people who provide service to them. This office can provide an independent review of a case. Call 1.800.567.3247.

For urgent help, dial “0” or “411” and ask the operator for the Helpline for Children. You can also dial it directly at 310.1234 (no area code). A social worker will answer 24 hours a day.

[updated July 2014]

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Senior Law and Elder Abuse (Script 239)

This script has legal information for seniors on financial help, elder abuse, and financial and medical affairs (this last section deals with wills, powers of attorney, mental incapacity, transferring a home to a child, and lending money to family members).

Financial help for seniors

Lots of financial help is available for seniors, including home care support and assisted living, free flu shots, discounted prescriptions, housing benefits like rent assistance, homeowner's grants and deferred property taxes, and discounted bus passes. If you're 60 or over, you should know about these benefits.

What old age security and other income assistance can you get?

- **OAS** [1]: You may qualify for the Old Age Security Pension (OAS) if you're a Canadian citizen or landed immigrant, 65 or older. The amount you get depends on how long you've lived in Canada. You have to apply for the OAS and other benefits at least 6 months before you are eligible—you don't get them automatically.
- **Guaranteed Income Supplement** [2]: As well as the OAS pension, low-income seniors may be able to get a Guaranteed Income Supplement. The less income you have, the more of this supplement you can get. In addition, the Senior's Supplement [3] is a monthly payment to low-income seniors who are receiving federal Old Age Security and the Guaranteed Income Supplement or federal allowances. If your income level falls below a level that BC guarantees, the supplement makes up the difference. It is automatic if you qualify—you don't need to apply.
- **Allowance** [4]: If you're aged 60 to 64 and your spouse is a senior who is getting the OAS pension and Guaranteed Income Supplement, you might also qualify for an Allowance. The Allowance is extra money for couples who live on only one OAS pension. If your spouse dies and you're between 60 and 64, you might be eligible to get the Allowance for the Survivor.
- [Welfare or income assistance [5]**: If you're not eligible for the OAS or Guaranteed Income Supplement, but need money for food, housing, clothing and other basic needs, you may be eligible for welfare or income assistance.**
- **CPP** [6]: A person who has worked and contributed to the Canada Pension Plan (CPP) and then retired can receive a pension from the Canadian government. This is an extra benefit, in addition to the OAS. CPP retirement benefits may begin as early as age 60.
- **SAFER** [7]: BC has the Shelter Aid for Elderly Renters Program (SAFER), which provides monthly cash payments to eligible BC residents who are 60 years or over and pay rent for their homes.
- Other benefits: Other financial benefits may also be available—including employment insurance benefits [8] if you continue working after age 65, Veterans Affairs Canada benefits [9], non-refundable tax credits [10], BC sales tax credits [11] and others.

For more information on financial help for seniors, check:

- **Income Assistance—for Seniors** [12] on the Service Canada website. Or phone Service Canada at 1.800.622.6232.

- **CanadaBenefits** [13]—the seniors section has a long list of programs and related links. They cover finances, housing, health, and personal safety.
- The **BC government seniors website** [14] or the **Seniors Health Care Support Line** [15] - call 1.877.952.3181 or call the BC Ministry of Health at 1.800.465.4911.
- The **Bus Pass Program** [16] offers lower cost, annual bus passes for low-income seniors and people receiving disability assistance from British Columbia.
- The **Seniors page** [17] on the People's Law School website. It has a lot of information including "When I'm 64 [18]". It has a video and a set of booklets covering services, benefits, housing and other topics.

Elder abuse

Elder abuse is surprisingly common—1 in 12 seniors in BC is abused. BC's *Adult Guardianship Act* tries to protect adults from abuse, neglect and self-neglect. It defines abuse as deliberate mistreatment that causes physical, mental or emotional harm to the adult, or damage to, or loss of, their assets. Elder abuse includes intimidation, humiliation, physical assault, sexual assault, overmedication, lack of medication, censoring of mail, invasion of privacy and denial of access to visitors. The BC government website on protection from elder abuse and neglect [19] has more information on the topic.

Who can help if you are being mistreated (or if an older adult you know is mistreated)?

- **Designated Agency** [20]: Contact a Designated Agency to report abuse or neglect of an adult. Designated agencies are the regional health authorities, the Providence Health Care Society, and Community Living BC (for adults with developmental disabilities). Call the Health Information Line at 1.800.465.4911 and ask for your regional health authority.
- **Public Guardian and Trustee of BC** [21]: Contact this office to report abuse or neglect of an adult. Call 604.660.4444 in Vancouver. Elsewhere in BC, call Service BC at 1.800.663.7867 (toll-free) and ask to be transferred to this office. They have a list of who to call to help an adult get support and to report abuse or neglect.
- **Patient Care Quality Office**: Each health authority must have a "patient care quality office" to handle complaints about the quality of patient care. Health authorities also have patient care quality review boards [22] to review the treatment of complaints. These complaint offices and review boards operate under the *Patient Care Quality Review Board Act*.
- **Office of the Assisted Living Registrar (OALR)** [23]: The OALR investigates complaints about the health and safety of assisted living residences. Call 250.952.1369 or 1.866.714.3378 (toll-free).
- **BC Centre for Elder Advocacy & Support** [24]: This agency provides education, support and advocacy for older adults. Call 604.437.1940 in Vancouver or toll-free 1.866.437.1940 elsewhere in BC.
- **Seniors Health Care Support Line** [15]: If you are concerned with the care and service provided to you or a family member by a health authority, call the Seniors Health Care Support Line at 1.877.952.3181. The website also has links to many programs and services.
- **Protection from elder abuse and neglect** [19] explains where to get help.

What happens if you report elder abuse?

The designated agency must look into your report. An investigator must make reasonable efforts to interview the older adult involved (whether that's you or someone else). If the problem can't be solved informally, the designated agency may have several legal options, including preparing a support and assistance plan, notifying the PGT (if there is a concern of financial abuse) and applying for a restraining order to keep the suspected abuser away. The designated agency must involve the older adult, to the greatest extent possible, in decisions about how to seek support and assistance.

If the abuse involves a criminal offence such as threats, assault, forgery or intimidation, the designated agency must report it to the police.

The Public Guardian and Trustee investigates reports of financial elder abuse when the older adult's assets are at risk and the person is incapable of managing his or her financial affairs. In some situations, the PGT may take steps to become "committee" of the estate, so it can make financial decisions to protect the person's assets ("committee" is discussed later in this script). If the PGT gets a report involving concerns about physical risk, it will refer the situation to a designated agency.

Financial and medical affairs

Changing your will

You can always change your will as long as you're mentally competent. Actually, you should change your will whenever your financial or personal circumstances change, or if your beneficiaries change (for example, if a beneficiary dies).

You should also review your will if you get married or divorced, or you separate, or you live in a marriage-like relationship for at least two years. Under the former law, when a person got married, the marriage automatically revoked or cancelled their existing will. Under the new *law, the Wills, Estates and Succession Act* (the Act) that does not happen.

A gift to a spouse and the appointment of a spouse as an executor are revoked if a person stops being a will-maker's spouse after a will is made. When do people stop being spouses? Married people and people who have lived in marriage-like relationship for at least two years stop being spouses under the Act when they separate.

You should always see a lawyer when making or changing your will.

Can you disinherit a family member?

Yes, but the *Wills, Estates and Succession Act* lets a court change a will that doesn't adequately provide for the maintenance and support of the deceased person's spouse or children. So a court can change your will after you die if it decides that you've been unfair or unreasonable toward a spouse or child. However, by consulting a lawyer for estate planning, you may be able to give away your estate in other ways that don't involve a will. For example, in some cases, an alter ego trust or a joint partner trust may let you avoid probate fees and the effect of the Act.

For more information on wills and estate planning, check scripts 176 to 179.

What is a power of attorney? What is an enduring power of attorney?

A power of attorney is a document that appoints another person, called an "attorney," to make financial and legal decisions for you. An enduring power of attorney lets your attorney make the necessary financial and legal decisions for you if you become mentally incapable because of age, accident or illness. But these documents can't deal with health care decisions. And if you want your attorney to deal with real estate, then you need the proper *Land Title Act* format. There are restrictions on who can be your attorney (for example, caregivers are not eligible), and formal procedures must be followed for signing a power of attorney. A lawyer can help you with this.

For more information, check script 180 on "Power of Attorney and Representation Agreements".

Can you make your own decisions about your health and where to live?

All adults have the right to live as they wish and to accept or refuse support or assistance, as long as they're capable of making these decisions and don't harm others. BC's *Health Care (Consent) and Care Facility (Admission) Act* also confirms the right of all adults over 18 to make their own medical and health care decisions.

What if you become mentally incapable of making your own decisions?

It's a good idea to plan for when you may be unable to make your own decisions. For example, to deal with decisions on your legal and financial affairs, you can make a power of attorney. To deal with health and personal decisions, you can make a "representation agreement." In this, you appoint someone you trust to handle your personal and health decisions if you're unable to make your own decisions.

If you don't make a representation agreement, the BC *Health Care (Consent) and Care Facility (Admission) Act* says that, if you are mentally disabled, first your spouse, then your adult children, then your nearest relative and then your close friend will make these decisions for you.

But what happens if you become mentally incapable and you haven't named anyone to make decisions for you, and you don't have a spouse, children, relative or close friend? The BC Supreme Court can appoint someone to make decisions for you. That person has to apply to the court under the *Patients Property Act* to be your "committee." Often a close friend or relative will apply to be committee. If none of these people apply, and instead, the Public Guardian and Trustee of BC applies (and it usually will in this case), the court can appoint the PGT as committee. Your estate will have to pay a fee to the PGT for its service.

For more information in this area, check the following 2 scripts:

- 180 on "Power of Attorney and Representation Agreements"
- 426 on "Committeeship"

Also, check the Nidus Personal Planning Resource Centre and Registry [25].

Should you transfer your home to your child so you can stay in it with them?

It depends. As people age, they often need help with their daily needs, but may not want to leave the comfort of their own homes. Sometimes, family members or friends will suggest that they move into your home and have you transfer your home to them in exchange for their looking after you. This can often be a good way to get the help you need, while letting the younger family member or friend get a home.

But this arrangement can cause misunderstandings and trouble. As your health changes and your needs increase, the family member or friend may not be able to give you the care you need, without significantly changing their own lives. For example, they may have to quit their job and stay at home with you to care for you. But they may not be willing to do that. At that point, you may need to sell your home to pay for health care and assisted living help.

In most cases, it's not a good idea to transfer your home to your child or to add their name to the title of your home because creditors and spouses could make claims against your home. And you could lose the capital gains tax exemption for your principal residence if a child's name is on the title, but it's not their principal residence.

So before you make any such an arrangement, you should see a lawyer experienced in this area to protect your rights.

How should you protect yourself when lending money to family members?

Older people often help their children or grandchildren by lending them money, co-signing a bank loan, or giving a personal guarantee. But you could lose a lot of money if you don't protect yourself by understanding the transaction and getting proper documents signed.

If you lend money to finance a house purchase, make sure you register a mortgage on the home to secure your interest. If you don't want to do that, you should at least get the borrower (and their spouse) to sign a promissory note with the loan terms.

If you guarantee a family member's bank loan, you are promising to pay the bank in full if the borrower doesn't repay the loan. You're responsible for the full amount of the loan, and the bank can come after you for it. Make sure that any guarantee you sign is for a specific amount.

Before you lend money to a friend or family member, make sure you see a lawyer for advice on the best way to protect your loan and your personal liability.

For more information, check script 248 on "Co-Signing or Guaranteeing a Loan".

Credit cards and bankcards

If you apply for a credit card and agree to have an extra credit card issued to your spouse or child, you're responsible for all purchases that person makes with the card. If you let someone else use your credit or bankcard, you're responsible for paying this off too.

For more information, check script 246 on "Buying Goods on Credit, Credit Cards and Credit Bureaus".

More information

- The **Seniors' Guide** [26] on the Seniors website [14] of the BC government has a wide range of information.
- **Regional health authorities**: contact these authorities to report abuse or neglect of an adult. Call the Health Information Line at 1.800.465.4911 (toll free) and ask for your local health unit.
- **Canadian Centre for Elder Law** [27]: check the publications on their website (part of the BC Law Institute). Or call the Centre at 604.822.0633 in Vancouver.

- **Public Guardian and Trustee of BC** [28]: check the publications on adult guardianship, elder abuse, representation agreements and other topics. Or call 604.660.4444 in Vancouver or 1.800.663.7867 elsewhere in BC and ask for the Public Guardian and Trustee.
- **HealthLinkBC** [29]: call this office for any medical questions that are not emergencies. It has a Senior Health section [30] with information on many topics such as elder abuse and advance planning. Call 811.
- **BC laws** [31]: this website has all the laws that this script refers to.

[updated August 2014]

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Defamation: Libel and Slander (Script 240)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is defamation?

Defamation is communication about a person that tends to hurt the person's reputation. It causes the reader or listener to think less of the person. The communication must be made to other people, not just to the person it's about. If defamation is spoken, then it is called *slander*. If it is written, it is called *libel*. It can also be a gesture, which is a type of slander.

The law protects your reputation against defamation. If someone defames you, you can sue them for money (called *damages*) for harming your reputation. You have to sue in Supreme Court, not Provincial Court, and you have to sue within 2 years of the defamation. This is the *limitation period*. It starts when the defamatory statement was made or published—not when you discovered it. For more on the court system, check script 432, called “Our Court System and Solving Disputes”.

The law doesn't protect you from a personal insult or a remark that injures only your pride. It protects reputation, not feelings. So if someone calls you a lazy slob, you might be hurt, but you would not have a defamation complaint unless the statement was made to another person.

If a person tells someone that you cheat in your business dealings, then you probably do have a good reason to sue, as long as he says it to someone else, not just to you.

Defamation can be a crime under the *Criminal Code*, but only rarely. This script is about civil, not criminal, defamation. If someone has defamed you, you may also be able to sue for a violation of your privacy under the provincial *Privacy Act*. Further, section 7 of the BC *Human Rights Code* prohibits another type of defamation, namely, a discriminatory publication. For more information on that, contact the BC Human Rights Tribunal at 604.775.2000 in Vancouver and 1.888.440.8844 elsewhere in BC. Or see its website at www.bchrt.bc.ca [1]. Also, check script 236, called “Human Rights and Discrimination Protection”.

What is libel?

Libel is the type of defamation with a permanent record, like a newspaper, a letter, a website posting, an email, a picture, or a radio or TV broadcast. If you can prove that someone libeled you, and that person does not have a good defence (see the section on defences below), then a court will presume that you suffered damages and award you money to pay for your damaged reputation. But going to Supreme Court is expensive and even if you win, you may not get as much as it costs you to sue. In deciding on damages, the Court will consider your position in the community. For example, if you are a professional, damages may be higher.

What is slander?

Slander is the type of defamation with no permanent record. Normally it's a spoken statement. It can also be a hand gesture or something similar. The law treats slander differently from libel: with slander, you have to prove you suffered damages, in the form of financial loss, to get compensation. But with libel, the law presumes you suffered damages. For example, say that Bill told John you were a cheat, and then John refused to do business with you because of that. You sue Bill and prove that you lost business with John because of what Bill said. Bill would have to pay you for the loss of John's business, but not for the general damage to your reputation. It can be very hard to prove this sort of financial loss. That's why most slander cases never go to court.

But in the following four examples, a slander lawsuit may succeed without your proving financial loss. Even though there's no permanent record of the slander, the law will presume damages, as if it were libel, if someone:

- accuses you of a crime (unless they made the accusation to the police).
- accuses you of having a contagious disease.
- makes negative remarks about you in your work, profession, trade, or business.
- accuses you of adultery.

What about the right to free speech?

The law protects a person's reputation but this protection can restrict other rights, such as the right to free speech. The law tries to balance these competing rights. Sometimes, even though someone made a defamatory statement that hurt a person's reputation, the law considers other rights more important. The law allows the following defences for a person who makes a defamatory statement.

What are the defences to a defamation lawsuit?

If someone sues for defamation, the most common defences are:

- truth (known in law as "justification")
- absolute privilege
- qualified privilege
- fair comment
- responsible communication on matters of public interest

1. Truth or justification

A statement may hurt your reputation, but if it is true, anyone who says it has a valid defence if you sue them for defamation. They just have to prove, on the balance of probability, that their statement is true.

2. Absolute privilege

People must be able to speak freely in our justice and political systems without worrying that someone may sue them. The 3 main examples of this defence are statements made:

- in Parliament.
- as evidence at a trial or in court documents, in a criminal or civil case.
- to a quasi-judicial body, such as a regulatory professional association like the law society, that is investigating a complaint.

This privilege does not apply if a person repeats their statement outside of Parliament or the court or regulatory process. It also does not apply if a person tells someone they made a discipline complaint.

This defence also allows the fair and accurate reporting of court proceedings in the media, such as newspaper reports of a trial.

3. Qualified privilege

This defence is where remarks that may otherwise be defamatory were conveyed to a third party non-maliciously and for an honest and well-motivated reason. Say a former employee of yours gave your name to an employer as a reference and that employer calls you for a reference. You say, "Well, frankly, I found that this employee caused morale problems." As long as you act in good faith and without malice, and your statement is not made to more people than necessary, then the defence of qualified privilege protects you if the former employee sues you for defamation. You gave your honest opinion and the caller had a legitimate interest in hearing it.

4. Fair comment

We all are free to comment—even harshly—about issues of public interest, as long as we are clear that our comments are:

- statements of opinion, not fact.
- based on facts that can be proven.
- not made maliciously.

For example, a newspaper columnist may write that a Member of Parliament (an MP) says he supports equality and equal rights, but he opposes same-sex marriages. The columnist writes that the MP is hypocritical. If the MP sues the columnist for defamation, the columnist may have the defence of fair comment.

5. Responsible communication on matters of public interest

In a December 2009 case, the Supreme Court of Canada established this new defence to a libel claim. The court said that journalists should be able to report statements and allegations—even if not true—if there's a public interest in distributing the information to a wide audience. This defence, which looks at the whole context of a situation, can apply if:

- the news was urgent, serious, and of public importance, and
- the journalist used reliable sources, and tried to get and report the other side of the story.

The court defined *journalist* widely to include bloggers and anyone else *publishing material of public interest in any medium.*

What effect does an apology have?

A newspaper or a TV or radio station that publishes or broadcasts a libel can limit the amount of the damages they may have to pay by publishing or broadcasting an apology right away.

Summary

The law of defamation protects your reputation against false statements. If a person makes a false statement to someone and it hurts your reputation, you can sue the person who made the false statement for damages. But because of other competing rights in our society, such as free speech and fair comment, you will not always win.

[updated March 2014]

Dial-A-Law© is a library of legal information available by:

- phone, as recorded scripts, and
- audio and text, on the CBA BC Branch website.

To access Dial-A-Law, call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. Dial-A-Law is available online at www.dialalaw.org [2].

The Dial-A-Law library is prepared by lawyers and gives practical information on many areas of law in British Columbia. Dial-A-Law is funded by the Law Foundation of British Columbia and sponsored by the Canadian Bar Association, British Columbia Branch.

References

[1] http://www.bchrt.bc.ca
[2] http://www.dialalaw.org

Immigrating to British Columbia (Script 290)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

The federal *Immigration and Refugee Protection Act* [1] controls immigration to Canada.

What are the main types of immigration?

People who want to immigrate to Canada can apply under two main classes:

- family class
- economic class

There is also a refugee class, explained later in this script. Under it, a newcomer can immigrate as a permanent resident of Canada.

Family class

The goal of this class is to reunite Canadians with their close relatives overseas. If you're a Canadian citizen or permanent resident, you can sponsor your spouse or common-law partner, parents, grandparents, dependent children (biological or adopted), or an unmarried orphaned sibling, nephew, niece or grandchild under 18. Depending on your relationship with that person, you must be able to financially support them from 3 to 10 years. Spouses and dependent children get priority. Usually, these applications take 3 to 12 months to process. It can take 5 to 6 years to process applications of parents and grandparents. As of August 1, 2014, dependent children must be under 19 years old (before that it was under 22).

As of November 5, 2011, the Minister of Citizenship and Immigration stopped accepting applications of sponsored parents and grandparents. Instead, these family members could apply for a long-term Super Visa [2] to visit family in Canada for up to 2 years at a time. The Minister re-opened the parent and grandparent category for 5000 applications in 2014, but he has not said if he will re-open the category again for 2015. The Super Visa is still an option for parents and grandparents.

Economic class

There are several types of economic-class applicants [3]: Federal skilled workers, Federal skilled trades, the Canadian Experience Class, the Start-up visa, and Self-Employed Persons under the Business immigration program.

- **Federal skilled workers** need at least 67 points based on age, work experience, education, abilities in English and French, and adaptability. They also need at least one year of work experience in one of 50 occupations identified by the Minister or have arranged employment in Canada that the government has approved. The Federal Skilled Worker class includes up to 500 people who qualify under the PhD class.
- In 2014, the Immigration Department is also accepting up to 5000 applicants under the **Federal skilled trades programs**.
- The **Canadian Experience Class** lets people with one year of full-time work in Canada in a skilled occupation immigrate to Canada.
- **Start-up visas** are issued only to business applicants who have a viable business idea and have arranged part of their financing from private investors in Canada who have been approved by the government.
- **Self-Employed Persons** must have at least 2 years of relevant experience and show that they intend to become self-employed in Canada. They must also score at least 35 points and show they'll make an economic contribution to Canada. Relevant experience means this class is limited to professional athletes, artists, musicians, actors, and some farmers.

Canada announced a new **Express Entry** [4] program to start in January 2015 to manage applications in some economic classes. The program's goal is to give the government more flexibility to meet skilled employment needs in Canada.

Does BC have a program to speed up immigration applications?

Yes—BC and several other provinces have provincial nominee programs (under the economic class). These provinces can speed up, or fast track, an immigration application so it takes less than one year. They can also have a work permit issued in 2 to 3 months. One of the fastest ways to immigrate to BC is under BC's Provincial Nominee Program [5], which lets BC select immigrants based on their specific ability to contribute to the BC economy. For example, applicants for jobs in BC where there is a shortage of workers—such as high-tech positions and rural postings—qualify here. But an applicant must first have a job offer to apply under this program.

What about refugee claims?

Canada has had a long tradition of helping people in need. Until recently, it has accepted between 20,000 and 30,000 people a year as refugees. They are people unable or unwilling to return to their own country for fear of being persecuted because of their race, religion, political opinion, nationality or membership in a particular social group, or people who might face risk to their lives, cruel and unusual treatment, punishment, or torture if they went home. In the last year, the Canadian government has restricted access to the refugee process by designating some countries as "safe" and requiring special procedures for refugee claimants from these countries.

What help is available for new immigrants?

Some financial and other help is available to immigrants through various programs and services, including counseling and cultural orientation, loans to help with transportation to Canada, language training, and job-related services.

The Legal Services Society (LSS) may provide a lawyer for free if you:

- meet the financial guidelines, and
- are facing an immigration proceeding that may remove you from Canada or you want to claim refugee status.

To find a legal aid location [6] near you, see the LSS website at www.legalaid.bc.ca [7] and click on Legal aid locations [6]. Or you can call the LSS Call Centre at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (call no charge, elsewhere in BC).

What if your application is rejected or you're asked to leave Canada?

Most people are eligible for a pre-removal risk assessment by Citizenship and Immigration Canada before they are removed from the country. If you have already made a refugee claim that was rejected, the decision on risk will be based only on new evidence.

The Federal Court of Canada can review most decisions of immigration officials and tribunals. But it does so only in very limited cases. You would need legal help in this area.

What if you do not qualify under the usual immigration rules?

Immigration officials can make exceptions to the usual immigration rules if following those rules would cause undeserved or exceptional hardship.

Where can you find more information on immigrating to BC?

- Citizenship and Immigration Canada [8] is a good starting point.
- The Legal Services Society [9] has free publications. Click Publications [10] then under "I want to find a publication by subject," click "Immigrants & Refugees [11]".
- The Immigration and Refugee Board [12] has details on refugee claims, admissibility hearings, and immigration appeals.
- The Canadian Council for Refugees [13] has general information on refugees.
- The BC Provincial Nominee Program [5] explains program details.

[updated July 2014]

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Health Law

Medical Malpractice (Script 420)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

Legal duty to give proper medical care

All doctors, nurses, hospitals, and other healthcare providers have a legal duty to provide proper medical care to patients—and to any other people who need emergency medical care. But doctors do not have to accept everyone as a patient. They can refuse to take a person as a patient for legitimate reasons. For example, a doctor may lack medical knowledge and experience in a particular area. Or a doctor and person may disagree on the right medical treatment for the person. But doctors cannot refuse to take a person as a patient because of age, gender, marital status, medical condition, national or ethnic origin, physical or mental disability, political affiliation, race, religion, or socioeconomic status.

If a doctor fails to provide proper medical care, a person can sue them for medical malpractice. At the same time, the person can also complain to the College of Physicians and Surgeons of BC, the body that licenses all BC doctors, enforces standards for them, and handles complaints against them. But the College cannot order a doctor to pay you money—only a court can do that. Script 423, called "Making a Complaint Against Your Doctor" explains how to file a complaint.

The two main types of medical malpractice are **negligence** and **failure to get a patient's informed consent**. And in some cases, the failure to get informed consent may also be an assault.

Negligence

Doctors or healthcare providers are negligent if they fail to provide the type (or standard) of care that a reasonable doctor or healthcare provider would provide in similar circumstances. If the negligence causes injuries or illness to a person, then the doctor or healthcare provider may be liable to pay damages to the person. It's no excuse for a doctor to say, "I did my best. I just didn't know any better." If the doctor should have known better, they may be liable. For example, let's say that you see your doctor because you are not feeling well and your doctor prescribes a drug to treat the symptoms you described. You take the drug and it harms you. It turns out that it was not appropriate, considering your medical history and the other drugs you were already taking. If other doctors with a similar practice would not have prescribed the drug, your doctor may be negligent. Another example: a surgeon performs the wrong surgery on a patient. The surgeon may be negligent if they did not provide the care a competent surgeon would provide, and instead made a clear mistake or omission that harmed the patient.

Not every mistake or bad result means there was negligence—doctors and healthcare providers are not liable for every mistake. The law realizes that doctors often have to make quick decisions without the best information. Let's say you complain to your doctor of severe head pain. He pays attention and carefully takes your medical history, listens to

you describe your symptoms, and orders the right tests. Then he decides that you have an ordinary tension headache that will go away. Later, it turns out that your doctor was wrong, and his mistake has put your health in danger. In this case, your doctor may have used proper care but still made a mistake. That's probably the case if other doctors would have treated you the same way. You probably won't win if you sue the doctor for malpractice. In other words, the key issue is whether the doctor made a reasonable decision that reasonable doctors would have made in the same circumstances—even if it turns out later to be the wrong decision leading to a bad result.

The standard of care—this differs from place to place. It also varies with the level of specialty of the doctor—the standard may be higher for specialists. And it varies with time—today's standard may not be good enough next year. You can't always expect the best care available at the most sophisticated research hospital. The standard of care is based on the hospital that treats you and the community it is in. You can't judge a small-town doctor in an isolated BC town by the same standard as you judge a doctor at Vancouver General Hospital.

In summary, not every mistake or bad result automatically means there was negligence. A doctor may take all the right steps and still make a mistake or get a bad result.

Damages for negligence—if you prove there was negligence and the negligence caused your injury or illness, a court will normally order the doctor, hospital, or healthcare provider to pay you damages for things the negligence caused, including your lost earnings, medical and other expenses, pain and suffering, and loss of enjoyment of life. This last category is the court's attempt to compensate you for the effect of an error on your life in general. The doctor is responsible only for the harm that his negligence caused. For example, say you needed surgery that would leave you with a mild disability if done properly. But the surgeon was negligent and caused you a greater disability. In this case, you would be paid only for the extra disability caused by the negligence, not for the mild disability you still would have had if the surgeon had not been negligent.

Others may be responsible—if a doctor delegates work to someone else, the doctor is generally still legally responsible for the work. If a doctor leaves a patient in the care of another doctor, both doctors are responsible. If an inexperienced intern performs the duties of a doctor, the intern has to give the same medical care the doctor gives. But a doctor can rely on the employees of a medical facility and expect that they'll meet the standard of care required in their jobs. So if a doctor leaves proper instructions with a nurse who doesn't follow them, the nurse, not the doctor, is normally responsible. If a person is harmed by the negligence of another healthcare professional, they can sue that professional. They can also file a complaint with the regulatory body for that profession. For example, the College of Registered Nurses of BC licenses nurses. The Emergency Medical Assistant Licensing Board licenses paramedics.

Hospitals also have a duty to exercise a proper standard of care. A hospital's duty is to take reasonable care in running the hospital to avoid harming patients. This includes appointing enough competent staff, ensuring that the staff act within their competence level, ensuring timely treatment, and taking the right steps to protect patients from infections from other patients. Hospitals normally have someone to handle complaints about healthcare they provide. And each health authority has a Patient Care Quality Office (listed at www.patientcarequalityreviewboard.ca [1]) to deal with complaints that hospitals cannot resolve. Above these offices is the Patient Care Quality Review Board. It reviews decisions of the Patient Care Quality Offices. For more information, call 1.866.952.2448 or see www.patientcarequalityreviewboard.ca [1].

Patients are responsible too—as a patient, you are also responsible for your healthcare. You must give the doctor all the important information about your condition, your medical history, and any other relevant information. If you don't, and that leads to an error in diagnosis or treatment, it will be your fault and not the doctor's. As well, a doctor is not responsible for problems if you don't follow the doctor's advice and your failure causes the problem you complain about. For example, it would be hard to prove that a surgeon was negligent in operating on you, if you don't follow the surgeon's instructions about diet and exercise after the operation—and then you get sick from ignoring those instructions.

Failure to get a patient's informed consent

A doctor has to tell you about your condition, the nature of the proposed treatment, the risks of the treatment, and other options that you may have. You can't consent to treatment unless the doctor gives you all this information. When a doctor tells you of the risks, they don't have to explain all the possible risks—just those that a reasonable patient would want to know before deciding about treatment. If a doctor doesn't give you all this information, the failure could be medical malpractice, but only if the failure caused your problems. Even if a doctor doesn't give you all the information, the doctor won't be liable if a reasonable person in your position would have agreed to the treatment anyway, even if the doctor had given them all the information.

A third, complicated type of malpractice

Besides negligence and lack of informed consent, there is a third type of malpractice. Recently, courts have said doctors may be responsible if they break the patient-doctor contract. This is a very complicated area of malpractice law, which this script does not explain. For example, one issue may be who has a contract with the doctor: you or the Medical Services Plan. You would need a lawyer to see if this applies to your case.

Suing because of malpractice—legal advice and time limits

If you have questions or concerns about your treatment, talk to your doctor. Then, if you feel that you've been the victim of medical malpractice, get legal advice right away.

Generally, you must start a malpractice lawsuit within two years of when the malpractice occurred. This is called the limitation period. More precisely, it's within two years of when a reasonable person would realize malpractice might have occurred—knowing what you learned along the way. Even if you're well during this time, you should act quickly—while witnesses are still available and their memories are fresh.

If you start a lawsuit, you have to be patient. Malpractice suits often take two to five years or more from start to finish.

Costs of suing

Some lawyers will work for a contingency fee. Their fee depends on the result of the case. If you lose, the lawyer gets nothing. If you win, the lawyer gets part of your compensation award. Win or lose, though, you usually have to pay the expenses of suing, which can be thousands of dollars, especially if you have to hire experts to help prove your case. The Law Society regulates contingency fee contracts to ensure they are fair to clients. For more information about lawyers' fees, check script 438, called "Lawyers' Fees".

Complaining to the College at the same time as suing

You can also file a complaint with the College of Physicians and Surgeons of BC, the body that licenses all BC doctors, enforces standards for them, and handles complaints against them. But the College cannot order a doctor to pay you money—only a court can do that. Script 423, called "Making a Complaint Against Your Doctor" explains how to file a complaint. Contact the College at 604.733.7758 in Vancouver and 1.800.461.3008 elsewhere in BC. Its website is www.cpsbc.ca [2].

[updated April 2014]

References

[1] http://www.patientcarequalityreviewboard.ca
[2] http://www.cpsbc.ca
[3] http://www.dialalaw.org

Getting Your Medical Records (Script 421)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains who owns medical records and the information in them, how to see your own medical records, and who else can see them.

Who do medical records belong to?

Many people think that their medical records are their own property, and that if they want to see them, they just have to ask. That's only partly true. Your medical records actually belong to the doctor, hospital, or other facility that made them, not to you. That's also the case with dental records and nursing home records. But the information in the medical records belongs to you, and normally, you have a right to see that information. The records should include any treatment or procedure that went wrong because courts have said that doctors have a legal duty to give patients that type of information.

Medical records that your doctor keeps

To see the medical records your doctor has on you, just ask to see them. Your doctor has a privacy officer—usually the doctor—who will deal with your request. Under the BC *Personal Information Protection Act*, you have a right to see the information. And the doctor will normally show you the records or give you the information in them. You can also ask for a copy of your records, but the doctor may charge you a fee (set by the BC Medical Association) to copy them because medical insurance does not pay for this.

Accuracy and privacy—the law requires doctors to make sure the information in your medical records is accurate and to keep it private. If you think the doctor made a mistake in your medical records, you can ask him or her to make a new

entry in the record about your concern. The doctor has to make a note of your request. But once medical information is recorded, it is not supposed to be destroyed or changed based on a patient's request.

Rarely, a doctor may refuse to give you the information in your medical record, thinking that it could cause immediate or grave harm to your safety or to your physical or mental health. If that happens, and you can't solve the problem with your doctor, contact the College of Physicians and Surgeons of BC. The College's Complaints Department may be able to help you. The College phone number is 604.733.7758 in Vancouver and 1.800.461.3008 elsewhere in BC. Its website is www.cpsbc.ca [1].

If you still can't solve the problem, contact the Information and Privacy Commissioner for BC. The Commissioner's phone number in Victoria is 250.387.5629. The website is www.oipc.bc.ca [2]] and the email address is info@oipc.bc.ca [3]. Outside of Victoria, call Enquiry BC and ask for the Office of the Information and Privacy Commissioner. To reach Enquiry BC, call 604.660.2421 in the lower mainland and 1.800.663.7867 elsewhere in BC.

Lastly, you can see a lawyer for legal advice on what to do.

Medical records that a hospital keeps

To see your hospital records, contact the medical or health records department of the hospital and ask for their information and privacy office or the person in charge of giving out information. If you make a written request, the hospital has 30 days to respond. Usually, you can see your hospital records and get a copy. The *Freedom of Information and Protection of Privacy Act* covers hospital records. Check script 235, called "Freedom of Information and Protection of Privacy", for more on this law.

Accuracy and privacy—the law requires hospitals to make sure the information in your medical records is accurate and to keep it private. The law also gives you the right to ask the hospital to correct any errors or omissions in your records. The hospital has to make a note of your request. But once medical information is recorded, it is not supposed to be destroyed or changed based on a patient's request.

If a hospital refuses to let you see your records, it must tell you why. If you disagree with the hospital's decision, you can ask the Information and Privacy Commissioner for BC to review it.

Lastly, you can see a lawyer for legal advice on what to do.

Are your medical records confidential?

Yes, in most cases your medical records are confidential. Doctors and hospitals must not give them to anyone else, except in certain cases:

1. Other people who give you medical care, such as specialists, will need your medical records.
2. If you're in a lawsuit about your medical history, your lawyer will need your medical records. Usually, doctors and hospitals will copy your medical records to your lawyer if you ask them to.
3. A court can order your medical records be shown to other people and lawyers in a lawsuit.
4. If you apply for life or health insurance, the insurance company will often need your medical records before giving you insurance.
5. Some types of jobs may require medical information. However, potential employers can get your records only if you agree to let them see the records.

Section 18 of the *Personal Information Protection Act*, which applies to doctors, lists other reasons for giving out personal information—some of them could apply to medical records. Section 33 of the *Freedom of Information and Protection of Privacy Act*, which applies to hospitals, lists other reasons for giving out personal information—some of

them could apply to medical records. Both laws are on the following website: www.bclaws.ca [4].

Doctors also have to release medical information to authorities in certain cases. For example, they must:

- report children at risk to the Ministry of Children and Family Development.
- tell the motor vehicle branch when a person's ability to drive may be reduced.
- tell police if someone's life or safety may be at risk.

And if police have a search warrant, a doctor may have to release information to obey the warrant.

[updated April 2014]

References

[1] http://www.cpsbc.ca
[2] http://www.oipc.bc.ca
[3] mailto:info@oipc.bc.ca
[4] http://www.bclaws.ca
[5] http://www.dialalaw.org

Children and Consent to Medical Care (Script 422)

Can children consent to medical care—if they are "capable"?

Yes, the BC *Infants Act* (available at www.bclaws.ca [1]) says that children (anyone under 19 years old) can consent (or agree) to their own medical care—if they are capable. When are children capable? The law considers them capable if they understand the need for a medical treatment, what the treatment involves, and the benefits and risks if they get—or don't get—the treatment. If the doctor or healthcare provider explains these things and decides that the child understands them and the healthcare is in the child's best interest, they can treat the child without consent of the parents or guardians. The child might have to sign a consent form. For the law on adults and consent to medical care, check script 428, called "Adults and Consent to Medical Care".

There is no set age when a child becomes capable. Doctors have to use their best judgment in each case to decide if a child is capable. Courts are flexible in deciding if a child is capable. It depends on how mature the child is and how serious the medical treatment is. A very young child may be able to consent to the dressing of a wound. On the other hand, an older child may not be capable of refusing life-saving treatment.

In 1985, a court found a 12-year-old girl capable of refusing a potentially life-saving transfusion and she later died. However, in 1993, a court found that a 15-year-old Jehovah's Witness boy who refused a potentially life-saving blood transfusion was not capable of refusing treatment. He had some idea that he would die, but he didn't realize the full implications of the process of dying.

Do children need the consent of a parent or guardian to get medical care?

No—not if they are capable. They can consent to their own medical care, without the consent or knowledge of their parents or guardians. Capable children can normally get medical treatment for things like birth control, abortion, mental health problems, sexually transmitted diseases, and alcohol and drug addiction problems.

Is a child's medical care confidential?

A doctor or healthcare provider can't talk with the parents or guardian about a capable child's medical care, unless the child agrees. Just as doctors must keep information about their adult patients confidential, they must also keep information about their capable child patients confidential.

There are exceptions to this confidentiality rule. In some cases, parents may be able to get their child's medical information. For example, if there is good reason to believe that a child might harm themselves or others, or there is reportable abuse (physical, sexual or emotional) then the information may not stay private. In such a case, the child should be told why their information won't be kept private and who it will be shared with.

And some doctors may consider a child not capable and insist on telling the child's parent or guardian if they treat the child. So if you're a child and you want your doctor to keep your medical information confidential, talk to the doctor before you get treatment to see if they agree you are capable and will keep your information confidential. If not, you can seek a different doctor.

For more information on patient confidentiality, check script 421, called “Getting Your Medical Records”.

Does medical care have to be in the child’s best interest?

Yes, capable children can consent to medical care only if it is in their best interest. If there is any disagreement about what a child’s best interest is, the people involved may have to see a lawyer and consider going to court. If a capable child refuses treatment that a doctor says is necessary, the parents or guardians, or the Ministry of Children and Family Development, can ask a court to overrule the child’s refusal. More information is available from the Ministry. In Victoria, call 250.387.7027. Elsewhere in BC, call 1.877.387.7027. Or see its website at www.gov.bc.ca/mcf [2] and click on the “For Youth” tab. More information is also available on the website of the Legal Services Society, in the Family Law section at www.familylaw.lss.bc.ca [3].

Is consent to medical care needed in a medical emergency?

Consent to medical care in a medical emergency may not be needed to treat a child or an adult—it depends on the situation. If a person’s life or health is seriously threatened, and it appears that the person isn’t capable of making healthcare decisions, healthcare providers may be able to treat the person without consent. Because they are dealing with a medical emergency, they may be able do whatever is necessary to try and save the person’s life or health.

But healthcare providers must not provide healthcare to an adult if they have reasonable grounds to believe that the adult—who is no longer capable—previously indicated that they wanted to refuse healthcare in a particular case—even a medical emergency. For example, an adult may carry a card saying they refuse to have a blood transfusion. If a person has previously indicated what they want in a medical emergency, healthcare providers must follow the person’s wishes if the emergency occurs. Whether a capable child, or a child’s parents, can refuse medical treatment in these types of situations raises complex legal questions. Parents and children who may wish to do so need legal advice.

Check script 238, called “Children’s Rights” for general information on the rights that children have in several areas other than medical care.

[updated April 2014]

References

[1] http://www.bclaws.ca
[2] http://www.gov.bc.ca/mcf
[3] http://www.familylaw.lss.bc.ca
[4] http://www.dialalaw.org

Making a Complaint Against Your Doctor (Script 423)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

If you have a complaint about your doctor, you have 4 options:

1. **Talk to the doctor** about the problem to see if you can work it out. If talking doesn't work, or if the problem is too serious, consider the next 3 options.
2. **Complain to the College** of Physicians and Surgeons of BC. Under the *Health Professions Act*, the College licenses all BC doctors, enforces standards for them, and handles complaints against them. Even if you complain to the College, you can still take the other actions described in items 3 and 4 below. In fact, if a doctor has harmed you and you want compensation, you have to sue (item 4) because the College cannot get money for you—only a court can do that.
3. **Consult a lawyer or the police** if you think the doctor has broken a criminal law.
4. **Sue for medical malpractice**—see a lawyer for advice about suing the doctor for damages—check script 420, called "Medical Malpractice".

Talk to the doctor

Most doctors will talk with a patient who has a problem about them. If you have a problem with your doctor that involves communication, conduct, or the treatment you received, discuss it first with your doctor. If you have a complaint about a doctor while you're in the hospital, you can also go to the head of the division or the hospital's medical director, who will follow the hospital's complaints process. If talking doesn't work, you have to consider the other 3 options listed above.

Complain to the College

There is no deadline to file a complaint, but it's good to file as soon as you can. You can file most complaints in 2 ways (a different process for sexual misconduct complaints is explained in the next section):

1. Review this script and the College website material on filing a complaint at www.cpsbc.ca [1]. Click on "For the Public [2]"—"File a Complaint [3]".
2. Complete and submit a complaint form [4] on the College website. Under "File a Complaint [3]", click on "General Process [5]" and then on "Complaint Form". Mail or fax it to the College. The College does not accept complaints by email or phone.
3. Send a complaint letter to the College with the following information:

- your name, date of birth, address, and phone number so that the College can contact you.
- the name and address of your doctor.
- the facts of what happened to you.
- your permission to send a copy of your complaint to the doctor for their response.

Mail or fax your complaint form or letter to:

Complaints Department

College of Physicians and Surgeons of BC

300 – 669 Howe Street

Vancouver BC V6C 0B4

Fax: 604.733.3503.

For more information, call the College at 604.733.7758 in Vancouver and 1.800.461.3008 elsewhere in BC. Or check its website at www.cpsbc.ca [1].

Sexual misconduct complaints

For complaints of sexual misconduct or inappropriate behaviour by a doctor, you can call the College to speak with an investigator. Its numbers are 604.733.7758 in Vancouver or 1.800.461.3008 elsewhere in BC. The investigator will explain the process and help you with it. You can discuss your concerns, including whether to proceed. But if you choose not to proceed, the College may not be able to take action against the doctor.

What does the College do when it receives a complaint?

The College investigates every complaint it receives. It may get more information from the person making the complaint and other people, including experts. It may also get relevant medical records. The College will also ask the doctor to respond to the complaint. Its Inquiry Committee assesses every complaint.

What the College can do about a complaint

College staff resolve most complaints after reviewing the patient's medical records and getting responses from the doctor and any other healthcare providers involved. The College may suggest a doctor change parts of their practice and take training and education in a specific area.

The College can issue a formal reprimand to a doctor who has not:

- met current standards of care, or
- followed the ethical principles in the Canadian Medical Association's Code of Ethics [6], or
- followed any of the College's bylaws or standards.

The College can limit a doctor's medical practice. It can also prohibit a doctor from practicing medicine. But the College would take these actions only if it found (during a formal disciplinary process) significant evidence of a doctor's lack of judgment, unprofessional behaviour, lack of current skill or knowledge, or impaired fitness to practice. The evidence would be tested at a Discipline Committee Hearing—unless the doctor agreed to the discipline as part of alternate dispute resolution.

What the College cannot do about a complaint

The College cannot:

- investigate complaints about hospitals or other healthcare providers—see the section below on complaints about the quality of healthcare.
- provide diagnoses or treatment recommendations, or prescribe specific patient care.
- pay any money or order a doctor to pay any money to complainants. If you want compensation from a doctor, see a lawyer about suing for damages. And check script 420, called "Medical Malpractice".
- contact the police for a complainant if illegal activities are involved—unless the complainant consents to this.
- decide on a complaint without first giving the doctor a chance to respond.

College website information—check the College website (www.cpsbc.ca [1]) under "For the Public [7]"—"File a Complaint [8]". It explains the role of the College, reasons for complaints, standards and guidelines in several specific areas, and the complaint process. It also has the complaint form.

Applying for a review of a College decision

If you disagree with the College's decision on your complaint, you can apply to the Health Professions Review Board to review the decision. You have to deliver your application to the Board within 30 days of when you receive the College's decision letter. If you apply after 30 days, then you must also apply for an extension to file your application, explaining why you missed the deadline. The Review Board is at 250.953.4956 and toll-free elsewhere in BC at 1.888.953.4986. Its website is www.hprb.gov.bc.ca [9].

Suing at the same time as complaining to the College

If a doctor has harmed you and you want compensation, you have to sue the doctor for medical malpractice because the College cannot get money for you—only a court can do that. You can sue at the same time as you complain to the College. Script 420, called "Medical Malpractice" explains how to sue for medical malpractice.

Complaints about the quality of healthcare—for problems with the quality of healthcare you received from a health authority, it's best to first complain to the place that gave you the service, for example, a hospital (which will then follow its own complaints process).

If that does not solve the problem, you can file a complaint with the Patient Care Quality Office of the health authority. Each health authority has such an office, listed at www.patientcarequalityreviewboard.ca/makecomplaint.html [10].

If you disagree with the decision by that office, you can ask the Patient Care Quality Review Board to review it. For more information, call 1.866.952.2448 or see www.patientcarequalityreviewboard.ca [11].

For complaints about other healthcare providers, contact the regulatory body for that profession. For example, the College of Registered Nurses of BC licenses nurses. The Emergency Medical Assistant Licensing Board licenses paramedics.

[updated April 2014]

References

[1] http://www.cpsbc.ca
[2] https://www.cpsbc.ca/for-public
[3] https://www.cpsbc.ca/for-public/file-complaint
[4] https://www.cpsbc.ca/files/pdf/Complaint-Form.pdf
[5] https://www.cpsbc.ca/for-public/file-complaint/general-process
[6] http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD04-06.pdf
[7] http://https://www.cpsbc.ca/for-public
[8] http://https://www.cpsbc.ca/for-public/file-complaint
[9] http://www.hprb.gov.bc.ca
[10] http://www.patientcarequalityreviewboard.ca/makecomplaint.html
[11] http://www.patientcarequalityreviewboard.ca
[12] http://www.dialalaw.org

Hospitalizing a Mentally Ill Person (Script 425)

Anyone who wants psychiatric help can ask to be admitted to hospital for psychiatric treatment. The BC *Mental Health Act* also allows authorities to send people to hospital even if they don't want to go. This script explains both cases.

Voluntary admission to hospital

Anyone 16 or older can ask to be admitted for treatment to a psychiatric unit in a general hospital or a psychiatric hospital. A doctor who examines them and believes they need psychiatric treatment can admit them to hospital. People under 16 need a parent or guardian to apply for them.

Hospitals can treat voluntary patients only if the patient consents to the specific treatment. If they are incapable of consenting, someone else can act as a temporary substitute decision maker (TDSM) to consent for them. It could be their spouse, child, parent, brother or sister, grandparent, grandchild, a person related to them by birth or adoption, a close friend, or a person immediately related to them by marriage—in that order. The TSDM must be at least 19 years old, must get along with the patient, and must have been in contact with the patient in the past 12 months.

The decision maker could also be the adult's representative or committee. Check script 428, called "Adults and Consent to Medical Care", for details on consenting to medical treatment and substitute consent. Also check scripts 426, called "Committeeship" and 180, called "Power of Attorney and Representation Agreements".

What if a voluntary patient wants to leave the hospital?

Voluntary patients can just tell the nurse in charge that they want to leave (or be discharged), and in most cases, they'll be free to go. The hospital may ask the person to sign a "Discharge against Medical Advice" form.

Involuntary admission to hospital

The rules for hospitalizing a person against their will are stricter. A person can become an involuntary patient by doctor's certificate or court order. As well, the police can take a person to hospital in an emergency—see below for details.

While a voluntary patient may be admitted to any hospital with psychiatric services, involuntary patients can be admitted only to certain hospitals in BC. If a hospital doesn't have a bed available, they may not be able to admit a person. In that case, the person would be sent, under supervision, to another hospital that has room.

1. Doctor's certificate

This is the most common way people are hospitalized against their will. A doctor who believes a person has a mental disorder, as defined in the *Mental Health Act*, can complete a certificate to admit the person to hospital, even if the person doesn't want to be hospitalized or treated. The doctor must believe the person needs to be hospitalized for psychiatric treatment, to prevent substantial mental or physical decline, or to protect the person or other people. The mental disorder must seriously impair the person's ability to react appropriately to their environment or to get along with others. The person does not have to be dangerous to be admitted involuntarily.

2. Court order

Anyone, including family members and neighbours, who reasonably believes a person has a mental disorder and needs to be hospitalized can apply to court. The court can issue a warrant that allows the police to take the person to hospital, where they will be assessed.

3. Police action in an emergency

The police can act in an emergency when family members or health professionals need help getting a person to see a doctor. If the police believe a person has a mental disorder and their behaviour is likely to endanger their own safety or the safety of others, the police can immediately take the person to a doctor—usually in a hospital. If the person needs to be hospitalized, a doctor will complete a certificate to admit them.

How long can involuntarily patients be kept in hospital?

A doctor's certificate to send a mentally ill person to hospital is valid for up to 14 days prior to admission. Involuntary patients can be kept in hospital for only 48 hours after they are admitted, based on one doctor's certificate. To keep the patient longer, the hospital must get a second doctor to examine the patient and produce a second certificate within the 48 hours. The patient is then certified and can be kept for up to one month. That term may be renewed for another month, then three months, then six months, and then every six months—each time with a doctor's certificate based on an examination and written report. The examination must conclude that the criteria for involuntary admission continue to be met.

The hospital director must give the patient written and oral notice that they are being hospitalized—at the start of the hospitalization and at each renewal of it. If the director believes that the patient does not understand the notice, the director must give the notices again as soon as they think the patient can understand it. The written notice must also go to the patient's near relative (which includes a representative). If there's no information available on a relative, then the notice must go to the Public Guardian and Trustee.

Can involuntary patients be treated without their consent?

Yes, because they may not understand or realize that they need psychiatric treatment. If they refuse treatment or are incapable of consenting, the hospital director consents to treatment for them. The patient (or a family member or someone else acting for them) can ask for a second medical opinion on whether the treatment is appropriate.

Can involuntary patients leave the hospital on their own?

No—an involuntary patient cannot leave the hospital unless their doctor discharges them (lets them go) permanently or on extended leave, or changes their status to voluntary. If they want to leave the hospital and their doctor won't discharge them, they (or someone acting for them) can ask a panel of the Mental Health Review Board (the Board) to review the decision (panels and reviews are explained in the next section). The Board is independent of government in making its decisions.

Some involuntary patients leave the hospital on extended leave and still have involuntary outpatient treatment that the hospital director authorizes. These patients have the right to periodic hearings by a panel—as if they had stayed in the hospital as involuntary patients.

How do reviews work?

Involuntary patients have the right to have a Board panel review their hospitalization—after they are involuntarily admitted and after each renewal of their hospitalization. It's not automatic—they (or someone acting for them) have to ask for it. To do that, the patient (or someone acting for them) must complete an application form available on the Board website (www.mentalhealthreviewboard.gov.bc.ca [1]), at the Board office (call 604.524.7220), and at the hospital.

A panel of three people (a medical doctor, a lawyer, and a person who is not a doctor or lawyer) performs the review. The panel must hold a hearing within 14 to 28 days after the Board receives the application, depending on how long the person is being hospitalized for. A patient has the right to have a lawyer, friend, or advocate speak for them.

The panel decides whether the hospital should keep or release the patient. A patient can apply to court for judicial review of the panel's decision. A patient can also bypass a review hearing and go directly to court. In both cases, the procedures are complicated, so they'll need a lawyer.

Where can you get more information?

- Check the website of the Mental Health Review Board (www.mentalhealthreviewboard.gov.bc.ca [1]) for detailed information.
- Seek help from a health professional, a lawyer, or the Mental Health Law Program at the Community Legal Assistance Society (www.clasbc.net [2]) — call 604.685.3425 in the lower mainland or 1.888.685.6222 elsewhere in BC.
- Check the Ministry of Health website at www.healthservices.gov.bc.ca/mhd [3]. Specifically, see the "Guide to the Mental Health Act" under the "Mental Health Act" link.
- The *Mental Health Act* is available at www.bclaws.ca [4].

[updated September 2013]

References

[1] http://www.mentalhealthreviewboard.gov.bc.ca
[2] http://www.clasbc.net
[3] http://www.healthservices.gov.bc.ca/mhd
[4] http://www.bclaws.ca
[5] http://www.dialalaw.org

Committeeship (Script 426)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

What is a committee?

A committee (pronounced caw-mi-tay, or caw-mi-tee, with emphasis on the end of the word) is a person appointed by the BC Supreme Court to make personal, medical, legal, or financial decisions for someone who is mentally incapable and cannot make those decisions.

Anyone who suffers from a mental illness or handicap, a head injury, a degenerative disease or some other kind of disability may not be able to make decisions about their personal, medical, financial, or legal affairs. They may be unconscious and unable to decide anything, including where and how to live. They may lose track of bank accounts, forget to pay bills, or be taken advantage of by dishonest people. In these cases, a committee is one possible solution. Appointing a committee is a very serious step because it takes away a person's right to decide things for themselves. It is usually a last resort when nothing else will work.

A **committee of the person** makes personal and medical decisions for someone who is not mentally capable, including decisions about where the person will live. Usually a family member or close friend will do this. Rarely, the Public Guardian and Trustee will agree to be committee of the person. Only the court can appoint a committee of the person.

A **committee of the estate** makes financial and legal decisions for someone who is not mentally capable. A family member or close friend, a trust company, or the Public Guardian and Trustee of British Columbia can fill this role. A committee of the estate can be appointed by the court. The Public Guardian and Trustee can also be appointed as committee of the estate by a certificate of incapability under the *Patients Property Act*. But no one else can be appointed this way.

Committees appointed by the court (other than the Public Guardian and Trustee) are sometimes called private committees. The Public Guardian and Trustee may apply to court to be the committee if there are no suitable friends or family willing to act (see details below).

How and when could you become a committee?

You might want to be a committee if one of your family members or close friends has lost the mental capacity to make important decisions and you want to help.

To become a committee, you must apply to the BC Supreme Court to be appointed by an order under the *Patients Property Act*. But first, you have to know whether the person is mentally incapable. To figure this out, you can talk to the person's doctor. If the doctor believes the person can't manage their affairs, or themselves, then you can see a lawyer.

A lawyer can help you with the paperwork, including affidavits, (or sworn statements), of two doctors licensed in BC, saying that the person is not capable of managing themselves or their affairs. If you're applying for committee of estate, the doctors' statements must say the person is not able to manage their financial and legal affairs and explain why. If you're applying for committee of person, the doctors' statements must say the person cannot manage their personal and medical decisions and explain why.

Unless the doctors swear that it would be harmful to the person, you or your lawyer must notify the person that you have applied to be their committee. Sometimes the person will oppose the application. You should also notify family members, and if you can, get their consent to your application.

Give the lawyer as much information as you can about the medical condition and financial affairs of the person. Because of privacy laws, some financial institutions may not want to give you information. When the paperwork is ready, the lawyer will apply to court for an order to appoint you as committee.

Depending on the size of the estate (all of a person's property, including income) and all the circumstances, the court may order you, as committee, to post a security bond to protect the person's assets. Or the court may restrict your access to the person's assets. The person's estate usually pays the cost of the bond and all other expenses to manage the estate.

If the person becomes capable again, they or you can apply to court to cancel your appointment as committee. You may have to pass the final accounts for the person's estate before the court – unless the person agrees you do not have to.

The Public Guardian and Trustee reviews all applications for committee – see below for details on the Public Guardian and Trustee.

Choosing, or nominating, your own committee

As long as you're mentally capable, you can name, (or nominate), someone you want to be your own committee, in case you ever need one. Then, if you become mentally incapable, the court will appoint that person unless there's a good reason not to. You should see a lawyer if you want to do this because you have to follow certain procedures and there are specific requirements for the nomination document.

What powers and duties do you have as a committee?

Generally, as committee, you have the same powers to deal with the person's estate and affairs as the person has when they are capable. But there are some things you can't do: for example, you can't make a will or estate plan for the person, vote on their behalf, or consent to marriage for them.

Everything you do must be in the person's best interests. You have what is called a fiduciary responsibility. This means that you must put the person's interest ahead of yours and you cannot mix your assets with theirs. You must never put yourself in a conflict-of-interest position. These are important duties and you should not take on the task lightly. You will have to consider whether the person is likely to recover quickly, or at all, because that can affect your decisions as committee.

The court can restrict your powers. For example, it might say you can't sell any of the person's real estate without first getting its permission or the consent of the Public Guardian and Trustee. Or the court may restrict your access to an investment so that you can access the income from the investment, but not the investment itself. But otherwise, it will be up to you to handle the person's estate, always keeping in mind the needs of the person and their family.

The *Trustee Act* controls what you can invest in. If you invest in things the *Trustee Act* does not allow, you may have to pay the estate for any losses. The law says you have to be a prudent investor. This means you cannot invest in high-risk or speculative things. You may want to get professional advice before you make any investment decisions.

Normally, you can't use the person's property or get any benefit from it. There are exceptions to this—for example, when a husband or wife is committee for their spouse. A husband who becomes incapable must still help support his wife and children. So if his wife is the committee, she can use some of his assets or income for her own living expenses. If you are a committee and believe you can use the person's assets or income to support a family member or yourself, you should first check with the Public Guardian and Trustee or your lawyer.

Your responsibilities as a committee can include the following things:

- handling the person's property
- doing the person's banking
- paying the person's expenses
- budgeting for the person's family
- selling the person's personal property and real estate
- entering into contracts for the person and operating the person's business
- dealing with any lawsuits involving the person
- filing the person's income tax returns
- applying for the person's pension and other benefits
- making medical decisions for the person
- deciding where and how the person should live

You have to keep detailed records, (or accounts), of all the person’s assets, liabilities, and money coming in and going out of the person's estate. You will have to give periodic accountings to the Public Guardian and Trustee and they will review and decide whether to pass (or accept) them. The Public Guardian and Trustee decides how often you have to file these accountings – it could range from every six months to every five years. The Public Guardian and Trustee also reviews reports of abuse or mismanagement by the committee.

The Public Guardian and Trustee has the necessary forms, samples of accounts you must keep, and a handbook for private committees on its website at www.trustee.bc.ca [1]. For more information, or to ask them to send you these documents, call 604.660.4444 in the lower mainland. Elsewhere in BC, call Service BC at 1.800.663.7867 and ask for the Public Guardian and Trustee. You can also email the office at mail@trustee.bc.ca [2].

You can hire professional help for tasks that require expert advice or work, but not for things that an ordinary person could do. The person's estate can pay reasonable amounts for these expenses.

Are you paid as a committee of the estate?

The person's estate can pay you a reasonable fee for your service as committee of the estate. The size of your fee depends on the size of the estate and how much work you must do to manage it. The Public Guardian and Trustee sets your fee for acting as committee when it approves your accounts.

Keep written records of the work you do and the time you spend on the estate. Include them when you submit your accounts to the Public Guardian and Trustee. You can pay from the estate any reasonable, out-of-pocket expenses, including professional fees for duties you cannot handle yourself.

The Public Guardian and Trustee of British Columbia

The Public Guardian and Trustee is an entity independent of the BC Government, with an office at 700-808 West Hastings Street in Vancouver. One of its duties is to act as committee when no one else can do it, or when there is a conflict—usually among family members. It charges a fee, set by regulation, for this service. If a committee is needed and you cannot be it, or if there is a family conflict, you should contact the Public Guardian and Trustee.

The Public Guardian and Trustee also reviews all applications to appoint a committee to ensure they are reasonable and appropriate and that the person applying is suitable. The Public Guardian and Trustee then makes recommendations to the court about the application.

The Public Guardian and Trustee also reviews all private committee accounts and sets the committee payment.

Check its guide, called "It's Your Choice [3]" at www.trustee.bc.ca [1], under the "Personal Planning" link.

Committee compared to power of attorney

Although a power of attorney might seem easier than a committee order, a person must sign it while still mentally capable of making that type of decision. So it doesn't work if a person is already incapable. And a power of attorney becomes invalid when the person who gave it becomes mentally incapable, unless the power of attorney has a term called an enduring clause. An enduring clause means the power of attorney continues if the person becomes mentally incapable. Finally, a power of attorney deals with legal and financial things but not with personal and medical issues. Script 180, called "Power of Attorney and Representation Agreements", has more information on this.

Other options – four laws to promote adults' rights to care for themselves

BC has the following four laws (at www.bclaws.ca [4]) to promote adults' rights to care for themselves. The laws aim to help people who can't make their own decisions or who could be taken advantage of by dishonest people:

- The *Representation Agreement Act*
- The *Health Care (Consent) and Care Facility (Admission) Act*
- The *Adult Guardianship Act*
- The *Public Guardian and Trustee Act*

These laws provide other ways, besides a committee order, to deal with mental incapacity, such as representation agreements and powers of attorney (script 180). The Public Guardian and Trustee has detailed information on these laws. Contact that office or a lawyer to learn more.

Agreement to administer federal pension benefits by private trustee—if a person who becomes mentally incapable has no assets or property besides some type of federal pension (Canada Pension Plan or CPP, Old Age Supplement or OAS, Guaranteed Income Supplement, Veteran's Pension) then this option may be cheaper and simpler than a committeeship.

Service Canada has more on this. Call it for information on CPP and OAS disability benefits at 1.800.277.9914. The form for this agreement is on the Service Canada website (www.servicecanada.gc.ca [5]) under the link called *Forms*.

Summary

A committee is a person, trust company, or the Public Guardian and Trustee appointed by the court to manage the affairs of a person who is mentally incapable of doing so. A committee must act in the person's best interests and generally has the same power over the person's estate as the person has when they are capable. Appointing a committee is a serious step because it takes away a person's right to decide things for themselves.

For more information, check:

- The Office of the Public Guardian and Trustee, at www.trustee.bc.ca [1].
- The Nidus Personal Planning Resource Centre and Registry website at www.nidus.ca [6].

[updated March 2014]

References

[1] http://www.trustee.bc.ca
[2] mailto:mail@trustee.bc.ca
[3] http://www.trustee.bc.ca/documents/STA/It%27s_Your_Choice-Personal_Planning_Tools.pdf
[4] http://www.bclaws.ca
[5] http://www.servicecanada.gc.ca
[6] http://www.nidus.ca
[7] http://www.dialalaw.org

Adults and Consent to Medical Care (Script 428)

Do you have the right to refuse medical care? Who and what allows doctors to treat you if you're unconscious or unable to indicate what medical treatment you want? The answers to these and other questions are in a BC law called the *Health Care (Consent) and Care Facility (Admission) Act* (available at www.bclaws.ca [1]). This law was amended on September 1, 2011.

The Act applies to adults – people 19 and over – but not to children. And it doesn't apply to patients who are involuntarily admitted to hospital for psychiatric treatment under the *Mental Health Act*. For information on consenting to and refusing psychiatric treatment as an involuntary patient, check script 425, called "Hospitalizing a Mentally Ill Person". For the law on children and consent to medical care, check script 422, called "Children and Consent to Medical Care".

A doctor or health care provider can treat you only if you consent

For your consent to be valid, it must be informed. That means your doctor or health care provider must explain your illness or condition to you and tell you about the proposed treatment, the risks and benefits of it, and any alternative treatments, including no treatment.

The law says, "Consent to health care may be expressed orally or in writing or may be inferred from conduct". This means that people can consent to health care in writing or verbally. And if a person can't give written or verbal consent, a doctor or health care provider may be able to decide – based on the person's conduct – that the person consents to health care.

Do you have the right to refuse medical care?

Yes. Every capable adult has the right to consent to medical care or refuse it – for any reason, including moral and religious reasons. Adults also have the right to change their decisions about medical treatment. You can refuse life support or other medical care, such as a blood transfusion, even if it means you will die.

To refuse treatment, you must be capable. The law presumes all adults are capable of giving, refusing, or revoking their consent, unless it's clear they are not capable of making those decisions. If a doctor questions a person's mental capability, the doctor can require the person to undergo a competency assessment by a medical expert.

What if you're incapable and cannot consent?

Consent to medical care in a medical emergency may not be needed to treat you if you're an adult – it depends on the situation. If your life or health is seriously threatened, and it appears that you are not capable of making health care decisions, health care providers may not need consent to treat you. Because they are dealing with a medical emergency, they may be able do whatever is necessary to try to save your life or prevent serious physical or mental harm.

But health care providers must not provide health care to you if you become incapable and they have reasonable grounds to believe that you previously indicated that you wanted to refuse health care in a particular case – even a medical emergency. For example, you may carry a card saying you refuse to have a blood transfusion.

Advance directives—what are they and how do they work?

If you previously indicated what you want in a medical emergency, health care providers must follow your wishes if the emergency occurs. For example, you may have made an advance directive. That is a written instruction by a capable adult that gives or refuses consent to health care (described in the advance directive) if the adult is not capable of giving the instruction when the health care is needed.

Signing requirements—an advance directive must be signed and dated by the adult in front of 2 witnesses. The directive must also be signed and dated by the 2 witnesses in front of the adult (only one witness is needed if the person is a notary or lawyer). The witnesses must be capable adults who understand the type of communication the adult uses. They can use an interpreter if necessary.

Who cannot be a witness—the following people cannot be a witness:

1. a person who provides personal care, health care or financial services to the adult for compensation, other than a lawyer or notary.
2. a spouse, child, parent, employee or agent of a person described in paragraph (a).

Signing for an adult who is not physically capable—if an adult is not physically capable of signing an advance directive, another person can sign it for them if the adult is physically present and directs the person to sign the directive. Their signature must be witnessed as if the adult were signing the directive. The following people must not sign an advance directive for an adult:

1. a witness to the signing of the advance directive.
2. a person prohibited from acting as a witness (described in the preceding paragraph).

Even if an advance directive is not properly witnessed, it may still show an adult's wishes made when they were capable. So it may still guide the person who has to make the decision.

If a health care provider knows there is an advance directive that applies to the proposed health care and there is no personal guardian or representative who has authority to make decisions for the adult, the health care provider must follow the advance directive for the proposed health care.

But an advance directive does not apply in any of the following cases:

- if the health care provider believes that the directive does not cover the health care decision to be made, or if it is too vague to tell if the adult has given or refused consent to the health care.
- if, after the advance directive was made, the adult's wishes, values, or beliefs in relation to the health care decision have changed and the advance directive does not reflect the change.
- if, after the advance directive was made, significant changes in medical knowledge, practice, or technology have been made that might substantially benefit the adult in relation to health care.

In some cases, another person, such as a family member or friend, can make medical decisions for you if you're too ill or unable. If you've made a representation agreement allowing your representative to make all major and minor health decisions for you, your representative can make the medical decision. Script 180, called "Power of Attorney and Representation Agreements" has more on this. If you're mentally incapable, a person appointed by the court as a committee (pronounced comm-it-tay) of the person can make medical decisions for you – check script 426, called "Committeeship".

But if you have no representative or committee of the person, your health care provider must choose a **temporary substitute decision-maker**, or **TSDM**, based on what the Act requires, as the next section explains.

How is a temporary substitute decision-maker (TSDM) chosen?

Your health care provider, in choosing a TSDM, must ask people in the following order (from the Act):

1. your spouse or partner (including a gay or lesbian partner)
2. an adult child
3. a parent
4. a brother or sister
5. a grandparent
6. a grandchild
7. anybody else related by birth or adoption
8. a close friend
9. a person immediately related by marriage

The TSDM must be at least 19 years old, must get along with you, and must have been in contact with you in the past 12 months.

What kind of decisions can the temporary substitute decision-maker (TSDM) make?

The TSDM must consult with you if possible. If that's not possible, the TSDM can rely on what they know or reasonably believe you would have wanted when you were capable. Then they must follow your wishes and beliefs to make health care decisions in your best interest. You should let your family know now what decisions you would like if you can no longer decide for yourself.

The TSDM can make decisions about any kind of health care, except controversial or irreversible treatments such as organ transplants and experimental surgery. Section 5 of the Health Care Consent Regulation (available at www.bclaws.ca [1]) says a TSDM cannot consent to those types of health care.

Section 18(2) of the Act allows the TSDM to say no to life-saving treatment if you're terminally ill or critically injured and your doctor will follow their decision. But the doctor may challenge the TSDM if their decision is medically inappropriate and there's no evidence that their decision reflects your wishes and is in your best interests.

What if someone disagrees with a health-care decision of the TSDM?

If a friend, family member, or doctor is concerned about any major health care decision the TSDM makes, they can ask the health authority to review the decision. Each health authority is supposed to have its own dispute resolution process.

Applying to court

Under Section 33(4) of the Act, the following people can apply to court for an order on certain things:

- a health care provider caring for an adult incapable of giving or refusing consent to health care.
- an adult's representative or personal guardian.
- a TSDM.
- an adult assessed as incapable of giving or refusing consent to health care or admission to a care facility.

The court can:

1. give direction on an advance directive, or any other health care instruction or wish.
2. say who the substitute decision maker should be.
3. confirm, reverse, or change a decision of a representative, guardian, or TSDM.
4. order the adult to have an assessment of incapability.
5. make any decision that a person chosen to provide substitute consent under the Act could make.

More information

To learn more about consenting to – and refusing – medical care, call the Public Guardian and Trustee of BC at 604.775.1007 in Vancouver, 604.775.1001 in the lower mainland, and 1.877.511.4111 elsewhere in BC (the call is free). Also, check the Public Guardian and Trustee website at www.trustee.bc.ca [2] and the Ministry of Health website at www.gov.bc.ca/health [2].

[updated February 2014]

References

[1] http://www.bclaws.ca
[2] http://www.trustee.bc.ca
[3] http://www.dialalaw.org

Lawyers, Legal Services and Courts

Low Cost and Free Legal Services (Script 430)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

People sometimes grumble about the high cost of lawyers' services. But many people don't know that there's a great deal of legal information and advice available at a very low cost – and even free in some cases. Because this script goes into some detail about what's available, it is fairly long, so if you're listening to this (as opposed to reading it), make sure you have a pen and paper handy to write down the phone numbers and websites mentioned.

Some sources for free legal information include:

Clicklaw: www.clicklaw.bc.ca [1]

Clicklaw is a website aimed at enhancing access to justice in BC. It features legal information and education designed for the public from many contributor organizations. Clicklaw WikiBooks [2] are collaboratively developed plain language legal publications that are born-wiki and can also be printed.

Courthouse Libraries BC: www.courthouselibrary.ca [3]

It provides legal information services to the legal community and the general public of British Columbia. Their toll free number is 1.800.665.2570.

Dial-A-Law: www.dialalaw.org [4]

Dial-A-Law is a library of free legal information prepared by lawyers. The program is funded by the Law Foundation of BC and operated by the Canadian Bar Association, BC Branch. It is available:

- by phone, as recorded scripts, at 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC, and
- by audio and text, on the CBA BC Branch website.

Justice Education Society: www.justiceeducation.ca [5]

Justice Education Society, formerly the Law Courts Education Society, is dedicated to improving access to the legal system through hands-on, targeted, two-way education between the public and those working in the justice system. Call 604.660.9870 in Vancouver for enquiries.

Legal Services Society (LSS):

LSS provides free legal information in person and over the phone, and through our websites and publications in many languages.

- **Publications**: www.legalaid.bc.ca [6]. (click "Our publications"). LSS publications cover a variety of legal topics, including family law, child protection, immigration issues, Aboriginal legal issues, criminal matters, and poverty law. LSS publications can be read online or ordered for free through Crown Publicationsn by going to the Crown Publications website at www.crownpub.bc.ca [7].
- Other legal information, resources, and self-help guides are available on the **LSS Family Law in British Columbia website**: www.familylaw.lss.bc.ca [8]. This site contains self-help materials to help people resolve family law problems, court forms, current family law information and resources, and links to useful related sites.
- Information for Aboriginal people is available on the **Aboriginal Legal Aid in BC website**: www.aboriginal.legalaid.bc.ca [9]. This section has information and publications [10] about the issues that are important to Aboriginal people. It also has information about the help that legal aid and other groups can give.
- **Legal info outreach workers (LIOWs)**: www.legalaid.bc.ca/legal_aid/legalInformationOutreachWorkers.asp [11]. LIOWs are LSS staff located in Prince Rupert, Terrace and Vancouver who can help you find legal information and self-help resources on the Internet; give you printed legal information; refer you to other services such as family duty counsel and other community services; visit community groups to talk about LSS services, and collect feedback from community workers and the public about LSS programs; provide legal information and referral services by phone; and assist Community Court clients. To contact a legal information outreach worker, call the regional centre closest to you:

  Terrace

  207– 3228 Kalum Street

  250.635.2133 or 1.800.787.2511 (call no charge, elsewhere in BC)

  Vancouver

  400 – 510 Burrard Street

  604.408.2172 (Greater Vancouver)

  1.866.577.2525 (call no charge, elsewhere in BC)

  Prince Rupert

  c/o Government Agent Office

  201-3rd Avenue W.

  250.624.7701

  1.800.787.2511 (call no charge, elsewhere in BC)
- **Aboriginal community legal workers (ACLW)** are located in Duncan and Nanaimo. They provide legal information and limited advice about family and child protection law, and issues such as residential schools, housing, and wills and estates, explain the legal process and other options such as mediation, attend court with you, help you prepare forms and letters, participate in negotiations, talk on your behalf to Ministry of Children and Family Development staff, a legal aid lawyer, duty counsel, or your Band, and make referrals to other services. For hours and locations see the LSS website at www.legalaid.bc.ca [12] (click "Information", then "Aboriginal community legal workers").
- Community partners are service providers located throughout BC who can help you get free legal information, call Legal Aid, find the nearest Legal Aid office, get legal help online, and connect with people who can help. For a list of

community partner locations see the LSS website at www.legalaid.bc.ca [13] (click "Information", then “Community partners”)

Native Courtworker and Counselling Association of BC (NCCABC): www.nccabc.ca [14]

It provides culturally appropriate services to aboriginal people and communities consistent with their needs. Their number is 604.985.5355 in Greater Vancouver, and toll free 1.877.811.1190 elsewhere in BC. Select “About Us” then “Our Team” from the website for a list of local numbers.

The Multilingual Legal Website: www.multilingolegal.ca [15]

It is a new online resource designed to access legal publications in Spanish, French, Vietnamese, Chinese, Punjabi, Persian, Korean, and Arabic. Topics include: abuse, child protection, court orders, family violence, newcomers services and resources, welfare, and victim services. The site is sponsored by the Latin American Community Council and MOSAIC, and is funded by the Law Foundation of BC.

The Public Legal Education Society (also know as the People’s Law School)

This non-profit organization sponsors free lectures on a great variety of legal topics, taught mainly by lawyers. To contact the People’s Law School, phone 604.331.5400, or see their website at www.publiclegaled.bc.ca [16].

The Public Library

Provincial and federal statutes can be found there, as well as many books about the law written especially for non-lawyers. Ask your reference librarian for help in finding what you need.

You have a legal problem, or at least you think you do, and you need some free or inexpensive help. Then the following services may be able to help you:

Lawyer Referral Service

It’s a public service offered by the BC Branch of the Canadian Bar Association, the same organization that operates Dial-A-Law. Call 604.687.3221 in the Lower Mainland or 1.800.663.1919 toll-free elsewhere in British Columbia. Explain briefly the type of problem, and the service will give you the name of a lawyer. Phone the lawyer and make an appointment. Tell the lawyer that Lawyer Referral Service sent you. The lawyer will give you up to a 30-minute appointment for $25. At the appointment, the lawyer will tell you if you have a legal problem. Then, if you and the lawyer agree, you can hire that lawyer at their normal rate. But you don't have to use that lawyer. You may decide you don't have a legal problem and don't need a lawyer. Or you may decide to find another lawyer.

Services provided by Legal Services Society (LSS): www.legalaid.bc.ca [6]

- **Legal Aid**: www.legalaid.bc.ca/legal_aid/ [17]

  The Legal Services Society will pay for a lawyer to represent you if: your legal problem is covered by our legal aid rules, you meet the financial guidelines [18], and you have no other way of getting legal help. Legal problems that may be covered by legal aid include criminal charges [19], mental health and prison issues [20], serious family problems [21], child protection matters [22], and immigration problems [23].

  To find a legal aid location [24] near you, see the LSS website at www.legalaid.bc.ca [6] and under “Legal aid,” click “Legal aid offices”. Or you can call the LSS province-wide Call Centre at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (call no charge, elsewhere in BC).

- **Brydges Line**

If you are being investigated for a crime and in custody, or have been arrested or detained, you can get 24-hour access to emergency legal advice by phoning the “Brydges Line,” available through the Legal Services Society at 1.866.458.5500 (call no charge).

If you are being investigated for a crime but not in custody, you *may* be ableto get 24-hour access to emergency legal advice in some situations by phoning the “Brydges Line,” available through the Legal Services Society at 1.866.458.5500 (call no charge).

- **Advice counsel (lawyers) for people in custody**

  If you know someone in custody at a police lock-up who is awaiting a bail hearing, they can get legal advice over the telephone during the evenings and on weekends and holidays. Advice counsel services are available by calling 1.888.595.5677 (no charge from anywhere in BC).

- **Duty Counsel**

  Criminal Law matters

  Duty counsel are lawyers paid by LSS to provide legal services in Provincial Court to in- and out-of-custody accused people who have been charged with a crime, do not have a lawyer, do not qualify for legal aid, or have not yet contacted legal aid. Duty counsel can provide you with advice about the charges against you, court procedures, and your legal rights (including the right to counsel and the right to apply for legal aid). Duty counsel can also represent you at a bail hearing, and, if there is time, help with a guilty plea. While you do not have to be financially eligible for legal aid to receive duty counsel services, you must meet LSS coverage and eligibility requirements to get a referral for ongoing representation. For duty counsel hours of operation in your area, check your local court registry. Court registry contact information can be found on the Provincial Court of British Columbia website at www.provincialcourt.bc.ca [25] (click “Judicial Administration” then “Court Locations Map”) or in the blue pages of your phone book (under “Government of British Columbia – Court Services”).

  Are you Aboriginal? First Nations Court

  If you self-identify as Aboriginal (if you think of yourself as Aboriginal), you may be able to have your bail or sentencing hearing in the First Nations Court of BC [26] in New Westminster. There is duty counsel available at the First Nations Court. For more information, call the First Nations Court duty counsel at 1.877.601.6066 (no charge from anywhere in BC).

  Immigration matters

  LSS provides duty counsel for people in detention at the Canada Border Services Agency's enforcement centre in Vancouver. Duty counsel provide detainees with advice regarding procedures and their legal rights, and may appear on their behalf at detention hearings. Clients do not have to meet LSS financial eligibility requirements to receive these services.

- **Family Duty Counsel**

  Family duty counsel are lawyers paid by LSS to assist people with low incomes with family law problems or child protection issues (where the Ministry for Children and Families becomes involved with your family). If you do not have your own lawyer, duty counsel can give you advice, speak on your behalf in court on simple matters, and attend family case conferences in some courts. Duty counsel first assists those who are financially eligible, and may assist others if time permits. Duty counsel will not take on your whole case and will not represent you at a trial.

  In Provincial Court

Duty counsel are available by appointment or on a walk-in basis in Vancouver, Surrey, Port Coquitlam, Nanaimo and New Westminster (although appointments are encouraged). At other locations, duty counsel services are on a drop-in basis. The lawyers must first help people who have matters in court that day, but can assist others once they are not needed in court. For duty counsel hours in your community, go to the LSS website at www.legalaid.bc.ca [27] (click “Legal advice” then “Family law matters”, then "How to find Provincial Court family duty consel") or contact your local legal aid office. You can also contact your local court registry (look in the blue pages of your phone book under "Government of British Columbia – Court Services").

In Supreme Court

If you are a person with a low income experiencing separation or divorce, you may be eligible for free legal advice from Supreme Court family duty counsel. Duty counsel are lawyers who can provide advice about: parenting arrangements, child support, property (limited advice), tentative settlement agreements, and court procedures. They can also attend judicial case conferences at some courts. Duty counsel may be able to help you even if you are not financially eligible. Duty counsel are available by appointment or on a walk-in basis in Vancouver. At other locations, duty counsel services are on a drop-in basis.

For the addresses and phone numbers of BC Supreme Court registries, look in the blue pages of your phone book under "Government of British Columbia – Court Services". For Supreme Court duty counsel hours, go to the LSS website at www.legalaid.bc.ca [28] (click “Legal advice” then “Family law matters”, then “How to find Supreme Court family duty counsel”) or call your local legal aid office.

- **Family Advice Lawyers**

  If you are a parent with a low income and experiencing separation or divorce, you may be eligible for free legal advice from a family advice lawyer. These lawyers are available at the Vancouver Justice Access Centre [29], the Nanaimo Justice Access Centre [30], the Family Justice Centre in Kelowna, the New Westminster Family Justice Centre, and at courthouses in Kamloops, Prince George, Surrey and Victoria. Services are available by referral from a family justice counsellor [31] or a child support officer.

  For more information about this service, call Enquiry BC at 604.660.2421 (from Vancouver), 250.387.6121 (from Victoria) or 1.800.663.7867 (from anywhere else in the province), and ask to be connected to a family justice counsellor's office in one of the locations above.

- **Family LawLINE**

  If you are a person with a low income experiencing a family law issue, you may be eligible for free legal advice over the telephone from a family lawyer. To be considered for this service, call the LSS province-wide Call Centre at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (call no charge, elsewhere in BC). The Provincial Call Centre is open the following hours: Mondays, Tuesdays, Thursdays, and Fridays from 9:30 am to 3 pm, and Wednesdays from 9:30 am to 2:30 pm.

Pro Bono Legal Services

"Pro bono" basically means "free," and in these programs, private and experienced lawyers volunteer to provide free legal advice to those who can't reasonably afford a lawyer or can't get Legal Aid.

- **Access Pro Bono Society of BC**: www.accessprobono.ca [32]

  Access Pro Bono promotes access to justice in BC by providing and fostering quality pro bono legal services for people and non-profit organizations of limited means. Access Pro Bono provides summary legal advice through its network of legal clinics around the province. It also provides representation services in limited situations, through its Roster Programs, Civil Chambers Duty Counsel Project (Vancouver), and the Nanaimo Children's Lawyer Project. The client access phone numbers for all services are 604.878.7400 in Greater Vancouver or 1.877.762.6664 from anywhere else in the province.

- **BC Public Interest Advocacy Centre**: www.bcpiac.com [33]

  BCPIAC is a non-profit, public interest law office. Its task is to provide representation to groups that would not otherwise have the resources to effectively assert their interests. Call 604.687.3063 in Vancouver.

- **Community Legal Assistance Society (CLAS)**: www.clasbc.net [34]

  The purpose of the Community Legal Assistance Society (CLAS) is to provide legal advice and assistance and to use and develop the law for the benefit of people who are physically, mentally, socially, economically or otherwise disadvantaged or whose human rights need protection. Call 604.685.3425 in Vancouver or toll free 1.888.685.6222.

- **Immigration & Multicultural Services**:

  - **Affiliation of Multicultural Societies and Service Agencies of BC (AMSSA)**: www.amssa.org [35]

    AMSSA provides leadership in advocacy and education in British Columbia for anti-racism, human rights, and social justice. AMSSA supports its members in serving immigrants, refugees and culturally diverse communities. Call 604.718.2780 in Vancouver or 1.888.355.5560.

  - **Immigrant Services Society of BC**: www.issbc.org [36]

    Immigrant Services Society of BC (ISS) will continue to be a leader in identifying the needs of immigrants and refugees and in developing, demonstrating and delivering effective, quality programs and services which meet those needs. Call 604.684.7498 or 604.684.2561 in Vancouver.

  - **MOSAIC**: www.mosaicbc.com [37]

    MOSAIC is a multilingual non-profit organization dedicated to addressing issues that affect immigrants and refugees in the course of their settlement and integration into Canadian society. Call 604.254.9626 in Vancouver.

  - **S.U.C.C.E.S.S.**: www.successbc.ca [38]

    S.U.C.C.E.S.S. supports the well being of Canadians and immigrants from diverse ethnic origins through the provision of social, educational and health services, business and community development, and advocacy. Call 604.684.1628 in Vancouver for general inquiries.

- **Justice Access Centres (Nanaimo, Vancouver and Victoria)**: www.ag.gov.bc.ca/justice-access-centre/ [39]

  The justice access centres are the place to come when you need help with family and civil law issues that affect your everyday life, such as separation or divorce, income security, employment, housing or debt. The Justice Access Centres have information and services you need to reach solutions to your problems. Services are provided in person, but you can call for information:

- Nanaimo: 250.741.5447 or toll free 1.800.578.8511
- Vancouver: 604.660.2084
- Victoria: 250.356.7012

- **Tenant Resource & Advisory Centre (TRAC)**: www.tenants.bc.ca [40]

  TRAC is a Vancouver-based non-profit organization that offers services on legal information for tenants, publications on tenants' rights, organizing tenants and workshops. Call 604.255.0546 in Vancouver or toll free 1.800.665.1185.

Law School Student Services

- **The Law Student's Legal Advice Program (LSLAP)**: www.lslap.bc.ca [41]

  It is a student-run organization that provides legal advice to those who cannot otherwise afford such assistance. Since recent cutbacks to Legal Aid in the province, LSLAP has become increasingly important in dispensing free legal advice. The main number is 604.822.5791. Their manual of free legal information is available online.

- **The Law Centre**: www.thelawcentre.ca [42]

  It is a service of the University of Victoria, Faculty of Law. It provides advice, assistance and representation to clients who cannot afford a lawyer. Free legal representation is for those who are qualified for legal assistance. Call 250.385.1221 or check their website for more information.

Private Lawyers

If you want to talk to a lawyer of your choice, but you're afraid of what it might cost, call the lawyer and ask what they would charge for an initial consultation. Some lawyers don't charge for the first interview and others charge very little.

Legal Researches and Websites

- **Best Guide to Canadian Legal Research**: www.legalresearch.org [43]

  A starting point for legal research. Effective strategies and techniques for Canadian legal research, find and using secondary sources, finding and analyzing cases, updating your research, legal writing, and frequently asked questions.

- **Department of Justice, Canada**: www.canada.justice.gc.ca [44]

  Information on issues related to federal laws. For example, federal statutes and regulations, constitutional documents, court decisions, child support guidelines, and immigration matters.

- **BC Ministry of Justice**: www.gov.bc.ca/justice [45]

  The website has information on court services, criminal justice, family law, justice reform and other related links.

- **Provincial Court of British Columbia**: www.provincialcourt.bc.ca [25]

  Information on appeals, alternatives trial, frequently asked questions, the complaint process, a court locations map as well as some information about criminal, youth, family, small claims, traffic, bylaw matters and related laws.

Other Information and Referral Services

- BC211 provides information and referral services. Staff can provide information and refer you to the appropriate community, social or government services. Call 211 or 604.875.6381. Check their website at www.bc211.ca [46].
- If you live in the Okanagan area of BC, you can call the Social Planning Council for the North Okanagan at 250.545.8572 or visit www.socialplanning.ca. They've published a "*Can We Help You?* [47]" guide to community services that are available primarily in the Okanagan.
- VictimLink BC is a 24-hour phone service for victims of all crimes anywhere in BC. Call 1.800.563.0808 in BC or visit their website at www.victimlinkbc.ca [48].

Some other Resources for Legal Information

- Adoption (Ministry of Children & Family Development): www.mcf.gov.bc.ca/adoption [49]
- Artists' Legal Outreach: www.artistslegaloutreach.ca [50]
- Atira: Women's Resource Society: www.atira.bc.ca [51]
- BC Centre for Elder Advocacy and Support: www.bcceas.ca [52]
- BC Coalition of People with Disabilities: www.bccpd.bc.ca [53]
- BC Laws: www.bclaws.ca [54]
- Better Business Bureau: www.bbb.org [54]
- Builders Lien Act Support Materials: www.bcli.org/law-reform-resources/builders-lien-act [55]
- Canadian Bar Association: www.cba.org [56]
- Canadian Human Rights Commission: www.chrc-ccdp.ca [57]
- Canadian Marketing Association: www.the-cma.org [58]
- CHIMO Crisis Services: www.chimoservices.com [59]
- College of Physicians and Surgeons: www.cpsbc.ca [60]
- Competition Bureau: www.competitionbureau.gc.ca [61]
- Consumer Protection BC: www.consumerprotectionbc.ca [62]
- Co-operative Housing Federation of BC: www.chf.bc.ca [63]
- Court Services: www.ag.gov.bc.ca/courts/ [64]
- Credit Counselling: www.nomoredebts.org [65]
- Dispute Resolution Office: www.ag.gov.bc.ca/dro [66]
- Employer's Advisers Office: www.labour.gov.bc.ca/eao [67]
- Employment Standards Branch: www.labour.gov.bc.ca/esb/ [68]
- Federal Court of Canada: www.fct-cf.gc.ca [69]
- Family Maintenance Enforcement Program (FMEP): www.fmep.gov.bc.ca [70]
- Human Rights Protection: www.ag.gov.bc.ca/human-rights-protection/ [71]
- JusticeBC: www.justicebc.ca [72]
- La justice en français: www.ajefcb.ca [73]
- Law Society of BC: www.lawsociety.bc.ca [74]
- Lawyer Referral Services in Canada: www.justice.gc.ca/eng/fl-df/enforce-execution/lr-ra.html [75]
- Legislative Assembly of BC: www.leg.bc.ca [76]
- Mediate BC Society: www.mediatebc.com [77]
- Men's Resources: www.vicmen.org [78]
- Mental Health and Addictions: www.health.gov.bc.ca/mhd [79]
- Ministry of Finance: www.gov.bc.ca/fin/ [80]

- Ministry of Health Services: www.gov.bc.ca/health [81]
- Multiple Sclerosis Society of Canada: www.mssociety.ca [82]
- Office of the Information and Privacy Commissioner: www.oipc.bc.ca [83]
- Old Age Security Benefits: www.servicecanada.gc.ca/eng/services/pensions/oas/ [84]
- Pivot Legal Society: www.pivotlegal.org [85]
- Prisoners' Legal Services: 1.888.839.8889
- Public Guardian and Trustee of Canada: www.trustee.bc.ca [86]
- RCMP: www.rcmp.ca [87]
- Real Estate Council of BC: www.recbc.ca [88]
- Residential Tenancy Branch: www.rto.gov.bc.ca [89]
- Silver Harbour Centre (senior service in North Vancouver): www.silverharbourcentre.com [90]
- The Society of Notaries Public of BC: www.notaries.bc.ca [91]
- Vancouver Rape Relief & Women's Shelter: www.rapereliefshelter.bc.ca [92]
- Vital Statistics Agency: www.vs.gov.bc.ca [93]
- West Coast Environmental Law: www.wcel.org [94]
- WorkSafeBC: www.worksafebc.com [95]
- Workers' Advisers Office: www.labour.gov.bc.ca/wab [96]

[updated February 2015]

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[24] http://www.legalaid.bc.ca/legal_aid/legalAidOffices.asp
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[26] http://www.aboriginal.legalaid.bc.ca/rights/firstNationsCourt.php
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The Law Society, Bar Associations and Law Foundation (Script 431)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

The legal profession in BC is closely involved with various organizations. These organizations and their roles can be confusing. This script explains 3 key organizations – the Law Society of BC, the Canadian Bar Association, and the Law Foundation. It also explains what they do and how to contact them.

The Law Society of BC

The Law Society is the governing body for the legal profession in BC. Located in Vancouver, its main duty, under the *Legal Profession Act*, is to regulate the legal profession in the public interest. A Board of 31 directors, called Benchers, governs the Law Society. The Board consists of 25 elected lawyers and 6 appointed non-lawyers (called lay-Benchers). The lawyer Benchers are elected by other lawyers and serve 2-year terms. They represent districts across BC. The 6 lay-Benchers are appointed by the BC provincial government to represent the public interest in all Law Society decisions. The senior Bencher is the President of the Law Society.

What does the Law Society do?

The Law Society works to ensure that lawyers do their work properly and that the public is well served by lawyers who are honourable, competent, and independent. It sets and enforces standards for licensing, competence, education, ethics, professional conduct, and discipline. The Law Society also sets the qualifications to become a lawyer and to practise law in BC. Only members of the Law Society can practise law in BC, though lawyers from other provinces may practise in BC temporarily. The Law Society recently started a mandatory continuing professional development program. All practicing members must complete a certain number of hours of both educational and ethical courses.

The Law Society deals with complaints from the public about lawyers' conduct. Most complaints result from misunderstandings. In some cases, the Law Society holds a hearing into a lawyer's conduct. All Law Society hearings are open to the public. If the hearing finds the lawyer guilty of professional misconduct, conduct unbecoming, or a breach of the *Legal Profession Act* or Law Society rules, the Law Society may reprimand, fine, or suspend the lawyer for months or years. It can also put conditions on the lawyer. And for serious misconduct, the Society can disbar a lawyer, meaning that the lawyer can't practise law.

The Law Society requires lawyers to carry liability insurance to protect clients who suffer financial loss because of their lawyer's negligence. It also has a fund to pay clients who lose money because their lawyer steals trust money.

To contact the Law Society

Call 604.669.2533 in the lower mainland, 1.800.903.5300 elsewhere in BC, or see www.lawsociety.bc.ca [1].

The Canadian Bar Association

The Canadian Bar Association, or CBA, is a voluntary national organization that promotes the interests of the legal profession and promotes law reform. The BC Branch of the CBA helps its lawyer members in BC stay current in their areas of practice. Lawyers with similar professional interests meet monthly and exchange ideas and information. Unlike the Law Society, the CBA does not license or regulate lawyers.

There are also local bar associations in most BC cities and towns. They are voluntary organizations concerned with local matters affecting their lawyer members.

With funding from the Law Foundation (described below), which collects the interest from lawyers' trust accounts, the BC Branch of the CBA provides two public service programs:

- **Dial-A-Law** provides free legal information on more than 130 topics. Scripts are available in English, Chinese and Punjabi and accessible by telephone and the internet. Call 604.687.4680 in the lower mainland or 1.800.565.5297 elsewhere in BC. The website is www.dialalaw.org [2].
- the **Lawyer Referral Service** provides the names and telephone numbers of lawyers in your area who will give you up to a half-hour consultation for $25 plus tax. Call 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in BC.

To contact the CBA

Call 604.687.3404 in the lower mainland or 1.888.687.3404 elsewhere in BC. Or go to www.cbabc.org [3].

The Law Foundation of British Columbia

The Law Foundation is a non-profit entity, created by law in 1969. It receives and distributes the interest on clients' funds held in lawyers' pooled trust accounts. All interest earned on these accounts goes to the Law Foundation. The small amounts earned by the funds of many clients held for a short time in their lawyers' trust accounts add up to a substantial income for the Law Foundation. The Foundation uses this money for legal education, legal research, legal aid, law reform, and law libraries. Dial-A-Law is one of the legal education programs that the Law Foundation funds.

To contact the Law Foundation

Call 604.688.2337 or go to www.lawfoundationbc.org [4].

[updated June 2012]

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Our Court System and Solving Disputes (Script 432)

This script explains our court system and other ways to solve legal disputes besides court, known as “alternative dispute resolution” or ADR.

British Columbia has two levels of trial court

These two levels are:

- Provincial Court
- Supreme Court

Trial courts hear evidence and decide cases.

Most cases start in Provincial Court

There are provincial courts in nearly 100 BC communities. Provincial Court has the following four main parts or divisions:

- Criminal Division, known as “Criminal Court”
- Family and Youth Division, sometimes called “Family Court” and “Youth Court”
- Small Claims Division, known as “Small Claims Court”
- Traffic Division, or “Traffic Court”

The BC Provincial Court website is www.provincialcourt.bc.ca [1].

Criminal Court deals with criminal issues

A person accused of a crime makes a first appearance in Criminal Court. If the person is in jail, a judge decides whether to release the person or keep them in jail until the trial. For less serious crimes, the trial is also held in this court. For more serious crimes, the accused person may be able to choose a trial here or in BC Supreme Court. The most serious crimes, like murder and treason, must be tried in Supreme Court. But even for those cases, a provincial court judge will still hold a preliminary inquiry to decide if there's enough evidence to have a trial in Supreme Court. For more information on criminal cases in Provincial Court, check script 211 on “Defending Yourself Against a Criminal Charge”.

The Family and Youth Division handles family, youth and criminal cases

It deals with family problems like maintenance for spouses, child support, custody and access, as well as some criminal cases involving families, like spouse abuse. This court also hears young offender cases involving youth aged 12 to 17. Check script 110 for more information on Family Court.

Small Claims Court deals with "civil" cases for $25,000 or less

In these cases, someone is suing someone else for money. People don't need a lawyer in this court; for example, all the forms are in plain language. For more information on Small Claims Court, check scripts 165, 166, 167, 168 and 169.

Traffic Court handles traffic and some other offences

These other offences include by-law offences like zoning and building code violations, plus some other offences under provincial law.

What does the BC Supreme Court deal with?

This court handles both criminal and civil cases. The most serious criminal trials, for murder and treason, are heard in this court, not in Provincial Court. Other serious criminal cases involving drugs, rape and attempted murder are usually tried here too. For civil cases, Supreme Court hears cases for more than $25,000 and some cases for less than that. For example, the law requires some types of cases, such as builders' liens and divorce, to be handled in Supreme Court.

Both criminal and civil trials can be in front of a judge, or a judge and jury. BC has several Supreme Court "resident" judges. These judges also travel to other places throughout BC to hold trials. Cases in Supreme Court are usually complicated and, while not legally required, most people use lawyers.

BC Supreme Court also hears appeals of some Provincial Court decisions.

More information on BC Supreme Court is at www.courts.gov.bc.ca/supreme_court [2].

There is also the BC Court of Appeal

The BC Court of Appeal is the highest court in BC. It doesn't hold trials. The Court of Appeal reviews decisions of trial courts if any of the people in a case disagree with the decision and appeal it. It hears appeals of civil and criminal cases from the BC Supreme Court, as well as appeals of some criminal cases from Provincial Court. The Court of Appeal is in Vancouver, but it also travels to Victoria, Kamloops, and Kelowna to hear cases. See www.courts.gov.bc.ca/Court_of_Appeal/ [3] for more information.

What are the federal courts?

At the federal level, we have the Federal Court of Canada and the Supreme Court of Canada.

What does the Federal Court deal with?

The Federal Court of Canada consists of the Federal Court, which is a trial court, and the Federal Court of Appeal. The Federal Court holds trials for cases on federal laws, mainly in the areas of immigration, income tax, and maritime law. These trials are before a judge only. The Federal Court of Appeal hears appeals of decisions by the Federal Court. The Federal Court's website is www.fct-cf.gc.ca [4].

The Supreme Court of Canada is the highest appeal court

Based in Ottawa, it hears appeals from decisions of the BC Court of Appeal, from the appeal courts of other provinces, and from the Federal Court of Appeal. Usually, the Supreme Court of Canada must agree to hear an appeal – and it doesn't agree to hear every appeal that people request. But there are some cases where the right to appeal is automatic. Until recently, people often had to go to the court in Ottawa, but now the court hears some appeals by live video over a satellite link to a court in Vancouver. For more information on the Supreme Court of Canada, see its website at www.scc-csc.gc.ca [5].

Courts are normally open to the public

All courtrooms are normally open to the public, so you can attend and watch. You can walk in and no one will ask you what you're doing, as long as you're quiet and don't disturb the proceeding. Some high profile trials (such as those gang and biker trials and the Air India trial) are not completely open to the public. They have intense screening and secureity of anyone who wants to attend.

What is alternative dispute resolution?

Alternative dispute resolution or ADR is an alternative to going to court. The four most common alternative ways to solve legal disputes are:

- negotiation
- collaboration
- mediation
- arbitration

ADR often works best at an early stage of a dispute (unless the issues are very complex, in which case, examining the documents and questioning the people involved might first be required. For less complex cases, the more time that goes by, the more likely it is that you and the other person will believe that you're each "right" and the other person is "wrong". Once you become stuck in your beliefs and positions, and ignore the common interests you may have, it's more difficult to reach a solution which you both can accept.

Why choose ADR over court?

Courts are often slow and expensive. They're not always the best place to solve a dispute. Going to court can often end up costing more than the dispute is worth. And going to court may not work if you need a quick solution. Also, court proceedings are open to the public, while ADR is private.

Even if you go to court, you can still try ADR in most cases. After a lawsuit has started, lawyers often negotiate settlements for their clients so they don't have to go to trial. Or your lawyer might recommend you try mediation or arbitration before going further with a lawsuit.

How does negotiation work?

Negotiation involves reaching an agreement with another person – you both work out a solution together that fits both of your interests. Negotiation happens every day. It's probably something you often do, perhaps without even realizing it. If you try to negotiate a legal dispute without a lawyer, you should both sign an agreement first that says your negotiations are "without prejudice" to your legal rights – meaning that your discussions won't be used against either person if one of you decides to go to court.

A lawyer or counsellor may be able to help you negotiate an agreement. But a negotiator represents one side of the dispute only, and only acts for that side of the dispute only.

How does collaboration work?

Collaboration involves both sides agreeing not to go to court, to disclose all relevant information and to work together towards an agreement that is in everyone's best interests. Collaborative negotiation is used in some non-criminal cases, but it's most widely used in family law. Both spouses have their own lawyers, who act for them only in the collaborative process. The lawyers are focused on settlement and instead of working against one another, they meet together with you and your spouse to minimize conflict and reach an agreement. If you can't reach an agreement, the collaborative process ends, and each of you must look for a resolution elsewhere and hire new lawyers.

Collaborative negotiation is an effective process for moving past conflict to resolution—even if you've tried other ways to come to an agreement. It also provides you with emotional support as well as legal guidance, and it's more private than going to court (court documents are public, but your collaborative agreement is not).

For more information on collaborative divorce and collaboration in family law, refer to script 111 on "Mediation and Collaborative Settlement Processes".

How does mediation work?

Mediation is a voluntary process that both people in the dispute agree to. A neutral person, called a mediator, listens to you and the other person in the dispute, and helps the two of you reach a solution that works for both of you. The mediator doesn't work for either person, or favour one person over the other. The mediator manages the process and organizes your discussions, remaining a neutral facilitator throughout the mediation process. He or she helps clear up misunderstandings and reduce tension, so you and the other person feel comfortable sorting out your problems together. But while the mediator helps the two of you to come to an agreement, he or she won't decide for you, or force you to accept a solution.

Mediation works well for most disputes—especially when the facts are clear, the people are in an on-going relationship, and they want to protect their privacy. For example, mediation can be ideal for solving family disputes and divorce issues, where the spouses have a continuing relationship and need to work together to solve parenting issues.

But mediation only works if both people are willing to resolve their dispute. It doesn't work if one person isn't interested in a solution that satisfies both people. In that case, court may be the only solution.

For more information on family mediation, check script 111 on "Mediation and Collaborative Settlement Processes".

How does arbitration work?

If you and the other person in the dispute are really quarrelling, or if you'd prefer a neutral person (or panel of people) to decide for you, you may choose arbitration as an alternative to going to court. An arbitrator is often experienced with the type of dispute you have and may be an expert on the subject. Arbitration works well for commercial and business disputes.

Arbitration is more formal than mediation, but less formal than court. You and the other person agree in advance on the rules for the arbitration process. If you wish, you can both agree on a process that will allow the arbitrator to reach a decision on a limited budget. The arbitrator listens to the evidence you each present and then makes a decision.

Before arbitration begins, you and the other person must decide if you can still go to court if you don't like the arbitrator's decision. This may depend on the law that applies to your particular problem. Usually, you're not able to go

to court later if you're unhappy with the arbitration result.

Where can you find a mediator or arbitrator?

Professionals who provide alternative dispute resolution include lawyers, social workers, and psychologists. When looking for a mediator or arbitrator, it's important to work with a qualified and skilled professional experienced in the type of dispute resolution process you want to use.

- For collaborative lawyers, see:

  Victoria: www.collaborativefamilylawgroup.com [6]

  Vancouver: www.collaborativedivorcebc.com [7]

  Outside Vancouver: www.nocourt.net [8]

- The **BC Arbitration and Mediation Institute** can put you in touch with a chartered mediator or arbitrator who is a member of the ADR Institute of Canada. The ADR Institute of Canada is a national, non-profit organization that sets education and training standards for its chartered mediators and arbitrators (www.adrcanada.ca [9]). Contact the BC Arbitration and Mediation Institute at 604.736.6614 in Vancouver or toll-free 1.877.332.2264 elsewhere in BC. Also, check their website at www.amibc.org [10] for more information.
- Try the **Mediate BC Society** at 604.681.6050 in Vancouver or 1.888.713.0433 elsewhere in BC. Or visit their website at www.mediatebc.com [11].
- Call the **Lawyer Referral Service**, operated by the BC Branch of the Canadian Bar Association, for a lawyer experienced in alternative dispute resolution. Call 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in BC.
- Organizations related to a specific business, product or service may also offer ADR. For example, the Canadian Motor Vehicle Arbitration Plan has an arbitration program for disputes between consumers and vehicle manufacturers about alleged manufacturing defects or new vehicle warranties (www.camvap.ca [12]). If you have a complaint involving a business, the Better Business Bureau offers both mediation and arbitration (www.mbc.bbb.org [13]) for the BBB of mainland BC). The BC Arbitration and Mediation Institute has a new program specifically for resolving strata bylaw disputes through mediation.

Where can you find more information?

- For information on the court system, contact the Justice Education Society. The society has offices throughout BC. Their website is www.JusticeEducation.ca [14]. The Vancouver phone number is 604.660.9870. Also, see the website of BC's Court Services Branch at www.ag.gov.bc.ca/courts [15].
- For more information on ADR, visit the website of the Dispute Resolution Office of the BC Ministry of Attorney General at www.ag.gov.bc.ca/dro [16].

[updated September 2014]

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[4] http://www.fct-cf.gc.ca
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[6] http://www.collaborativefamilylawgroup.com
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[15] http://www.ag.gov.bc.ca/courts
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[17] http://www.dialalaw.org

Appearing in Court by Phone (Script 433)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

A party must usually appear in court in person

If you are a party in a court proceeding (for example, you are the plaintiff or defendant), and you have to attend or "appear" in court, you usually have to physically show up in court. Telephone appearances are discouraged. However, the court has the discretion in some circumstances to allow you to appear by telephone if you don't have to testify (and give sworn evidence).

You need court approval to appear by phone

To make a phone appearance, you must get prior approval from the court. Ask the registry of the court where you have to appear if you can do it by phone. Do this at least one week before your court date, if possible. If not, then ask the court registry at least 3 days before your court date. If a phone appearance is possible, the court registry will usually explain what you need to do.

In Small Claims Court, an appearance by telephone may be allowed if the party requesting the telephone appearance doesn't live or carry on business within a reasonable distance from the court location where the hearing is to take place, or if there are exceptional circumstances. An application using Small Claims Court Form 16 must be made in advance. If the registrar allows the party to appear by telephone, all documents relating to the hearing must usually be sent to the court and to the other parties before the hearing.

In Supreme Court, an application to appear by phone must be made by requisition using Supreme Court Form 17, supported by a signed letter setting out the reasons why you want an order allowing you to appear by phone.

You should contact a lawyer to help you with any court matters.

[updated September 2013]

References

[1] http://www.dialalaw.org

Choosing a Lawyer (Script 435)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains why people need lawyers, how to choose one, and how to prepare for the first interview. You can also check the following scripts:

- 436, called "If You Have a Problem with Your Lawyer"
- 438, called "Lawyers' Fees"

Also, see the BC Law Society's website at www.lawsociety.bc.ca [1] for information on how to choose a lawyer and what to do at the first meeting.

When do you need a lawyer?

If you need legal help or advice, you need a lawyer. People use lawyers for many reasons – business and personal. Lawyers deal with a wide range of cases including wills, real estate, leases, contracts, separation agreements, divorces, and car accidents. Lawyers also work on criminal cases like impaired driving and assault. Lawyers are trained to understand and interpret the law. They defend your rights and tell you how the law applies to your business or personal situation.

Why use a lawyer instead of a notary public?

A lawyer has much more training and expertise in the law and can give you service that is more complete in a wider range of areas. For example, if a will or real estate transaction turns out to be complicated, a notary may need to send you to a lawyer for legal advice. Notaries are only entitled to give legal advice in the areas of law that they are entitled to practice, which is fairly limited.

Most lawyers get a university degree before they go to law school. At law school, they study law full-time for three years. Then they take 10 weeks of intensive training and must pass a series of bar admission exams. All law students must also apprentice for 10 months with an established lawyer before they can work on their own.

Most BC notaries were licensed before 2008 and had to take a part-time correspondence course and pass government-regulated examinations to qualify. New notaries have to complete a master's degree in Applied Legal Studies at SFU and a training program in addition to the government-regulated examinations.

Why use a lawyer for simple legal procedures?

Things that look simple may actually be complex. People sometimes think that because procedures and forms look simple, the legal service is also simple. But legal transactions are often complex. Lawyers analyze how the law applies to your case. They do this groundwork before advising you how the law applies to you and which procedures or forms you need. You face substantial risks and disadvantages if you use the legal system without fully understanding the law and its effects.

Wills and real estate: two important examples

Your will may be the most important legal document you ever make. It has to be right because if there's a mistake, it may be too late to fix it. Buying, selling and mortgaging your home often involve the most important financial contracts you ever sign. Both real estate transactions and wills have to be treated with extreme caution and done very carefully.

We always hope things turn out for the best but it's smart to be prepared. Lawyers are trained to find and fix legal problems. They also know of many tax implications associated with your case and can advise you on them.

Laws change daily and so do their effects. Lawyers understand, apply, and explain those laws to you. Why not be prepared for all situations by using a lawyer from the start?

Are lawyers' fees competitive?

Yes. There are about 10,000 practising lawyers in BC. About three-quarters of them are in private practice (the rest work in government and business). Competition helps keep legal fees reasonable. Lawyers' fees can be competitive with notaries' fees for similar procedures. Lawyers give complete legal advice—something notaries can't give.

How should you choose a lawyer?

Most people use a lawyer only rarely, if ever. So if they need a lawyer, they often don't know how to find one.

1. Start with a lawyer you've used before

If you have used a lawyer before, start with that lawyer. For example, if you are getting divorced and the only lawyer you have ever used is the one who did your will, that lawyer may not be the best one to handle your divorce. Instead, you probably want a lawyer with experience in divorces. Lawyers, especially those in large cities, tend to work in certain areas of law. But they don't specialize like doctors do—there are no exams a lawyer can write to become a specialist in divorce or any other area.

If you were happy with your will, you can ask the lawyer who did it for names of lawyers who do divorce cases. The lawyer who did your will may also have partners who handle divorce. Try to get two or three names, so you can shop around and compare.

2. Ask friends for recommendations

If you've never used a lawyer, ask friends and acquaintances to recommend a lawyer they used for similar problems. A personal recommendation is usually a good way to choose any professional. You could also ask your doctor, accountant, or financial advisor. Often, they know lawyers who do divorce and other cases. Your employer may have a lawyer on staff, or you can ask your union lawyer for a recommendation. Always describe your problem in detail.

3. Call the Lawyer Referral Service

If you've never used a lawyer and you can't get a recommendation, try the Lawyer Referral Service. BC lawyers participate in this voluntary service. Even if you aren't sure if you have a legal problem, you can use this program, operated by the BC Branch of the Canadian Bar Association. Call 604.687.3221 in the lower mainland and 1.800.663.1919 elsewhere in BC. Briefly explain your problem. The service will give you the name of a lawyer who does that type of law.

Phone the lawyer and make an appointment. Tell the lawyer that Lawyer Referral Service sent you. The lawyer will give you up to a 30-minute appointment for $25 plus tax. At the appointment, the lawyer will tell you if you have a legal problem. Then, if you and the lawyer agree, you can hire that lawyer at their normal rate. You are not required to use that lawyer. You may decide you do not need a lawyer for your particular issue, or you may decide to shop around and find another lawyer.

Prepare for the first interview

Once you choose a lawyer—one you are comfortable with and whose advice you value—carefully prepare for your first interview with the lawyer. You can still change lawyers after the first interview—or at any time—if you're not happy with the lawyer.

1. Collect and organize your information

You have to give the lawyer a clear picture of your problem and goal. Make notes of all the facts of your case, in an organized way—usually chronologically (by time). Gather and organize all the documents on your case. Bring the notes and documents to the interview. For example, if you had a car accident, write everything you remember about how the accident happened and your injuries. Draw a diagram of the accident scene. List all your expenses. Bring all your receipts and paperwork, like accident and insurance reports. This lets the lawyer advise you properly and quickly.

2. Ask lots of questions

Use the first interview to get as much information as you can. Even if you got the lawyer's name through Lawyer Referral Service, there is no guarantee that this lawyer is right for you. Ask questions, such as:

- Does the lawyer have experience in your type of problem?
- Does the case interest the lawyer?
- How long will your case probably take?
- Can the lawyer work on your case right away, or will you have to wait until other cases end? Will that make a difference to your case?
- What steps will solve your problem and how much time will each step likely take?
- How much will your case cost? See the next section for more on costs.

3. Ask about fees and disbursements (expenses)

Always ask about fees and expenses in the first interview. Ask the lawyer to estimate about how much it will cost to solve your problem—including fees and expenses (called disbursements). How will the lawyer bill you: monthly or at the end of the case? How does the lawyer charge—a flat rate, by the hour, or a percentage of what you win? Refer to script 438, called “Lawyers' Fees”, for more details.

4. Ask if you have a strong case

Ask the lawyer for a realistic opinion of your case and your chance of winning. Should you settle the case instead of suing? Can you do anything to reduce the lawyer’s time on your case, and to reduce your costs?

5. Make sure the lawyer reports to you

Once you hire a lawyer, explain that you want to be informed of all developments in your case. The best way to ensure this is by having the lawyer automatically send you a copy of all correspondence on your case. Then you can avoid repeated phone calls to find out what's happening, because those phone calls cost you money.

Problems between lawyers and clients often result from a lack of communication. So if problems come up, talk or write to your lawyer (refer to script 436 for more on problems with your lawyer). You will probably spend a lot of time and money on your legal problem, so you should choose your lawyer carefully.

[updated April 2014]

References

[1] http://www.lawsociety.bc.ca
[2] http://www.dialalaw.org

If You Have a Problem With Your Lawyer (Script 436)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains what to do if you have a problem with your lawyer. You can also check the following scripts:

- 431, called "The Law Society, Bar Associations and Law Foundation"
- 435, called "Choosing a Lawyer"
- 438, called "Lawyers' Fees"

First, talk or write to your lawyer about the problem

Problems with lawyers usually involve miscommunication, fees, delays, or misconduct. If you have trouble with your lawyer, talk to the lawyer right away. You may be able to solve the problem before it gets too bad or delays your case. If you have trouble talking about the problem, put it in writing—by email or letter. If you don't understand the lawyer's response, ask for a written explanation.

File a complaint with the Law Society

If talking to your lawyer doesn't work, you can complain to the Law Society, the organization that licenses all BC lawyers. It protects the public by setting professional standards of conduct and competence for lawyers. It also monitors, evaluates, and disciplines them. You can file a complaint online at www.lawsociety.bc.ca [1]. Click on "Complaints and Discipline [2]". That section has an online complaint form, and it explains how to file a complaint. And you can also write a complaint letter and send it to the Professional Conduct Department by:

- Email: professionalconduct@lsbc.org [3]
- Mail: 845 Cambie Street, Vancouver BC V6B 4Z9
- Fax: 604.669.5232

If you find it hard to put your complaint in writing, ask a friend or advisor for help. In your letter, describe your connection with the lawyer. Give a history of the problem and include any other written material that explains it. Include the lawyer's name and your address and phone number.

What the Law Society can do

The Law Society's Professional Conduct Department has commercial crime investigators, forensic auditors, and lawyers. The Department reviews all complaints against lawyers as follows:

First, the Department decides if they have the authority to investigate your complaint. If not, they close the file. If they have the authority, they look into your complaint in detail. They can then send it to the Discipline Committee, which can:

- take no further action.
- send a conduct letter to the lawyer or order a conduct meeting or a conduct review.
- authorize the Executive Director to issue a citation, leading to a formal hearing.
- refer the lawyer (after a conduct review) to the Practice Standards Committee if the lawyer needs to upgrade skills.

Law Society discipline hearings are like court hearings—Law Society staff present the case against the lawyer and the lawyer gives his or her side of the case. A hearing can lead to any of the following results:

- A reprimand (a warning) of the lawyer.
- A fine up to $20,000.
- Conditions controlling how the lawyer works.
- Suspension of the lawyer from working as a lawyer or from working in one or more areas of law (with or without conditions) for a certain time.
- Disbarment of the lawyer (meaning the lawyer cannot work as a lawyer).

For more information on the complaint process, phone the Law Society at 604.669.2533 in the lower mainland and 1.800.903.5300 elsewhere in BC. Or see its website at www.lawsociety.bc.ca [1].

What the Law Society cannot do

The Law Society cannot:

- give legal advice.
- pay you money or order a lawyer to pay you money.
- change a court decision.
- find that a lawyer was negligent or control what a lawyer does in your case.

In those types of cases, you may want to get legal advice from another lawyer about your options.

Are Law Society decisions final?

Not always—in some cases you can appeal the Department's decision if it decides not to act on your complaint. The appeal goes to the Complainants' Review Committee—the Department can give you more information on this.

The Law Society can apply to its board of directors for a review of a hearing verdict. Both the Law Society and the lawyer can apply to the board for a review of a penalty. The lawyer also has the right to appeal either a verdict or penalty to the BC Court of Appeal.

Is your lawyer's fee the problem?

Try either of the following two solutions for a fee problem that you and your lawyer can't solve:

1. You may be able to use the Law Society's Fee Mediation Program for disputes from $1,000 to $25,000. It is free. This program works only if your lawyer agrees to use it. If so, the Law Society appoints a mediator to help you reach a settlement. Since the process is voluntary, it works only if you and your lawyer can agree on a settlement. Call the Law Society at 604.669.2533 in the lower mainland and 1.800.903.5300 elsewhere in BC. Or see its website at www.lawsociety.bc.ca [1]. The Law Society is the organization that licenses all BC lawyers. It protects the public by setting professional standards of competence and conduct for lawyers. It monitors, evaluates, and disciplines them.
2. You can ask a Registrar of the BC Supreme Court to review the bill. This costs $80. Plus you may have to pay your lawyer's costs if you lose. There is no limit on the amount of the fee. You don't need your lawyer's agreement to use this process. You have one year from the date of the bill to apply to the registrar—if you have not already paid it. But if you have already paid the bill, you must apply within three months of paying it. The Registrar holds a hearing where you and your lawyer each give your side of the case. Then the Registrar decides what the fee will be. For details, see the Registrar's Office website at www.courts.gov.bc.ca/supreme_court [4]. Click on "About the Supreme Court" and then on "Registrar's Office [5]". Lastly, click on "Legal Profession Act Reviews [6]".

For more information on lawyers' fees, check script 438, called "Lawyers' Fees".

[updated April 2014]

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[7] http://www.dialalaw.org

Lawyers' Fees (Script 438)

The **Dial-A-Law** library is prepared by lawyers and gives practical information on many areas of law in British Columbia. This script gives information only, not legal advice. If you have a legal problem or need legal advice, you should speak to a lawyer. For the name of a lawyer to consult, call the **Lawyer Referral Service** at 604.687.3221 in the lower mainland or 1.800.663.1919 elsewhere in British Columbia.

This script explains how lawyers' fees are calculated and billed. You can also check the following scripts:

- 435, called "Choosing a Lawyer"
- 436, called "If You Have a Problem with Your Lawyer"

Do you fear fees?

You may approach a lawyer's office like you approach a dentist's office—thinking it's going to be painful—not in your mouth, but in your pocketbook. You don't know how much it's going to cost, and you're afraid to ask. All you know is it could cost a lot.

Some people won't even go to a lawyer when they have a legal problem because they fear the cost. And many people who go to a lawyer never ask about fees. They may be embarrassed or think it's impolite to talk about money. These people are mistaken because a delay in seeing a lawyer can cost them more in the end. It can also hurt their position. Failing to ask about fees can lead to problems and misunderstandings.

If you have a legal problem, don't avoid lawyers because of the cost (if you can't afford a lawyer, see the note at the end of this script). When you see a lawyer, ask about fees the first time you meet. Lawyers should be able to tell you how

they will calculate the fee and when they will bill you. They usually can't give you a firm estimate of the total cost because it depends on many things that are hard to estimate, including the time a case will take.

No rule controls how much lawyers can charge or how they can bill you—the market decides these things. Lawyers usually bill you in one of the following four ways: fixed fee, hourly rate, contingency fee, or lump sum.

1. Fixed fees

Fixed fees are most common for routine work like wills and real estate. Some lawyers also use fixed fees for uncontested divorces and routine criminal cases, like impaired driving, theft, and assault. You pay the amount the lawyer quotes you, regardless of how much time the lawyer spends on the case.

2. Hourly rates

Hourly rates are the most common type of fee, probably because it is hard to predict at the start of a case just how much time it will take. A lawyer keeps detailed records of all the time spent on a case. Then they multiply the total hours by their hourly rate to get your bill. Most lawyers have a trial rate, by day or by court appearance, and it's often higher than their normal hourly rate. Both hourly rates and trial rates depend on several things – the most important one is the lawyer's experience in an area of law. More experience means a higher rate.

3. Contingency fees

Contingency fees depend (or are contingent) on whether you win your case. If you win, you pay your lawyer part of the money you get. If you lose, you don't pay your lawyer any fee, but you still pay expenses, such as medical reports and court filing fees.

Contingency fees are most common in personal injury and wrongful death cases from motor vehicle accidents. In these cases, the maximum fee is one-third of the amount recovered. In other cases involving personal injury or wrongful death, the maximum is 40%. These maximums are set by Part 8 of the Law Society Rules, available on the Law Society website (www.lawsociety.bc.ca [1]) under "Publications [2]". There are no maximums for other types of cases.

Contingency fee agreements must be in writing. Contingency fees are not allowed in family law cases involving child custody or access.

At the start of your case, you and your lawyer agree on the amount of the fee as a percentage of what you win. The actual percentage depends on your chance of success, the amount of your claim, and whether your case goes to trial or settles before trial. The percentage is lower if your case settles early, before the lawyer has done much trial preparation. The percentage is higher if your case goes to trial. Your agreement with the lawyer will have different percentages for different outcomes.

4. Lump-sum fees

Sometimes the first three types of fees may not work. In that case, you and the lawyer can try to agree on a lump sum that fairly reflects the time spent and all the other factors. If you can't agree, you will have to ask a Registrar of the Supreme Court or the Law Society for help (see details below).

Is there tax on lawyers' fees?

Yes, you have to pay GST plus provincial tax on your lawyer's fee and on most expenses.

What is a retainer?

A retainer is money you pay to your lawyer as a deposit at the start of your case. The lawyer keeps this money in a trust account and uses it for fees and expenses. The lawyer bills you periodically and takes the amount you owe from the retainer. The lawyer may bill you monthly, or at the end of each stage of your case, or at the end of your case. When the retainer falls below a certain level, the lawyer asks you for more money.

What are disbursements?

Disbursements are expenses your lawyer pays for you. You have to pay your lawyer for those expenses. They include costs of photocopies, faxes, long distance telephone calls, postage, couriers, experts, medical reports, and court filings. Disbursements can often be high—ask your lawyer to estimate how much they will be.

Do you have a written agreement with your lawyer? Make sure you have a written agreement with your lawyer that covers fees. If your lawyer doesn't use a standard form for this, ask for a letter confirming your discussion.

How can you keep costs down?

- Ask the lawyer how they will tell you about the progress of your case. Keep your own file with copies of all letters and court documents. Make notes of things you want to bring up at your next meeting. Don't phone the lawyer too often—many people do this, which means they pay more than they need to. Before you phone, consider if it would be better to write a letter or email. Then you have a written record and your lawyer can deal with your questions properly. If you call, you may interrupt your lawyer who is concentrating on another case. If you must phone, explain to the lawyer's secretary why you are calling. The secretary knows about your case and may be able to help, so you don't have to speak to the lawyer.
- Be organized, so you don't waste the lawyer's time. Before you first meet with the lawyer, make a list of everything you want to say and ask. Make a point-form summary of your case in chronological (or time) order. Include the important details and names (with addresses, phone numbers, and other helpful information). Some lawyers will ask you to fill in a fact sheet before your first interview.
- Ask the lawyer if a junior colleague can do some of the routine work on your case—they have lower rates.
- Be reasonable. Try to agree on the minor things that aren't worth fighting about. Save your time and money for the important things.
- Don't count on a court ordering your opponent to pay all your costs. A court can order your opponent to pay costs, but those costs are based on a schedule and may cover only about 35% to 40% of your lawyer's bill.
- Supreme Court may award costs for fees and disbursements to the successful party. But Provincial Court awards litigation expenses only very rarely.

What if you can't solve a fee problem with your lawyer?

If you have a problem with your lawyer's bill, discuss it with the lawyer. Most lawyers want to clear up any misunderstanding over fees. If you can't solve the problem, you have the following two choices:

1. You may be able to use the Law Society's Fee Mediation Program for disputes from $1,000 to $25,000. It is free. This program works only if your lawyer agrees to use it. If so, the Law Society appoints a mediator to help you reach a settlement. Since the process is voluntary, it works only if you and your lawyer can agree on a settlement. Check Script 436, "If You Have a Problem with Your Lawyer", for more information. And call the Law Society at 604.669.2533 in the lower mainland and 1.800.903.5300 elsewhere in BC. Or see its website at www.lawsociety.bc.ca [1]. The Law Society is the organization that licenses all BC lawyers. It protects the public by setting professional standards of competence and conduct for lawyers. It monitors, evaluates, and disciplines them.
2. You can ask a Registrar of the BC Supreme Court to review the bill. This costs $80. Plus you may have to pay your lawyer's costs if you lose. There is no limit on the amount of the fee. You don't need your lawyer's agreement to use this process. You have one year from the date of the bill to apply to the registrar—if you have not already paid it. But if you have already paid the bill, you must apply within three months of paying it. The Registrar holds a hearing where you and your lawyer each give your side of the case. Then the Registrar decides what the fee will be. For details, see the Registrar's Office [3] website at www.courts.gov.bc.ca/supreme_court [4]. Click on "About the Supreme Court" and then on "Registrar's Office". Lastly, click on "Legal Profession Act Reviews [5]".

What if you can't afford a lawyer?

You may be able to get legal aid, which is run by the Legal Services Society (LSS). It depends on your legal problem and other details. To find a legal aid location near you, go to the LSS website at www.legalaid.bc.ca [6] and under "Legal aid", click "Legal aid locations [7]". Or phone the province-wide Call Centre at 604.408.2172 (Greater Vancouver) or 1.866.577.2525 (toll free elsewhere in BC).

In some cases, a lawyer may be willing to charge you a lower fee if you can't afford the regular rate.

More information

The Law Society of BC website (www.lawsociety.bc.ca [1]) has a section called, "Lawyers' Fees". It covers common billing practices, contingency fees, fee disputes, and the Law Society Fee Mediation Program.

[updated April 2014]

References

[1] http://www.lawsociety.bc.ca
[2] http://www.lawsociety.bc.ca/page.cfm?cid=93&t=Publications
[3] http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/registrars_office.aspx
[4] http://www.courts.gov.bc.ca/supreme_court
[5] http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/registrars_office/booklet/Legal%20Professions%20Act.pdf
[6] http://www.legalaid.bc.ca
[7] http://www.legalaid.bc.ca/legal_aid/legalAidOffices.php
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